

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GLEN FORD, VITAPHARM CANADA LTD.,
FLEMING FEED MILL LTD., and MARCY DAVID

Plaintiffs

- and -

F.HOFFMANN-LA ROCHE LTD., HOFFMANN-LA
ROCHE LTD., MERCK KGaA, LONZA AG,
ALUSUISSE-LONZA CANADA INC.,
SUMITOMO CHEMICAL CO., LTD.,
SUMITOMO CANADA LIMITED/LIMITEE and
TANABE SEIYAKU CO., LTD.

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Biotin)

)
)
) *Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C.,*
) *J. J. Camp Q.C., and Joe Fiorante* for the Plaintiffs
) in all actions

) *Glenn M. Zakaib*, for the Defendant Merck KgaA

) *John Callaghan*, for Sumitomo Chemical Co. Ltd.

) *William Vanveen and François Baril*, for the
) Defendants Hoffmann-La Roche Limited,
) F. Hoffmann-La Roche Ltd.

) *Ariane Farrell*, for Sumitomo Canada Ltd.

) *Donald Houston*, for Lonza AG

)
)
) **HEARD:** March 8 and 9, 2005

COURT FILE NO.: 00-CV-200045CP

BETWEEN:

GLEN FORD, VITAPHARM CANADA LTD.,
FLEMING FEED MILL LTD., ALIMENTS BRETON
INC., OGER AWAD and MARY HELEN AWAD

Plaintiffs

- and -

F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA
ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC
S.A., AVENTIS ANIMAL NUTRITION S.A.,
RHÔNE-POULENC CANADA INC., RHÔNE-
POULENC ANIMAL NUTRITION INC., RHÔNE-
POULENC INC., BASF AKTIENGESELLSCHAFT,
BASF CORPORATION, BASF CANADA INC.,

)
)
) *William Vanveen and François Baril*, for the
) Defendants F. Hoffmann-La Roche Ltd. and
) Hoffmann-La Roche Limited/Limitee

) *Glenn M. Zakaib*, for the Defendant Merck KgaA

) *Katherine L. Kay and Eliot N. Kolers*, for the
) Defendant Eisai Co., Ltd.

) *Evangelia Kriaris*, for Takeda Pharmaceutical
) Company Limited (formerly Takeda Chemical
) Industries, Ltd.); Takeda Canada Vitamin and Food
) Inc.

EISAI CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA VITAMIN AND FOOD INC., MERCK KgaA, DAIICHI PHARMACEUTICAL COMPANY, LTD., REINHARD STEINMETZ, DIETER SUTER, HUGO STROTMANN, ANDREAS HAURI, KUNO SOMMER and ROLAND BRÖNNIMANN

Defendants

Proceeding Under the *Class Proceedings Act*, 1992
(Bulk Vitamins)

) *Sandra A. Forbes*, for Aventis Animal Nutrition SA,
) the Rhone-Poulenc defendants and Daiichi
) Pharmaceutical Company, Ltd.

) *David W. Kent*, for BASF Aktiengesellschaft, BASF
) Corporation and BASF Canada Inc.

COURT FILE NO.: 00-CV-198647CP

BETWEEN:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., LEN FORD and MARCY DAVID

Plaintiffs

- and -

BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., CHINOOK GROUP, LTD., CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO NOBEL NV, AKZO NOBEL CHEMICALS BV, BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN KENNEDY, ROBERT SAMUELSON, LINDELL HILLING, JOHN I. ("PETE") FISCHER and ANTONIO FELIX

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Choline Chloride)

) *David W. Kent*, for BASF Aktiengesellschaft, BASF
) Corporation and BASF Canada Inc.

) *Andrew J. Roman*, for Akzo Nobel N.V. and Akzo
) Nobel Chemicals B.V.

) *George D. Hunter*, for DCV Inc. and Ducoa L.P.

) *James Doris*, for Bioproducts, Inc.

) *Tycho Manson*, for Chinook Group, Ltd.

COURT FILE NO.: 00-CV-201723CP

B E T W E E N:

GLEN FORD, FLEMING FEED MILL LTD.,
ALIMENTS BRETON INC., and KRISTI CAPPA

- and -

RHÔNE-POULENC S.A., RHÔNE-POULENC
CANADA INC., DEGUSSA-HÜLS AG, DEGUSSA
CORPORATION, DEGUSSA CANADA INC.,
NOVUS INTERNATIONAL, INC. and AVENTIS
ANIMAL NUTRITION S.A.

Plaintiffs

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Methionine)

)
)
)
) *Sandra A. Forbes*, for Aventis Animal Nutrition
S.A. and the Rhone-Poulenc defendants

) *F. Paul Morrison* and *J. P. Brown*, for Degussa
Corporation, Degussa Canada Inc. and Degussa-Huls
A.G.

) *S. A. Dawson*, for Novus International, Inc.

COURT FILE NO.: 00-CV-200044CP

B E T W E E N:

VITAPHARM CANADA LTD., FLEMING FEED
MILL LTD., ALIMENTS BRETON INC., and KRISTI
CAPPA

- and -

DEGUSSA-HÜLS AG, DEGUSSA CORPORATION,
DEGUSSA CANADA INC., REILLY INDUSTRIES
INC., REILLY CHEMICALS S.A., VITACHEM
COMPANY, ALUSUISSE-LONZA CANADA INC.,
LONZA AG, NEPERA INCORPORATED, ROGER
NOACK and DAVID PURPI

Plaintiffs

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Niacin)

)
)
)
) *Donald Houston*, for Lonza AG (acting previously
discontinued agent) for Alusuisse-Lonza Canada Inc.

) *Jennifer Badley* (per D. Kent) for Reilly Industries
Inc. and Reilly Chemicals S.A.

) *F. Paul Morrison* and *J. P. Brown*, for Degussa
Corporation, Degussa Canada Inc. and Degussa-Huls
AG

) *S. Vlahakis*, for Nepera Inc., Roger Noack and
David Purpi

COURT FILE NO.: 40610

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON
INC., GLEN FORD and MARCY DAVID

Plaintiffs

Donald Houston, for UCB S.A. and UCB Chemicals
Corporation

- and -

UCB S.A. and UCB CHEMICALS CORPORATION

Defendants

Proceedings under the *class Proceedings Act*, 1992
(Supplemental Choline Chloride)

COURT FILE NO.: 42267CP

B E T W E E N:

GLEN FORD

Plaintiff

Donald Houston, for Wippon Soda Co. Ltd.

- and -

NOVUS INTERNATIONAL (CANADA) INC.

Defendant

Pauline W. Wong for Defendant, Mitsui & Co., Ltd.

S. A. Dawson, for Novus International (Canada) Inc.

Proceeding under the *Class Proceedings Act*, 1992
(Supplemental Ontario Methionine)

CLASS PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

REASONS FOR DECISION

CUMMING J.

The Motion

[1] This is a motion for approval of class counsel fees in respect of a group of class actions under sections 32 and 33 of the *Class Proceedings Act*, S.O. 1992, c. 6 (“CPA”).

[2] In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called “supplemental”, class actions have also been initiated. Certain “Settling Defendants” have now entered into a proposed settlement with certain “Settling Plaintiffs” in these class actions in Ontario, culminating in what is called the “Amended Canadian Vitamins Class Actions National Settlement Agreement” (“Agreement”) made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, following upon the successful motions for certification and settlement approval, is set forth in paragraph 106 of the separate Reasons for Decision in respect of the certification motions and for settlement approval released contemporaneously with these Reasons for Decision.)

[3] The Agreement is lengthy and complex with several schedules and can be found (together with additional information), online: <<http://www.vitaminsclassaction.com>>. (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of Motion Record). There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV (“Akso”), UCB S.A. (“UCB”), and Reilly Industries Inc. (“Reilly”)) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

[4] The alleged conspiracies remain simply that, i.e. “alleged” conspiracies, although it is to be noted that many of the Settling Defendants have pleaded guilty to charges of conspiracy in separate criminal proceedings with consequential fines.

[5] The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of “Class Counsel Fees” being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of fees for class counsel.

[6] Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews "(Camp)", Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau.

[7] As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

[8] Class Counsel decided at an early stage that the litigation would be pursued in Ontario ahead of the actions in British Columbia and Quebec. Lawyers J.J. Camp and Joe Fiorante of the British Columbia bar both obtained a special call in Ontario to assist in the Ontario litigation.

[9] Alleging distinct conspiracies, Class Counsel devised a theory which had not previously been postulated. Simply put, in separate actions (collectively called the "Vitamins class actions"), they alleged damage on behalf of all persons in Canada injured as a result of each alleged conspiracy. The class members have been divided into three groups, namely, Direct Purchasers, Intermediate Purchasers and Consumers. Class Counsel have sought to assess damages for them on a global basis. This theory has been pleaded in subsequent price-fixing actions and, indeed, approved by this Court in *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79.

[10] Several pre-certification motions have been heard. Class Counsel brought a carriage motion to defeat a challenge by other counsel in Ontario seeking to prosecute class actions on behalf of only Consumers (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594). Then, some Defendants unsuccessfully challenged the Ontario Court's jurisdiction (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 298). Some Defendants challenged the plaintiffs' right to obtain evidence in the U.S. (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 237). This issue was argued in the District of Columbia and, ultimately, in the Ontario Court of Appeal where the plaintiffs prevailed ([2003] O.J. No. 868 (C.A.)).

[11] The settlement Agreement, now approved by this Court (and if approved by the British Columbia and Quebec Courts), seeks to compensate all class members across Canada. As discussed in the Reasons for Decision relating to the settlement approval, the *cy-près* mechanism is employed to some extent in giving effect to the distribution of the settlement funds.

[12] The settlement compares favourably to the results achieved in U.S. litigation even though in the U.S. there is a regime of statutory treble damages and a jury culture. As well, the settlement falls within the range of damages estimated by the plaintiffs' expert economist, Dr. Thomas Ross.

[13] The proposed overall class action settlement totals by far the largest amount recovered in class actions relating to price-fixing in Canada. The settlement is based on a total damage assessment in excess of \$140,000,000 including interest, expenses and costs and results in an

expected payment by the Settling Defendants to the Administrator of about \$100,000,000 after the deduction of "Settlement Credits" (being credits against the overall Canadian assessment of damages by excluded customers, that is, Direct Purchasers or Distributors who have already settled their individual claims with Settling Defendants separate and apart from the Agreement at hand).

[14] Class Counsel in Ontario agreed with the representative plaintiffs to be paid counsel fees equal to 15% of the settlement funds or monetary award plus applicable taxes plus recovered costs, plus their unrecovered disbursements and applicable taxes.

[15] Section 18.1 of the Agreement deals with "Class Counsel Fees and Disbursements and Administration Expenses." Paragraph 13 of the factum of Class Counsel sets forth the expected calculations under that provision:

Amount for Administration Expenses and Class Counsel Fees	\$18,000,000
Plus Fees on Additional Settlements	\$75,000
Plus estimated Costs and Interest recovery from Mr. Borden and/or his clients	\$70,000
Subtotal	\$18,145,000
Less Administration Expenses (actual and estimated)	(\$1,390,709)
Less Quebec Counsel's Disbursements and GST (estimated)	(\$40,000)
Less Class Counsel Disbursements (paid and payable)	(\$1,552,392)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel Disbursements where applicable	(\$94,667)
Subtotal	\$15,067,232
Less GST on Class Counsel Fees and Quebec Counsel Fees	(\$985,707)
Maximum amount available for Class Counsel Fees and Quebec Counsel Fees	\$14,081,525
Percentage for Class Counsel Fees and Quebec Counsel Fees based on \$100,000,000 recovery	14.08%
Less Quebec Counsel Fees (estimated) net of GST and disbursements	(\$2,000,000)
Maximum amount available for Class Counsel Fees	\$12,081,525
Multiplier inherent in Class Counsel Fees	2.28

[16] An "Expense Fund" of \$10,000,000 was negotiated by Class Counsel as part of the Agreement. This is often seen in the practice in Ontario in class action and general litigation. For example, in a personal injury action involving a minor or a person under a disability, plaintiff's counsel will negotiate a fixed amount for "costs" as part of a settlement which is tendered to the court for approval.

[17] There are problematic aspects to a discrete amount being labeled in a settlement agreement as being a contribution for class counsel fees. On the one hand, as the class is going to be required in all events to pay class counsel their fees, this factor is a necessary consideration in looking to the overall quantum of the funds being sought by the class in negotiating a settlement.

[18] On the other hand, the structure for any sum isolated and labeled in any settlement agreement as going toward counsel fees requires careful scrutiny to ensure that the determination of class counsel fees is ultimately fair and reasonable.

[19] A Court must be cognizant that any amount so labeled in a class action as being "on account of Class Counsel Fees" does not imply the minimum starting point in a determination of the quantum of fair and reasonable legal fees. The isolated amount, if such there is, should properly be seen as simply an indistinguishable part of the total global recovery for the class with fair and reasonable fees then being determined by looking to the global recovery along with all other appropriate factors.

[20] I turn now to the Agreement at hand. Section 6.1(1) of the Agreement "notionally" allocates the "Settlement Amount" (defined in s. 1.1(65) as being "\$132.45 million, including an amount of \$10 million on account of Class Counsel Fees and Administration Expenses," plus interest) into five funds, including an "Expense Fund of \$10 million."

[21] Section 18.1(1) then proceeds to state, "The \$10 million allocated to the Expense Fund is a payment by the Settling Defendants on account of Class Counsel Fees and Administration Expenses." Section 18.1(2) then provides that "The maximum amount the Courts shall allocate for Class Counsel Fees and Administration Expenses is \$18 million." Section 18.1(10) states that as a result of this \$18 million cap the Settling Defendants agree not to oppose the approval of Class Counsel Fees and Administrative Expenses.

[22] Further elaboration on the regime for Class Counsel Fees and Administration Expenses is set forth in the remaining subsections of s. 18.1.

[23] Class Counsel in their Factum emphasize that they "agreed to an \$18,000,000 cap on Administration Expenses and Class Counsel Fees during the negotiations of the Amended Settlement Agreement knowing that this could result in a payment to them of less than Class Counsel agreed to and expected as a result of their fee agreements with each plaintiff." Presumably this was because the calculation as shown in the above chart would result in Class Counsel Fees of only 14.08% whereas the contingency fee agreements provide for a 15% fee of the recovered amount.

[24] The written agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds states:

Solicitor's Fees

4. Whether or not Success is achieved in the Action, the CLIENTS agree that the SOLICITOR shall be paid and shall receive all recovered party and party costs in the Action irrespective of the scale upon which the party and party

costs are awarded, applicable taxes and any interest accruing on account of party and party costs.

5. In addition to any fees recovered as party and party costs paid to the SOLICITOR pursuant to the provisions of paragraph 4 above, in the event of Success in the Action the CLIENTS agree that the SOLICITOR shall be paid and shall receive the aggregate of the following:

(a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and

(b) *15% of the settlement funds or monetary award plus applicable taxes.*

Disbursements

6. The CLIENTS agree that disbursements to be paid to the SOLICITOR shall include all amounts incurred or which may be incurred by the SOLICITOR and his firm and the Associate Counsel in connection with the representation of the CLIENTS and the Class in relation to the trial of the Common Issues and/or settlement, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance telephone calls, the cost of a toll-free telephone line, the cost of specialized computer equipment and management systems software, the cost of a website, courier, postage, telecopier, imaging, and all services provided to the SOLICITOR by consultants, experts and agents. [Emphasis added]

[25] Class Counsel take the position that the written agreement between each plaintiff in the B.C. Actions and Camp provides for Camp to be compensated on the same basis except that there is no provision for costs because no costs may be awarded in favour of or against a plaintiff in a B.C. class action. (It is noted the B.C. action retainer agreements apparently provide for legal fees that vary, depending on the stage of litigation, from 15% to 25% of all benefits obtained for class members, plus disbursements and applicable taxes.)

[26] The representative plaintiffs each signed the Settlement Agreement and thereby agreed to \$18,000,000 for Administration Expenses and Class Counsel Fees. However, it is noted that the expectations of the Ontario class action representative plaintiffs in doing so are that there is about \$100 million in actual settlement benefits and that the legal fees being requested are consistent with the retainer agreements' stipulation of legal fees being in the amount of 15% of all benefits obtained for class members, plus disbursements and applicable taxes. See for example the affidavit of Ms. Kristi Cappa, a representative plaintiff in the Ontario Methionine Action and the Ontario Niacin Action. Indeed, the affidavit of Ms. Heather Rumble Peterson of the lead plaintiff counsel firm, Strosberg, reiterates this intent and expectation.

[27] Section 18.1(3) limits the maximum amount of fees for Quebec Counsel at \$2.18 million, inclusive of taxes and disbursements.

[28] Section 18.1(4) states that Class Counsel Fees and Administration Expenses "shall first be paid from the Expense Fund." Section 18.1(5) goes on to state that if there is Court approval to greater fees and expenses that the excess shall be paid from the four funds in given

percentages (Direct Purchaser Fund-80%, Methionine Fund-4%, Intermediate Purchaser Fund-8%, and Consumer Fund-8%).

[29] Section 18.1(6) provides that, "Class Counsel Fees and Administration Expenses shall constitute a first charge upon and shall be paid as the first payments from each fund."

[30] In my view, there are some required adjustments to the calculations as shown in the chart above. First, some of the claimed disbursements in reality are notionally properly considered as fees for legal services implicit to the services provided by Class Counsel.

[31] The factum of class counsel in the first instance sought to treat a payment to another Canadian law firm of some \$200,000 as a simple disbursement. This payment arose because of an agreement resulting from a commitment by the other law firm to drop out of the contest in respect of the carriage motion back in 2001. There was nothing improper about this arrangement and it was made known to the Court at the point of the agreement. However, the payment should properly come out of the quantum determined as Class Counsel Fees and not be treated as a disbursement before determination of the quantum of Class Counsel Fees.

[32] As well, the factum sought in the first instance to treat the \$451,381 to be paid to American law firm advisors as a simple disbursement outside the determination of the quantum of Class Counsel Fees. This amount is notionally for legal services as a part of the overall legal services being provided by Class Counsel. Such amount is properly payable by Class Counsel out of the Class Counsel Fees after the determination of the quantum of Class Counsel Fees. Such amount is not properly treated as a disbursement by Class Counsel outside of the determined quantum of Class Counsel Fees. (It is noted incidentally as well that payment to the Canadian law firm of the \$200,000 and to the American law firms of the \$451,381 was agreed to by Class Counsel to be contingent upon success in the class actions at hand.)

[33] Class Counsel were first alerted to the alleged conspiracies by several groups of U.S. counsel with experience in prosecuting antitrust cases, some of whom were involved in the prosecution of vitamins anti-trust litigation in the U.S. Federal court. U.S. counsel provided advice and guidance that assisted in a preliminary manner in shaping the general strategy and in developing expert evidence. They provided information about the alleged Vitamin conspiracies that was not readily available, even though not subject to U.S. protective orders. They introduced Class Counsel to some of the representative plaintiffs and to their expert economist, Dr. Beyer. They also assisted in the motion seeking access to evidence in the District of Columbia. The U.S. firms are: Much Shelist Freed Denenberg Ament & Rubenstein P.C.; Freed and Weiss LLC; Gallagher, Shrap, Fulton & Norman; Cohen, Milstein, Hausfeld & Toll P.L.L.C; Levin, Fishbein, Sedran & Berman; and The Cuneo Law Group. Class Counsel negotiated with some of the U.S. counsel in an attempt to formalize a working relationship with them; however, no agreement was ever finalized and signed.

[34] Thus, in my view, there should be added into the quantum of Class Counsel Fees actually being received the two sums of \$200,000 and \$451,381 or a total add-in of \$651,381. (There is a corresponding deduction to Class Counsel disbursements of this amount of \$651,381, resulting in

the adjusted anticipated expenses of Class Counsel being only \$901,011 (rather than \$1,552,392, as shown on the above chart).

[35] Thus, the chart, as properly adjusted in my view, would be as follows:

Amount for Administration Expenses and Class Counsel Fees	\$18,000,000
Plus fees on Additional Settlements	\$75,000
Plus estimated Costs and Interest recovery from Borden court proceedings	\$70,000
Subtotal	\$18,145,000
Less Administration Expenses (actual and estimated)	(\$1,390,709)
Less Quebec Counsel's Disbursements and GST (estimated)	(\$40,000)
Less Class Counsel Disbursements (paid and payable)	(\$901,011)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel Disbursements where applicable	(\$94,667)
Subtotal	\$15,718,613
Less GST on Class Counsel Fees and Quebec Counsel Fees	(\$985,707)
Maximum amount available for Class Counsel Fees and Quebec Counsel Fees	\$14,732,906.
Percentage for Class Counsel Fees and Quebec Counsel Fees based on \$100,000,000 recovery	14.732%
Less Quebec Counsel Fees (estimated) net of GST and disbursements	(\$2,000,000)
Estimated amount available for Class Counsel Fees	\$12,732,906.
Multiplier inherent in Class Counsel Fees on base fee of \$5,306,189	2.78

[36] The s.18.1 regime as illustrated in the above charts makes Class Counsel Fees the residual amount after the payment of Administration Expenses. Class Counsel know with certainty the specific amounts for disbursements, taxes and administration expenses (having negotiated with the intended Administrator a capped fixed fee – see s.17 of the Agreement). The adjusted chart shows anticipated Class Counsel Fees of \$14,732,906. In my view, it is quite possible that the Administration Expenses will be less than anticipated, which would mean some further increase to the residual calculation of Class Counsel Fees.

[37] Class Counsel estimate that they will expend further time valued at approximately \$350,000 and approximately \$40,000 in disbursements. These future activities of Class Counsel (excluding the Methionine Actions) will include: preparation for and attendance at the motions for the approval of the settlement agreements and fees in the three jurisdictions; responding to questions from class members and their lawyers regarding the settlement and questions from, and interacting with, industry and consumer organizations; and bringing motions to declare the settlements operative.

[38] Class Counsel will not be paid any additional fees or disbursements (except in relation to the Methionine Actions) for these further services. Therefore, the estimated value of these future services has been included by Class Counsel in the calculation of the base fee and factored into the calculation of the multiplier, as are their estimated future disbursements.

[39] The result is that the regime set forth in the Agreement for the suggested overall Class Counsel Fees amounts to a reasonable certainty of expectation to Class Counsel of approximately \$14,732,906 to \$15,000,000.

[40] Subject to the Court's approval, the Agreement allocates a maximum of \$18,000,000 for the payment of Administration Expenses and Class Counsel Fees. The chart prepared by Class Counsel assumes the recovery and distribution of about \$100 million in settlement funds. A recovery of \$100 million is the premise underlying the estimate that Class Counsel Fees will be less than 15% of the recovered amount.

[41] But the s. 18.1 regime is not dependent upon a recovery of \$100 million. As drafted, the calculation of Class Counsel Fees does not change if the recovery in fact falls below \$100 million due to opt outs. If the total Purchase Price of Vitamins by Direct Purchasers and Distributors who opt out of the Settling Proceedings exceeds the "Opt Out Threshold" the Settling Defendants may elect to terminate the Agreement (s. 15 of the Agreement). However, if there is no termination the s. 18.1 regime provides in effect that the Class Counsel Fees will always be calculated as set forth in the chart which should result in at least \$14,732,906. (The "Opt Out Threshold" has been fixed by the agreement of counsel but will remain unknown to others (the set amount has been placed in a sealed envelope deposited with the Court) until the Opt Out date has passed.)

[42] Suppose hypothetically that there is an opt out by Direct Purchasers such that recovery is only \$90 million. In such event, Class Counsel Fees of \$14,732,906 would be 16.37% of the actual settlement recovery.

[43] In the course of submissions, given concerns expressed by the Court, various possibilities were mooted as alternatives to the proposal of Class Counsel as to a regime to determine the quantum of fees. One alternative considered as a possibility was that of a 'hard cap' in respect of Class Counsel fees, being determined as the least amount resulting from two calculations: first, 15% of the actual recovered amount for the classes and second, \$15 million (inclusive of payment to Quebec counsel of \$2,180,00.00) (plus any recovery of costs in the Borden court proceedings). The concept of a so-called 'hard cap' is based upon the underlying contingency fee agreement of 15% of any recovery of damages (plus any recovery in respect of the so-called "Borden court proceedings," discussed hereafter).

[44] Quebec Counsel would be paid \$2,180,000 out of the total fees allowed for counsel or such lesser amount as the Quebec Court directs.

[45] If the British Columbia Court also gives its approval to the proposed settlement and the Quebec Court approves a payment of \$2,180,000 to Quebec Counsel for fees, disbursements and

taxes, then it is estimated Class Counsel (i.e. counsel for the plaintiff classes apart from Quebec Counsel) would receive under the hypothetical hard cap maximum:

- (a) the balance of the \$18,000,000 available after payment of Administration Expenses and Quebec Counsel to a maximum of \$12,820,000.00 (i.e. the cap of \$15 million less Quebec counsel fees of \$2,180,000.00); plus
- (b) any recovery of the costs and interest in respect of the Borden court proceedings.

[46] The base fee representing the value of Class Counsel's time expended to about February 23, 2005 and their estimated time to completion is \$5,306,189. With a base fee of about \$5,306,189, the maximum of \$14,732,906.00 for Class Counsel Fees would imply a multiplier of 2.78 on the base fee.

[47] A court may fix as a fee a lump sum or a base fee increased by a multiplier or a percentage of the recovery. In the case of a lump sum, the court should test the reasonableness of the result by considering it as a multiplier and as a percentage of the amount recovered. *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386 at 393 (Ont. Gen. Div.); *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 425 (C.A.).

[48] The adjusted chart shows that, in total, it is estimated Class Counsel and Quebec Counsel would actually receive an amount of about \$14,732,906 for fees or a percentage fee of about 14.73% based on a recovery of \$100,000,000 after Settlement Credits. To the extent the recovery may be greater than \$100 million and/or the estimated charges against the recovery in the above chart are less than the estimates, the fees would increase but could not exceed \$15 million if there was a 'hard cap' of that amount.

[49] If there are greater amounts for expenses, disbursements or taxes than as contemplated in the above calculations, such debits will reduce the amount of Class Counsel Fees as they are calculated as the residual after the various deductions as seen in the chart. However, as discussed above, the estimation as to the quantum of expenses, disbursements and taxes seems to have a fair degree of certainty.

[50] Class Counsel express concerns as to a possible hard cap of 15% of the actual recovery. They suggest that if this approach were to be favoured by the Court then a protective proviso would be appropriate. They suggest that to the extent there are opt outs up to \$6,000,000 of the settlement's Direct Purchasers Fund (the figure of \$6,000,00 being calculated from \$50 million in sales, i.e. 12% of sales) the 15% limiting factor for Class Counsel Fees would not apply. That is, if there were to be a reduction in recovery monies within the range of \$100 million to \$94,000,000 due to opt outs, the possible 15% hard cap limiting factor would not apply. At \$94 million, total Counsel Fees of \$14,732,906 would then represent a 15.67% return to Class Counsel and Quebec Class Counsel.

[51] Under this possible regime for Class Counsel Fees, if the opt outs were to exceed \$6,000,000 (i.e., the recovery for the classes fell below \$94 million) it was mooted in the exchanges with the Court during submissions that an adjusted limiting factor might then apply. The Class Counsel fees would be reduced by a percentage, say perhaps 10% hypothetically, times the amount of the shortfall in recovery below \$94 million.

[52] For example, suppose only \$90 million were to be recovered after the impact of opt outs. Then under this hypothetical regime the Class Counsel Fees of \$12,732,906 (after payment to Quebec Counsel of \$2,000,000) would be decreased by \$4,000,000 (\$94,000,000 minus \$90,000,000), times 10% = \$400,000, leaving an amount of \$12,332,906 as Class Counsel Fees. In the example, the total Class Counsel Fees of \$14,332,906 would then be 15.93% of the amount recovered, \$90 million. However, Class Counsel would also propose that their fees should never be allowed to fall below a given figure, say, \$13,500,000.

[53] As I have said, s. 18.1 of the Agreement serves the function of calculating Class Counsel Fees, subject to Court approval. There is an explicit cap in the formula of about \$15 million for Class Counsel Fees given the overall ceiling of \$18 million for Administration Expenses and Class Counsel Fees. This is arguably appropriate, fair and reasonable. But it is based upon the underlying premise of an actual recovery of \$100 million.

[54] There is, however, also an implicit floor in respect of Class Counsel Fees through the s. 18.1 regime. That is, the Class Counsel Fees would always amount to about \$15 million, no matter what the actual recovery is through the settlement after possible opt outs, so long as a settlement survives (i.e. the Agreement is not terminated because the Opt Out Threshold is exceeded and the Settling Defendants elect for termination).

The Law

[55] A solicitor and a representative party may enter into a written agreement providing for the payment of fees and disbursements only in the event of success in the class proceeding, that is, on a contingency basis.

[56] Subsection 33(2) of the *CPA* defines success in a class proceeding to include a settlement that benefits one or more class members.

[57] The contingency agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds is set forth above. Each contingency agreement states that counsel fees shall be "15% of the settlement funds[.]" Class Counsel state that the contingency agreements with B.C. counsel are to be read the same way.

[58] The *CPA* has the following three principal goals:

- (a) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;

- (b) improved access to the courts for those whose actions might not otherwise be asserted (put otherwise, potentially meritorious claims might have legal costs implications so disproportionate to the amount of each claim that plaintiffs would not be able to pursue their legal remedies without the assistance afforded by the statute); and
- (c) modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore legal obligations.

(a)

See generally *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 27-29.

[59] The realization of the foregoing objectives is achieved by providing appropriate rewards to counsel prepared to assume the manifold risks of the litigation. Professor Garry Watson of Osgoode Hall Law School of York University has expressed the need for adequate compensation for class counsel in the context of the *CPA*:

This [issue of compensation] is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the Class Proceedings Act will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors [-] (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier – except in very clear cases. Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at 3-4.

[60] A frequently quoted passage supporting the introduction of contingency fee arrangements in class proceedings is found in the Report of the Ontario Law Reform Commission on the then-proposed legislation:

Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential

representatives may be unable or unwilling to retain them. Ontario Law Reform Commission, Report on Class Actions, vol. 3 (Toronto: Ministry of the Attorney General, 1982) at 737.

[61] If individuals are to have access to capable and effective legal representation, an incentive must be provided for counsel to act for plaintiffs and class members who would not otherwise have the means to retain counsel. In support of this incentive, the CPA and the courts have provided the rationale and the means for premium fees to be paid to counsel who are willing to act for class members and who seek payment only in the event of success. Winkler J. has observed:

In furtherance of the intent of the legislation--that counsel be encouraged to accept the risk associated with litigation of this type, and encouraged to pursue it diligently in circumstances where they may never be remunerated for their efforts--it is necessary to reward the successful resolution with a reasonable multiplier of the base fee. Serwaczek, supra, at 399. See also Gagne, supra, at 422-423 and Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 at 88 (Gen. Div.).

[62] Courts must be cognizant of many problematic factors, including: whether legal fees are based on the benefits actually received by class members and are not illusory; whether fees awarded to class counsel are proportionate to what class counsel actually accomplish for the benefit of the class members; whether the proposed settlement is reversionary with repayment to the defendant of unclaimed monies such as to potentially reduce the claimed settlement; whether the defendant agrees to pay class counsel's fees or purports to set their fees; and the expectations of class counsel and the representative plaintiffs as reflected in any fee agreement.

[63] I turn now to a further consideration of the structure of the proposed settlement before the Court.

[64] There is explicit expert economic evidence from Dr. Thomas Ross that the damage suffered by the class members is in the range of \$103,000,000 to \$138,000,000. The settlement is based on a total value of \$140,676,928 (including interest) and a total payable to the Administrator of about \$100,000,000 after Settlement Credits.

[65] Significantly, the settlements have no reversionary aspect for unclaimed monies. That is, no unclaimed money will be repaid to the Settling Defendants. Any monies not paid out of the Direct Purchaser Fund will trickle down to the Consumer Fund. The Intermediate Purchaser Fund and Consumer Fund will be fully distributed *cy-prés*.

[66] The negotiations underlying the settlement of the class actions at hand were long and adversarial and involved mediation.

[67] Factors relevant in assessing the reasonableness of the fees of any class counsel include the following:

- (a) the factual and legal complexities of the matters dealt with;

- (b) the risk undertaken, including the risk that the matter might not be certified;
- (c) the degree of responsibility assumed by class counsel;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the class;
- (f) the degree of skill and competence demonstrated by class counsel;
- (g) the results achieved;
- (h) the ability of the class to pay;
- (i) the expectations of the class as to the amount of the fees; and
- (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

See generally *Serwaczek, supra*, at 393; *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 at 376 (Gen. Div.); *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 at paras. 44-89 (S.C.).

[68] The classes in the class actions at hand are comprised of three groups: Direct Purchasers numbering in the thousands, Intermediate Purchasers numbering in the tens of thousands and Consumers numbering in the millions.

[69] The legal issues have proven to be complicated and challenging. The litigation approach was designed to maximize recovery for the classes by first quantifying the overcharges on all Canadian Vitamin sales and, thereafter, to distributing the amount recovered under court supervision.

[70] Factual complexities arose because of the global nature of the alleged conspiracies among major corporations and some individuals. The carriage action involved a novel situation at the time for a Canadian court. The challenges to the jurisdiction of the Ontario Court and the need to attend outside of Canada for cross-examinations added cost and expenses, as did the attempts of some of the Defendants to block the plaintiffs' from gathering evidence in the United States.

[71] When fixing class counsel fees after a settlement is reached, the Court should look at the matter not only from the present perspective of the conclusion but should also be mindful of the challenges and risks that confronted class counsel at the outset and over the course of the action.

The risks involved in prosecuting the class action should be assessed as they existed when the litigation commenced and as it continued. Risk ought not to be assessed with the benefit of hindsight. See *Gagne, supra*, at 423, Goudge J.A.; *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 at 311 (Gen. Div.).

[72] In addition to the traditional analysis which addresses litigation risk, the Court has considered "certification risk" and "resolution strategy risk" as substantial factors to consider in assessing whether the proposed fees in a class proceeding are fair and reasonable. *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at 293, 295 (S.C.J.).

[73] Some of the risks affecting Class Counsel in respect of the class actions at hand included:

- (a) the fact of the multiplicity of actions in Ontario (seven), British Columbia (seven) and Quebec (two);
- (b) the fact of the multitude of Defendants in different jurisdictions;
- (c) the possibility that certification might be denied generally, a national class might not be certified or certification might be denied in Quebec or British Columbia or Ontario (in particular, that certification for a class of consumers seemed problematical, given the decision in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, and if certification was denied in one of the provinces, the Canada-wide approach to damages would have been problematical;
- (d) the possibility the actions, or some of them, might be dismissed at a trial of the common issues;
- (e) the possibility that actual recovery might be much smaller than that seen through the settlement;
- (f) the chance that the value of counsels' time expended might be disproportionate to the amount involved;
- (g) the possibility the litigation might be delayed, resulting in any recovery being postponed for a significant period of time.;
- (h) the possibility of liability for wasted significant out-of-pocket disbursements (including for expert reports);
- (i) the possibility that some of the Non-Settling Defendants could object to the settlement because of the form of the proposed bar order;

- (j) the possibility that objectors might persuade the court not to approve the settlement;
- (k) the possibility the settlement may not be approved in British Columbia and Quebec giving some of the Settling Defendants the right to terminate the Amended Settlement Agreement; and
- (l) the possibility the Opt Out Threshold may be exceeded and the settlement thereby declared null and void.

[74] Class Counsel assumed significant risk in undertaking the class actions at hand. At the time the actions were commenced, price fixing civil litigation was novel in Canada (although the American experience served as a beacon of possibility for Canadian class action counsel). During the course of this litigation, other price-fixing actions have been defended in Ontario. There has been a refusal to certify an action brought on behalf of consumers that alleged the defendant sought to maintain prices of various audio-visual products in breach of Canadian competition laws. *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (S.C.J.). The Ontario Court of Appeal declined to certify an action brought on behalf of a group of consumers who alleged that manufacturers conspired to fix the price of iron oxide. *Chadha v. Bayer Inc.*, *supra*.

[75] Risks continue even if the settlements are approved in all three Courts. The "blow out" provision in s. 14.4 of the Agreement puts the settlements at risk if the Opt Out Threshold is exceeded.

[76] Although the expert economic evidence applied in respect of all of the class actions, it was necessary to draw separate motion material seeking certification in each of the actions because the factual underpinnings for each were different.

[77] There are about 21 firms defending in Ontario and 15 firms in British Columbia. In the context of settlement negotiations, it was necessary to deal with many of these firms.

[78] The interests of each of the Defendants differed depending upon the Vitamin involved. For example, the "Degussa" Defendants settled the Niacin Actions but refused to settle the Methionine Actions.

[79] The definition of class in Ontario includes Quebec corporations but not individuals. The considered view is that the class action legislation in Quebec in 1999 only allowed class actions for the benefit of individuals: Book IX, C.C.P. That is, corporations could not then be members of any Quebec class action. Consequently, the definition of the class in Ontario includes Quebec corporations. For this reason, and also because of the need to deal with Quebec Counsel, Class Counsel was expanded to include Desmeules.

[80] Moreover, it was necessary to have negotiations that were really on two planes: first, with some of the Defendants and concurrently with Quebec Counsel and, then, with other Defendants.

[81] When the carriage motion was decided in December, 2000, it was the first carriage motion in Ontario. Six separate groups initially sought carriage of the Vitamins class actions. Ultimately, the Court gave carriage to Strosberg and Siskinds.

[82] In Quebec, similar jockeying went on. Initially, there was a dispute between Desmeules and the other Quebec law firms about who would have carriage of which Vitamin action in Quebec. Ultimately, all plaintiffs' counsel agreed to cooperate, but this took substantial time and effort on Class Counsel's part.

[83] Mr. Perry Borden Q.C. was one of the counsel in Ontario seeking carriage of the Vitamins class actions on behalf of retail purchasers or individual consumers. The affidavit of Ms. Patricia A. Speight of the Strosberg law firm, dated February 28, 2005, sets forth the history of the Borden court proceedings. Although other potential plaintiffs ceased their involvement after this Court's decision in respect of the carriage motion in favour of the present Class Counsel and consequential order dated December 4, 2000 (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594, *supra*), Mr. Borden's clients did not.

[84] Mr. Borden has represented a series of persons seeking to commence a class action on behalf of retail purchasers. The putative representative plaintiff Horvath, represented by Mr. Borden, initially appealed the carriage order to the Court of Appeal. She abandoned her appeal on a without costs basis and Class Counsel state they anticipated that there would be no further proceedings.

[85] However, Mr. Borden then subsequently appeared on behalf of other individuals, being Messrs. Curran, Webster, Nightingale and Soderstrom, seeking to commence a new class action relating to retail purchasers. The motion for leave to commence a new action was dismissed by this Court September 14, 2001 (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche*, [2001] O.J. No. 3682) and the appeal of this order was quashed by the Court of Appeal May 14, 2002 (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 2010).

[86] Leave to appeal was also sought by Mr. Borden in Divisional Court with several appearances in the fall of 2002, and a lengthy saga involving a multitude of proceedings, as set forth in Ms. Speight's affidavit, ensued, which proceedings are as yet incomplete.

[87] Class Counsel say that they have expended in excess of \$250,000 in the value of their time in dealing with Mr. Borden's attempts to seek leave on behalf of his clients to commence actions on behalf of retail purchasers. I agree with the submission of Class Counsel that they could not reasonably have foreseen these continuing collateral attacks on their authority to prosecute the class actions following upon this Court's decision in respect of the carriage motion December 4, 2000.

[88] The following are reportedly the outstanding costs orders in favour of the plaintiffs relating to the interventions of Mr. Borden's clients:

- (a) \$10,000, inclusive of GST and disbursements, plus interest payable at the rate of 6% per annum, as a result of the dismissal of the leave application on September 14, 2001;
- (b) \$10,000 as a result of the Court of Appeal quashing the appeal of the September 14, 2001 order on May 14, 2002;
- (c) \$3,500 as a result of the November 4, 2002 order dismissing the motion for leave to appeal the September 14, 2001 order to the Divisional Court;
- (d) \$17,500 plus disbursements of \$1,637.01, plus GST as a result of the November 7, 2003 decision of Madam Justice McFarland; and
- (e) an amount, estimated by Class Counsel to be about \$25,000, to be determined at a hearing scheduled for April 8, 2005, as a result of the August 21, 2003 order by the Divisional Court dismissing the motion for an order setting aside the November 4, 2002 order.

[89] On August 18, 2003, Mr. Curran paid \$20,000 into court in partial satisfaction of the costs awarded against him. These monies have not yet been paid out.

[90] On April 8, 2005, the Divisional Court is scheduled to hear and determine the issue of costs as a result of its August 21, 2003 order. That is, the court will decide whether or not Mr. Borden's client and/or Mr. Borden must pay the costs of the appeal. Class Counsel estimate that the Divisional Court will fix costs in an amount of about \$25,000.

[91] Mr. Borden commenced yet another new, pending application February 23, 2005 on behalf of Mr. Lars Soderstrom seeking to advance a claim on the basis of an alleged infringement of the *Canadian Charter of Rights and Freedoms*.

[92] The above proceedings relating to Mr. Borden's clients have been collectively referred to herein as "the Borden court proceedings." In my view, given the very exceptional circumstances of these continuing proceedings, it is reasonable that any recovery of costs in respect of the Borden court proceedings by Class Counsel should fairly go to Class Counsel, as requested, without reduction to the quantum of fees otherwise awarded to Class Counsel by the motion at hand in achieving a settlement.

[93] Class Counsel and The Cuneo Law Group obtained an order from Hogan J. granting the plaintiffs leave to intervene in the Niacin litigation pending in the District of Columbia (*In re Vitamins Antitrust Litigation*, 2001 WL 34088808). However, Hogan J. deferred his ruling on whether to allow Class Counsel to participate in the deposition and have access to documentary productions until authorized by the Ontario Court.

[94] Some Defendants then sought an order preventing or enjoining plaintiffs' access to the Niacin productions and depositions in the U.S. No such order had ever before been argued. By reasons released on January 26, 2001, this Court dismissed the motion, stating that there was "no consequential unfairness to the defendants" if the plaintiffs were given the access they sought to documents and depositions (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 237).

[95] Some of the Defendants challenged the jurisdiction of the Ontario Court in some of the Ontario Actions. Counsel from Siskinds and Camp attended in the United States and Europe for the purposes of cross-examinations. On January 28, 2002, this Court dismissed the jurisdiction motions (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 298). This Court held that it had jurisdiction over the Ontario Actions and that Ontario was the *forum conveniens*.

[96] The degree of success achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable. Total recovery or the nature of payment is not the only criterion on which to judge the settlement. A court should also give weight to the relative ease or difficulty of access to the benefits achieved through the settlement for class members, *Parsons, supra*, at 289; *Gagne, supra*, at 424; *Roberts v. Morana* (1998), 37 O.R. (3d) 333 (Gen Div.) at 343, *aff'd* (2000), 49 O.R. (3d) 157 (C.A.).

[97] Class Counsel estimate that it would cost another \$3,000,000 to prosecute the class actions to trial if the settlements were not approved. In such event, it is estimated it would take another three to five years before the class members might gain any compensation through a favourable result at trial.

[98] The overall settlement is based upon total damages of \$140,676,928 (inclusive of interest). It is estimated the Administrator will have about \$100,000,000 (after deduction for Settlement Credits) in its hands by the time of distribution.

[99] The amount of this settlement is the largest in Canadian legal history for price-fixing. It provides an expeditious claims process for a large number of Direct Purchasers who will receive the amount the Administrator calculates as due, unless a Direct Purchaser specifically disagrees.

[100] Class Counsel proposes a plan of distribution which fairly deals with all members of the classes. The constituent Funds achieve this result. The *cy-près* distribution protocols and governing rules developed are precise and detailed. The precise formulation of this settlement "demonstrated ingenuity and imagination" in the face of "real and substantial risk." *Roberts, supra*, at 343.

[101] The cost of prosecuting an individual action would be beyond the financial capability of most class members except for substantial Direct Purchasers. The disposition of these class actions through the overall settlement achieved represents an exemplary example of the public policy objective underlying the CPA of deterring wrongful conduct and achieving behaviour modification in the public interest. Put otherwise, public regulation by government authorities is often ineffectual. By encouraging the private sector of class action attorneys to police such

behaviour through civil class actions (with the inducement of sizeable legal fees when successful) the realization of the public policy objectives of the regulators is enhanced. Wrongful anti-competitive behaviour through price-fixing in the marketplace is discouraged. Meritorious claims that would otherwise go uncompensated are effectively dealt with.

[102] IDRC, now known as Micronutrient Initiative, is a Crown corporation. It was the only Intermediate Purchaser which commenced an individual court action. IDRC contracted with Accucaps, a Direct Purchaser, to put vitamins into capsules. IDRC then distributed these vitamin capsules, without charge, through UNICEF to persons in Third World countries. IDRC was not a typical Intermediate Purchaser because it was involved in a unique, non-profit situation.

[103] The recovery of at least \$11,400,000 for each of the Intermediate Purchaser Fund (see Schedule F to the Agreement) and the Consumer Fund (Schedule G to the Agreement) compensates these class members by means of a *cy-près* distribution.

[104] There are two factors specifically enumerated in the *CPA* to determine a multiplier. The first factor, specified under clause 33(7)(b), is the risk which class counsel "incurred in undertaking and continuing the proceeding." The second factor, set out under subsection 33(9), is "the manner in which the solicitor conducted the proceeding." Also to be considered is the degree of success achieved by counsel, either at trial or through settlement of the proceeding.

[105] In *Gagne* at 422 to 424, Goudge J.A. reasoned that a multiplier is a necessary ingredient if the *CPA* is to successfully achieve its goal of providing access to justice for claimants otherwise excluded.

[106] In *Gagne*, the Court concluded that the determination of a multiplier is an art, not a science. All relevant factors must be weighed in order to determine an appropriate multiplier. Goudge J.A. said at 425:

In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

[107] Using a percentage calculation in determining class counsel fees properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours." *In Re Warner Communications Securities Litigation*, 618 F.Supp. 735 at 747 (D.C.N.Y. 198); see also *Endean, supra* at para. 74.

[108] Class Counsel intend to continue to prosecute the Methionine Actions in respect of "Non-Settling Defendants." The existing Methionine Fund of \$6,000,000 created as the result of a Settling Defendant is to be held for the benefit of the Settlement Class Members who are Direct Purchasers or Distributors of Methionine and shall be paid as the Court directs on later motions brought by Class Counsel.

[109] Class Counsel have advised that they may, at some future time, ask this Court to approve an amendment to the fee agreement with the plaintiffs in the Methionine Actions to provide, among other things, that if the plaintiffs in the continuing Methionine Actions become liable for costs, that the costs will be paid out of the Methionine Fund.

[110] As I have discussed above, I agree that Class Counsel have achieved remarkable results and a successful overall settlement. They are experienced, imaginative, thorough and diligent counsel. However, they embarked upon this venture on the basis of contingency agreements providing for, *inter alia*, 15% of the recovery. Class Counsel throughout the submissions and in their factum have emphasized that their claim to fees is justified in large part on the basis of the significant risk as to whether they might be successful ultimately and what might be recovered. With respect, in my view, that risk must properly continue in the determination of their ultimate fees. The risk of a shortfall in the anticipated recovery having an adverse impact upon fees (because of the 15% contingency fee arrangement) should not be shifted to class members in the event there are opt outs from the Settling Plaintiff classes.

[111] Class Counsel calculate their requested fees in the chart they prepared as part of their factum by emphasizing that they would receive not more than what they agreed upon with their clients through the contingency agreements, i.e. 15% of the recovery. Yet the regime in s. 18.1 is drafted to guarantee them about \$15 million in Class Counsel Fees so long as the Agreement is not terminated due to the Opt Out Threshold being exceeded and Settling Defendants then making the election to terminate the Agreement. In effect, the s.18.1 regime transfers the risk of opt outs reducing the recovery below \$100 million (but not being sufficient to trigger the termination) to the class members and means that Class Counsel Fees might rise beyond 15% of the actual recovery.

[112] It was argued in the course of submissions that the implicit multiplier of about 2.78 upon the base fee is modest and a higher multiple would be supportable. In my view, the implicit multiplier applied to the base fee is one standard to measure whether the fees sought are fair and reasonable. The \$15 million sought for fees is reasonable *if the actual recovery is \$100 million*. In my view, the agreed-upon standard for fees of 15% of actual recovery as set forth in the bargained-for contingency agreements governing the Ontario actions must properly set a ceiling. Moreover, it is an appropriate ceiling. The results achieved, i.e. the actual recovery, is a seminal factor in determining fair and reasonable fees in any class action settlement.

[113] In my view, the Class Counsel Fees should be limited to being not greater than 15% of the actual recovery through the overall settlement. If the actual recovery is more than \$100 million, counsel may receive slightly more than \$15 million in Class Counsel Fees (but subject to

the agreed-upon cap with the Settling Defendants in s. 18.1 (2) of \$18 million (plus \$75,000 in respect of the trailing, additional settlement agreements), less Administration Expenses, disbursements and applicable taxes). If their estimate of a recovery of \$100 million proves accurate they will receive about \$15 million. If there are opt outs such that the actual recovery falls below \$100 million then they will receive less than \$15 million in fees. Moreover, there should not be payment of fees until the actual recovery is known with certainty and precision.

[114] Taking all factors into consideration, in my view, and I so find, Class Counsel Fees to a ceiling of 15% of the actual recovered amount for the class members (i.e. *after* the impact of any opt outs) is fair and reasonable. For the reasons given, it is stipulated that the s.18.1 regime is to operate to accord with these Reasons for Decision. Considering all relevant factors, in my view, and I so find, the quantum of fair and reasonable Class Counsel Fees through the overall settlement at hand is fixed with a ceiling of 15% of the settlement funds or monetary award actually recovered.

DISPOSITION

[115] For the reasons given, subject to the Agreement not being terminated in accordance with its provisions, but rather coming into full force and effect, an order shall issue that accords with these Reasons for Decision:

- (1) declaring that an amount up to a ceiling of \$18,075,000, calculated in accordance with subparagraph (2), for Class Counsel Fees (plus qualifying disbursements and applicable taxes) and Administration Expenses relating to the overall settlement of the subject class actions is fair and reasonable;
- (2) declaring that Class Counsel Fees shall be calculated and paid, after deduction for the payment of qualifying disbursements, applicable taxes and Administration Expenses, on the basis of being limited to 15 % of the actual recovery of monies for class members through the overall settlement; and
- (3) declaring that it is fair and reasonable that Class Counsel are entitled to all costs and interest, if any, recovered in the Borden court proceedings, in addition to the amount received under subparagraph (1) as calculated under subparagraph (2).


CUMMING J.

Released: March 23, 2005

COURT FILE NO.: 00-CV-202080CP
DATE: 20050323

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD.,
FLEMING FEED MILL LTD., and MARCY DAVID

Plaintiffs

- and -

F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA
ROCHE LTD., MERCK KGaA, LONZA AG, ALUSUISSE-
LONZA CANADA INC., SUMITOMO CHEMICAL CO.,
LTD., SUMITOMO CANADA LIMITED/LIMITEE and
TANABE SEIYAKU CO., LTD.

Defendants

Proceeding under the *Class Proceedings Act, 1992*
(Biotin)

COURT FILE NO.: 00-CV-200045CP

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD.,
FLEMING FEED MILL LTD., ALIMENTS BRETON INC.,
OGER AWAD and MARY HELEN AWAD

Plaintiffs

- and -

F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA
ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC S.A.,
AVENTIS ANIMAL NUTRITION S.A., RHÔNE-
POULENC CANADA INC., RHÔNE-POULENC ANIMAL
NUTRITION INC., RHÔNE-POULENC INC., BASF
AKTIENGESELLSCHAFT, BASF CORPORATION,
BASF CANADA INC., EISAI CO., LTD., TAKEDA
CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA
VITAMIN AND FOOD INC., MERCK KgaA,
DAIICHI PHARMACEUTICAL COMPANY, LTD.,
REINHARD STEINMETZ, DIETER SUTER, HUGO
STROTMANN, ANDREAS HAURI, KUNO SOMMER and
ROLAND BRÖNNIMANN

Defendants

Proceeding under the *Class Proceedings Act, 1992*
(Bulk Vitamins)

COURT FILE NO.: 00-CV-198647CP

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON
INC., LEN FORD and MARCY DAVID

Plaintiffs

- and -

BASF AKTIENGESELLSCHAFT, BASF CORPORATION,
BASF CANADA INC., CHINOOK GROUP, LTD.,
CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO
NOBEL NV, AKZO NOBEL CHEMICALS BV,
BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN
KENNEDY, ROBERT SAMUELSON, LINDELL HILLING,
JOHN I. ("PETE") FISCHER and ANTONIO FELIX

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Choline Chloride)

COURT FILE NO.: 00-CV-201723CP

B E T W E E N:

GLEN FORD, FLEMING FEED MILL LTD.,
ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

RHÔNE-POULENC S.A., RHÔNE-POULENC CANADA
INC., DEGUSSA-HÜLS AG, DEGUSSA CORPORATION,
DEGUSSA CANADA INC., NOVUS INTERNATIONAL,
INC. and AVENTIS ANIMAL NUTRITION S.A.

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Methionine)

COURT FILE NO.: 00-CV-200044CP

B E T W E E N:

VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., REILLY INDUSTRIES INC., REILLY CHEMICALS S.A., VITACHEM COMPANY, ALUSUISSE-LONZA CANADA INC., LONZA AG, NEPERA INCORPORATED, ROGER NOACK and DAVID PURPI

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Niacin)

COURT FILE NO.: 40610

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., GLEN FORD and MARCY DAVID

Plaintiffs

- and -

UCB S.A. and UCB CHEMICALS CORPORATION

Defendants

Proceedings under the *class Proceedings Act*, 1992
(Supplemental Choline Chloride)

COURT FILE NO.: 42267CP

BETWEEN:

GLEN FORD

- and -

Plaintiff

OVUS INTERNATIONAL (CANADA) INC.

Defendant

**Proceeding under the *Class Proceedings Act*, 1992
(Supplemental Ontario Methionine)**

REASONS FOR DECISION

CUMMING J.

Released: March 23, 2005