CITATION: Cygnus Electronics v. Panasonic, 2018 ONSC 2312
COURT FILE NO.: 3795/14CP
DATE: 20180410

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Cygnus Electronics Corporation and Sean Allott, Plaintiffs

AND:

Panasonic Corporation; Panasonic Corporation of North America; Panasonic Canada Inc.; Sanyo Electric Co. Ltd.; NEC Tokin Corporation; NEC Tokin America Inc.; Kemet Corporation; Kemet Electronics Corporation; Nippon Chemi-Con Corporation; United Chemi-Con Corporation; Hitachi Chemical Co. Ltd.; Hitachi Chemical Company America, Ltd.; Hitachi Canada; Nichicon Corporation; Nichicon (America) Corporation; AVX Corporation; Rubycon Corporation; Rubycon America Inc.; Elna Co. Ltd.; Elna America Inc.; Matsuo Electric Co. Ltd.; Toshin Kogyo Co. Ltd.; Samsung Electro-Mechanics; Samsung Electro-Mechanics America Inc.; Samsung Electronics Canada Inc.; Rohm Co. Ltd.; Rohm Semiconductor U.S.A., LLC.; Hitachi AIC Inc.; Hitachi Chemical Electronics Co., Ltd.; FPCAP Electronics (Suzhou) Co.; Fujitsu Ltd.; Fujitsu Canada, Inc.; Holy Stone Enterpise Co., Ltd.; Vishay Polytech Co. Ltd. f/k/a HolystonePolytech Co., Ltd.; Milesone Global Technology, Inc. d/b/a Holystone International; and Holy Stone Holdings Co., Ltd., Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

BEFORE: Justice R. Raikes

COUNSEL: Counsel, for the Plaintiffs: Jonathan Foreman and Genevieve Graham

Counsel, for the Hitachi Defendants, Katherine Kay and Mark Walli

HEARD: March 19, 2018

ENDORSEMENT

[1] The Hitachi defendants and others bring a motion to strike the affidavits (3) of the plaintiffs' economics expert, Dr. Reutter, filed in support of the plaintiffs' motion for certification. The defendants assert that the opinion evidence of Dr. Reutter is inadmissible because,

1. Dr. Reutter provides no valid or reliable method as a matter of economics to determine that all class members have been harmed, the purpose for which his evidence is tendered; and

2. Dr. Reutter provides no valid methodology to determine if the alleged overcharges were passed through or to determine the extent of the pass-through. The methodology referred to in his reports is so vague as to be meaningless and is incapable of assessment.

[2] In the alternative, the defendants assert that the evidence of Dr. Reutter in his third affidavit is not proper reply and constitutes case splitting. Accordingly, it should be excluded on the certification motion.

[3] The plaintiffs assert, *inter alia*, that Dr. Reutter's evidence is precisely the sort of evidence required by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477. This evidence reflects the same analytical approach taken by Dr. Reutter in other class proceedings where that evidence was accepted and relied upon in certifying cases in Ontario and British Columbia. The plaintiffs submit that the defendants' motion is an invitation to engage in a battle of the experts, which the Supreme Court of Canada clearly indicated was inappropriate at the certification stage.

[4] The motion before me deals with the admissibility of Dr. Reutter's evidence as expert opinion evidence on the motion for certification. It does not engage consideration of the ultimate use and weight that evidence will have, if admitted, on the certification motion.

[5] In this decision, I will

- Outline the factual and procedural context in which this motion is set.
- Review the expert reports in issue together with the defendants' expert's reports.
- Identify and address the arguments advanced.
- Review the applicable legal principles for admissibility of expert evidence.
- Analyze the plaintiffs' expert evidence in relation to those principles with due regard to the issues raised by the defendants' expert.

Background/Context

[6] The plaintiffs allege in this action that the defendants conspired to fix, raise, maintain or stabilize prices of aluminum and tantalum electrolytic capacitors in Canada between September 1, 1997 and August 6, 2014 ("the claim period").

[7] The plaintiffs claim, *inter alia*, general damages calculated on an aggregate basis for breach of ss. 45 and 46 of Part VI of the *Competition Act*, R.S.C. 1985, c. C-34, conspiracy, unlawful means tort and unjust enrichment. They rely upon s. 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") for the determination of the defendants' liability to class members on an aggregate basis. S. 24(1) of the *CPA* states:

(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate were a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[8] The plaintiffs seek to certify this action as a class proceeding. The plaintiffs propose that the Class be defined as:

> All persons and entities in Canada who purchased aluminum and tantalum electrolytic capacitors or products which contained aluminum or tantalum electrolytic capacitors between September 1, 1997, and the present, other than (1) all persons and entities resident in British Columbia and, (2) all persons and entities other than legal persons established for a private interest, partnership or association, who had under its direction or control more than 50 persons bound to it by contract of employment who purchased said products in Québec during that period.

[9] Thus, the proposed class definition includes direct and indirect purchasers as well as umbrella purchasers. A direct purchaser is one who purchased an aluminum or tantalum electrolytic capacitor or a product containing that device directly from one of the defendants during the claim period. An indirect purchaser is one who purchased an aluminum or tantalum electrolytic capacitor manufactured by one of the defendants or a product containing that device from someone further down the distribution chain during the claim period; for example, from a retailer or wholesaler. An umbrella purchaser is one who, during the claim period, purchased an aluminum or tantalum electrolytic capacitor or a product containing such a device that was not manufactured by any of the defendants.

[10] Paragraph 5 of the notice of motion for certification sets out the proposed common issues including the following:

a. Did the defendants, or any of them, breach s. 45 or s. 46 of the *Competition Act* … giving rise to liability pursuant to s. 36 of the *Competition Act*?

iv. Did class members suffer injury as a result?

b. Are the defendants, or any of them, liable in tort for conspiracy to fix the price of capacitors?

v. Did class members suffer injury as a result?

f. Can damages for the Class be measured on an aggregate basis and, if so, what are the aggregate damages for the Class?

[11] The plaintiffs in this action seek to certify as common issues both the fact of injury or harm and that the quantum of damages suffered can be calculated on an aggregated class-wide basis.

[12] Proof of harm or damage is an essential element of liability under the relevant provisions of the *Competition Act*; *viz.* there is no liability absent satisfactory proof of damage. In *Pro-Sys*, the Supreme Court of Canada clarified that the aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability: see paras. 131-133.

[13] At para. 132, Justice Rothstein for the court wrote:

> I agree with Feldman J.A.'s holding in *Chadha* that aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage" (para. 49). I also agree with Masuhara J. of the B.C.S.C. in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "[t]hat question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575 (CanLII), at para. 176). ...

[14] Thus, the calculation of aggregate damages at trial pursuant to s. 24 of the *CPA* is engaged only after the plaintiffs have proven liability which, on the causes of action asserted herein, includes proof that the overcharge occurred and was passed through to class members. The calculation of aggregate damages does not itself prove that there was an overcharge or that it was passed through to class members.

[15] In *Pro-Sys*, the court provided direction as to the evidentiary foundation required at the certification stage to establish commonality to certify aggregate damages as a common issue in a price-fixing case. Justice Rothstein wrote at paras. 114 and 115:

> [114] One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.
>
> [115] The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re Linerboard Antitrust Litigation*, 305

> F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact, to all members of the class" (ibid., at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.

[16] Further, at para. 118, he wrote:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. 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 (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[17] It is against this legal evidentiary backdrop that the plaintiffs engaged and obtained the expert reports of Dr. Reutter. The purpose of the expert opinions expressed by Dr. Reutter is to satisfy the court on the certification motion that there is a sufficiently credible or plausible expert methodology that will establish "some basis in fact" to conclude that there is a realistic prospect of establishing loss on a class-wide basis.

[18] I pause to observe that there is no issue on this motion as to Dr. Reutter's qualifications as an economist experienced in the analysis and calculation of damages in price-fixing cases. Further, there is no suggestion that expert opinion evidence from an economist is unnecessary; that is, the defendants agree that expert evidence from an economist would be helpful in the sense that the subject-matter is likely to be beyond the ordinary knowledge of the court and the opinions of an expert would assist the court in understanding the issues.

[19] The defendants do not criticize Dr. Reutter for failing to have calculated damages at this stage; they agree that is entirely premature. They also agree that expert evidence of the sort described by the court in *Pro-Sys* is relevant; however, they argue that the expert reports of Dr. Reutter are wholly inadequate and unreliable to such a degree that this court should refuse to admit the opinions expressed by Dr. Reutter in his reports.

[20] I turn now to the first two expert reports of Dr. Reutter which are appended as exhibits to his affidavit's sworn July 13, 2016 and March 10, 2017. For ease of reference, I will refer to the report attached to his affidavit dated July 13, 2016 as Report #1, and to the report attached to his affidavit dated March 10, 2017 as Report #2. Finally, Dr. Reutter swore a reply affidavit on January 24, 2018 which contains his reply opinion in response to the defendants' expert, Dr. Israel. I will refer to that last report as Report #3.

Report #1

[21] At para. 4 of Report #1, Dr. Reutter sets out the issues he was initially asked to address as follows:

> 1. Would all members of the proposed class have been impacted by the conspiracy alleged?
>
> 2. To determine if there are methods available to estimate any overcharge, as well as aggregate damages, that may have resulted from the conspiracy alleged, based on evidence that is common to the proposed class.

[22] In responding to those issues, Dr. Reutter "assumed that the alleged wrongdoing did in fact occur"; however, he did not assume "that the alleged wrongdoing had an impact on the proposed Class.": (see para. 4). There has been no cross-examination of Dr. Reutter to date.

[23] Defence counsel interprets the assumptions made by Dr. Reutter to mean that he has assumed that there was a price-fixing conspiracy as alleged by the plaintiffs but has not assumed that there was an overcharge; the fact of an overcharge is "an impact". I do not agree with defence counsel's premise.

[24] I understand from my reading of Dr. Reutter's report that he has assumed that the plaintiffs will be able to establish both the fact of a conspiracy and the fact of an overcharge. The "alleged wrongdoing" is set out at paras. 80 and 81 of the Fresh As Amended Statement of Claim which alleges:

> 80. During the Class Period, senior executives and employees of the Defendants, acting in their capacities as agents for the Defendants, engaged in communications, conversations, and attended meetings with each other at times and places, some of which are unknown to the Plaintiffs. As a result of the communications and meetings the Defendants and their unnamed co-conspirators unlawfully conspired and/or agreed to:
>
> a. unreasonably enhance the prices of Capacitors in Canada;
>
> b. fix, maintain, increase, or control the prices of Capacitors in Canada;
>
> c. monitor and enforce adherence to an agreed-upon pricing scheme;
>
> d. restrain trade in the sale of Capacitors in Canada; and
>
> e. lessen unduly competition in the sale of Capacitors in Canada.

81. In furtherance of the conspiracy, during the Class Period the defendants and/or their servants and agents:

a. fixed, maintained, increased, controlled, and/or enhanced unreasonably the prices of Capacitors in Canada;

b. communicated secretly, in person and by telephone, to discuss and fix prices of Capacitors;

c. made formal agreements with respect to the prices of Capacitors;

d. exchanged information regarding the prices of Capacitors for the purposes of monitoring and enforcing adherence to the agreed-upon prices;

e. rigged bids for the sale of Capacitors to OEMs and their subsidiaries;

f. allocated sales, territories, customers, or markets for supply of Capacitors;

g. fixed, maintained, controlled, prevented, or lessened the production and/or supply of Capacitors; and

h. disciplined any conspirator which failed to comply with the conspiracy.

[25] I note specifically the allegation at para. 81a that the defendants "fixed, maintained, increased, controlled, and/or enhanced unreasonably the prices of Capacitors in Canada". It is implicit in this allegation that the defendants overcharged for capacitors in furtherance of their conspiracy on the market.

[26] Defence counsel argues that Dr. Reutter has to demonstrate a methodology to establish that an overcharge actually occurred and, in doing so, he cannot use the calculation of aggregate damages as a means of proving the fact of overcharge because that would be contrary to the principle stated by the Supreme Court of Canada in *Pro-Sys* (see paras. 12 and 13 above).

[27] In my view, there is a distinction between calculating the extent of the overcharge as a function of damages and proof that an overcharge occurred pursuant to the conspiracy. Dr. Reutter has assumed the latter and his reports are intended to address the former. As indicated earlier, there has been no cross-examination of Dr. Reutter and, accordingly, I must draw my own conclusion from a careful review of his report.

Summary of Conclusions

[28] Dr. Reutter makes clear that in forming the opinions expressed in his report, he has relied exclusively on public sources of information and data. A list of materials relied upon is attached as an appendix to his report. His opinions are based on the material reviewed and he reserves the right to amend the opinions if other information is provided to him in the future.

[29] At paras. 6-9 of his report, Dr. Reutter provides a summary of his "conclusions". Defence counsel placed emphasis both on the fact that he reached conclusions at such an early stage and that those conclusions result from inadequate, incomplete and vague principles, so much so that the conclusions reached do not meet the level of intellectual rigour required of an economist. Suffice to say that plaintiffs' counsel argued otherwise.

[30] With respect to the prematurity of conclusion position, I observe that:

- Dr. Reutter is clear that his conclusions are based only upon the information he has reviewed to date, all of which is in the public domain.

- Dr. Reutter equally makes clear that there is other relevant information internal to the defendants that he would expect to exist based on his experience in other similar cases but to which he does not yet have access.

- He leaves open that his conclusions may change if he gets new information.

[31] In these circumstances, it seems to me that the reference to "conclusions" simply represents his initial findings based on the information that is available to him at this point. In the context of the litigation as a whole, they might more accurately be described as preliminary findings that are subject to change as and when new information is provided to him. I do not interpret his reference to "conclusions" as a rush to judgment on his part.

[32] At para. 6, Dr. Reutter summarizes his conclusions on the two issues posed to him as follows:

> … First, I have concluded that all, or nearly all, members of the proposed Class would have been impacted by the actions of defendants as alleged in the *Statements of Claim*. Second, I have concluded that there are accepted methods available to estimate any overcharge and the dollar amount of aggregate damages that may have resulted from the alleged wrongdoing, based on evidence common to the proposed Class…

[33] Defence counsel urges me to find that the conclusion that all members of the proposed class, both direct and indirect purchasers, have been impacted is derived from Dr. Reutter's analysis and conclusions of four economic factors alone. She submits that that is clear from para. 7 which reads as follows:

> 7. The above conclusions are based on the following four economic considerations. First, during the proposed Class period, defendants accounted for a majority of all aluminum and tantalum electrolytic capacitors manufactured worldwide. Second, there are no economic substitutes for Capacitors. Third, Capacitors are commodity-like products, manufactured to conform to industry standards. Fourth, the manufacture and sale of Capacitors exhibits barriers to entry….

[34] With respect, the conclusion that all members of the class were impacted is not restricted to the analysis of the four economic factors. Bearing in mind that paras. 6-9 are merely summaries of the conclusions reached in the balance of the report, I note that at para. 8, Dr. Reutter indicates that capacitors and products containing capacitors are economic goods subject to the economic laws of supply and demand. He then sets out the law of demand and law of supply which deal with the relationship between price and quantity supplied of a good, and writes:

> … **As described herein**, these relationships suggest that any change in the price of defendants' Capacitors, including any overcharge resulting from the alleged wrongdoing, would have been passed through in part and absorbed in part at each level of the distribution chain, thus impacting all, or nearly all, members of the proposed Class [emphasis added]

[35] Thus, I disagree with the suggestion that Dr. Reutter reached his conclusion that all or substantially all of the class would have been impacted by the overcharge simply on the basis of the presence of the four economic factors that he analysed. It is clear that he considered the nature of the product – that it is commodity-like – and that it is subject to the usual laws of supply and demand which hold that increased costs are typically passed along wholly or in part through the distribution chain.

Analysis of Product and Market Conditions

[36] The body of Dr. Reutter's report starts at para. 10. In his report, Dr. Reutter discusses the product that is at the centre of this litigation and its place in the market. To that end, he

- sets out what capacitors are and the function they perform in electrical devices
- compares the characteristics of aluminum and tantalum electrolytic capacitors with other types of capacitors
- examines the annual worldwide sales of aluminum and tantalum capacitors between 1997 and 2012
- describes the distribution chain for these capacitors.

[37] At paras. 18 and 19 under the heading "Economic Market Conditions", Dr. Reutter states:

> 18. The field of economics identifies a limited number of market conditions that, if present, allow firms acting in concert, colluding, with each other to have an impact on the supply and price of products produced in an industry. These conditions include: (1) a concentrated market, where a small number of firms account for a large share of an industry's output; (2) a lack of economic substitutes for the product, or products, subject to the alleged collusion; (3) a standardized, commodity-like, product; and (4) barriers to entry that slow or prohibit firms from entering a market and eroding supra – competitive prices.

> 19. An analysis of the market for Capacitors indicates that, during the period of the alleged collusion, the industry exhibited each of the above market conditions. This suggests that, *if acting together, as alleged, defendants would have been able to impact and hence raise the price of Capacitors above that which would have otherwise existed in the marketplace. As explained below, defendants' ability to affect the price of Capacitors would have had an impact on downstream products that incorporate Capacitors.* [Italics added]

[38] Starting at paras. 20 through 33, Dr. Reutter examines each of the four economic conditions referred to in para. 18. The defendants are critical of Dr. Reutter's approach; in particular, the defendants argue that:

> 1. The notion that only four economic conditions are relevant is deeply flawed. As Dr. Israel points out, there are other relevant accepted factors to be considered which Dr. Reutter failed to do;
>
> 2. In any event, no reasonable economist would make a conclusion as to the impact of an alleged overcharge through price-fixing based solely on the four economic conditions identified and discussed by Dr. Reutter; and
>
> 3. Dr. Reutter does not provide any analytical methodology for the evaluation of each of these conditions. Where he does refer to objective criteria like Canada's Merger Enforcement Guidelines (MEGs), he fails to apply them or does so selectively.

[39] I will address the merits of those positions later in this decision.

Analysis of Impact on Class Members

[40] Section V of Dr. Reutter's report is entitled: "Impact on All Members of the Proposed Class". Starting at para. 34, Dr. Reutter provides a simplified explanation of how the laws of supply and demand work in various scenarios. Defence counsel referred to this part of his report as "Economics 101".

[41] At paras. 41 and 42, Dr. Reutter states:

> 41. ... Thus, given a typical supply and demand relationship, when an industry is faced with higher input costs, a portion of those costs are passed through to downstream entities, e.g. consumers, and the remainder is absorbed by the upstream entity supplying the good to the market.
>
> 42. Based on my research, there is no reason to conclude that tantalum and aluminum electrolytic capacitors, and Capacitor products, are anything but typical goods. Thus, it is my opinion that any price increase that resulted from the alleged collusive behaviour would have been passed through in part and absorbed in part, at each level of the distribution chain, impacting all, or nearly all, members of the proposed Class. As described below, there are accepted methods for estimating pass through at each stage of the distribution chain.

[42] Having concluded that all, or nearly all members of the proposed class were impacted by the alleged overcharge, Dr. Reutter then turns in his analysis to how one would determine the extent of the overcharge, the extent to which the overcharge was passed through each level of the distribution chain and how aggregate damages may be calculated on a class-wide basis.

[43] To be clear, I do not agree with the submission made by defence counsel that Dr. Reutter conflates the methodology to establish aggregate damages with the analysis that there was class-wide impact. I do not read his report to suggest that the existence of a methodology to calculate aggregate damages on a class-wide basis proves that there was class-wide impact.

Aggregate Damages – Estimate of Overcharge

[44] Dr. Reutter indicates at para. 43 that the first step in the determination of aggregate damages is to estimate the overcharge. That requires a determination of what the price would have been but for the collusion and price-fixing that occurred. He indicates that there are two accepted methodologies: a standard regression model method, and a price – cost or profit method.

i. Regression Model

[45] At paras. 44 – 67, Dr. Reutter sets out the methodology that underpins a regression model analysis. He describes a regression model in broad terms for each type of capacitor – aluminum and tantalum. In that analysis, he recognizes that the demand for each type of capacitor is more prevalent in different end products. Throughout this section of his report, he indicates that he expects the defendants to be in possession of both internal data and market analyses which would guide the regression analysis.

[46] Although Dr. Reutter sets out various formulae in his report, he does not build the model that will be used to calculate damages. Instead, he describes more generally the methodology that would be employed because, at this stage - before discovery - the extent of available data is unknown. Defence counsel agreed that she would not expect Dr. Reutter to present at this stage a fully developed regression model, complete with all the necessary formulae. Nevertheless, she argues that the model which he has provided is so generic, so lacking in particularity as to be unhelpful and unreliable. In an oft-repeated phrase, she characterizes his approach as nothing more than a promise to "do the math" to solve a math problem.

[47] Dr. Reutter indicates at para. 52 that: "Standard econometric and statistical techniques are available and commonly used by economists to differentiate between changes in the price of products due to changes in manufacturing costs versus changes in price due to other factors, e.g. the impact of an alleged collusive arrangement." That statement is a footnoted by reference to three published articles found at tabs 23, 24 and 25 of the plaintiffs' Book of Authorities. The Rubinfield paper entitled "Reference Guide on Multiple Regression" is part of a Reference Manual on Scientific Evidence. The paper explains how a multiple regression model works and the principles that underlie it.

[48] In *Shah v. LG Chem, Ltd,*. 2015 ONSC 6148 at para. 119, Perell J. described a regression analysis in the following terms:

> 119. … A regression analysis involves developing an economic model of supply and demand for each type of LIB. Then supply and demand data is gathered and a regression program uses statistical techniques to isolate the impact of the alleged conspiracy by comparing prices before and during and/or during and after the alleged wrongdoing.

[49] Dr. Reutter was the plaintiffs' economic expert in *Shah* where he similarly put forward a regression analysis for the purpose of calculating aggregate damages on a class-wide basis.

[50] Defence counsel agreed that a regression analysis is a recognized econometric and statistical tool used to isolate a particular cost variable. Her description is consistent with that of Justice Perell above.

[51] At para. 55, Dr. Reutter indicates that once the data are collected, the extent of any overcharge can be estimated using standard multiple regression techniques. At para. 56, he indicates that to the extent the defendant discovery identifies factors, in addition to those already captured by equations he has provided, that impact the supply of or demand for tantalum capacitors, those factors can be incorporated into the model.

[52] Thus, Dr. Reutter proposes the use of a multiple regression model as a means to isolate and estimate the overcharge. He explains that approach and leaves open the prospect of modification to capture other potential causes of increased costs. He provides various formulae which, at this stage in the proceeding, are necessarily rudimentary. A regression analysis is a recognized econometric and statistical method. This is not a case where Dr. Reutter has eschewed conventional modelling for an unproven model that is not recognized or accepted by economists.

ii. Price-Cost Ratio

[53] The alternate method proposed by Dr. Reutter is the price – cost ratio or profit analysis which is referred to in paras. 68 and 69 of his report. At para. 69, Dr. Reutter states:

> 69. Similar to the regression model described above, estimating any overcharge with the price – cost method will require the analysis of data both during and outside the period of the alleged conspiracy. As indicated above, it is expected that defendants have transaction level data for Capacitor sales over time. Depending on the availability of data, estimating any overcharge using the price – cost ratio could be accomplished by comparing the ratio of costs to transaction prices, to direct purchasers, during the period of the alleged collusion to the same ratio for a period of time outside the period. Assuming all else equal, any difference between the two ratios can be attributed to the alleged wrongdoing. A more sophisticated approach would be to use factors of supply and demand, similar to those described above, and forecast the price – cost ratio during and

outside the period of the alleged collusion. Again, any difference in the estimates of the price – cost ratio would be attributed to the alleged collusion.

[54] Dr. Reutter cites and relies upon a paper written by Dijk and Verboven entitled "Quantification of Damages" published in Issues in Competition Law and Policy for the American Bar Association Section on Antitrust Law in 2008. A copy of that article is found at tab 10 of the plaintiffs' Book of Authorities. I note that the footnote references the entire article. The price – cost ratio or profit analysis Dr. Reutter describes is not clearly delineated in the paper, at least I did not find it to be so.

Pass-Through

[55] Paras. 70-75 of Dr. Reutter's report deal with direct and indirect first purchaser damages. These damages apply to those who purchased a capacitor from one of the defendants or purchased a product made by one of the defendants that contains a capacitor. These purchasers are in the first line of the distribution chain. The calculation of these damages is relatively straightforward: the amount of overcharge multiplied by the number of units purchased. This may be done as a percentage of the value charged.

[56] At paras 76 – 85, Dr. Reutter deals with pass-through rates. He indicates that the pass-through rate is determined by dividing the elasticity of supply by the difference in elasticity of supply and elasticity of demand at each stage of the distribution chain (see para. 80). Alternatively, a regression equation is set out at para. 81. In order to undertake this analysis, he requires data sufficient to estimate the elasticity of supply and demand for capacitors and electronic products containing capacitors. He indicates that in his experience, the defendants and third-party sources will have the data sufficient to do so.

[57] Dr. Reutter indicates that the "law of one price" may apply by analogy in the circumstances. At para. 82, he states:

> 82. Because the named defendants include vertically integrated tantalum and aluminum Capacitor manufacturers and related downstream electronic products manufacturers, e.g. Panasonic, sales transaction data produced in this matter should inform the level of pass-through at various points in the distribution chain. For instance, sales transaction data from defendant Panasonic, a defendant manufacturer of Capacitors, will inform the transfer price at which it sold Capacitors to related downstream electronic products entities, as well as the price at which Panasonic sold Capacitors to non-defendants such as Hewlett-Packard. The law of one price suggests that the alleged conspiracy would have resulted in an overcharge that would have had similar impact on both defendant and non-defendant OEMs. If this were not the case then arbitrage opportunities would develop that would have been counterproductive to the alleged conspiracy.

[58] He explains the law of one price in para. 83 and clarifies that while that law deals with homogeneous good trades, he does not suggest that capacitors produced by different manufacturers are homogeneous goods. At para. 84, he states:

> 84. As described above, I have concluded that Capacitors are substitutable and enhanced commodity-like, not strictly homogeneous. Therefore, given an empirical analysis of defendants transaction data I do not expect to find that to commodity like, and hence substitutable tantalum Capacitors, one manufactured by Kemet and the other by AVX, sold at the exact same price, all else equal. I expect Kemet and AVX have slightly different cost structures that would make such an occurrence unlikely. What I do expect, and how I invoke the law of one price is that, for a given defendant, a given model Capacitor would have sold at the same price to all similarly situated buyers, including buyers that are downstream entities related to upstream defendants.

[59] He indicates at para. 85 that those downstream of the manufacturers of the capacitors operate on thin profit margins. As a result, any overcharges resulting from the alleged conspiracy are likely to have been passed through to end users, and the degree of pass-through is an empirical matter that can be measured.

[60] Finally, Dr. Reutter concludes at para. 91 that there are accepted methods for estimating the extent to which any overcharge was passed through to members of the proposed class, and aggravated damages.

Report #2

[61] Dr. Reutter's second report was written and filed before this motion to strike was brought and before the defendant's expert, Dr. Israel, provided his initial report criticizing Reports #1 and 2.

[62] In Report #2, Dr. Reutter identifies additional sources of information and data, public and private, that may be useful in the estimation and eventual distribution of any damages resulting from the alleged wrongdoing. In addition, he was asked by plaintiffs' counsel to address whether umbrella purchasers would have been impacted by the alleged conspiracy.

[63] The purpose of the evidence of additional data and sources of information is to satisfy the court on certification that there is good reason to believe that the data needed for the methodologies proposed to calculate aggregate damages exist and are available. Even the best formula or methodology will fail to yield meaningful results without adequate data to input.

[64] To that end, Dr. Reutter refers to "tear down" data obtainable from two sources that will assist in determining what products contain the subject capacitors and how many. Similarly, he refers to Statistics Canada trade data which may assist in estimating damages to first purchasers of standalone capacitors.

Umbrella Purchasers

[65] Starting at para. 20, Dr. Reutter addresses the issue of umbrella purchasers – those who bought aluminum or tantalum capacitors manufactured by someone who is not a defendant or bought a product containing same. The economic theory seems to be akin to

"a rising tide raises all boats"; *viz.* non-defendant manufacturers of similar capacitors would raise their prices somewhat to take advantage of the market price set by the defendants.

[66] At para. 25, Dr. Reutter states:

> 25. … All other things equal, because Capacitors are commodity-like goods, it is necessarily true that Capacitors manufactured by non-defendants may also be substituted for Capacitors manufactured by the defendants.

[67] Dr. Reutter notes that this assumes that the capacitors manufactured by non-defendant manufacturers are of equal quality which may not be the case. The market **may** be divided between high quality and low quality capacitors. His discussion of umbrella purchasers is intended to deal only with the high quality capacitor market of which the defendants are part.

[68] Dr. Reutter does not specify a methodology by which high quality versus lower quality is differentiated. There is an off-hand reference to products destined for Western capital markets versus those for less-developed countries. That strikes me as a bald premise. Certainly, Dr. Reutter provides no support for a differentiation along that line.

[69] Thus, one of the challenges to any consideration of umbrella purchasers is a delineation of those manufacturers who are not defendants who fall into the category of high quality producers. Dr. Reutter provides no meaningful methodology and, given that he is an economist, not an electrical engineer, it may be beyond the scope of his expertise in any event.

[70] Once again, Dr. Reutter relies upon the law of one price which he indicates at para. 31 is theoretical although there are published papers that describe empirical testing of the validity of that law. He fairly observes that some empirical studies find support for the law of one price while others fail to do so.

[71] At para. 34, Dr. Reutter cites his own previous opinions in other price-fixing matters, and concludes that the price of non-defendant capacitors would have increased by the same magnitude as any estimated overcharge directly attributable to the defendants. That assertion is prefaced with "…basic economics teaches that, all else equal ".

[72] At para. 35, Dr. Reutter states:

> 35. … Thus, total aggregate damages, that account for both defendant and non-defendant capacitors sales, can be estimated by dividing aggregate damages directly attributable to defendants by the appropriate market share.

[73] At its core, Dr. Reutter assumes that the price charged by non-defendant manufacturers would have increased by the same percentage overcharge that the defendants applied, and the damages attributable is a simple mathematical calculation based on their percentage share of the market.

[74] Defence counsel submits that Dr. Reutter's approach lacks any foundation in reality. There is no analysis of the non-defendant capacitor market. It is ill-defined. There is no methodology to test the validity of the assumption that non-defendant manufacturers would have increased the amount payable for their capacitors at the same rate as the defendants or at all. There is no indication that data is readily available for that segment of the market; certainly, there is no opportunity for discovery as there is of the defendants.

[75] Further, defence counsel argues that, in any event, the evidence of the methodology to calculate aggregate damages for umbrella purchasers lacks legal relevance because the Divisional Court has rejected umbrella purchaser claims as disclosing no cause of action. In *Shah v. LG Chem, Ltd., 2017 ONSC 2586,* the Divisional Court upheld the decision of the motion judge that umbrella purchasers have no cause of action because extending liability to the manufacturer defendants for harm occasioned to umbrella purchasers gives rise to indeterminate and uncircumscribed liability (see para. 30). Accordingly, their claims do not meet the s. 5(1)(a) *CPA* criterion. Thus, whether Dr. Reutter's methodology is adequate or not, there is no underlying claim to which it attaches.

[76] I am advised by counsel that leave to appeal to the Court of Appeal has been granted in *Shah.* That appeal is scheduled to be heard May 7, 2018. I am also advised that the British Columbia Court of Appeal came to the opposite result in *Godfrey v. Sony Corporation,* 2017 BCCA 302.

[77] Again, I will address this issue below.

Israel Report #1

[78] The defendants engaged Dr. Mark Israel to review Reports 1 and 2 and to opine "whether the opinion of Dr. Reutter is based on methodologies that are accepted by economists as valid and reliable".

[79] Like Dr. Reutter, Dr. Israel provides a summary of his conclusions near the front of his report, with the detail to support his conclusions following. At para. 7, Dr. Israel states:

> 7. I conclude that Dr. Reutter's opinion is not based on methodologies that economists accept as valid or reliable for addressing the questions he was asked to address. To the contrary, the analysis that Dr. Reutter proposes to undertake does not meet even the most basic standards for reliable economic analysis of the effects of an alleged cartel. In particular:
>
> a. I conclude that Dr. Reutter does not provide a valid economic methodology that could be used to determine whether the alleged conspiracy was effective at raising the prices of aluminum and tantalum capacitors, and thus he has certainly failed to provide a valid methodology that could establish whether all, or nearly all, direct purchasers who are members of the proposed class (or who sold products which were purchased by members of the proposed class) paid an overcharge.

b. I further conclude that Dr. Reutter does not present a valid economic methodology capable of reliably establishing whether and the extent to which pass-through of any overcharge occurred to indirect purchasers who are members of the proposed class.

[80] At para. 8, Dr. Israel summarizes the reasons of for the conclusions expressed in para. 7 above. Those reasons may be synthesized into the following:

- No reliable conclusion as to the impact of an alleged price-fixing cartel can be made from an analysis of the four market conditions analysed by Dr. Reutter. An economist cannot determine whether an alleged cartel effectively raised prices to direct purchasers based on an assessment of only the four market conditions.

- Dr. Reutter provides no objective economic standard or methodology for determining when any of the four market conditions is met.

- The "law of one price" does not apply because capacitors are, according to Dr. Reutter, commodity – like. Therefore, the theoretical conditions needed for the law to apply are not present.

- Dr. Reutter provides no analysis of the differences between the defendants' capacitors and non-defendant capacitors and whether those differences are sufficient for prices to diverge.

- Dr. Reutter's analysis is internally contradictory because if capacitors were commodity products, the law of one price would imply that the defendants would not be able to increase prices because they would lose sales to non-defendants.

- Dr. Reutter's model to estimate pass-through rates is equivalent to a "tax incidence" model which only applies if certain theoretical market conditions exist. Those conditions do not exist for electronic products that use these capacitors. Dr. Reutter ignores relevant factors including the specific shape of demand and marginal cost curves facing particular products.

- The alternate regression model is undefined and is therefore not actually a methodology that can be evaluated or used in a future trial.

[81] At para. 16, Dr. Israel sets out 12 additional features to be considered as part of any valid and reliable methodology to establish whether and, if so, when an alleged cartel succeeded in suppressing competition and raising prices. He indicates that Dr. Reutter ignored most of these factors. At para. 17, he states:

> 17. … As such, Dr. Reutter's four-condition approach is not a valid or reliable methodology from which to conclude that the alleged cartel implemented an overcharge. And it is certainly not one that can be used to conclude that all, or nearly all, direct purchasers faced an overcharge in all purchases, as Dr. Reutter claims to have done. Dr. Reutter would still need to analyse whether the alleged cartel successfully implemented a price increase on each transaction by each buyer over a period of 20 years.

[82] I do not agree with Dr. Israel's characterization of the opinions expressed by Dr. Reutter and the purpose for which Dr. Reutter analysed the four market conditions. I will address same below.

[83] In paras. 25 – 33, Dr. Israel reviews the four marketplace conditions referred to by Dr. Reutter and offers various criticisms including:

- An article cited and relied upon by Dr. Reutter concludes that there is no simple relationship between industry concentration and the likelihood of collusion.

- The competition Bureau's MEGs are clear that even where market share concentration exceeds the 65% threshold, this is merely a starting point for analysis of mergers and does not necessarily indicate an anti-competitive marketplace.

- Dr. Reutter did not apply the MEG threshold consistently.

- Dr. Reutter offered no economic basis to determine how limited or little substitution must be in order to reach the conclusion that all, or nearly all, buyers were impacted by the alleged conspiracy.

- Dr. Reutter provides no analysis of whether purchasers switch to alternate products in response to a price increase nor how such an analysis would be done.

- The reference by Dr. Reutter to statements by two manufacturers and the U.S. government in 1998 that the industry was "mature" and products were "commodity products" do not provide a valid or reliable basis to conclude that capacitors have comparable economic attributes to commodities.

- Dr. Reutter offers no analysis of how to assess quality levels or the degree of substitution that may exist between high and low quality capacitors and how that would affect his conclusion that capacitors are commodity-like.

- Dr. Reutter fails to consider whether there are profitable entry opportunities and barriers that prevent firms from entering to take advantage of them.

[84] With respect to the use of the law of one price to establish impact on umbrella purchasers, Dr. Israel notes that a commodity-like product is not a commodity product which means there are differences between the products. Dr. Reutter offers no assessment of, nor any standards or methodologies to assess whether the differences between capacitors manufactured by the defendants and those of non-defendant manufacturers are significant enough for consumers of those products to consider them to be imperfect substitutes. If they are imperfect substitutes, one would expect prices to diverge and the law of one price would not apply.

[85] With respect to the methodology to determine whether and the extent to which pass-through occurred to indirect purchasers, Dr. Israel notes at para. 36 that:

> 36. … Products using tantalum and aluminum capacitors are highly diverse, differentiated from one another by their designs, specifications and brands (e.g., capacitors are used in diverse automotive products, communications products, computer-related products, consumer electronics products, and military/aerospace products, among other products). In such a setting, consumers view one supplier's products as differentiated from another supplier's products, and therefore view different suppliers' products as being imperfect substitutes. In such a case, the reaction of each supplier's change to a price in its costs (including a change in the cost of capacitors) is determined by the shape of the specific demand curve and cost function facing that supplier as well as the reactions of other suppliers to changes in their costs. This means that the existence and extent of pass-through will be firm specific, not industrywide, and certainly not across the many industries which use capacitors during the class period.

[86] Finally, at para. 38, Dr. Israel characterizes the regression equation proposed by Dr. Reutter as "vague and generic", one which says nothing about the regression model that he would actually use. Accordingly, it provides no basis on which to evaluate whether a regression model could be used and whether the regression model to be used would accord with generally accepted econometric techniques.

Report #3

[87] Dr. Reutter responded to the report of Dr. Israel by way of a reply affidavit. It is unnecessary for me to recite in detail his response to the criticisms made by Dr. Israel. Suffice to say, he took issue with Dr. Israel's conclusions and his characterization of Dr. Reutter's earlier reports.

[88] The following points are noteworthy:

- The four market conditions he analysed in Report #1 are used by economists when determining if a market is conducive to collusive behaviour. The presence of those four conditions does not *per se* mean collusive behaviour occurred. Analysing market conditions or market structure is an accepted methodology that is used to inform the likelihood of collusive behaviour.

- He could identify no economic substitutes for capacitors based on his review of publicly available data and information, and Dr. Israel did not identify an economic substitute for capacitors in his report.

- An analysis of cross-price elasticities using the defendants' transaction data would further address the extent to which economic substitute products exist but a formal analysis is impossible at this stage of the litigation without defendant discovery.

- The 12 additional market features identified by Dr. Israel can only be addressed through defendant discovery and, in any event, Dr. Israel offered no insight as to how those additional features would affect the conclusions that he drew in Report #1.

- At this early stage in the litigation, he has provided a standard methodology by which to address the issue of pass-through, not fully specified regression models. The identification of such models is, in part, dependent on defendant discovery and would be part of a full-blown analysis that would be part of a trial.

- It is reasonable to divide capacitor products into subcategories for the purpose of undertaking an analysis. He proposes the following subcategories: consumer electronics, household appliances and automobiles. Even within those subcategories, a particular product may stand as its own subcategory for analysis purposes.

- The estimation of aggregate class-wide damages and pass-through are empirical matters dependent on the availability of data. He is satisfied that there is ample data available in addition to the defendants' transaction data to allow for an estimation of aggregate class-wide damages and pass-through.

Reply Report of Dr. Israel

[89] Dr. Israel provided a reply report to the reply report (Report #3) of Dr. Reutter. Like Dr. Reutter, he reiterates some of his earlier conclusions and points to what he perceives are acknowledgements, express or implied, by Dr. Reutter as to the shortcomings in Dr. Reutter's methodology.

[90] The following points are noteworthy in Dr. Israel's reply report:

- With respect to Dr. Reutter's proposed application of a regression model at the level of product subcategories, there is no indication of what additional variables might need to be included that would affect upstream and downstream prices and the estimation method he would use.

- Because Dr. Reutter indicates that further identification of the models he would use is dependent on defendant discovery, it follows that his regression model remains undefined and cannot be evaluated.
- Analysis of the demand conditions for the many and various products that incorporate the defendants' capacitors to determine pass-through to indirect purchasers would not be a class-wide analysis based on common evidence.
- Dr. Reutter has not established that he would be able to obtain the data for all of these various products.

Law – Admissibility of Expert Evidence

[91] Expert evidence tendered on a motion for certification must meet the test of admissibility; however, once admitted, the quality of the evidence needed to establish a "basis in fact" on the certification motion is not the same as is required for proof on a balance of probabilities at trial: *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 at paras. 65-67. Put another way, the fact that the bar is set low on a motion for certification ("some basis in fact"), does not lower the bar for admissibility of expert evidence.

[92] In *White Burgess Langille Inman v. Abbott and Halliburton Co.*, 2015 SCC 23 the Supreme Court of Canada adopted, with minor modification, the reformulated *Mohan* test for the admissibility of expert evidence laid out by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624 (*Abbey #1*). A two-stage analysis is required. In the first stage, the focus is on the threshold requirements of admissibility. In the second stage, the focus is on the judge's discretionary gatekeeper role.

[93] The test for admissibility of expert evidence is set out at para. 48 in *R. v. Abbey*, 2017 ONCA 640 (*Abbey #2*) as follows:

> Expert evidence is admissible when:
>
> (1) It meets the threshold requirements of admissibility, which are:
>
> a. The evidence must be logically relevant;
>
> b. The evidence must be necessary to assist the trier of fact;
>
> c. The evidence must not be subject to any other exclusionary rule;
>
> d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the Court to provide evidence that is:
>
> i. Impartial,
>
> ii. Independent, and

iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose, and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,

b. Necessity,

c. Reliability, and

d. Absence of bias.

[94] In her factum, defence counsel indicates that the challenge to Dr. Reutter's evidence is made on the basis that the evidence is unreliable on its face, i.e., it fails to satisfy the requirements of 1e and 2c above and lacks legal relevance to the issues on the certification motion, i.e., fails to satisfy requirement 2a. Accordingly, the evidence is not of assistance to the trier of fact (see 1b above) and should be excluded pursuant to the court's gatekeeper function.

[95] In *J.-L.J.*, [2000] 2 S.C.R. 600, the court held that the admissibility of expert evidence is to be scrutinized at the time it is proffered and not allowed too easy an entry on the basis that its frailties could go to weight rather than admissibility. More recently in *Abbey #2*, the court emphasized the importance of assessing the reliability of proposed expert evidence as part of the court's enhanced gatekeeper function. Reliability is a key component of the evidence's probative value and thus its legal relevance: *Abbey #2*, paras. 54 and 112.

[96] In *Abbey #2* at para. 119, the Court of Appeal confirmed that an evidence-based approach to the evaluation of the reliability of expert evidence is required. That approach requires that the court to be given all of the data it needs to assess the opinion it is being asked to accept. Anything less amounts to a "trust me" approach which is the antithesis of reliability.

Analysis

[97] I will deal first with the admissibility of Dr. Reutter's evidence as to whether all members, or nearly all members, of the class would have been impacted by the alleged wrongdoing – the alleged price-fixing conspiracy and overcharge. I will then address the admissibility of Dr. Reutter's evidence with respect to calculation of the overcharge, pass-through and calculation of aggregate damages. Finally, I will consider the admissibility of Dr. Reutter's evidence specific to umbrella purchasers.

1. Admissibility – Impact on Class Members

[98] I have already addressed, to some extent, the arguments advanced by defence counsel with respect to her characterization of and challenges to the admissibility of the evidence on this issue.

[99] It seems to me that the defendants and Dr. Israel have misconstrued and misapprehended the purpose for which Dr. Reutter considered the four market conditions. I do not read Dr. Reutter's opinion to say that because these four conditions were present, there was an actual overcharge. Rather, he indicates that where these four market conditions are present, it allows firms acting in concert – colluding - to have an impact on the supply and price of products in an industry. If they colluded and acted together as alleged, they would have been able to impact and raise the price of capacitors above what they would otherwise have been.

[100] In any event, I do not accept that Dr. Reutter concluded that based on analysis of four economic conditions alone, there was an impact on all or nearly all class members.

[101] Again, as I read Dr. Reutter's reports, he indicates that the subject capacitors are typical goods in a typical market and, as such, the laws of supply and demand ought to apply. In a typical market, the overcharge would be passed on wholly or in part through the various levels of the distribution chain. Accordingly, he opines that all or nearly all members of the proposed class – direct and indirect purchasers – would be impacted.

[102] In support of his approach, Dr. Reutter cites and relies upon various papers and textbooks which he footnotes. There is no suggestion that the articles cited were not published, have subsequently been discredited or rejected.

[103] With respect to the additional factors that Dr. Israel cites and which he says were ignored by Dr. Reutter, I note that:

1. Like the four factors cited by Dr. Reutter, these additional factors are principally focused on whether a conspiracy of the sort alleged could have been carried out in this market during this time – whether the conditions present would have supported such a conspiracy;

2. For the purpose of answering the question put to him as to whether all or nearly all members of the proposed class would have been impacted, Dr. Reutter assumed the alleged wrongdoing – the fact of the conspiracy and the fact of an overcharge;

3. Dr. Reutter's evidence focuses on commonality of the plaintiffs' proposed aggregate damages common issue which requires common impact, not the predicate finding of liability – was there a conspiracy and did injury occur.

[104] Further, I observe that many of the additional factors noted by Dr. Israel require analysis specific to the defendants and are not structural market considerations. Dr. Reutter indicates in his reply affidavit that these additional factors, if relevant at all, would require additional information that would likely come from discovery of the defendant. At this early stage in the proceeding, that discovery has not occurred.

[105] As indicated, defence counsel and Dr. Israel criticize the reliability of the Dr. Reutter's evidence because he does not provide objective criteria or methodologies by which to analyse and assess these four economic conditions. I am not convinced that it is incumbent upon Dr. Reutter to articulate methodologies or standards to be applied as a precondition to his assessment of these market conditions. He set out the conclusions that he reached for each of these criteria with reference to the information that he considered and relied upon.

[106] Dr. Israel does not suggest that there are defined sets of criteria or standards or methodologies to be applied to these four identified economic conditions; rather, he seems to suggest that it is necessary for Dr. Reutter to develop the methodologies, gain the general acceptance of economists and then apply the methodologies. Barring that, the implication of Dr. Israel's criticism in this regard is that no analysis can be performed. That is both impractical and inconsonant with what economists do.

[107] I am satisfied that the opinion evidence of Dr. Reutter with respect to his conclusion that all or nearly all members of the proposed class would have been impacted by the alleged wrongdoing meets the threshold criterion for reliability.

[108] I also find that the probative value of this evidence far outweighs any prejudicial effect from its admission. This expert evidence is directly relevant to an issue on the motion for certification – commonality of impact. I also observe that the certification motion is a procedural motion. Save for determinations under s. 5(1)(a), there are no determinations made on the merits nor any findings of fact which are binding on the parties. Even if that were not so, I would still admit this evidence given its probative value and the lack of any meaningful prejudicial effect. In the context of a motion for certification to be heard by a judge alone, there is no prospect that the evidence is likely to confuse or obfuscate the issues to be determined.

2. Admissibility – Calculation of Overcharge, Aggregated Damages and Determination of Pass-Through

[109] The calculation of damages on an aggregate basis requires:

1. Determination of the amount of the overcharge throughout the claim period;

2. Proof that pass-through of the overcharge occurred and at what rates for each level in the distribution chain; and

3. The calculation of the aggregate loss sustained by the class.

i. Estimating Overcharge

[110] Dr. Reutter puts forward two methodologies which he opines can be applied to determine the estimated overcharge. The first methodology is a regression model. He initially indicated in Report 1 that he would use a standard regression model method. In Report 3, he indicated for the first time that the regression model could be adapted and applied to

subcategories of capacitor products. The second methodology initially put forward is the price – cost or profit method.

[111] Dealing first with the regression model analysis, the defendants do not suggest that a regression model is a never before used econometric tool to isolate costs. Instead, the defendants argue that Dr. Reutter's report provides no substance as to what the regression model will look at and how it will identify and overcome challenges peculiar to this claim. Dr. Reutter's explanation of regression models is entirely too basic, too generic and too undefined to be admitted into evidence as reliable.

[112] I disagree. As I indicated earlier in this decision, the focus of the inquiry on this motion is admissibility not the acceptability of the proposed model to satisfy the some basis in fact evidentiary burden on the certification motion. In my view, the arguments advanced are more appropriately addressed at the certification motion where the adequacy of the evidence will be assessed. Is the so-called ill-defined generic model sufficient to get over the low bar of some basis in fact?

[113] I am satisfied that the evidence provided with respect to the use of a regression model is sufficiently reliable that it meets the threshold reliability standard. Dr. Reutter proposes using an accepted econometric and statistical model, one which has been accepted and used in other price-fixing class proceedings. I agree with defence counsel that the mere fact that other price-fixing class actions have accepted and relied upon the use of a regression model where there was no challenge to the admissibility of that evidence does not *per se* mean that Dr. Reutter's proposed use of a regression model should be found to be reliable. However, I am nevertheless satisfied the threshold for reliability is met.

[114] The approach proposed by Dr. Reutter is not "novel science"; rather, it is the application of accepted economic principles and econometric tools in a manner consistent with that set out in published papers dealing with antitrust damages calculations.

[115] Further, I am satisfied that the proposed evidence is probative of an issue on the motion – whether there is a viable model to estimate the overcharge as part of the calculation of damages. There is no meaningful prejudicial effect from the admission of this evidence at this stage. The probative value far outweighs any prejudicial effect.

[116] With respect to the price – cost or profit method, I have noted my concern that this methodology is said to derive from a paper published that deals with the calculation of damages in price-fixing cartel situations. The description provided by Dr. Reutter does not match exactly what is set out in the article relied upon. Nevertheless, I find that this evidence meets the threshold test for reliability. The article contemplates various means by which one may calculate an overcharge which are analogous to the approach proposed. It appears from the various articles provided by both sides that the methodologies to be applied in the calculation of price-fixing damages, including estimation of the overcharge, is an evolving area.

[117] Again, this evidence is probative of an issue on the motion for certification and there is no meaningful prejudicial effect. Probative value substantially outweighs any prejudicial effect.

ii. Estimating Pass-Through Rates

[118] In *Pro-Sys*, Rothstein J. was clear that where a claim is made for indirect purchasers in a price-fixing case and the plaintiffs seek to certify aggravated damages as a common issue on the motion for certification, the methodology put forward must have the ability to establish common impact; i.e. the overcharges were passed through to the indirect-purchaser level.

[119] Thus, pass-through is a critical element to establishing indirect purchaser damages.

[120] I disagree with the defendants' submission that Dr. Reutter merely references a regression model without more; that no context is provided for the equation provided and how it would apply.

[121] Dr. Reutter explains the principles involved, how they apply and provides a formulaic approach to determination of the measure of pass-through. That is not to say that he has provided a fully developed model. At this early stage in the litigation, it is to be expected that refinement and greater detail will occur as the model is applied in the preparation for trial.

[122] Dr. Reutter appears to recognize and accept that a one-size fits all approach is inappropriate in Report #3. He acknowledges, at least implicitly, that the regression analysis may require separate calculations and analysis based on sub-categories of products that use capacitors – a criticism leveled by Dr. Israel. I do not regard the failure to have addressed sub-categories in Report #1 as fatal to the admissibility of Dr. Reutter's evidence. It does not undermine the reliability of his proposed methodology. To the contrary, the use of sub-categories is a refinement, not a change that impugns the approach proposed.

[123] Again, the methodology put forward by Dr. Reutter is not "novel science". He is proposing to use methods consistent with published papers and economic principles in the area of antitrust damage calculation. Whether his opinions are adequate to meet the "some basis in fact" threshold to establish commonality is an issue for the certification motion. That is an issue of weight, not admissibility.

[124] I find the evidence to be probative of the issues on the motion. There is no meaningful prejudice by the admission of this evidence on the certification motion. Probative value substantially outweighs any prejudicial effect.

iii. Calculating Aggregate Damages

[125] The methodologies put forward by Dr. Reutter depend and rely upon data and information applicable to the class as a whole. He has provided an extensive list of

publicly available data and information he would expect would be available from the defendants themselves.

[126] The calculation of class-wide damages depends upon the number of transactions, the amount of the overcharge, the pass-through rates and the types of products involved. All of these factors are addressed in Dr. Reutter's Reports.

Umbrella Purchasers

[127] The position of the defendants is summarized at paras. 74 and 75 above. The plaintiffs submit that the law is currently "unsettled" and no decision should be made at this time. They also submit that the evidence related to umbrella purchasers meets the threshold requirements for admissibility and its probative value is not outweighed by any prejudicial effect.

[128] The issue of admissibility of Dr. Reutter's evidence on umbrella purchasers is moot if the Court of Appeal upholds the Divisional Court decision in *Shah*. If there is no underlying umbrella claim per *Shah*, that claim will be dismissed in the s. 5(1)(a) analysis on certification. The evidence tendered to show aggregate damages can be calculated for umbrella purchasers relates to the common issues criterion for certification and, as such, will not be considered.

[129] The appeal in *Shah* is scheduled to be heard before the dates set to argue the certification motion in this action. We may well have an answer by then. I agree that I am bound by the decision of the Divisional Court and, if that is the state of the law when certification is argued, the issue of umbrella purchasers will be addressed under s. 5(1)(a) of the *CPA*. It seems to me appropriate in the circumstances to defer the determination of the legal relevance argument to the certification motion.

[130] The defendants argue that even if the Court of Appeal overturns the Divisional Court in *Shah*, the evidence of Dr. Reutter suffers from numerous deficiencies that render it inadmissible in any event (see para. 74 above). In my view, all of those alleged deficiencies relate to the adequacy or inadequacy of that evidence to satisfy even the low bar of "some basis in fact" that there is a realistic prospect of establishing a loss on a class-wide basis for umbrella purchasers. Simply put, the issues raised by the defendants go to whether his proposed approach is too theoretical and hypothetical to be satisfy the court on the commonality criterion at certification.

[131] Therefore, I find that the evidence provided by Dr. Reutter on umbrella purchasers meets the threshold criteria for admissibility. It is not novel science. It is probative depending on the state of the law as to umbrella claims. There is no prejudicial effect. I find it is admissible but whether it will be sufficient is a matter of weight to be argued if necessary at certification.

Case Splitting

[132] The defendants argue in the alternative that the evidence of Dr. Reutter in Report #3 as to subcategories of products to be analyzed constitutes improper reply and case splitting. They ask that that evidence be excluded on that basis.

[133] I decline the defendants' request to exclude that evidence. As indicated, I see that evidence as a refinement to the methodology in Report #1 and a response to the criticism advanced by Dr. Israel. Even if it is not proper reply evidence, I would allow it with leave to the defendants to file such additional evidence as they deem appropriate to respond to that specific evidence. No cross-examinations have been held. There is no prejudice to the defendants if they have the opportunity to respond.

Conclusion

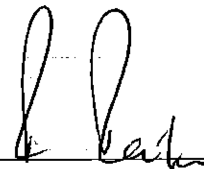
[134] I conclude as follows:

1. The defendants' motion to strike the affidavits of Dr. Reutter as inadmissible evidence is dismissed save for the issue of legal relevance in respect of umbrella purchasers.

2. The issue of legal relevance of the umbrella purchaser evidence of Dr. Reutter is deferred to the certification motion.

3. The defendants shall serve and file any further expert evidence they deem necessary within 10 days hereof on the issue of subcategories of products containing capacitors for analysis of pass-through rates.

4. The costs of this motion will be addressed after the certification motion is determined.



Justice R. Raikes

Date: April 10, 2018