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## Court of Appeal Opens the Floodgates to Umbrella Purchaser Claims in Ontario (For Now)

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In *Shah v LG Chem Ltd.*, the Court of Appeal for Ontario considered whether “umbrella purchasers” can assert statutory and common law claims in connection with alleged price-fixing conspiracies. Umbrella purchasers are those who purchase products directly or indirectly from non-conspirators, but who nevertheless allege they were overcharged because price-fixing by the cartel participants caused firms that did not participate in the cartel to raise their prices. This is known as the “umbrella effect.”

### Key Takeaways

- The Court of Appeal allowed umbrella purchaser claims to proceed by way of a class action, rejecting concerns that such claims give rise to indeterminate liability and that harm to umbrella purchasers cannot be proven on a class-wide basis.
- This reconciles the law of Ontario with the law of British Columbia, where the viability of umbrella purchaser claims was recognized in *Godfrey v Sony Corporation*.
- The issue is already going to the Supreme Court of Canada. The Supreme Court will hear an appeal in the *Godfrey* matter on December 11, 2018.
- Subject to the Supreme Court’s decision in *Godfrey*, we expect that going forward all proposed price-fixing conspiracy class actions in Ontario (and throughout Canada) will assert claims on behalf of umbrella purchasers. Plaintiffs’ class action lawyers may also seek to add umbrella purchaser claims to pending class actions that do not already include such claims.

### Background

The case involves an alleged conspiracy to fix the price of lithium-ion batteries sold in Canada in the period from January 2000 to December 2011. A proposed class action was commenced in Ontario against certain manufacturers and suppliers on behalf of all Canadian purchasers of lithium-ion batteries and lithium-ion products during that period. The causes of action included: (i) the statutory cause of action under section 36 of the *Competition Act* (the “Act”) for breaching the conspiracy provision in section 45 of the Act; and (ii) the “unlawful means” version of the common law tort of conspiracy.

Section 36 of the Act provides that anyone who has suffered loss or damage as a result of conduct contrary to Part VI of the Act may sue and recover damages from the person who engaged in that conduct. Section 45 of the Act, which is in Part VI, prohibits conspiracies to fix the price of a product.

The tort of unlawful means conspiracy is made out where a plaintiff establishes that: (i) the defendants’ conduct was unlawful; (ii) the defendants’ conduct was directed at the plaintiff; (iii) the defendants knew that the plaintiff was likely to be injured or should have known that such injury would occur; and (iv) the plaintiff was, in fact, injured.

In October 2015, Justice Paul Perell of the Ontario Superior Court of Justice certified the statutory claim on behalf of non-umbrella purchasers. He declined to certify the statutory claim on behalf of umbrella purchasers and declined to certify the unlawful means conspiracy claim altogether. Justice Perell refused to allow the umbrella purchaser claims to go forward for a number of reasons,

including that in his view they would give rise to liability to an indeterminate group consisting of any direct or indirect purchaser of any product that is alleged to have been impacted by the conduct.

In a decision released in April 2017, the Divisional Court agreed that the umbrella purchaser claims should not be permitted to proceed. The Divisional Court did, however, vary Justice Perell's order by allowing the unlawful means conspiracy claim to move forward on behalf of non-umbrella purchasers.

The plaintiffs then appealed to the Court of Appeal for Ontario.

### Decision of the Court of Appeal

The Court of Appeal allowed the plaintiffs' appeal, holding that the umbrella purchasers' claims should be certified.

The Court of Appeal rejected the argument that umbrella purchaser claims should not be recognized because they raise the spectre of indeterminate liability. With respect to the statutory claim, the Court of Appeal found that both the plain meaning and the purpose of the Act favour permitting umbrella purchaser claims. The relevant provisions of the Act confer a right of action on anyone who has suffered loss or damage due to unlawful anti-competitive conduct; the provisions do not include language to restrict such claims to persons who purchased products directly or indirectly from the alleged conspirators. Allowing umbrella purchaser claims is also consistent with the promotion of compensation for harm caused by prohibited conduct and with the need to deter such conduct, both of which are purposes underlying the Act. In any event, the Court of Appeal held that concerns about indeterminate liability are inapplicable given the "internal constraints" on the cause of action imposed by the Act. Specifically, plaintiffs can succeed only if they prove that the defendants intended to agree upon anti-competitive conduct and that the plaintiffs suffered actual loss or damage as a result of the conspiracy. The unlawful means conspiracy tort is even more limited in scope, given the requirement that the defendants' conduct be "directed at" the plaintiffs, and concerns about indeterminate liability are therefore inapplicable to the common law cause of action as well.

The other main objection raised by the defendants was that the plaintiffs did not advance a plausible methodology for proving harm to the umbrella purchasers on a class-wide (as opposed to individual) basis. The Court of Appeal also rejected that argument. Although the plaintiffs' expert witness' methodology did not "expressly mention umbrella purchasers" and was "short on detail," the Court of Appeal concluded that the methodology nonetheless offered a realistic prospect of establishing harm on a class-wide basis. This was so even though the defendants filed expert evidence that harm cannot be established on a class-wide basis. The Court of Appeal reaffirmed that the courts should not try to resolve a "battle of the experts" at the certification stage of a class action. Whether a methodology is actually capable of establishing harm on a class-wide basis is a matter for trial.

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