

Infineon Technologies AG v Option consommateurs: has the Supreme Court of Canada opened the door to purely speculative class action claims?

For several months now, class action practitioners in Quebec have been patiently awaiting the Supreme Court of Canada's decision in *Infineon Technologies AG v Option consommateurs*.¹ The wait is now over; on October 31, 2013, the Supreme Court rendered its decision and upheld the Court of Appeal's decision to authorize the class action. In doing so, the Supreme Court authorized a class action comprised of a potentially heterogeneous group of hypothetical victims.

At first glance, the decision may seem surprising. It does however follow a recent trend of cases which lowered the bar that class members need to meet in the demonstration of the existence of a *prima facie* cause of action at this stage of the proceedings. In many respects, the Supreme Court's decision is tributary to the particular facts at issue in the case. However, there still remains a risk that it may be interpreted by eager class claimants, amongst others, as having essentially eliminated the criteria required for the authorization of class actions in Quebec.

¹ *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59.

Such an interpretation would expose businesses (and ultimately consumers who always end up paying for the inefficiencies of any system) to a considerable economic risk as a result of the multiplication of purely opportunistic class actions premised on questionable legal and/or weak factual grounds. This result would be contrary to the Quebec legislature's intentions of putting in place the authorization process, precisely to prevent such abuses.

In light of the Infineon decision, the judges of the lower courts, in particular the Superior Court judges (since there is no right of appeal against a decision which authorizes a class action), will simply be left to their own devices with regards to which criteria to apply when it comes to "filtering" out frivolous class actions.

This decision was rendered concurrently with two other related cases emanating from the courts of British-Columbia, each of which also addressed the issue of indirect purchaser claims for antitrust damages. Those cases are the object of a separate McMillan bulletin.

the key highlights of the decision

- Confirms the low evidentiary and legal threshold required for class action claimants to obtain authorization of class actions in Quebec;
- Indirect purchasers now have a *prima facie* claim for antitrust damages;
- Confirms that it is not necessary at the authorization stage for the courts to ensure that all the potential class members actually have a right of action on the merits of the case; and
- Confirms that an indirect purchaser can have a right of action before the Quebec courts if the consumer contracts said consumer entered into with a retailer is deemed to have been concluded in Quebec.

background

In 2004, the US antitrust authorities concluded that a number of multinational DRAM manufacturers had been participating in a conspiracy to fix prices for dynamic random-access memory (DRAM). Several of these manufacturers pleaded guilty to the infractions.

In October 2004, a motion to institute a class action against these manufacturers was filed by a Quebec consumer (Cloutier) who had purchased a Dell computer containing DRAM. The computer was purchased over the internet from a company located in Ontario, from Cloutier's domicile in Quebec. The proposed class sought to include direct purchasers, as well as any person who could have purchased DRAM indirectly, either wholesale or retail, through the purchase of electronic products containing DRAM. Essentially, the claimant alleged that there was an overcharge for all DRAM sold in Quebec during the class period. The claimant did not however put forward any allegations corroborating their assumption that any increase in prices was actually passed down the DRAM distribution chains to the end consumers. In other words, based on the allegations of the proposed proceedings, it was possible that some of the proposed class members never actually suffered any personal harm and therefore would not have a personal right of action. Should a class action be authorized on their behalf in such circumstances?

In 2008, Mr. Justice Mongeau of the Superior Court decided not to authorize the proposed class action since the proposed recourse failed to demonstrate that any of the class members had actually suffered a prejudice. Justice Mongeau had also decided that the Superior Court of Quebec did not have territorial jurisdiction over the claim.

In November 2011, the Quebec Court of Appeal reversed Justice Mongeau's decision and authorized the class action. In doing so, the Court of Appeal concluded that the Superior Court did have jurisdiction over the case and that it was not necessary, at the authorization stage, for the class claimant to specifically allocate

the alleged prejudice as between the potential victims of said prejudice.

Supreme Court of Canada decision

In its unanimous decision, written by the two Quebec judges on the bench, the Supreme Court mentions that at the authorization stage, the court's role is merely to filter out frivolous claims and that essentially, class claimants are simply required to establish that they have an arguable case on the merits.

In application of the general provision governing delictual and quasi-delictual liability in Quebec law, the class claimant has to establish *prima facie* all the elements of civil liability, which are (i) that the defendants committed a fault; (ii) that the claimant and the members of the class suffered an injury; and (iii) that a causal connection exists between the fault and the injury. The Court emphasised that the claimant's burden is not very high at this stage of the proceedings, and that the threshold with regards to the evidence is low, in particular in establishing the existence of a prejudice suffered by the class members. The analysis of these elements was particularly revealing in this regard.

the existences of a fault

With regards to fault, the Supreme Court acknowledged the fact that no proceeding had been initiated by Canadian authorities against the defending DRAM manufacturers. The only evidence put forward concerning proceedings against them concerned actions initiated in the United States and in Europe. The rules in Canada concerning alleged cartels (pursuant to the *Competition Act*) are substantially different than those applicable in the United States and in the European Union: in certain circumstances, an agreement can constitute a criminal infraction in the United States or in the European Union without necessarily infringing the Canada's *Competition Act*. It was argued that the existences of a guilty plea in a foreign jurisdiction does not create a presumption that a fault under Quebec law was committed.

The Supreme Court concluded that the allegations and supporting evidence attested to the apparent international nature and impact of the alleged anti-competitive conduct. The Court concluded that this was sufficient to support an inference of fault, given the relatively low standard to be met at the authorization stage.

injury suffered by the proposed class members

The Supreme Court was of the view that there was no rule in civil law which would bar the right of action of an indirect victim. In this case an indirect victim is a victim who has no connection with the relevant market at issue but who could hypothetically have been passed-on a portion of the loss as an effect of the relevant distribution networks. It was argued by Infineon that the fact that the direct purchasers did not lose their right of action as a result of having passed-on the loss to their clients (indirect purchasers) militates in favour of the argument that said clients could not themselves have a right of action since this could lead to double recovery as against the DRAM manufacturers.

The Supreme Court rejected this argument and explained that maintaining the right of action of direct purchasers in situations where they have passed-on a loss to indirect purchasers was a question of judicial policy which did not imply as a corollary that indirect purchasers need to be deprived of a parallel right of action. The issue of double recovery can be assessed on a case by case basis, and, in this particular case, it was not an apparent problem, at least not at the authorization stage.

With regards to the prejudice suffered by each and every member of the proposed class, the Court was of the view that at the authorization stage, Quebec claimants are not required to produce economic evidence, or put forward a specific theory concerning the probability or even the possibility that the passing on of the inflated price to the indirect purchasers actually took place. They simply need to establish that it is plausible that such losses were indeed passed on to the indirect purchasers.

Also of importance is the fact that the Supreme Court concluded that the Quebec class claimants are not required to demonstrate that each proposed class member suffered a loss. At the authorization stage, it is sufficient to demonstrate an aggregate loss; the manner in which this loss will be divided amongst class members is an issue which may be left to be debated on the merits. Thus, one could theoretically initiate a class action for the benefit of a group of people of which it is evident that some may not ultimately be members of the class.

causality

Infineon argued that there was no causality between the fault and the hypothetical prejudice suffered by the indirect purchasers, due to the fact that numerous factors may have influenced the ultimate price paid by the indirect purchasers for products to which DRAM was incorporated. Thus, the alleged damage could not be said to be direct.

The Supreme Court concluded that there is a distinction to be made between "indirect damages" and "indirect victims". An indirect victim can suffer a prejudice which is a direct consequence of the alleged fault. In order to satisfy the causal connection requirement, the damages suffered need to be the logical, direct and immediate result of the fault. Thus, an indirect victim could suffer a direct damage and be compensated for said damage. In light of the low burden of demonstration at the authorization stage, the Court concluded that the allegations put forward by the claimant were sufficient to meet her burden.

jurisdiction

Infineon argued that none of the connecting factors provided for at Article 3148 CCQ were met. In particular, relying on a series of cases from the Quebec Court of Appeal, Infineon argued that purely economic and intangible prejudices are not located in any particular *situs*. Artificially designating the claimant's domicile as the location of this intangible prejudice would have the perverse effect of rendering all the connecting factors of Article 3148 CCQ

obsolete, leaving the domicile of the claimant as the only relevant connecting factor.

The Supreme Court concluded that in the case at hand, the claimant's contract (which Infineon was not a party to) was deemed to have been concluded in Quebec by operation of the *Quebec Consumer Protection Act*. As a result, the claimant's alleged prejudice could be considered to have been suffered in Quebec, thus giving the Quebec courts jurisdiction.

commentary

In the short and long term, this decision will mostly likely crystallize the prevalent tendency already present in the Quebec case law that the threshold with regards to filtering frivolous class actions is extremely low.

On a practical level, the decision can be viewed as a double edged sword. If the Supreme Court's reasoning is pushed to its extremes, it could be interpreted to mean that class claimants can henceforth initiate a class proceeding alleging whatever they wish for the benefit of whomever they consider to be appropriate as long as they can demonstrate that they have an "arguable case" at the authorization stage. In other words, a right of action on behalf of each the proposed class members would not be required. It is our view that the knowledge that certain proposed class members will ultimately not have a claim should be sufficient to bar such potential members from being included in the class action. An increase in potentially unfounded and frivolous class proceedings would not benefit anyone and would circumvent the intended purpose of the filtering mechanism set forth by the authorization process.

In the absence of clear criteria by the Supreme Court or by the legislator as to what it means for class claimants to have an

"arguable case", the Superior Court judges will be left to evaluate each proposed class action on a case by case basis. As a result, it is likely that the general trend will continue and that few class actions will be heard on the merits. For better or for worse, class action settlements will likely continue to be the norm in Quebec.

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[a cautionary note](#)

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