

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CROSSLINK TECHNOLOGY, INC.

Plaintiff

- and -

BASF CANADA, BASF CORPORATION,
BASF A.G. BAYER INC., BAYER A.G.,
BAYER MATERIAL SCIENCE LLC,
BAYER CORPORATION, DOW
CHEMICAL COMPANY, DOW
CHEMICAL CANADA INC., HUNTSMAN
INTERNATIONAL LLC, LYONDELL
CHEMICAL COMPANY, RHODIA,
RHODIA INC., and RHODIA CANADA
INC.

Defendants

)
)
) Charles M. Wright, for the Plaintiff
)
)
)
) Susan Paul for Bayer Inc., Bayer A.G.,
) Bayer Material Science LLC and Bayer
) Corporation
)
) Benjamin Zarnett and Jessica Kimmell for
) BASF Canada, BASF Corporation and BASF
) A.G.
)
) Dana Peebles and Paul Morrison for Dow
) Chemical Company and Dow Chemical
) Canada Inc.
)
) Katherine Kay for Huntsman International
) LLC.
)
) Robert E. Kwinter for Lyondell Chemical
) Company
)
) Sandra A. Forbes for Rhodia, Rhodia Inc. and
) Rhodia Canada Inc.
)
)
)
) HEARD: September 28, 2007

RADY J.:

OVERVIEW

[1] This is a proceeding under the *Class Proceedings Act*. The Plaintiff alleges that the Defendants unlawfully conspired to fix, increase and/or maintain prices in the market for polyether polyols between January 1, 2002 and December 31, 2003.

[2] The Plaintiff has reached a settlement with Bayer Inc., Bayer A.G., Bayer Material Science LLC (formerly Bayer Polymers LLC), and Bayer Corporation (collectively "Bayer" or the "Settling Defendants"). The litigation in this case is continuing against BASF Canada, BASF Corporation, BASF A.G., Dow Chemical Company, Dow Chemical Canada Inc., Huntsman International LLC, Lyondell Chemical Company, Rhodia, Rhodia Inc., and Rhodia Canada Inc. (collectively the "Non Settling Defendants"). The Plaintiff moves for orders certifying the proposed class for settlement purposes and approving the settlement.

[3] The Non Settling Defendants oppose the motion on two principal grounds. They argue that the Plaintiff seeks an order barring any claim for contribution and indemnity by the Non Settling Defendants against the Settling Defendants (paras. 19, 20 of the Draft Order) which varies in a significant way with previous such orders issued by the court and is unfair and prejudicial to them.

[4] The Non Settling Defendants also object to para. 21 of the Draft Order because before they may conduct an examination for discovery of Bayer, a court order must be obtained.

BACKGROUND INFORMATION

[5] Polyether polyols are used in the following ways:

- (i) as flexible foam which is used in transportation (passenger car seating, carpet underlay, steering wheels, sun visors, headrests and door panels), carpet underlay, furniture, bedding, packaging and textiles;
- (ii) as rigid foam which is used in construction, appliances (home appliances, water heaters, commercial refrigerators), packaging, industrial insulation (pipes, tanks and ducts) and transportation; and
- (iii) as adhesives, coatings and elastomers, which are used in RIM (reaction-injection moulding) materials, cast elastomers (elastomers, coatings and encapsulants used in electronics, belting products and

footwear), thermoplastic elastomers (used in moulding, adhesives and sealants), surface coatings, binders, fillers and polyurethane fibres.

[6] Bayer sales between January 1, 2002 and December 31, 2003 were approximately \$250,000,000 which represents roughly 50 percent of the total market in Canada.

[7] Unlike some other price fixing cases, none of the defendants has been found guilty of improper conduct and there is no publicly available information relating to the allegations of conspiracy.

[8] There is similar litigation ongoing in the U.S. In January 2005, the plaintiffs in the U.S. litigation reached an agreement with Bayer. Under the terms of that settlement, Bayer agreed to pay USD\$55,300,000 to settle the claims against it. This equated to approximately one percent of Bayer's polyether polyols sales during the alleged conspiracy period, which in that case ran from January 1, 1999 to December 31, 2004.

THE SETTLEMENT AGREEMENT

[9] The Bayer Settlement Agreement was executed on June 6, 2007. The settlement is conditional upon approval of the courts in both Ontario and Quebec. The pertinent terms of the settlement may be summarized as follows:

- (i) Bayer is required to pay \$2,500,000 for the benefit of the class members. The settlement amount is to be held in trust for the benefit of the class members pending further judgments or resolutions in the continuing litigation with the Non-Settling Defendants and court approval of a plan of distribution. This sum represents approximately one percent of its sales, similar to the U.S. settlement.
- (ii) Bayer is not entitled to an opt out refund for class members who choose to exclude themselves from the settlement. However, Bayer may terminate the Settlement Agreement if the total purchase price paid for polyether polyols by persons who have opted out of the settlement exceeds \$75,000,000.

- (iii) The settlement class has been defined as: "All persons in Canada who purchased Polyether Polyols Products during the Polyether Polyols Class Period, except the Excluded Persons and persons who are included in the Quebec action."
- (iv) The class period is January 1, 2002 to December 31, 2003.
- (v) Bayer will provide the Plaintiffs with cooperation, including the provision of relevant information, testimony and documents.
- (vi) A bar order will be granted barring all claims for contribution and indemnity against Bayer (excluding claims made by persons who opt out of the settlement).
- (vii) The proceeding will continue against the Non Settling Defendants.

[10] Notice of this hearing was published in several national newspapers, was sent by mail to Bayer's customers and was posted on class counsel's website. No objection to the proposed settlement has been made by any putative class members.

[11] A key settlement dynamic operating here is the Plaintiff's need for cooperation from Bayer in order to prosecute the claim against the Non Settling Defendants. Consequently, the proposed settlement represents a significant compromise when measured against Bayer's large market share and its healthy sales. It must be observed, however, that it is extremely unlikely that a better settlement can be achieved in Canada than in the United States.

[12] In evaluating the merits of the settlement class, counsel has taken into consideration the following:

- (i) total sales of polyether polyols in Canada during the alleged conspiracy period;
- (ii) Bayer's sales of polyether polyols in Canada during the alleged conspiracy period;
- (iii) the absence of any guilty pleas in Canada, the United States or Europe;

- (iv) procedural and litigation risks, including:
 - (a) the risk that the court would not certify the action;
 - (b) the risk that the court would not certify a national class
 - (c) the risk that the court would not find jurisdiction over some of the Defendants;
 - (d) procedural risks associated with multi-party litigation;
 - (e) the risk that the court would not agree that an aggregate damage assessment was possible, thus making the proof for individual class members onerous;
 - (f) the risk that individual class members would encounter difficulties proving that damages were not passed on by them, or were passed on to them;
 - (g) the risk that the court would find that there was no conspiracy, that the conspiracy entered into was ineffective, or that any illegal activity had little or no effect on prices; and
 - (h) even in the event that the Plaintiff is successful in all phases in the litigation, the Plaintiff is aware that the Defendants would likely file appeals in respect of multiple issues, thus resulting in a considerable delay in compensation for class members.

CERTIFICATION

[13] Section 5 of the *Class Proceedings Act*, 1992 sets out the requirements that must be met before certification will be granted. They are as follows:

- (i) the pleadings or the notice of action must disclose a cause of action;
- (ii) there is an identifiable class of two or more persons that would be represented by the representative Plaintiff;
- (iii) the claims or defences of the class members raise common issues;
- (iv) a class proceeding would be the preferable procedure for the resolution of the common issues; and

- (v) there is a representative Plaintiff or Defendant who,
 - (a) would fairly and adequately represent the interests of the class,
 - (b) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and
 - (c) does not, on the common issues, have an interest in conflict with the interests of other class members.

[14] I am satisfied on the basis of the material before me that the Section 5 criteria are all satisfied and certification of the class must therefore follow for the purposes of this settlement.

THE SETTLEMENT APPROVAL

[15] In *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 (S.C.J.) Cullity J. summarized the following general principles to be applied on a motion for settlement approval.

- (i) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;
- (ii) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
- (iii) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
- (iv) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
- (v) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a

process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

- (vi) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal; and
- (vii) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

[16] See also *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.).

[17] In determining whether to approve a settlement, the courts have identified the following factors to be appropriate considerations:

- (i) the presence of arm's-length bargaining and the absence of collusion;
- (ii) the proposed settlement terms and conditions;
- (iii) the number of objectors and nature of objections;
- (iv) the amount and nature of discovery, evidence or investigation;
- (v) the likelihood of recovery or likelihood of success;
- (vi) the recommendations and experience of counsel;
- (vii) the future expense and likely duration of litigation;
- (viii) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations;
- (ix) the recommendation of neutral parties, if any; and
- (x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

[18] See, for example, *Nunes v. Air Transat A.T. Inc.*, *supra*; *Dabbs v. Sun Life, Assurance Company of Canada*, [1998] O.J. No. 1598 at 13 (Gen. Div.); and (1998), 40 O.R. (3d) 429 at 440 - 444 (Gen. Div.); *aff'd* (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372; and *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 71, 72 (S.C.J.).

[19] In addition to the foregoing factors, I would add whether the settlement of the action impairs the Non Settling parties' ability to fully and fairly defend their positions during the prosecution of the claim.

[20] Having considered the foregoing factors, I am satisfied that the proposed settlement should be approved for the following reasons. I recognize that the monetary benefits to be received by class members, while certainly not insignificant, are perhaps modest when measured against Bayer's sales during the relevant period and its market share.

[21] However, the settlement falls within a range of reasonableness as described in *Nunes and Dabbs* and set out in para. 15 above.

[22] Moreover, the class receives a very significant non-monetary benefit in the form of cooperation from Bayer. This is something that the court is entitled to consider: *Rideout v. Health Labrador Corp.*, [2007] N.J. No. 292 (S.C.T.D.). There is American authority to the same effect.

[23] For example, in *In re Linderboard Antitrust Litigation* 292 F. Supp. 2d 631 (E.D. Pa. 2003) when approving the first settlement in the litigation, the court commented that the Settling Defendant's obligation to cooperate "is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement." The settlement agreement obligated the Settling Defendants to provide significant cooperation to the Plaintiffs in pursuing their case against the Non Settling Defendants immediately upon execution. Similarly, in *In re Corrugated Container Antitrust Litigation*, 1981 W.L.

2093 (S.D. Tex.) which also involved the first settlement in the litigation, the court commented that the cooperation provisions "constituted a substantial benefit to the class." The provisions "were intended to save Plaintiffs time and expense in the continuing litigation by shifting certain costs to the Settling Defendants." The cooperation provisions also "made certain information and expertise available to the class which might not have been available through normal discovery." Those comments apply equally here.

THE OBJECTIONS OF THE NON SETTLING DEFENDANTS

[24] It is important to bear in mind the court's role in reviewing a settlement agreement. As already noted, the function of the court in reviewing a settlement is not to reopen and enter into negotiations with the parties. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. See *Newberg on Class Actions*, 3rd ed. (Shepard's/McGraw-Hill, 1992) s. 11.46; and *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*.

[25] As a preliminary matter, therefore, I do not consider it within my power to modify the terms of the settlement agreement as negotiated by the parties, as the Non Settling Defendants have urged the court to do but it is open to me to indicate areas of concern.

[26] I propose to deal with the right to discovery issue first and then the issue respecting the bar order.

1. Discovery

[27] As noted, the Non Settling Defendants object to para. 21 of the Draft Order because they are, by its terms, obliged to obtain a court order before a discovery of the Settling Defendant can be had. The Non Settling Defendants submit that para. 21 adds

nothing to their rights and actually detracts from their pre-settlement rights. They point out, correctly, that pre-settlement, Defendants have a right of discovery against other Defendants who are adverse in interest.

[28] The Non Settling Defendants also submit that the proposed wording of para. 21 does not define whether the settling party is a party or a non-party, which also affects discovery rights.

[29] The Plaintiff and the Settling Defendant submit that para. 21 is consistent with prevailing practice. Bayer is also concerned that cooperation is not the same as disclosure. It submits that it may be obliged as part of its agreement to cooperate to provide information it would not have been otherwise required to disclose. It expresses concern as well that the Non Settling Defendants may take a particularly hard line respecting discovery given that the Defendant with the largest market share has settled. The Non Settling Defendants disagree with those propositions.

[30] The leading case is *Ontario New Home Warranty Program v. Chevron Chemical Company* (1999), 46 O.R. (3d) 130 (S.C.J.). Winkler J. (as he then was) stayed (rather than dismissed) the action against the Settling Defendants. He went on to order certain terms, as follows:

The Non Settling Defendants may, on motion to this court, obtain:

1. documentary discovery and an affidavit of documents in accordance with the *Rules of Civil Procedure* from each of the Settling Defendants;
2. oral discovery of a representative of each of the Settling Defendants, the transcript of which may be read in at trial;
3. leave to serve a request to admit on each Settling Defendant in respect of factual matters;
4. an undertaking to produce a representative to testify at trial, with such witness to be subject to cross-examination by counsel for the non Settling Defendants;
5. In addition, the fact of the settlement, but not the terms thereof, shall be disclosed to the trial judge at the commencement of trial;

6. Furthermore, pursuant to its case management powers under the Act, this court shall maintain an ongoing supervisory role in this action. In the event that any Settling Defendant fails to comply with an order of this court made pursuant to the above terms, the court may, in addressing any such failure, lift the stay of proceedings in respect of that Defendant.

[31] I favour the order made by Winkler J. I do not consider it a hardship for the Non Settling Defendants to be obliged to move for an order permitting discovery and related relief. This way, the court retains its customary supervisory role to ensure an appropriate balancing of the parties' rights and obligations. Consequently, I would prefer para. 21 to be amended to be consistent with the terms crafted by Winkler J. in the *Ontario New Home Warranty Program* case. This means, of course, that the claim against the Settling Defendant would not be dismissed but rather stayed. I am prepared to hear further submissions on this point, however.

2. The Bar Order

[32] The proposed bar order is of considerable concern to both the Plaintiff and the Non Settling Defendants. As I understand it, there is no criticism of the language of para. 19 but the Non Settling Defendants strongly object to the proposed wording of para. 20 and submit that the two paragraphs are contradictory.

[33] Bar orders have become common in complex class action litigation because while it is difficult to achieve settlement with all Defendants, there is a clear policy interest in encouraging settlements with one or some Defendants.

[34] A Settling Defendant wants a guarantee that caps its liability or exposure. It requires protection from claims for contribution and indemnity from Non Settling Defendants. At the same time, Non Settling Defendants want guarantees that, if they are forever barred from claiming over against Settling Defendants, the Plaintiff will not be

able to claim damages from Non Settling Defendants that are attributable to Settling Defendants.

[35] The standard bar orders generally follow the following format: the Settling Defendants make a payment to the Plaintiff representing their proportionate share of the damages in exchange for an agreement to settle the action. The Plaintiff agrees to accept that (likely reduced) amount in satisfaction of the Settling Defendant's proportionate share of the damages. Since the Plaintiff then only continues the action as against the Non-Settling Defendants for the proportion of damages for which they are directly responsible, the Non Settling Defendants are barred from seeking contribution and indemnity from the Settling Defendants. Obviously, there is a principle of *quid pro quo* that underlies a bar order.

[36] By way of example, in *Ontario New Home Warranty Program, supra*, the Plaintiff and Settling Defendants determined that the Settling Defendant's proportionate liability was 65% and settled for approximately \$5 million. The Plaintiff then continued the action but limited the damages it sought as against the Non Settling Defendants to 35% of the total amount. Similarly, the bar order approved by Nordheimer J. in *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.) provided as follows:

19(a)The Plaintiffs shall not make joint and several claims against the Non Settling Defendants but shall restrict their claims to several claims against each of the Non Settling Defendants such that the Plaintiffs shall be entitled to receive only those damages proven to have been caused solely by each of the Non Settling Defendants.

[37] The rationale behind such bar orders is that the Plaintiff agrees to accept a payment from the Settling Defendant which represents its liability on a "severally liable" basis. The bar as against the Non Settling Defendants is justified because they will only be required to pay damages in accordance with their own liability to the Plaintiff and, as such, would have no claim for contribution and indemnity against the Settling Defendants in respect of such damages in any event. As the Court of Appeal stated in *M. (J.) v. B.*

(W.), [2004] O.J. No. 2312 (C.A.), "the goal of the proportionate share agreement is to limit the liability of the Non Settling party to its several liability." Justice Cumming quoted *M. (J.)* in his decision refusing to approve settlement in *Lau v. Bayview Landmark*, [2006] O.J. No. 600 (S.C.J.) because no bar order was provided.

[38] In this case, paragraphs 19 and 20 of the draft order provide as follows:

19. **THIS COURT ORDERS** that all claims for contribution, indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought against a Releasee by a Non Settling Defendant or any other person or party, or by a Releasee against a Non Settling Defendant, are barred, prohibited and enjoined in accordance with the terms of the Order (unless such claim is made in respect of a claim by a person who has validly opted out of the Settlement Class.)

20. **THIS COURT ORDERS** that if the Courts ultimately determine that there is a right of contribution and indemnity between the Defendants, the Plaintiffs and the Settlement Class Members shall restrict their joint and several claims against the Non Settling Defendants such that the Plaintiffs shall be entitled to claim and recover from the Non Settling Defendants on a joint and several basis only those damages (including punitive damages) arising from and allocable to the sales or conduct of the Non Settling Defendants.

THE NON SETTLING DEFENDANTS' POSITION

[39] The Non Settling Defendants submit that the proposed language is unfair to them in two ways. First, the order requires that the Non Settling Defendants obtain a ruling from the court that they have a right to contribution and indemnity "between the Defendants" *before* the plaintiff agrees to limit the scope of the damages sought to that proportion relating to the Non Settling Defendants. However, the Non Settling Defendants are barred from making any claim for contribution and indemnity from the Settling Defendants by virtue of paragraph 19 of the proposed Order. They assert that

such a requirement is contradictory and it undermines the principle behind proportionate settlement agreements and bar orders.

[40] Secondly, even if the Non Settling Defendants obtain an order that they have a right to contribution and indemnity, they say that the plaintiff still intends to seek damages attributable to the Settling Defendants' sales from the Non Settling Defendants, despite barring any right to contribution and indemnity as against the Settling Defendants. They argue that this is the reason reference to "conduct" is contained in para. 20.

[41] In particular, the Plaintiff seeks an order which limits the damages that may be sought as against the Non Settling Defendants to that which is "allocable to the sales *or conduct* of the Non Settling Defendants". On the Plaintiff's theory of joint and several liability, which is specifically denied by the Non Settling Defendants, the Non Settling Defendants are potentially liable for the damages resulting from Bayer's sales because their conduct (the alleged conspiracy) contributed to these damages.

THE PLAINTIFF'S POSITION

[42] The plaintiff emphasizes that this is a price fixing conspiracy case and it is not settled law in Canada that the co-defendants have a right to contribution and indemnity.

[43] It reasons that the right to contribution is a statutory right; it is not available at common law. Section 1 of the *Negligence Act* imposes joint and several liability upon any person who is found to be at fault or negligent. There is some case law suggesting that Section 1 applies in respect of intentional torts. However, it is submitted that these cases have all involved a component of negligence and that Section 1 has never been applied in the absence of a negligence component. Further, it asserts that any expansion of the *Negligence Act* is limited to tortious behaviour and there is no support for the notion that a right to contribution exists where liability arises from non-tortious, criminal behaviour, such as price-fixing.

[44] The Plaintiff argues that it would be contrary to public policy to allow criminal wrongdoers to be permitted to formulate a cause of action based on their own wrongdoing or to mitigate damages by displacing damages to other wrongdoers.

[45] The Plaintiff relies on *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981) in which the U. S. Supreme Court held that co-conspirators in a price-fixing action have no right of contribution or indemnity. The right of contribution would be inconsistent with the intent of antitrust legislation, which is "to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."

[46] The Plaintiff asserts that the Canadian case law is of limited assistance in assessing the bar order provisions in the context of this case. As a result, the bar order has been drafted to accommodate the possibility that no right to contribution and indemnity exists. The bar order contemplates the possibility of the court ultimately determining that a right to indemnity and contribution exists and it adequately protects the rights of both the Settling Defendants and Non Settling Defendants should such a determination be made. At the same time, it ensures that class members do not compromise their claims to a greater extent than necessary given Bayer's significant market share.

ANALYSIS

[47] I begin by observing that the litigants agree that it is not settled in Canada whether a right to contribution and indemnity exists between co-conspirators in a price fixing case. It is not necessary for the court to make that determination at this juncture.

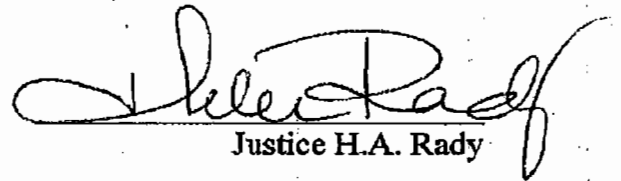
[48] It seems to me that the proposed wording of paras. 19 and 20 is appropriate in the circumstances of this case for several reasons. First, this is a case involving allegations of what may be criminal or quasi-criminal conduct as well as allegations of tortious behaviour, including conspiracy and intentional interference with economic relations. The law respecting the rights of co-defendants to claim contribution and indemnity in a case such as this is not clear. As a result, it strikes me as inappropriate to craft a bar order based on an

including conspiracy and intentional interference with economic relations. The law respecting the rights of co-defendants to claim contribution and indemnity in a case such as this is not clear. As a result, it strikes me as inappropriate to craft a bar order based on an assumption that the right exists. The Non Settling Defendants are not prejudiced because their potential rights are not being limited or abrogated. They are simply in abeyance pending further determination of the court.

[49] With respect to the inclusion of reference to the conduct of the Non Settling Defendants, it seems to me that the frailty in that argument is that it presumes that the basis of allocating liability is based on share of sales. However, there are other methods for allocating liability, one based on profits, for example. The basis for allocating liability is an open question, and as with the entitlement to contribution and indemnity, remains to be determined by the court.

[50] As a result, I cannot give effect to the objections of the Non Settling Defendants. I am unable to conclude that their ability to fully and fairly defend their positions is impaired by the proposed order.

[51] Counsel may arrange to speak with me with respect to my suggestions with regard to the order respecting discovery.



Justice H.A. Rady

Released: November 30, 2007

COURT FILE NO: 50305CP

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CROSSLINK TECHNOLOGY, INC.

Plaintiff

- and -

**BASF CANADA, BASF CORPORATION,
BASF A.G. BAYER INC., BAYER A.G.,
BAYER MATERIAL SCIENCE LLC, BAYER
CORPORATION, DOW CHEMICAL
COMPANY, DOW CHEMICAL CANADA
INC., HUNTSMAN INTERNATIONAL LLC,
LYONDELL CHEMICAL COMPANY,
RHODIA, RHODIA INC., and RHODIA
CANADA INC.**

Defendants

REASONS FOR JUDGMENT

RADY J.

RELEASED: November 30, 2007