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ARTICLE

## Lithium-Ion Batteries And Indeterminate Liability: Ontario Extends Certification In Claims Of Global Price-Fixing Conspiracy

The Ontario Court of Appeal overturns lower court decisions and extends class action certification to include so-called "umbrella" purchasers in the class membership.

In *Shah v. LG Chem Ltd.*, Justices Rouleau, Roberts and Fairburn of the Ontario Court of Appeal granted the appeal of the representative plaintiffs in a class action. The proceeding relates to an alleged conspiracy to fix prices of lithium-ion batteries and other products. The decision overturns the prior decisions of the Divisional Court and of the certification judge, and brings the Ontario law on the issue of the indeterminate liability defence in alignment with that developed by the British Columbia Court of Appeal in a separate action, *Godfrey v. Sony Corporation*.

The class action defendants are alleged to have controlled the majority of the lithium-ion battery market in Canada from 2001 to 2012. At one time, the defendants controlled approximately 75% of the international market and an even higher proportion in Canada. They are alleged to have met and agreed upon floor pricing, reductions in production, manufacture and supply, allocations of sales volumes and the submission of collusive bids. The plaintiffs maintain that the alleged cartel held so much of the market share that increases in the cartel's prices of lithium-ion products caused non-conspirators to also raise their prices – a phenomenon described as an "umbrella effect".

The defendants' potential liability to so-called "umbrella purchasers" – purchasers of lithium-ion batteries that originated from non-defendants – has been a fiercely contested issue. Lower court decisions and appeals have gone back and forth in Ontario and British Columbia with each subsequent decision considering and rejecting the reasoning of the latest decision from the other jurisdiction – until now.

In Ontario, the certification judge and Divisional Court had excluded the umbrella purchasers from the proposed class on the basis that the defendants would be exposed to indeterminate liability if these claims were allowed to proceed. However, the Court of Appeal held that Parliament did not intend that the principle of indeterminate liability, which is a policy consideration found in the law of negligence, to apply to statutory claims under the *Competition Act*, nor does indeterminate liability apply to claims of unlawful means conspiracy. The appeal decision further holds that any concerns about indeterminate liability are mitigated by the requirement to prove intentional wrongdoing and losses resulting there from. The Court also noted indeterminate liability is not to be confused with significant liability. Although there would be additional exposure with the addition of the umbrella purchasers, "conspiring to fix prices for batteries that are in high demand for contemporary society, may well come with significant liability".

In addition to finding in the plaintiffs' favour with respect to the indeterminate liability issue, the Court of Appeal agreed with the Divisional Court that the plaintiffs claim for an unlawful means conspiracy could proceed along with their statutory claim and further held that the claims were properly pleaded, that a separate representative plaintiff was not required for the umbrella class, that a class proceeding is the preferable procedure for resolving the issues in common and that, with the exception of the quantification of damages for the umbrella purchasers, the issues can be resolved on a common basis.

Interested persons should continue to watch for the upcoming decision of the Supreme Court of Canada, which has already granted leave to appeal with respect to the B.C. proceeding, for holdings both on the issue of indeterminate liability and the applicability of the unlawful means conspiracy claim.

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