

Quebec Court of Appeal decision in DRAM: even more class actions ahead in Quebec?

In a long awaited decision regarding dynamic memory computer chips (DRAM), finally issued on November 16, 2011, the Quebec Court of Appeal has profoundly altered the legal landscape for class actions in Quebec.

At first blush, the Quebec Court of Appeal DRAM decision follows the more liberal trend towards class certification already present in competition related class actions in the rest of Canada, by allowing a class action to proceed involving a mixed class composed of both direct and indirect purchasers.

However, upon a closer look, the Quebec Court of Appeal has considerably lowered the test that Quebec class claimants have to pass for their cases to be authorized. Arguably, from now on, Quebec class actions may be authorized on the mere basis of a potential claim, or indeed even a purely speculative one.

The decision undeniably results in an increased potential exposure to speculative class actions by opportunistic class claimants. As such, the decision is liable to have far reaching implications for businesses operating in Quebec.

the decision

DRAM is a semiconductor memory product that provides high-speed storage and is found in many common electronic devices such as computers, cell phones and servers. In 2004, a number of DRAM manufacturers pleaded guilty in the US to participating in a conspiracy to fix prices in the multi-billion dollar DRAM market.

In October 2004 a motion to institute a class action against these manufacturers was brought by a Quebec consumer who had bought a Dell computer which purportedly contained a DRAM chip. The action purported to cover any person who bought a product equipped with DRAM chip throughout the class period. The proposed action sought to include both direct and indirect purchasers of DRAM but did not account for obvious differences between these two classes of purchasers. Furthermore, the proposed action did not provide for a distinction between the different types of DRAM equipped-products (computers, cell phones, etc...) Indeed, the class description even made no exception for any person who would have bought second hand DRAM-equipped products!

The motion material moreover presented no argument or theory whatsoever supporting the view that all of the potential class members would have suffered harm as a result of the US conspiracy. Although common sense dictates that certainly not all class members suffered harm as a result of the alleged cartel, the fact of harm to all class members was simply assumed by the class claimants.

In Superior Court, Mr. Justice Mongeau decided that the proposed class representative failed to argue in any convincing way why indirect purchasers of DRAM equipped product would have suffered harm. Relying on the earlier Quebec Court of Appeal decision in *Harmegnies v. Toyota*, Mr. Justice Mongeau concluded that *prima facie* only the direct purchasers suffered harm as a result of the alleged conspiracy and he refused to authorize the class action.

In appeal, dismissing a theory that is sometimes used in common law provinces, the Quebec Court of Appeal reiterated that the action was necessarily a damage-based case. Or, in other words, there was no possibility for class claimants to circumvent the requirement to establish harm with restitution-based remedies, as has been the case recently in certain common law provinces. The Court then conceded that the allegations of harm to the indirect purchasers in the class claimant motion were sparse and uncertain (the class claimants' motion uses the conditional tense to refer to harm to indirect purchasers).

The Court held however that such allegations, albeit shaky, were nonetheless sufficient for the Court to authorize the class action to move forward. In reaching its decision, the Court noted that unlike in most common law provinces, a Quebec class claimant does not need to demonstrate, at the authorization stage, that there is a "clear methodology" to show that damages were actually suffered by indirect purchasers. This analysis is only relevant for the trial judge. At the authorization stage, it is sufficient for a class claimant to lump together in a common class various groups of people who may (or indeed who may not) have suffered harm as a result of the impugned behaviour, and to simply allege that all have suffered damages. The Court's explicit assumption is that the trial on the merit of the class action will show later who, among the groups lumped together in the class action, actually had a claim in the first place.

In the case of the DRAM matter, in all likelihood, many groups of purchasers of DRAM -equipped products have no claim whatsoever. Purchasers of second hand DRAM-equipped products is a good example. Thus, the result of the DRAM Quebec Court of Appeal Decision is to authorize a class action on behalf of groups of people who have no recourse against the Defendants.

With all due respect, in our view this runs afoul of the screening function of the authorization stage in class actions, which is precisely to ascertain that the claimants do appear to all at the very least have a claim against the purported defendants (let

alone a common claim). The removal of this most basic requirement from class claimants, coupled with the fact that in most cases defendants are not authorized to bring any evidence to counter the allegations of a class motion, and with the fact that judgements authorizing class actions in Quebec are not appealable, all but empties the authorization process of any usefulness whatsoever. If the Quebec DRAM decision were to stand, authorization processes in Quebec could in the future be little more than rubber stamp administrative process, akin to getting a docket number from the court's registry.

jurisdiction

The Quebec DRAM decision also purports to put an end to the controversy in the Quebec case law surrounding the jurisdiction of Quebec courts over foreign defendants where no fault is alleged to have taken place in the province.

Quebec, unlike the common law provinces does not apply a "close connection" test to assess its jurisdiction. Rather, Section 3148 of the Civil Code provides for a number of statutory connecting factors. Whether the plaintiff is located in Quebec is not one of these connecting factors.

In many cases against foreign defendants the only potential connecting factor is whether damages were suffered in Quebec. According to an older line of Quebec Court of Appeal cases, if a purely economic prejudice was presumed to have been suffered at the domicile of the plaintiff, then the domicile of the plaintiff would become a connecting factor, which is contrary to the language of the Code. Thus, economic prejudice was deemed to be an insufficient type of prejudice to connect an action to Quebec.

In DRAM the Court of Appeal distinguished its prior jurisprudence by creating a distinction between the place where the harm is actually suffered and the place where the harm is recorded. In this particular case, the court held that the alleged harm was actually suffered in Quebec because the contract whereby the class

claimant bought her computer from Dell (a third party to the proceedings) was deemed through the Quebec *Consumer Protection Act* to have been passed in Quebec (although the language in the contract actually referred to Ontario). Thus the Court concluded that unlike its previous line of cases, the plaintiff was not merely "recording" its financial losses in Quebec but that the losses being claimed, despite being purely financial were "suffered" in Quebec and thereby sufficiently connecting the action to Quebec.

The Quebec Court of Appeal DRAM decision has been long expected to mark an important milestone in the Quebec class action practice. It will certainly be one. The pendulum has now swung almost entirely on the class claimant's side. The mid to long term consequences for businesses operating in Quebec of this new state of play remain to be assessed. Predictably though the number of class actions filed by various activists and other pro-consumer groups is unlikely to go down any time soon!

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[a cautionary note](#)

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