

The General Trend Toward Certification In Canada

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Recent rulings on class certification in proceedings brought under the Canadian Competition Act demonstrate a “general trend towards certification” in Canada’s courts. On June 3, 2010, in the DRAM price fixing litigation, the Canadian Supreme Court denied the defendants’ request for leave to appeal a ruling by the British Columbia Court of Appeal that certified a class of indirect purchasers. In reversing the decision of the lower court, which had denied certification, the Court of Appeal in *Pro-Sys Consultants v. Infineon Tech. AG*, 2009 BCCA 503 (Nov. 12, 2009) held that the British Columbia Class Proceedings Act should be “construed generously in order to achieve its objectives” of, among other things, improving access to justice by consumers who have been harmed by unlawful price-fixing activities.

Prior to the DRAM ruling, one of the leading indirect purchaser decisions in Canada was *Chadha v. Bayer, Inc.*, [1999] 45 O.R. (3d) 29, O.J. No. 3773 (Gen. Div.), a decision out of the Ontario Court of Appeal denying certification of an indirect purchaser class because the plaintiffs failed to propose a methodology for establishing harm to the class. Since the Court of Appeal’s November 2009 opinion in DRAM, however, classes have been certified in various indirect purchaser cases. One of those cases was *Pro-Sys Consultants v. Microsoft Corp.*, 2010 BCSC 285, in which the British Columbia court, on March 5, 2010, certified a class of indirect purchasers of Microsoft operating system and applications software.

On June 30, 2010, a decision in another British Columbia proceeding, *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922 (June 30, 2010), continued the “general trend towards certification” under Canada’s Class Proceedings Act. In certifying the proposed class, *Sun-Rype* the court explicitly acknowledged that the Canadian Class Proceedings Act “should be construed generously in order to achieve its objects: judicial economy...; access to justice...; and behavior modification.” The court’s lengthy analysis proceeded with these considerations in mind.

Sun-Rype involved allegations that manufacturers of High-Fructose Corn Syrup (“HFCS”) violated the Competition Act by engaging in an illegal conspiracy to fix the price of the sweetening agent widely used in the manufactured food industry. The plaintiffs in *Sun-Rype* moved to certify a class that consisted of *all* persons residing in British Columbia and elsewhere in Canada who purchased HFCS, or products containing HFCS, manufactured by the defendants between January

1988 and June 1995. Plaintiffs' proposed class definition thus included both direct and indirect purchasers.

In considering plaintiffs' application, the trial court noted that the case was complicated by the fact that the product at issue, HFCS, was not generally sold directly to consumers. Rather, as the court observed, it is an ingredient in other products that are sold through a complex distribution chain, and that those products are themselves oftentimes incorporated into other products that are sold and resold. These facts presented a situation in which the value of the HFCS in a final consumer product was often only a small proportion of the total cost of the product, and – according to the court – created multiple opportunities for the manufacturer or distributor to either absorb the increased cost of the HFCS, or to “pass-on” or the overcharge to the next level in the distribution chain. But despite these complexities, the trial court granted plaintiffs motion and certified the case as a class proceeding under Canada law.

The defendants argued that both direct and indirect purchasers could not have valid causes of action under Canadian law. In granting the certification application, the court rejected that argument, along with the reasoning employed by the U.S. Supreme Court in *Illinois Brick* that barred indirect purchaser actions under U.S. federal law. In the words of Justice Rice:

Firstly, it is a mistake to equate pass-through as a defence at law with pass-through as a factual occurrence. It could be that pass-through actually occurred in fact, even if the court does not allow the defendants to use this fact as a defence to the plaintiffs' claims. The second mistake is that the defendants face potential liability not to “direct purchasers” but to the class as a whole. Using the “top-down” approach... employed in this province in both *DRAM* and *Microsoft*, the focus is not on which part of the class ended up with the loss. At this stage, it does not matter. Rather, it is how much, if anything, was wrongfully taken by the defendants. By including both the direct and indirect purchasers in the class, *i.e.*, all those who potentially suffered a loss, and by using econometric methods that the plaintiffs claim will ascertain the entire amount and only that amount overcharged by the defendants to the class as a whole, there will be no possibility of overrecovery.

The trial court further determined, contrary to the defendants' arguments, that there was no conflict of interest between direct and indirect purchaser class members that precluded certification. The existence of a potential pass-through defense was found to be a common issue that only created a possible conflict “when it comes time to divide the money.” Prior to that time, the court observed,

direct and indirect purchasers shared the common interest of moving the litigation forward to trial, and only maintained a conflict of interest vis-à-vis defendants.

Notwithstanding the particular complexities involved in the varied distribution channels through which HFCS ultimately reached those consumers, the focus remained on the total harms allegedly inflicted by the defendants. In certifying the proposed classes, the court repeatedly relied on the recent decisions in the *DRAM* and *Microsoft* cases in finding that class membership was sufficiently ascertainable, and that the plaintiffs' claims could be proved on a common, class-wide basis using expert economic models. These conclusions were in accordance, the court noted, with the "general trend towards certification" exhibited by the recent case law in Canada.

The ruling in *Sun-Rype* provides encouraging evidence that Canadian consumers have access to justice in Canadian courts, and that their interests, as well as the interests of judicial economy and behavior modification, will continue to guide certification rulings under the Class Proceedings Act.

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