CITATION: David v. Loblaw, 2021 ONSC 7331
COURT FILE NO.: CV-17-586063-00CP
DATE: 20211231

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MARCY DAVID, BRENDA BROOKS, ANDREW BALODIS Plaintiffs	*David Wingfield, Jay Strosberg, James Orr, Kyle Taylor, Annie (Qurrat-ul-ain) Tayyab, Jonathan Careen and Pujan Modi*, for the Plaintiffs
– and –	
LOBLAW COMPANIES LIMITED, GEORGE WESTON LIMITED, WESTON FOODS (CANADA) INC., WESTON BAKERIES LIMITED, CANADA BREAD COMPANY, LIMITED, GRUPO BIMBO, S.A.B. De C.V., MAPLE LEAF FOODS INC., EMPIRE COMPANY LIMITED, SOBEYS INC., METRO INC., WAL-MART CANADA CORP., WAL-MART STORES, INC., AND GIANT TIGER STORES LIMITED Defendants	*Robert Russell, Davit Akman, and Michelle Maniago*, for the Defendants, Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada) Inc., and Weston Bakeries Limited *Eliot Kolers, Katherine Kay, Sinziana Hennig and Gavin Inkster*, for the Defendants, Sobeys Inc. and Empire Company Limited *Randall Hofley, Catherine Beagan Flood, Nicole Henderson, and Joe McGrade*, for the Defendants, Canada Bread Co. Limited and Grupo Bimbo S.A.B. de C.V. *Eric Lefebvre, Andrew McCoomb and Ted Brook*, for the Defendant, Metro Inc. *Sandra Forbes and Kristine Spence*, for the Defendants, Walmart Canada Corp. and Walmart Inc. *Derek Ricci and Chantelle Cseh*, for the Defendant, Giant Tiger Stores Limited *Christopher Naudie and Adam Hirsh*, for the Defendant, Maple Leaf Foods Inc. **HEARD**: October 25-29, 2021

CERTIFICATION MOTION

E.M. MORGAN, J.:

I. Nature of the claim

[1] Bread, according to the biblical Book of Prophets, is the staff of life: Isaiah 3:1. According to the Plaintiffs, it is also key to the Defendants' book of profits.

[2] The Plaintiffs claim that a price fixing conspiracy among major players in the packaged bread market has allowed those producers and retailers, along with their parent companies and majority shareholders, to manipulate a $40 billion market and to accrue somewhere in the range of $5 billion in ill-gotten gains: Expert Report of Jeffrey Leitzinger, paras 80-81. Economists have described conspiracies of this nature and size as having a reverberating, pernicious effect on the market economy, with an even "greater adverse economic impact on society than…theft and fraud": *Canada v. Maxzone Auto Parts (Canada) Corp*., 2012 FC 1117, at para 55.

[3] The conspiracy at issue in this proposed class action is alleged to have gone on for some 16 years. The Plaintiffs claim that it was massive in scale, involving the wholesale and retail sale of one of Canada's most widely consumed staple products: packaged bread. The perpetrators are alleged to be some of Canada's largest manufacturers and sellers of this product, and the price fixing allegedly impacted on sales, loyalty programs, sales rebates, and, as explained below, indirect sales and pricing effects on competitors' sales and beyond. The Plaintiffs seek certification under section 5(1) of the *Class Proceedings Act, 1996*, SO 1996, c. 6 ("*CPA*") of their claim for compensation for what is asserted to be the Defendants' long-term and large-scale illegality.

[4] The victims of the conspiracy are alleged to be millions, or perhaps tens of millions, of consumers. They include persons who bought packaged bread from a Defendant or from a customer of the Defendant in the chain of commerce, as well as so-called umbrella purchasers – i.e. those who bought products on which the alleged price fixing had a knock-off, or indirect, effect, such as those who bought packaged bread from a non-Defendant competitor of the Defendants who raised its prices to keep up with the fixed prices, or those who bought fresh bread either from a Defendant or from a non-Defendant competitor of the Defendant who raised its prices to keep up with the fixed prices of packaged bread.

[5] The Defendants, with the exception of most of the parent company Defendants who deny all involvement, do not entirely deny the factual bases underlying the conspiracy allegation. Indeed, one group of Defendants – Loblaw Companies Limited ("Loblaw"), George Weston Limited ("George Weston"), Weston Bakeries Limited ("Weston Bakeries"), and Weston Foods (Canada) Inc. ("Weston Foods") – has been proactive in publicly disclosing the price fixing enterprise under relevant securities legislation and in bringing the conspiracy with other producers and retailers to the attention of the federal Competition Bureau. Loblaw has also offered consumers

a $25 gift card in an effort to make amends for its years of unfairly manipulating packaged bread prices: *David v. Loblaw*, 2018 ONSC 198, at paras 3-4.

[6] The other producers and retailers named as Defendants argue that the data to which the Plaintiffs' proposed economic methodology is to be applied in proving the case is not available. They point to the unwieldly duration of the proposed class period, the size of the class, and the diversity of prices, promotional initiatives, and products at issue as making the claim too large for the evidence to address. They also submit that the Plaintiffs' experts cannot properly differentiate between retail purchasers and umbrella purchasers, and that there will be a large number of people whose claims overlap these categories.

[7] The two sides, in effect, present mirror arguments about the size and complexity of the case. It is the Plaintiffs' submission that the alleged conspiracy and the economic harm it has caused is so massive and economically complex that it must be addressed by the court and the certification motion cannot be dismissed. It is the Defendants' position that the conspiracy and its economic impact is so massive and economically complex that it is beyond anything that could possibly be addressed in the evidentiary record and thus must be dismissed.

[8] Plaintiffs' counsel stress that certification of a class action is a notoriously low bar and that, more generally, "certification is a procedural, not a substantive matter": *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499, at para 11. Defendants' counsel stress that despite the low threshold, certification, and in particular the proposed methodology for proving economic losses, "cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para 118.

[9] In short, the Plaintiffs' position is that their allegations of conspiracy are, in effect, too big to fail. To this, the Defendants retort that the allegations of conspiracy are, in effect, too big to prove.

II. The alleged conspiracy

[10] In 2015, the federal Competition Bureau commenced an investigation into a price fixing conspiracy involving packaged bread that had begun over a decade previously – in or about November 2001. Packaged bread is industrially produced bread that is packaged for resale. The term generally describes the soft-crusted, well-preserved sliced bread typically sold in Canadian supermarkets. The Plaintiffs also go on to characterize it as a rather diverse category of staple foods that includes bagged breads, buns, rolls, bagels, naan bread, English muffins, wraps, pita and tortillas. The competition investigation came to the public's attention when news of it was published in the media in 2017.

[11] In December 2017, roughly two months after the Competition Bureau's conspiracy investigation came to the public's attention, Loblaw and George Weston issued a press release in which they admitted they had participated in this conspiracy. George Weston's bakery subsidiary, Weston Bakeries, produces approximately 48% of Canada's bread and Loblaw and its affiliates account for approximately 30% of Canada's grocery sales of bread. The press release indicated that this family of companies have since March 2015 been cooperating with the ongoing

investigation, thereby gaining immunity from criminal charges under the *Competition Act*, RSC 1985, c. C-34.

[12] Documents collected during the Competition Bureau's investigation and unsealed by the court, including investigators' affidavits and search warrants, show that Weston Bakeries together with the Defendant, Canada Bread Company ("Canada Bread"), as producers, and Loblaw together with the Defendants, Metro Inc. ("Metro"), Sobeys Inc. ("Sobeys"), Wal-Mart Canada Corp. ("Wal-Mart Canada"), and Giant Tiger Stores Limited ("Giant Tiger"), as retailers, are suspected by the Bureau of having participated in an industry-wide conspiracy to increase the price of wholesale and retail packaged bread. The role of this investigative information will be discussed later in these reasons. However, I hasten to add here that none of the Competition Bureau's investigative information has been proven in any judicial or administrative proceeding.

[13] The unsealed investigative documents discuss a so-called "7/10 Convention" by which the various companies suspected in the conspiracy divided up the overcharge they imposed on consumers. Under this formula, 30% of the increased consumer price of packaged bread produced and sold by the named Defendants is alleged to have been retained by the retailers and 70% is alleged to have been retained by the producers. The unsealed investigative documents identify fifteen dates during the proposed Class Period on which packaged bread prices were allegedly increased by the participants in the conspiracy.

[14] The Amended Amended Third Fresh as Amended Statement of Claim (hereinafter the "Statement of Claim") pleads the following about the alleged conspiracy:

> • *The conspiracy*: Beginning in November 2001, the Defendants conspired to set the wholesale and retail price of packaged bread sold in Canada by controlling the product's output, price and other aspects of its manufacture, production, or supply.
>
> • *Parties*: Loblaw, Sobeys, Metro, Giant Tiger, and Wal-Mart Canada, who are competitors of one another in the retail grocery market, and Weston Bakeries and Canada Bread, who are competing suppliers and producers in the market for bread.
>
> • *Intent*: To injure the Plaintiffs and class members and to enrich themselves.
>
> • *Overt acts*: Beginning in November 2001 and continuing until today, the supplier Defendants agreed and co-ordinated with each other on at least fifteen occasions to increase the price of packaged bread; at the same time, the retailer Defendants agreed and co-ordinated with each other to set the price of packaged bread, and the supplier and Retail Defendants all agreed and coordinated with one another to ensure adherence with the pricing arrangements.
>
> • *Particulars*: The price increases in packaged bread followed a "7/10 Convention" – a seven-cent increase at wholesale corresponded with a ten-cent increase at retail, with the increases taking place on specific dates. The suppliers were responsible

for establishing and enforcing retail price floors and co-ordinating retail price points amongst the retailers.

• *Market power*: The Defendants together possess significant market power in Canada for the production and sale of packaged bread. Relying on this market power, the Defendants were able to increase the wholesale and retail price of the product.

• *Implementation*: The conspiracy was generally conducted via direct communication between senior officers and executives in the Defendants' organisations. The retail Defendants and the supply Defendants also had relationships with one another, allowing communication between retailers to frequently occur through suppliers.

• *Umbrella effects*: The price of packaged bread produced or sold by anyone other than the co-conspirators was inflated in parallel with the price as between the co-conspirators, as was the price of fresh bread sold by the retail Defendants and by specific non-defendant retailers in Canada.

• *Economic harm*: During the Class Period the Plaintiffs and the Class paid supra-competitive prices for both packaged bread and fresh bread.

III. The certification test

[15] The requirements for certification are specifically outlined in section 5(1) of the *CP*A. The Supreme Court of Canada made it clear in *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at paras 16, 28-9, that the analysis under this section is a procedural one. It is not required for the Plaintiffs to demonstrate at the certification stage that the case will succeed on the merits. That said, certification follows a well-established analytic process that requires a plaintiff to pass a number of significant hurdles. As the Divisional Court has put it, "a certification motion is an important screening mechanism for claims that '…are not appropriate for class actions'": *Arabi v. Toronto-Dominion Bank*, [2007] OJ No 5035, at para 18 (Div Ct).

[16] Overall, the evidentiary standard that applies to certification is "much less stringent" than the balance of probabilities standard for proof at trial: *Pro-Sys*, *supra*, at para 118. The motion does not inquire into the strength of the overall action, but does inquire into the evidentiary basis for the claim. Generally speaking, it asks "not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements": *Ibid.*, at para 102.

a) Causes of action

[17] The cause of action threshold in section 5(1)(a) of the *CPA* is a relatively low one when it comes to demonstrating an evidentiary foundation for the asserted cause of action: *McCracken v Canadian National Railway*, 2012 ONCA 445, at para 75. The test is similar to that which applies on a motion under Rule 21.01 for striking out a plaintiff's pleading: the claim should only be struck

if it is "plain and obvious" that it contains no reasonable cause of action or that the cause of action cannot succeed: *Pro-Sys*, at para 63; *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401, at para 41 (Ont CA), leave to appeal refused [2005] 1 SCR vi.

i) The claims against the producer and retailer Defendants

[18] The Plaintiffs plead statutory causes of action under the current and former versions of sections 36, 45(1), and 46(1) of the *Competition Act*. In addition, they plead common law and equitable causes of action: common law civil conspiracy, unjust enrichment, knowing receipt, and knowing assistance. They originally added waiver of tort as a cause of action as well, but have abandoned that claim in acknowledgment of the Supreme Court of Canada's dismissal of that heading as an independent cause of action: *Atlantic Lottery Corp Inc v. Babstock,* 2020 SCC 19.

[19] Section 36 of the *Competition Act* authorizes "any person who has suffered loss or damage as a result of conduct that is contrary to the provisions of Part VI of the Act" to "sue for and recover from the person…an amount equal to the loss or damage proved to have been suffered by him". Included within Part VI is section 45, which makes it an offence to conspire, agree or arrange with a competitor to fix, maintain, increase or control the price for the supply of a product; to allocate sales, territories, customers or markets for the production or supply of a product; or to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product. Prior to March 2010, this section also prohibited agreements that unduly lessen competition or unreasonably enhance prices, whether or not the agreements were made by competitors.

[20] The material facts needed to support claims under both versions of s. 45(1) are pleaded with respect to the supplier and retailer Defendants, including the *actus reus* and *mens rea* aspects of the claims as described by the Supreme Court of Canada in *Pioneer Corp v Godfrey*, 2019 SCC 42, at para 75. The most current version of the Statement of Claim identifies the allegedly conspiring parties and their relationship, describes the structure of the market for packaged bread, sets out the communications that amount to the alleged agreement to conspire, states the intent and objects of the alleged conspiracy, identifies various acts allegedly taken by the co-conspirators in furtherance of these objects, and describes the effect of and damages caused by the price fixing that is at the heart of the alleged conspiracy.

[21] The claim also defines the products that are the subject of the conspiracy and the geographical markets for the product as required by the terms of the former s. 45(1) of the *Competition Act*. As well, the umbrella classes are defined in a manner that asserts – baldly, as will be explained below – a causal link between the loss suffered by the members of this extended class and the allegedly conspiratorial conduct. The Supreme Court has indicated that this linkage is a requirement for bringing umbrella purchasers within the ambit of the case: *Godfrey*, at para 76.

[22] As they are entitled to do, the Plaintiffs also assert common law and equitable causes of action alongside their claim under s. 36 of the *Competition Act*: *Godfrey*, at para 89. Here, these claims include an allegation that the predominant purpose of the Defendants' conduct was to cause injury to the Plaintiffs and class members using either lawful or unlawful means and that they indeed caused such injury – i.e. predominant purpose conspiracy. The claims also include

allegations that the Defendants' unlawful conduct was directed toward the Plaintiffs and class members knowing that they would be injured and that they in fact were injured – i.e. unlawful means conspiracy.

[23] These common law claims are well recognized by Canadian courts: *Pro-Sys*, at paras 74-80. The courts have also acknowledged that a breach of s. 45 qualifies as an unlawful means for the purposes of the unlawful means conspiracy claim: *Ibid*., at para 89; *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, 2016 ONCA 621, at paras 73, 81. At least with respect to the producer and retail Defendants, the Statement of Claim conforms with the description of a pleading of civil conspiracy provided by the Court of Appeal in *Normart Management Ltd v. West Hill Redevelopment Co Ltd* (1998), 37 OR (3d) 97, at para 21:

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[24] The Plaintiffs also advance a claim for unjust enrichment, which is a cause of action well recognized and previously certified in class action cases: see *Pro*-Sys, at para 89; and *Kalra v Mercedes Benz*, 2017 ONSC 3795, at paras 21-21. The essential elements of such a claim – enrichment of the defendant, a corresponding deprivation of the plaintiff, and the lack of a juristic reason for the enrichment – are all pleaded in the Statement of Claim.

[25] In *Pro-Sys*, at para 87, the Supreme Court of Canada observed that for the purposes of the low threshold in section 5(1)(a) of the *CPA*, the enrichment of a defendant need not be direct but rather may be indirect and passed on by a third party. Accordingly, the cause of action, as drafted, reflects the Plaintiffs' attempt to include direct purchasers of packaged bread as well as indirect and umbrella purchasers.

[26] There is therefore a properly pleaded cause of action against the producer and retail Defendants. The causes of action are drafted in a way that they encompass both the indirect sales and the umbrella effects of the alleged conspiracy. While the claims put forward on behalf of the umbrella purchasers are problematic in other ways (as discussed below with respect to the common issues), the pleading does set out recognizable causes of action. The Statement of Claim therefore passes the *CPA*'s section 5(1)(a) requirement for certification insofar as it makes claims against Loblaw, Weston Bakeries, Weston Foods, Canada Bread, Metro, Sobeys, Wal-Mart Canada, and Giant Tiger.

[27] With the exception of George Weston, the Defendants who are the corporate parents/shareholders of the producer and retail Defendants – i.e. Wal-Mart Stores, Inc. ("Wal-Mart USA"), Empire Company Limited ("Empire"), Grupo Bimbo, S.A.B. De C.V. ("Grupo Bimbo"),

and Maple Leaf Foods Inc. ("Maple Leaf") (collectively, the "Parents") – must be analyzed in a different light and will be discussed below.

[28] As for George Weston, the Statement of Claim alleges that it directly participated in the conspiracy and that its affiliates implemented a directive initiated by it for the purpose of giving effect to the conspiracy. In response to the Competition Bureau's investigation of the price-fixing conspiracy, George Weston generally concedes that it was a direct participant with its subsidiary, Loblaw. The Plaintiffs therefore claim that they and the class members are entitled to recover damages under s 36(1) of the *Competition Act* from George Weston on this basis, among others.

[29] As an alleged direct participant in the conspiracy, George Weston does not fall into the separate analysis that must be applied to the Parents. Rather, the same analysis that applies to the producer and retail Defendants applies to George Weston. The claims against it pass the requirement under section 5(1)(a) of the *CPA* that there be a viable cause of action.

ii) The claims against the parent/shareholder Defendants

[30] As a preliminary point, counsel for the Plaintiffs identify the fact that several of the Parents – i.e. the Defendants who are parents/shareholders of the participants in the conspiracy but who are not themselves the active participants – are non-Canadian corporations. With this in mind, they submit that section 46 of the *Competition Act* is relevant to the present claim insofar as it creates an offence for implementing a foreign directive intended to give effect in Canada to a conspiracy outside the country that would contravene s. 45 if it were entered into domestically. As Plaintiffs' counsel correctly point out, this court has previously certified claims under s. 46(1).

[31] That said, this argument seems to ignore the fact that the circumstances of the previous s. 46(1) cases were significantly different than what is alleged in the present Statement of Claim. In the cases that have been certified under s. 46(1), the actual conspirators were located or incorporated outside Canada and were the driving force behind the price fixing: see *Fanshaw College v. LG Philips LCD Co*., 2011 ONSC 2484. It was clear there that liability of a non-Canadian parent company turned on the parent being fully involved co-conspirators.

[32] Although the Plaintiff's pleading seems to baldly state that the same situation prevails here, it provides no details of the Parents' involvement. Given the independent management of the Canadian producer and retail Defendants, direct decision-making participation of the Parents cannot simply be assumed.

[33] In fact, the Statement of Claim is not particularized in any way with respect to the bald conspiracy allegations against the Parents. This is problematic, as it is well established that conspiracy allegations require particularity with respect to the acts alleged against each Defendant. "A recitation of a series of events coupled with an assertion that they were intended to injure is insufficient, and it is not appropriate to lump some or all of the Defendants together into a general allegation that they conspired to injure the Plaintiff. If the Plaintiff does not, at the time of pleading have knowledge of the facts necessary to support the cause of action, then it is inappropriate to

make the allegations in the statement of claim": *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646, at para 142.

[34] It is incumbent on the Plaintiffs to plead conspiracy with "clarity and precision", and to include in the pleading a description of the "overt acts that are alleged to have been done by each of the conspirators in furtherance of the conspiracy": *Ibid*., at para 143. The "Plaintiff cannot just state that some or all of the Defendants did something together, without attributing specific acts to specific Defendants": *Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc.*, 2010 ONSC 2441, at para 20.

[35] The Statement of Claim does not fulfill this requirement. The Plaintiffs have lumped the Parents in with their subsidiaries in defining the Defendants, and have made allegations against all of them at once. There is no pleading of any particular involvement or act in relation to the alleged conspiracy by any of the Parents, as distinct from their subsidiaries. Indeed, insofar as the Parents are not – and are not alleged to be – producers or retailers of packaged bread, the allegation that they set the retail price of packaged bread in accordance with a "7/10 convention" makes no sense. There is certainly nothing in the record to suggest that the retail price of packaged bread in Canada was set in the United States (in the case of Wal-Mart USA) or Mexico (in the case of Grupo Bimbo).

[36] The only apparent basis on which the Plaintiffs extend the conspiracy allegations to any of the Parents is their parent-subsidiary relationship with the producer and retail Defendants. It is those Defendants who, in turn, are alleged to have done the actual acts in furtherance of the conspiracy. Taking the Statement of Claim at face value, the Parents have done nothing – taken no active steps – in furtherance of the price-fixing conspiracy.

[37] Further, the pleading also provides no basis for disregarding the separate corporate personalities of the Parents and the companies of which they are shareholders. Indeed, the Plaintiffs specifically plead that the Parents and the other Defendants are all "legally independent of one another." While the pleading goes on to claim that the Parents exercised "dominion and control" over their subsidiaries, it provides, and the record otherwise contains, no material facts on which to support that bald assertion.

[38] The principle of corporate separateness remains a foundational principle of corporate law: *Yaiguaje v Chevron Corporation*, 2018 ONCA 472, at paras 57, 61, 66-71. An exception to this principle exists where "the corporate form is being abused to the point that the corporation is not truly a separate corporation": *Ibid*., at para 70. To meet that test, the subsidiary must be a "mere puppet of the Parent and must have been incorporated for the purpose of deflecting responsibility for misconduct from the Parent: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, (1996), 28 OR (3d) 423, at para 22 (Gen Div), aff'd (1997), 74 ACWS (3d) 207 (Ont CA).

[39] There are no material facts pleaded that could in any way suggest this state of affairs. The subsidiaries pre-date the alleged conspiracy, have significant independent functioning of their own

in administering thousands of production and retail outlets across Canada, and are certainly more than shells or empty vessels used to avoid liability.

[40] In much the same way, facts are not pleaded that would support the notion that the subsidiaries somehow functioned as "authorised agents" of the Parents. In any case, a pleading of a principal-agency relationship is not a recognized legal platform on which to impute liability under section 45 of the *Competition Act*: *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 SCR 662.

[41] Similarly, the claim of unjust enrichment levelled at the Parents is bald and unaccompanied by supporting facts. The Statement of Claim asserts that the Defendants – in unspecified plural – were unjustly enriched by retaining revenues from the sales of packaged bread in Canada, which revenues were attributable to the unlawful price resulting from the conspiracy. There is no specific allegation in the pleading levelled at any of the Parents on their own or as a group. The allegation is that the subsidiaries sold packaged bread at a manipulated and inflated price, not that the Parents did. There is likewise no allegation in the pleading that the Parents actually received revenue from sales of packaged bread by their producer and retail subsidiaries.

[42] The Plaintiffs also plead constructive trust as against the Parents. However, the grounds for this are lacking. A constructive trust is only available where a monetary award is inappropriate and there is a link or causal connection between a plaintiff's claim and the specific property over which a trust is to be imposed: *Kerr v. Baranow*, [2011] 1 SCR 269, at paras 50, 91. A constructive trust therefore "attaches to specific assets of the defendant that represent the enrichment; it is not a charge on the defendant's general assets for the amount of the plaintiff's claim": *Michelin Tires (Canada) Ltd. v. The Queen*, 2001 FCA 145, at para. 19.

[43] There is no part of the pleading here that references or, for that matter, that could realistically reference any such specific assets. As in previous price fixing cases, the constructive trust allegation is bound to fail where the Plaintiffs' claims are strictly monetary in nature. This type of claim is simply not levelled at any specifically identified property that could be the subject of the claimed trust: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] 3 SCR 545, at paras 39-41.

[44] In any case, constructive trust is a remedy, not a stand-alone cause of action: *Pro-Sys*, at para 90. In the absence of a valid claim for unjust enrichment against the Parents, the pleading of constructive trust cannot stand.

[45] In an effort to get around these issues, the Plaintiffs have put forward claims in knowing receipt and knowing assistance. Both of these claims relate to non-participants in a conspiracy who nevertheless knowingly participate in a breach of trust: *Air Canada v. M & L Travel Ltd.*, [1993] 3 SCR 787, at 810. The relevant trust for the purposes of the Plaintiffs' claim is identified as a constructive trust which can be imposed by courts at their discretion where good conscience requires, including to remedy an unjust enrichment: *Moore v Sweet*, [2018] 3 SCR 303, at para 32.

[46] The knowing receipt claim alleges that the producer and retail Defendants acquired, maintained, preserved or improved their property from revenues they received from sales of packaged bread during the class period as a result of the conspiracy. It pleads that this property is therefore held in constructive trust for the Plaintiffs, and that some or all of this property was transferred by these Defendants to their respective parents in breach of that trust. Plaintiffs' counsel submits that similar knowing receipt claims have been previously certified in class actions: *Kherani v Bank of Montreal*, 2012 ONSC 2230, at para 144.

[47] The knowing assistance claim alleges that the retail and producer Defendants participated in the conspiracy under the direction of their parent companies. It pleads that the Parents exercised complete domination and control over the affairs and activities of their subsidiaries, and that they were aware of and participated in the price fixing conspiracy. The Statement of Claim also alleges that the Parents accepted the property transferred to them by their subsidiaries with actual knowledge of, or willful blindness to, the conspiracy, and that the property they received from their subsidiaries was in whole or in part the proceeds of the conspiracy. Again, Plaintiffs' counsel submits that similar knowing assistance claims have been previously certified in class actions: *Kherani*, at para 104.

[48] As with the other causes of action, there are no material facts pleaded against the Parents to support either knowing receipt or knowing assistance. In fact, there is no pleading that the Parents received funds from the producer and retail Defendants whose shares they own, let alone that such remittances are causally connected to the price of packaged bread.

[49] The entire pleading in this respect is a matter of speculation and, frankly, imagination. The material facts that support the damages claims simply do not fit the knowing receipt or knowing assistance paradigms. Belobaba J. described a similarly mispleaded claim in *Stenzler v. TD Asset Management Inc.*, 2020 ONSC 111, at para 24: "The knowing assistance and knowing receipt claims are square pegs that are being forced unsuccessfully into a round hole. Both are plainly and obviously doomed to fail."

[50] Tellingly, Plaintiffs' counsel submit that these claims are necessary for recovery by the Plaintiffs and other class members because the producer and retail Defendants may have transferred assets to the Parents or may otherwise be incapable of satisfying a monetary judgment. There is, however, no claim of fraudulent conveyance or fraudulent preference levelled against any of the Defendants, and there are no facts pleaded that even suggest that such activity has taken place. In other words, the entire pleading against the Parents is in reality a desire to achieve execution before judgment and to assist that execution by roping in uninvolved corporate affiliates. Needless to say, that is not a proper basis for naming the Parents as Defendants.

[51] Before concluding the discussion of the claim against the Parents, I will briefly comment on what Plaintiff's counsel characterize as the unique position of Maple Leaf. It is the Plaintiffs' view that, unique among the Parents, Maple Leaf was more than just a passive, behind-the-scenes participant in the conspiracy or receiver of its proceeds. This allegation is based on statements contained in the Information To Obtain ("ITO") submitted by the Competition Bureau in support of a search warrant that the Bureau executed on a number of the Defendants during the course of

its own investigation. The ITO stated that Richard Lam, who at the time was Chief Operating Officer of Maple Leaf, was a participant in the price fixing discussions with other Defendants.

[52] In evaluating this submission, it should be kept in mind that an ITO does not contain evidence. It is composed of unsubstantiated statements that reflect an investigator's concerns. The Supreme Court of Canada has described a search warrant as "an investigative tool for answering those questions": "What happened? Who did it*?" CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, at para 21. The ITO on which a warrant is based poses those questions; it does not answer them. The warrant, and the information on which it was obtained, remains unchallenged until trial: *Re Zevallos and The Queen* (1987), 37 CCC (3d) 79 (Ont CA). At this stage, statements in an ITO are nothing more than bald allegations such as may be found in a pleading. They do not provide material facts on which anyone can rely.

[53] What is interesting in the circumstances is that the ITO, which is identified by Plaintiffs' counsel as the source of their allegations against Maple Leaf, does not actually mention Maple Leaf. It mentions Mr. Lam, but in a different capacity – i.e. his capacity at the time as an officer of Canada Bread. Much as the ITO and search warrant contains allegations rather than evidence and must be treated as such, this one does not even allege that Mr. Lam acted on behalf of Maple Leaf. If his participation was significant at all, the ITO identifies it as being significant to Canada Bread's participation, not to Maple Leaf's.

[54] Unlike the Plaintiffs in the parallel Quebec and British Columbia actions where Maple Leaf is not named as a Defendant, the Plaintiffs here have seized on the fortuitous presence of Mr. Lam's name in the ITO. They have used this hook to include a corporate party, Maple Leaf, that even the Bureau's investigators who created the ITO do not suspect was part of any price fixing conspiracy.

[55] Maple Leaf is a publicly traded company that does not produce or sell packaged bread (or any other bread). For a portion of the class period – until 2014 when it sold its interest to Grupo Bimbo – it was majority shareholder of what was then another publicly traded company, Canada Bread. It their pleading, the Plaintiffs have not set out any basis to disregard the principle of corporate separateness and they have not adduced any real basis in fact to assert their conspiracy allegation against Maple Leaf. Mr. Lam's supposed presence in some discussions on behalf of Canada Bread, with absolutely no allegation in the ITO that he was also there on behalf of Maple Leaf, does not constitute a material fact in support of a lawsuit against Maple Leaf.

[56] Moreover, the Plaintiffs do not allege and could not plausibly allege that Canada Bread – a publicly traded company pre-dating the alleged conspiracy, the shares of which were never completely owned by Maple Leaf – was incorporated for an improper purpose or as a mere shell. There is nothing to support any cause of action against Maple Leaf despite the Plaintiffs' attempt to distinguish it from the other Parents.

[57] The causes of action against the Parents do not meet the requirements for certification set out in section 5(1)(a) of the *CPA*. I come to this conclusion without disregarding the fact that pleadings must be read generously at the certification stage. A novel cause of action, or a novel take on a cause of action, ought not be left uncertified merely because of its novelty: *Vitapharm*

Canada Ltd. v. F. Hoffmann-La-Roche Ltd., [2005] OJ No 1118, at para. 17 (SCJ). The problem with the allegations against the Parents, however, is not that they are novel; it is that they are unsupported, and that important portions of them could not possibly be supported, by any material facts.

b) The class

[58] The class as originally framed by the Plaintiffs consists of people who purchased packaged bread sold by a Defendant producer or retailer or manufactured by a Defendant producer and sold by either a non-Defendant retailer or an intermediary. When the Supreme Court of Canada ruled in *Godfrey* that the cause of action under s. 36 of the *Competition Act* could include consumers who experienced umbrella price effects from a price-fixing conspiracy, the claim was amended to include them as well.

[59] The Statement of Claim now embraces people who purchased packaged bread that was neither produced or nor sold by the alleged conspirators. It also includes people who purchased fresh bread from the retail Defendants and people who purchased fresh bread from the largest non-Defendant retailers in Canada (Federated Co-Operatives Ltd., The North-West Company, Overwaitea Food Group, H Mart, Buy Low Food Ltd., Longo Brothers Fruit Markets Inc., Costco Wholesale Canada Ltd., or Quality Foods).

[60] The Plaintiffs claim damages on behalf of consumers (other than Quebec residents and certain other excluded persons) who reside in Canada at the date of certification and who purchased packaged or fresh bread during the Class Period from the conspirators or from the specified non-conspirators. The proposed Class Period is from November 1, 2001, which has been identified by the Plaintiffs as the dawn of the price fixing conspiracy. Plaintiffs' counsel propose that it is to run until the end of the damages period – i.e. up until the date of the certification Order.

[61] The Defendants take issue with the Plaintiffs' definition of the Class Period at both ends. They submit that the start date should not be prior to 2008, which is where the data relied on by Dr. Leitzinger in his report appears to begin, and that it should end with the October 2017 execution of search warrants by the Competition Bureau, which they state put an end to any possible allegation of an ongoing conspiracy.

[62] In my view, the Plaintiffs are entitled to some leeway in defining the Class Period, at least for the purposes of certification. If at a common issues trial they are unable to establish that the common issues extend to the front or back edges of the Class Period, it can be narrowed by the common issues trial judge. Based on the Competition Bureau's investigative parameters and the demonstrable economic effects of price fixing into the future, there is a reasonable basis for defining the Class Period in the way that the Plaintiffs have proposed.

[63] In making their objections, the Defendants over-emphasize the role of an expert at the certification stage of the proceedings. It is not to be expected that Dr. Leitzinger would provide the fact evidence necessary to all of the allegations in the claim: see *Pro-Sys*, at para 115. If there is evidence from Loblaw or George Weston or any other source that conspiratorial conduct

commenced at a time that pre-dates Plaintiffs' expert's data in his report, it is that evidence, and not the data that the expert decided to cite, that governs.

[64] What Dr. Leitzinger does do with authority is describe the reverberating impact of price fixing. This can potentially move the claim into a period that post-dates the end of any active conspiring among the Defendants. While for the purposes of litigation there does need to be a termination date for the Class Period, I see no reason that the date of this judgment cannot serve that purpose. In terms of pricing of packaged bread in the market, it is no more or less arbitrary than the date that the Competition Bureau gathered its resources together to execute its search warrant.

[65] For the purposes of certification, the Class Period runs from November 1, 2001 to the date of the issuance of the present reasons for judgment.

[66] In general, a class satisfies the requirement of section 5(1)(b) of the *CPA* if members of the class can be identified using objective criteria to determine membership: *Robertson v Thomson Corp* (1999), 43 OR (3d) 161, at para 25 (Gen Div). The proposed class members need not have identical claims or interests, but the court must be satisfied that the claims will be advanced by the resolution of the common issues: *Sankar v Bell Mobility*, 2013 ONSC 5916, at para 57. This includes the claims of indirect purchasers, whose inclusion in the action promote the deterrence and compensation objectives of the *Competition Act*: *Pro-Sys*, at paras 46-49. As indicated above, it theoretically also includes umbrella purchasers who have experienced the price impact of the Defendants' alleged acts by being purchasers in the impacted market: *Godfrey*, at para 108.

[67] The proposed class meets the rather minimal criteria for certification set out in section 5(1)(b) of the *CPA*. Under the circumstances, however, it will be limited to the direct and indirect purchasers of packaged bread, and will exclude purchasers of fresh bread and all of the proposed umbrella classes. While those excluded umbrella purchasers are theoretically capable of being members of a consumer class, the facts of the case do not support it. This will be explained more fully below under the analysis of common issues. The claim, as it currently stands, is not supported by a record that evidences any methodology capable of dealing with the claims of umbrella purchasers as defined by Plaintiffs' counsel.

c) Common issues

[68] The common issues proposed by Plaintiffs' counsel are:

DEFINED TERMS

1. The defined terms have the meanings given in the Statement of Claim, as amended from time to time. "Umbrella classes" means the Umbrella Class – Packaged Bread, the Umbrella Class – Defendants' Fresh Bread; and the Umbrella Class – Non-Defendants' Fresh Bread.

BREACH OF THE *COMPETITION ACT*, RSC 1985, C C-34

2. Did the Defendants, or any of them, engage in conduct that was contrary to section 45 of the *Competition Act* in effect during the Class Period up to and including 11 March 2010? If so, what was the duration of the conduct?

3. Did the Defendants, or any of them, engage in conduct that was contrary to section 45 of the *Competition Act* in effect during the Class Period from 12 March 2010? If so, what was the duration of the conduct?

4. Did the Canadian affiliates of any of the Defendants who have foreign affiliates commit any act contrary to section 46 of the *Competition Act*? If so, when did this conduct begin and when did it end?

5. Did the Plaintiffs and the members of the Class and the Umbrella classes suffer loss or damage as a result of the Defendants' conduct contrary to any provision of Part VI of the *Competition Act*?

6. Are the Plaintiffs and the members of the Class and the Umbrella classes entitled to recovery of their loss or damage pursuant to section 36 of the *Competition Act?* If so, in what amount or amounts?

COMMON LAW CONSPIRACY

7. At any time during the Class Period did any of the Defendants or their affiliates conspire, agree, or arrange with any other legal or natural person to engage in conduct in contravention of section 45 of the *Competition Act* with:

   (a) the predominant purpose of causing harm to any of the Plaintiffs and the members of the Class and the Umbrella classes; or

   (b) the actual or constructive intent and with the natural result of causing harm to the Plaintiffs and the members of the Class and the Umbrella classes.

8. Did the Defendants, or any of them, act with any unknown co-conspirators to harm the Plaintiffs and the members of the Class and the Umbrella classes?

9. Did the Plaintiffs and the members of the Class and the Umbrella classes suffer loss or injury as a result of the common law conspiracy?

10. What damages, if any, are payable by the Defendants, or any of them, to the Plaintiffs and the members of the Class and the Umbrella classes?

UNJUST ENRICHMENT

11. Have the Defendants, or any of them, been enriched by the revenue they received from the Conspiracy and, if so, in what amount or amounts?

12. If so, did the Plaintiffs and the members of the Class and the Umbrella classes suffer a corresponding deprivation?

13. If so, is there a juridical reason why the Defendants, or any of them, should be entitled to retain revenue they received from the Conspiracy?

14. What restitution, if any, is payable by the Defendants, or any of them, to the Plaintiffs and the members of the Class and the Umbrella classes?

CONSTRUCTIVE TRUST

15. Should the Defendants, or any of them, be constituted as constructive trustees in favour of the Plaintiffs and the members of the Class and the Umbrella classes for any revenue the Defendants received from the Conspiracy?

16. What is the amount of the revenue, if any, that the Defendants, or any of them, hold in trust for the Plaintiffs and the members of the Class and the Umbrella classes?

17. What restitution, if any, is payable by the Defendants to the Plaintiffs and the members of the Class and Umbrella classes?

KNOWING RECEIPT

18. Did the Defendants, or any of them, knowingly receive property impressed with a trust in favour of the Plaintiffs and the members of the Class and the Umbrella classes arising from the sale to them of Packaged Bread or Fresh Bread during the Class Period?

19. What is the quantum of the property acquired, maintained, preserved or improved by the Defendants from revenues they received from sales of Packaged Bread and/or Fresh Bread to the Plaintiffs and the members of the Class and Umbrella classes as a result of the Conspiracy which the Defendants' affiliates transferred to the Defendants in breach of trust and which they received for their own use and benefit and not as *bona fide* purchasers for value without notice?

20. Did the Defendants exercise domination and control over the affairs and activities of their affiliates and did the affiliates act as authorized agents for the Defendants in respect of their participation in the Conspiracy?

21. What restitution, if any, is payable by the Defendants to the Plaintiffs and any of the members of the Class and the Umbrella classes based on the doctrine of knowing receipt?

KNOWING ASSISTANCE

22. Did the Defendants knowingly assist their affiliates in furtherance of the Conspiracy?

23. What is the quantum of property acquired, maintained, preserved or improved by the Defendants from revenues they received from sales of Packaged Bread and/or Fresh Bread to the Plaintiffs and the members of the Class and the Umbrella classes as a result of the Conspiracy and which the affiliates transferred to the Defendants in breach of trust?

24. Did the Defendants accept the property transferred to them by their affiliates with knowledge of the affiliates' participation in the Conspiracy and with knowledge that this property was wholly or in part the proceeds of the affiliates' participation in the Conspiracy?

25. What restitution, if any, is payable by the Defendants to the Plaintiffs and the members of the Class and the Umbrella classes based on the doctrine of knowing assistance?

PUNITIVE DAMAGES

26. Are the Defendants, or any of them, liable to pay punitive damages to the Plaintiffs and the members of the Class and the Umbrella classes having regard to the nature of their conduct and, if so, in what amount?

INTEREST

27. What is the liability, if any, of the Defendants, or any of them, for interest?

COSTS

28. Should the full costs of investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on an aggregate basis pursuant to section 36 of the *Competition Act* and, if so, in what amount?

i) The approach to common issues

[69] In *Western Canadian Shopping Centres Inc v Dutton*, [2001] 2 SCR 534, at para 39, the Supreme Court explained that in a certification motion, "[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis". From this foundation point, it follows that while class members need not all be situated

identically *vis-à-vis* the Defendants, a "common issue" is one which "is necessary to the resolution of each class member's claim" *Ibid*.

[70] Further, the Court must be satisfied that the evidence tendered in support of the Plaintiffs' claims demonstrates that there is at least some basis in fact for the proposed common issues: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para 25. This assessment entails something more than "a bare assertion in the pleadings" that the common issues have evidentiary support: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 79. As the Divisional Court has explained: "some factual basis – in the form of admissible evidence – to support the allegation[s]", without which, the "gatekeeping function of the court would be effectively neutered": *Williams v. Canon Canada Inc*., 2012 ONSC 3692, at para 23.

[71] Thus, section 5(1)(c) requires a two-step inquiry as to whether proposed common issues actually exist and, if so, can be answered in common across the Class. This is not a particularly high standard, but it is one that nevertheless requires the Court to move beyond mere "symbolic scrutiny": *Lin v. Airbnb, Inc*., 2019 FC 1563, at para 33. As my colleague Perell J. stated in *Kuiper v. Cook (Canada) Inc*., 2018 ONSC 6487, at para 134, rev'd in part on other grounds, 2018 ONSC 6487 (Div Ct), "while the standard is low, it is not subterranean." It is the Defendants' primary contention in this certification motion that the evidentiary record does not meet the requisite standard.

[72] Counsel for each of the Defendants take slightly different approaches, but all of them agree that the Plaintiffs' claims for breach of the *Competition Act*, common law conspiracy, and unjust enrichment require proof of loss as an element of liability: see *Shah v. LG Chem Ltd*., 2018 ONCA 819, at para. 34; *Chadha v. Bayer Inc*., [2003] OJ No 27 (Ont CA). They therefore submit that the record must establish that there is some basis in fact that loss can be proven and quantified on a common basis.

[73] Defendants' counsel further submit that there must be a plausible methodology, grounded not just in theory but in the facts of the case, for establishing and quantifying the alleged harm to the Class, including all subclasses and/or all levels of consumers included in the putative Class. Relying on *Pro-Sys*, at para 118, they argue that the record must establish that the data needed for this liability analysis and quantification is not just potentially available but is actually available. "This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class": *Ibid*.

[74] It is also the Defendants' position that where the claim alleges that a wrongfully imposed cost has been passed on to indirect purchasers, or that a class of umbrella purchasers incurred damages, the record must show that the Plaintiffs' methodology has a reasonable prospect of establishing that the damages reached the indirect and umbrella purchaser levels. This, of course, presents a serious challenge for the Plaintiffs, as the Supreme Court acknowledged in *Godfrey*, at para 77: "Marshalling and presenting evidence to satisfy the conditions placed by Parliament on recovery under ss. 36(1)(a) and 45(1) – showing a causal link between loss and conspiratorial conduct, and proving the *actus reus* and *mens rea* of s. 45(1) – represents a significant burden."

[75] In addition, the Defendants contend that for the proposed aggregate damages common issues to be certified, the Plaintiffs must demonstrate that their methodology has a reasonable prospect of establishing that the several sub-classes suffered a loss that can actually be quantified. They argue that since the aggregate damages provisions do not allow for an award of damages for class members that suffered no loss, the proposed methodology must be capable of at least distinguishing among those class members who did, or did not, suffer losses. Citing *Pro-Sys*, at paras 131-32, the Supreme Court in *Godfrey*, at para 116, emphatically confirmed this approach: "[T]his Court could not have been clearer that the aggregate damages provisions cannot be used to establish liability".

[76] The Defendants challenge the both the liability and the quantification methodology employed by the Plaintiffs' expert, Dr. Jeffrey Leitzinger, in respect of the relevant products and the relevant levels of consumers. The products in question are packaged bread – i.e. the intended subject matter of the Defendants' alleged conspiracy – and fresh bread – i.e. an alleged unintended spillover from the Defendants' alleged conspiracy.

ii) Direct and indirect purchasers of packaged bread

[77] Turning first to packaged bread, there is certainly sufficient evidence to support, for certification purposes, the allegation that this product has been the subject of a price-fixing conspiracy. Loblaw and George Weston have admitted to the conspiracy even if those it says were its co-conspirators persist in denying it: see *David v. Loblaw*, 2018 ONSC 198, at para 3; *Govan c. Loblaw Companies Limited*, 2019 QCCS 5469, at para 27. There is some – indeed, more than just *some* – basis in fact to indicate that damages may be awarded to consumers as well as businesses who paid intentionally inflated prices for packaged bread.

[78] This includes consumer and business purchasers who did direct business with the Defendants as well as those who are one level removed and can be characterized as indirect purchasers in the Defendants' chain of commerce in packaged bread. In *Godfrey*, at para 107, Justice Brown reasoned that on certification the Plaintiffs need only demonstrate that they have a plausible methodology to establish that the loss reached "one or more" claimants at the "purchaser level." For indirect purchasers, this would require a methodology for showing that direct purchasers passed on the inflated pricing to at least one indirect purchaser member of the class. The expert evidence of Dr. Leitzinger establishes to my satisfaction that the Plaintiffs have a methodology capable of proving this common-sense conclusion.

[79] Justice Brown further stated, *ibid*., at para 99, that the Plaintiffs' expert's methodology need not demonstrate loss to the entire class and need not be capable of identifying which particular class members suffered loss and which did not. As the Court put it in *Pro-Sys*, at para 44, "Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However,…these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case…"

[80] Given the state of the evidence regarding the conspiracy to fix prices for packaged bread, there are sufficient grounds to certify the claim in respect of direct and indirect purchasers of that product (or that set of products, as defined by the Plaintiffs).

iii) Purchasers of fresh bread

[81] As indicated, counsel for the Plaintiffs also contend that the conspiracy to artificially inflate the price of packaged bread has had the effect of inflating the price of freshly baked bread. They submit that the right to damages conferred by section 36 of the *Competition Act* includes inflated prices paid by consumers for products in the same product market or in a neighbouring product market to the price-fixed product: *Godfrey*, at paras 56-59, 64. They specifically rely on Justice Brown's observation that the theory of umbrella pricing is premised on the notion that "a rising tide lifts all boats": *Ibid*., at para 59.

[82] Counsel for the Defendants argue that the inclusion of fresh bread in this claim is a stretch that the law does not and cannot accommodate. In the first place, it is the Defendants' position that the two product streams cannot be juxtaposed with one another in this way because fresh bread is not a substitute for packaged bread. This view accords with the Supreme Court's view that if a product other than that which is the subject matter of the conspiracy is to be included in an umbrella claim, it must be a competitive target:

> Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or the size of the market covered by that cartel, it cannot be ruled out that a *competing undertaking*, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is, in the absence of that cartel. [Emphasis added]
>
> *Godfrey*, at para 58, quoting *Kone AG and Others v. ÖBB-Infrastruktur AG*, C-557/12, ECLI:EU:C:2014:1317 (ECJ).

[83] The Defendants explain that packaged bread and fresh bread are not "competing undertakings", as required in *Godfrey*. They describe significant quality and functional differences between the two products – fresh bread lacks preservatives and has a short shelf life, is harder or crustier, is more typically an artisanal and unique product rather than a standardized one, is more of an adult food than a children's food, is consumed same day rather than stored for extended use, is eaten at home mealtime rather than school lunches, etc. According to the Defendants – and, indeed, according to Dr. Leitzinger in his first affidavit (submitted prior to the *Godfrey* decision) – packaged bread and fresh bread, though superficially similar, are not consumed by the same consumer groups.

[84] To put it simply, they do not compete in the market. To say otherwise is to embrace an unrealistic, Marie Antoinette-like theory of the two products.

[85] The Defendants are of the view that the Plaintiffs' umbrella allegations with respect to fresh bread are significantly distinct from the types of umbrella effects that the Supreme Court recognized in *Godfrey*. In *Godfrey*, at para 2, as in *Shah v. LG Chem Ltd.*, 2018 ONCA 819, at para 1, the alleged umbrella effects concerned the same product manufactured by non-defendants who were not alleged to be parties to the conspiracy. In accepting the viability of umbrella purchaser claims, the Supreme Court in *Godfrey*, at para 59 and the Court of Appeal in *Shah*, at para 65 relied on an economic theory of umbrella effects that has as its premise the notion of product substitutability:

> Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a substitution away from the cartels' products toward substitute products produced by cartel outsiders…. The increase[d] demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market … or in neighboring markets.

[86] In fact, Defendants' counsel point out that in concluding that a cause of action for umbrella purchasers would not expose defendants to indeterminate liability, the first factor relied upon by the Supreme Court was that the Defendants' liability would be "limited… by the specific products whose prices are alleged to have been fixed": *Godfrey*, at para 72. By contrast, the Plaintiffs claim compensation for umbrella pricing effects with respect to a different product, which is not substitutable with the product that was the subject of the conspiracy.

[87] Most importantly, Defendants' counsel point out that Dr. Leitzinger proposes no methodology for demonstrating that the price impact from the manipulation of packaged bread would have reached the umbrella purchasers of fresh bread. His report is speculative on the issue of whether retail price of fresh bread would have matched the inflated price of packaged bread, suggesting a comparison of prices, costs, and margins for fresh bread without showing that such an analysis can be done. After all, the two products are really two sets of varied products, each with its own internal pricing variables and external market changes over time.

[88] It is self-evident that a straight comparison of different price points for the two products would not establish the causal link necessary to make the Plaintiffs' case. There are too many distinctions between the two products, different ingredients, different labour costs, different retailers, different seasonal considerations with respect to school schedules, etc. But if a direct pricing comparison does not provide the evidence necessary to support this umbrella claim, neither does any other approach suggested by the Plaintiffs.

[89] Plaintiffs' counsel respond to this critique by arguing that section 36 of the *Competition Act* does not limit the right to this type of "umbrella damages" to unlawful price rises of products which are direct economic substitutes. They contend that a damages claim, unlike an analysis of a proposed merger, need not rely on a formal economic analysis of whether the given products compete in the relevant market. Instead, they put forward the view that the distinction between the two products is really one of price, and that as the price to the consumer rises in respect of packaged

bread the more expensive fresh bread becomes a *de facto* competitor even though it was not one prior to the inflated prices caused by the conspiracy.

[90] While there is a certain theoretical logic to this argument, there is no evidence in the record to suggest that it can be (or could ever be) demonstrated. There is likewise nothing on which to base any means of limiting this type of spill-over contention to fresh bread. By the same logic, if an inflated price will drive packaged bread buyers to a non-competing product like fresh bread, it may also drive them to any number of non-competing products. Bread eaters may, as suggested earlier, turn to cake, or they may be attracted to muffins, crackers, or even matzah once the economic impact makes this night slightly less different than all other nights.

[91] None of those products truly compete with packaged bread in an untampered market, although all share a superficial likeness as flour and water-based carbohydrates. Without any methodological analysis one might imagine that this similarity could play a role in fashioning consumer choice in this area, but there is no data that actually demonstrates, in the legal causation sense, that this speculation is true.

[92] Indeed, the thought is so theoretically attractive but unprovable that there is no reason to limit it to Canadians' well-documented affection for carbs: Didier Garriguet, *Overview of Canadians' Eating Habits* (Statistics Canada, Health Stats. Div., 2004). If packaged bread becomes too expensive, consumers may opt for more vegetables. The may perhaps substitute a chicken salad for a chicken sub, or wrap their burger in a lettuce leaf, or sandwich their protein between two Shiitake mushrooms. Indeed, the ratio of beef to breadcrumbs in their meatloaf may change, their preference for gluten-free items may increase, etc.

[93] For that matter, if consumers across Canada spend more on food they will eventually have less to spend on automobiles. In a complex market economy, there is literally no limit to the potential impact of a staple commodity whose price is fixed on non-market terms.

[94] It is for this reason that Justice Brown restricted his "rising tide" approach to umbrella claims in which a cartel's conduct is alleged to affect the market for the subject product and its true competitors. Otherwise, price fixing, which in its nature deviates from the market's law of supply and demand in establishing prices, might ultimately impact not just on the subject product but the entire market economy.

[95] Theorists have long contemplated this phenomenon of economic interdependence as an aspect of general equilibrium theory, which seeks to explain the circumstances in which Pareto optimal pricing and a general state of equilibrium will exist across markets: Gerard Debreu, *Theory of Value: An Axiomatic Analysis of Economic Equilibrium* (New York: John Wiley & Sons, Inc., 1959), at p 98. In short, the theory holds that "the economic system is a whole in which all of the parts are connected and react on one another. An increase in the income of the producers of commodity A will affect the demand for commodities B, C, etc. and the incomes of their producers, and by their reaction will affect the demand for commodity A": Antoine Cournot, *Researches into the Mathematical Principles of the Theory of Wealth,* Nathaniel Bacon, trans. (New York: The Macmillan Company, 1837), p. 127.

[96] Where a foundational resource or a staple food product is concerned, the impact will likely be broadly inflationary. Just as a cartel's historic manipulation of the price of oil impacted on a wide range of far-flung and ostensibly unrelated industries, a cartel's manipulation of the price of packaged bread will predictably impact on a wide range of ostensibly unrelated foods: Christopher J. Neely, "How Much Do Oil Prices Affect Inflation?" (2015) Econ. Res. No. 10 (Fed. Res. Bank of St. Louis); Frederick Furlong and Robert Ingenito, "Commodity Prices and Inflation" (1996) Econ. Rev. 28-29.

[97] In the interconnected world of consumer economics, the Plaintiffs allege far too much when they make damages claims based on the cost of non-substitutable or non-directly competitive products. There may well be a case for regulatory intervention in the case of market failure with a reverberating economic impact across multiple sectors: see Edward Iacobucci, Michael Trebilcock, and Huma Haider, *Economic Shocks: Defining a Role for Government* (Policy Study No. 35, C.D. Howe Institute, 2001), p. viii. But the regulatory function of adjusting broadly impactful economic activity is different than the judicial function of righting wrongs, including in the class action context.

[98] The Supreme Court's point in allowing umbrella claims to proceed is not to allow litigation over theoretically connected but practically unprovable increases in all products everywhere. Rather, it is to ensure that all damages provably caused by a price fixing cartel – i.e. the increased prices for the product and its direct competitors whose price was manipulated – are accounted for.

[99] Products which do not directly compete with and are not truly substitutable for the subject product lend an element of abstract theory to the otherwise practical task of assessing causation and damages. As counsel for Sobeys has described it in their factum, Dr. Leitzinger's evidence with respect to the fresh bread umbrella claims amounts to a "trust me" approach to the evidence – as if the entire exercise were an academic one in which the theory is foremost and the practical proof is a detail that need not concern us right now. This approach, however, undermines the justiciability of the proposed claim.

[100] Accordingly, when it comes to umbrella purchasers of fresh bread (or any other non-competing product), the lawyers and economists can articulate a theory of price increase. But the evidentiary record cannot provide a basis in fact to suggest that these far-reaching claims will succeed.

iv) Non-Defendant producers of packaged bread

[101] Turning to the claims of those who purchased non-Defendant packaged bread products – i.e. those packaged breads produced and sold by non-participants in the price fixing conspiracy – the Defendants say that the price impact on these products are not capable of being analyzed as common issues.

[102] The evidence of the Defendants' industry expert, Randy Baltzer, indicates that soft-top bread is the most common variety of packaged bread sold in Canadian grocery stores. This product is dominated by leading national brands such as Dempster's (Canada Bread) and Wonder Bread

(Weston Bakeries). Mr. Baltzer explains that non-Defendant producers for the most part produce packaged artisanal bread (e.g. Rudolph's Rye bread), using different ingredients and formulations. As a consequence, these packaged breads are crustier, taste different, have a shorter shelf life, and carry a higher price than Canada Bread's or Weston Bakeries' packaged bread.

[103] As a result of these differences, consumers seeking to buy packaged soft-top bread (e.g. to make school lunch sandwiches) are unlikely to replace it with artisanal bread produced by non-Defendant bakeries. Consumers – and especially consumers of children-oriented food products – tend to be loyal to their preferred brands. In his affidavit, Mr. Baltzer notes that retailers have not substituted significant volumes of Canada Bread or Weston Bakeries' bread for products baked by other bakeries over the course of the Class Period. He concludes that packaged bread from non-Defendant bakeries are not substitutes for the leading brands of packaged bread baked by Canada Bread and Weston Bakeries.

[104] The great variety of packaged breads produced and sold by non-Defendants across Canada, and the diverse formulas and techniques that differentiate these often locally-produced products from the Canada Bread's and Weston Bakeries' national versions, makes them an impossible fit for a common issues analysis. Counsel for the Plaintiffs admitted this themselves in the carriage motion for the parallel claim in British Columbia. The judge in that proceeding specifically noted that, "Counsel for the plaintiff in the David Action also challenges whether it is possible to develop an appropriate framework for market definition in an umbrella case. Counsel relies on *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1995] FCJ No 1091 to illustrate the difficulties in defining a market": *Asquith v. George Weston Limited*, 2018 BCSC 1557, at para 36.

[105] The reference to *Southam* is instructive. In that case, Iacobucci J. described the difficulty in defining a media market where close scrutiny revealed that various media were too diverse to subject to meaningful comparison. That product diversity among what might seem to be superficially similar items drove the Court to conclude, at para 70, that no common market effects could be established among the various types of media:

> It is perfectly consistent to distinguish between the broadcast media and the print media on one ground and to distinguish further between two kinds of print media on another ground. Broadcasters attract advertisers who want to convey an 'image'. Newspapers attract advertisers who want to convey a great deal of specific information about a variety of products all at once. Accordingly, the two kinds of media serve different markets. However, from the fact that newspapers in general serve a certain broad class of advertiser, it does not follow that all newspapers serve precisely the same particular advertisers, or the same relevant advertising markets. Further division of the market is possible. Thus, daily newspapers serve advertisers who wish to reach even a relatively small proportion of people throughout a large region. Community newspapers serve advertisers who wish to reach a large proportion of people in a small region. These markets are at least possibly, and therefore reasonably, different. [Citations omitted]

[106] Plaintiffs' counsel's point in the British Columbia proceedings, and Defendants' counsel's point here, is that an analogous diversity exists among packaged bread producers. Indeed, if anything the packaged bread industry is more varied, more localized, more dominated by what counsel has referred to as "mom and pop" enterprises, than the broadcast and print media.

[107] In the hearing before me, Plaintiffs' counsel expressed their assurance that evidence with respect to the thousands of independently owned bakeries would not actually be included in the active claims against the Defendants. With respect, however, whether or not their participation is actively sought by counsel is not the point; if the price of packaged bread produced by non-Defendant producers is factored into the umbrella claims against the Defendants, then the pricing pursued by those independent producers is very much part of the class claim. It therefore must be susceptible to common issue analysis if it is to pass the certification hurdle, whether or not counsel ultimately choose to ignore that evidence at trial.

[108] The claim with respect to independent producers of packaged bread is not certifiable for the same reason that Plaintiffs' counsel does not want to pursue it. That is, it is not possible to effectively gather and adduce in evidence. It is another example of a claim that may work in theory but that cannot be translated into legal process.

[109] Accordingly, none of the umbrella claims are capable of being certified, as none of them pass the threshold common issues test under section 5(1)(c) of the *CPA*. The umbrella claims may reflect real economic loss, but not provable loss in any legal sense of the term. They represent what economists label a "deadweight loss" – i.e. a cost to society created by market inefficiency, which occurs when supply and demand are out of equilibrium such as in a price fixing arrangement, and consumers opt for alternative purchases: see *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 SCR 161, at para 94.

[110] Economists see such losses of wealth on a societal level as a negative impact of monopolistic activity. But that negative impact alone does not make them justiciable. As one set of scholars explains it: "The loss is deadweight because it is a pure loss to society as a whole and is not a transfer of wealth from the consumers to the monopolist": David C. Hjelmfelt and Channing D. Strother Jr., "Economic Damages for Consumer Welfare Loss", 39 Cleveland State Law Rev. 505, 507 (1991).

[111] Courts must consider such diffuse economic loss to be unfortunate but unrecoverable. Deadweight loss such as that represented by the various umbrella claims proposed here reflects a loss in the macroeconomic sense of society's general quest for wealth maximization. It is also a waste of resources in that it reflects producers' and retailers' quest for monopolistic positioning: Richard A. Posner, "The Social Costs of Monopoly and Regulation", 83 J. Pol. & Econ. 807 (1975). But causation in the "but for" sense that the law requires, where there must be a provable link between the Defendants' acts and the Plaintiffs' loss, is elusive.

[112] As a result, the common issues are limited to those questions relevant only to the direct and indirect purchasers of packaged bread.

d) Preferable procedure

[113] Under s. 5(1)(d) of the *CPA*, the question of whether a class action is the preferable procedure to resolve class claims is to be assessed through the lens of judicial economy, behaviour modification, and access to justice: *AIC Limited v. Fischer*, [2013] 3 SCR 949, at para 16. This generally entails an analysis of the significance and nature of the proposed common issues, the individual issues that would remain after the common issues trial, and the manageability of the proposed action overall: *Chadha v. Bayer Inc.* (2001), 54 OR (3d) 520 (Div Ct) at para 16, aff'd (2003), 63 OR (3d) 22 (Ont CA).

[114] In the circumstances, there is little doubt that a class action is the preferable procedure for this claim. The Class is predicted to be extremely large, and each Class member's claim is likely to be relatively small. No one litigant is in a position to advance a national price fixing case over a staple food product consumed by what are probably millions of consumers. Given the nature of the claim, the point is self-evident.

[115] In their factum, Plaintiffs' counsel quote Judge Posner to the effect that there can be no serious debate about the preferability of a class action in a case that entails such a widely consumed product. It is hard to disagree with that sharply phrased assessment: "The realistic alternative to a class action is not 17m individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30": *Carnegie v Household International Inc*, 376 F 3d 656, 661 (7th Cir. 2004), cited with approval in *Mastercard Incorporated & Ors v Merricks*, [2020] UKSC 51, at para 84.

e) Representative Plaintiffs and litigation plan

[116] I am satisfied that the proposed Plaintiffs will adequately represent the interests of the Class without a conflict of interest. They were not cross-examined on their supporting affidavits, and I see no reason to doubt their motivation and ability to vigorously pursue the litigation on behalf of the class: *Western Canadian Shopping Centres*, *supra*, at para 41. Their interests are aligned with those of the Class members.

[117] Further, the Plaintiffs' litigation plan provides a workable framework for the issues reasonably expected to arise as the case proceeds: *Waldman v Thomson Reuters Corp*, 2012 ONSC 1138, at para 131. In any case, I recognize that litigation plans are a work in progress that may need to be revisited from time to time as the action moves to trial: *Cloud v. Canada (Attorney General)*, [2004] OJ No 4924, at para 95.

IV. Disposition

[118] The action is certified under s. 5(1) of the *CPA* as against Loblaw, George Weston, Weston Bakeries, Weston Foods, Canada Bread, Metro, Sobeys, Wal-Mart Canada, and Giant Tiger, in respect of the claims of direct and indirect purchasers of packaged bread. The Plaintiffs shall be the representative Plaintiffs and Plaintiffs' counsel are appointed Class counsel.

[119] The Class shall be as originally framed in the first version of the Statement of Claim – i.e. the version that did not include the umbrella classes. The certified Class consists of people who purchased packaged bread, either directly or indirectly, sold by a Defendant retailer or manufactured by a Defendant producer.

[120] The certified common issues are as set out in Schedule 'A' hereto.

[121] The motion to certify the action as against Wal-Mart USA, Empire, Grupo Bimbo, and Maple Leaf is dismissed.

[122] The parties may make brief written submissions as to costs. I would ask each of them to email my assistant with a maximum three pages of submissions and a Bill of Costs or Costs Outline within three weeks of the date hereof. If they so desire, any party may make equally brief responding submissions within two weeks thereafter.

Released: December 31, 2021

Morgan J.

SCHEDULE 'A'

CERTIFIED COMMON ISSUES

BREACH OF THE *COMPETITION ACT*, RSC 1985, C C-34

Did the Defendants, or any of them, engage in conduct that was contrary to section 45 of the *Competition Act* in effect during the Class Period up to and including 11 March 2010? If so, what was the duration of the conduct?

Did the Defendants, or any of them, engage in conduct that was contrary to section 45 of the *Competition Act* in effect during the Class Period from 12 March 2010? If so, what was the duration of the conduct?

Did the Plaintiffs and the members of the Class suffer loss or damage as a result of the Defendants' conduct contrary to any provision of Part VI of the *Competition Act*?

Are the Plaintiffs and the members of the Class entitled to recovery of their loss or damage pursuant to section 36 of the *Competition Act?* If so, in what amount or amounts?

COMMON LAW CONSPIRACY

At any time during the Class Period did any of the Defendants or their affiliates conspire, agree, or arrange with any other legal or natural person to engage in conduct in contravention of section 45 of the *Competition Act* with:

(a) the predominant purpose of causing harm to any of the Plaintiffs and the members of the Class and the Umbrella classes; or

(b) the actual or constructive intent and with the natural result of causing harm to the Plaintiffs and the members of the Class and the Umbrella classes.

Did the Defendants, or any of them, act with any unknown co-conspirators to harm the Plaintiffs and the members of the Class and the Umbrella classes?

Did the Plaintiffs and the members of the Class suffer loss or injury as a result of the common law conspiracy?

What damages, if any, are payable by the Defendants, or any of them, to the Plaintiffs and the members of the Class?

UNJUST ENRICHMENT

Have the Defendants, or any of them, been enriched by the revenue they received from the Conspiracy and, if so, in what amount or amounts?

If so, did the Plaintiffs and the members of the Class suffer a corresponding deprivation?

If so, is there a juridical reason why the Defendants, or any of them, should be entitled to retain revenue they received from the Conspiracy?

What restitution, if any, is payable by the Defendants, or any of them, to the Plaintiffs and the members of the Class?

CONSTRUCTIVE TRUST

Should the Defendants, or any of them, be constituted as constructive trustees in favour of the Plaintiffs and the members of the Class for any revenue the Defendants received from the Conspiracy?

What is the amount of the revenue, if any, that the Defendants, or any of them, hold in trust for the Plaintiffs and the members of the Class?

What restitution, if any, is payable by the Defendants to the Plaintiffs and the members of the Class?

PUNITIVE DAMAGES

Are the Defendants, or any of them, liable to pay punitive damages to the Plaintiffs and the members of the Class having regard to the nature of their conduct and, if so, in what amount?

INTEREST

What is the liability, if any, of the Defendants, or any of them, for interest?

COSTS

Should the full costs of investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on an aggregate basis pursuant to section 36 of the *Competition Act* and, if so, in what amount?

CITATION: David v. Loblaw, 2021 ONSC 7331
COURT FILE NO.: CV-17-586063-00CP
DATE: 20211231

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MARCY DAVID, BRENDA BROOKS, ANDREW BALODIS

Plaintiffs

– and –

LOBLAW COMPANIES LIMITED, GEORGE WESTON LIMITED, WESTON FOODS (CANADA) INC., WESTON BAKERIES LIMITED, CANADA BREAD COMPANY, LIMITED, GRUPO BIMBO, S.A.B. De C.V., MAPLE LEAF FOODS INC., EMPIRE COMPANY LIMITED, SOBEYS INC., METRO INC., WAL-MART CANADA CORP., WAL-MART STORES, INC., AND GIANT TIGER STORES LIMITED

Defendants

REASONS FOR JUDGMENT

E.M. Morgan, J.

Released: December 31, 2021