

Update

Competition Law

December 4, 2009

Ontario and B.C. Courts Certify Price-Fixing Class Actions

Two recent decisions from the Ontario Superior Court of Justice and the British Columbia Court of Appeal may mark a fundamental shift in how proposed price-fixing class proceedings will be dealt with in Canada. In recent years, Canadian courts have seen a significant increase in cases involving class actions arising from conduct claimed to be contrary to the criminal provisions of the *Competition Act*. However, contested certification motions have historically resulted in certification generally being denied, in large part due to the plaintiffs' inability to demonstrate a workable methodology for establishing loss and liability on a class-wide basis. This may now have changed.

The Traditional Position Respecting Indirect Purchasers

Canadian legislation typically requires that a plaintiff demonstrate the following to obtain certification of a class proceeding: the existence of a viable cause of action, an identifiable class, a common issue, that a class proceeding is the preferable procedure, and the existence of an adequate representative plaintiff.

To date, the leading appellate decision on certification of competition law class actions was the Ontario Court of Appeal's 2003 decision in *Chadha v. Bayer (Chadha)*. In *Chadha*, the Court denied certification of a proposed class action brought on behalf of indirect purchasers of iron oxide pigments. The pigments were used to colour concrete bricks and paving stones which were incorporated into the construction of homes,

buildings and landscaping. The proposed class members were home-buyers who purchased homes with bricks containing iron oxide. These homeowners were indirect purchasers of the iron oxide pigments to which the conspiracy claim related. The Court held that a plaintiff could not assume that the direct purchasers of iron oxide passed on the effects of a price-fixing scheme to indirect purchasers throughout the distribution chain. Moreover, the Ontario Court of Appeal held that on a class-wide basis, loss could not be accurately ascertained for indirect purchasers. Until recently, the principles underlying *Chadha* effectively thwarted attempts to certify a class of indirect purchasers on a contested basis.

New Developments

On September 28, 2009, the Ontario Superior Court of Justice released the first Canadian decision certifying a competition law class proceeding in which indirect purchasers were the class members. In *Irving Paper Limited et al. v. Atofina Chemicals Inc. et al. (Irving Paper)*, the Honourable Madam Justice Rady certified a class action on behalf of all persons in Canada who purchased hydrogen peroxide and products containing or using hydrogen peroxide in Canada between January 1, 1984 and January 5, 2005.

In *Irving Paper*, the plaintiffs alleged that the defendants conspired to allocate markets, restrict supply and increase the price of hydrogen peroxide in Canada. Following *Chadha*, the defendants argued that the plaintiffs could not establish harm or damage on a class-wide basis and that the plaintiffs proposed use of aggregate damages was untenable.

In certifying the class proceeding, Justice Rady acknowledged that the proposed class of direct and indirect purchasers could potentially include all of the residents of Canada, and acknowledged that there are considerable impediments to certification in price-fixing cases involving indirect purchasers.

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Justice Rady held, however, that the plaintiffs need only prove potential liability, that is, that the defendants acted unlawfully. It was therefore not necessary to prove damages on a class-wide basis. Contrary to *Chadha*, Justice Rady specifically held that it was not necessary for the plaintiff to prove that every class member suffered a loss at the class certification stage, so long as a methodology may exist for the calculation of damages at trial. Justice Rady held that *Chadha* had been overtaken by principles developed in recent non-conspiracy class proceedings which, she reasoned, demonstrate a relaxing of the requirements for certification.

The British Columbia Court of Appeal released a parallel decision in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (“*DRAM*”) on November 12, 2009. The *DRAM* case involves an alleged price-fixing conspiracy of computer memory components, namely, dynamic random access memory. Dynamic random access memory is used in many computer products and telecommunications products, as well as other electronic products.

The B.C. Court of Appeal unanimously reversed the motion judge’s decision to deny certification and certified a class of both direct and indirect purchasers of dynamic random access memory. Similar to Justice Rady, the Court concluded in essence that the plaintiffs need only show a credible or plausible methodology using regression techniques which in theory might be able to address loss on a class-wide basis. The Court also similarly concluded that expert evidence adduced at the certification stage should not be subjected to the exacting scrutiny required at trial. Although it remains to be seen whether or not *Chadha* remains good law in Ontario, the B.C. Court of Appeal’s decision in *DRAM* clearly indicates that the stricter requirements for certification set out in *Chadha* is not good law in British Columbia.

Conclusion

Irving Paper and *DRAM* mark a sharp divergence from existing case law in Canada regarding certifi-

cation of price-fixing conspiracy class proceedings. Leave to appeal *Irving Paper* is being sought, and it is also expected that the defendants in *DRAM* will seek leave to appeal to the Supreme Court of Canada. Importantly, if the approaches to certification approved in *Irving Paper* and *DRAM* are upheld on appeal, they will significantly lower the threshold for granting certification in contested price-fixing conspiracy class proceedings. When coupled with the recent amendment to the *Competition Act* that has made price-fixing a *per se* offence, it may become much easier for plaintiffs to successfully pursue price-fixing class proceedings.

If you have any questions regarding these recent judicial developments, please contact Richard Annan, Michael Koch, Jason Wadden or any other member of Goodmans’ Competition Group:

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