KIM ORR CLASS ACTION MONITOR—November 5, 2013

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IN THIS ISSUE

NEW CASES

Class action commenced against manufacturers of generic diabetes drug ACTOS

Overview:

On October 25, 2013, Jean Robert, Anne Robert and Randolph Carrier commenced a class action on behalf of all persons resident in Canada who used pioglitazone hydrochloride in the generic form manufactured and marketed by Apotex Inc., Sandoz International GmbH, and Sandoz Canada Incorporated, and on behalf of family members with derivative claims.

Pioglitazone was originally produced by the Japanese drug company Takeda Pharmaceuticals Inc., and co-marketed by Eli Lilly under the brand name ACTOS. It was approved for sale in Canada in August, 2000 to control blood sugar levels in people

with Type 2 (non insulin-dependant) diabetes. In 2007, the defendants began to manufacture generic versions of ACTOS. Regulators in Canada and the U.S. issued safety announcements from 2010-2012 about the elevated risk of bladder cancer but the drug was never withdrawn in Canada.

The plaintiffs allege that the defendants knew or ought to have known that generic ACTOS (marketed as APO-Pioglitazone and Sandoz Pioglitazone) materially increases the risk of bladder cancer, and that the defendants failed to warn class members of that risk in a timely manner or to recall the drug. The plaintiffs have not specified an amount of damages in their statement of claim.

The claim alleges causes of action in negligence, including negligent design and failure to warn, as well as breach of express and implied warranties.

Details:
Plaintiffs: Jean Robert, Anne Robert and Randolph Carrier
Lawyers for the plaintiffs: Rochon Genova LLP, Joel P. Rochon and John Archibald
Defendants: Apotex Inc., Sandoz International GmbH, and Sandoz Canada Incorporated.
Court: Ontario Superior Court of Justice
Court File No.: CV-13-491534-00CP
Comments:
This case is the latest in a growing number of pharmaceutical product liability class actions being commenced in relation to generic versions of allegedly defective drugs. The Ontario Courts have previously refused to allow claims against innovator drug companies to proceed in relation to damage caused by their generic competitors [, 2010 CarswellOnt 896]. While class actions against innovator drug companies can now be said to be common, generics have generally avoided being drawn into this type of litigation. This is in contrast to the U.S. experience where generics are frequently the subject of pharmaceutical product liability suits. It will be interesting to see how Courts deal with the different role generic manufacturers play in the pharmaceutical market place compared to innovators.

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CASE UPDATES

Benoit c. Amira Enterprises inc.
2013 CarswellQue 9725 (Que. S.C.J.)

Decision:	Motion for the authorization of a class proceeding - motion dismissed Date of Decision: October 1, 2013

Judge:	Gibeau J.C.S.
Court:	Quebec Superior Court
Lawyers:	**Lawyers for the plaintiff, Genevieve Benoit:** Jeffrey Orenstein and Andrea Grass
	Lawyers for the defendant, Almira Enterprises inc.: Vincent de l'Etoile and Ruth Essebag

Background:
The plaintiff, Genevieve Benoit, sought to authorize a class action against Almira Enterprises inc. ("Almira"), an importer and distributer of nuts and dried fruits. Almira issued a voluntary recall of its walnuts in cooperation with the Canada Food Inspection Agency (CFIA) on April 3 and 4, 2011 due to possible E. coli contamination. The recall involved products sold between January 1, 2011 and April 4, 2011.

The plaintiff alleged that she purchased two bags of walnuts in March 2011 at a cost of $4.99 each. The plaintiff alleged that she learned of the recall on April 8, 2011 and tried to obtain information regarding a refund by calling Almira (the plaintiff's call was not answered and she did not leave a voicemail) and through its website (no refund information was posted on the website). The plaintiff alleged that she spoke to the manager of the store where she claimed to have purchased the walnuts but was told she was unable to obtain a refund because she did not have a receipt.

The motion for authorization of the class action was filed on April 11, 2011. The plaintiff proposed a class of all residents of Canada who purchased raw shelled walnuts between January 1 and April 4, 2011 and who disposed of the product without obtaining a refund. Alternatively, the plaintiff proposed that the class only include Quebec residents who purchased the walnuts. The plaintiff sought a refund of the cost of the recalled products and compensatory damages.

The plaintiff alleged that Almira was negligent in failing to put into place an adequate system for reimbursement, contrary to s. 1457 of the *Civil Code of Quebec*, L.R.Q., c. C-1991.

On April 26, 2011, Almira amended its website with the addition of a "Frequently Asked Questions" section which included information on obtaining a refund for recalled products. The CFIA permitted Almira to resume its activities on April 27, 2011. No trace of E. coli was found in its nuts, its machinery or its facilities.

Update:
At the hearing Almira sought to introduce into evidence a scholarly article dating from 2009 dealing with recalled products. Almira sought to rely on the article as a neutral source supporting its position. The plaintiff opposed the evidence on the basis that it was similar to expert evidence, and that she did not have the opportunity to cross-examine the author. The Court agreed with the plaintiff and struck the article. The Court found that the subject-matter of the article went to the heart of the dispute about whether Almira put into place a sufficient system for reimbursement. The Court found that the article constituted hearsay on a significant issue to be determined, and that the plaintiff would suffer prejudice if the article was admitted without her having the opportunity to cross-examine the author.

The Court examined the criteria for the authorization of a class proceeding set out in the *Code of Civil Procedure*, R.S.Q., c. C-25.

The Court concluded that the facts alleged were insufficient to justify the conclusions sought.

The Court stated that the plaintiff's energies were focused on meeting her lawyer and commencing the class proceeding rather than on seeking a refund for the recalled product. The plaintiff failed to leave a voicemail or send an email to the defendant and did not contact the CFIA. The plaintiff did not give the defendant any opportunity to respond to her demand for a refund, and in fact never made a demand for a refund to the defendant. The evidence was that the plaintiff's grocer did not carry the products she purchased, and therefore would be justified in refusing to reimburse her for a product it did not stock. However, the grocer in fact had a policy that it would issue refunds for Almira products that it did carry with or without proof of purchase.

The evidence demonstrated that Almira sent 138 emails to individuals regarding the recall and hired a full-time employee to respond to the 331 telephone calls it received from the public.

The Court also found that the plaintiff would not be an adequate representative, citing the plaintiff's failure to investigate the existence or experiences of other class members. The class members who contacted the plaintiff's counsel complained of illness following the ingestion of the nuts, which had nothing to do with the claims raised by the plaintiff.

The Court found that it was impossible to determine the existence of a class in the absence of a reasonable proposal from the plaintiff as to how to identify the class members.

The Court determined that it was not necessary to examine the common issues question, given its other findings.

The motion for authorization was dismissed with costs.

Related Cases:
Benoit c. Amira Enterprises inc., 2012 CarswellQue 895 (Que. S.C.J.)

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Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees) v. SNC Group Inc.
2013 CarswellOnt 14096 (Ont. S.C.J.)

Decision:	Motion for documentary production - motion dismissed
	Date of Decision: October 8, 2013

Judge:	Perell J.
Court:	Ontario Superior Court of Justice
Lawyers:	**Lawyer for the plaintiffs The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and 0793094 B.C. Ltd.:** A. Dimitri Lasacaris, John Archibald and Peter Jarvis **Lawyer for the defendants SNC-Lavalin Group Inc., Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, and Lawrence N. Stevenson:** James Hodgson, Michael Brown and Guy White **Lawyer for the defendant Pierre Duhaime:** Steven Sufer

Background:
In September 2012, this proposed securities class action was certified on consent. Leave to proceed with a claim for secondary market misrepresentation under Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 was granted at the same time [see Issue 2012-17 2012-17 - Case Update - "*The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*"].

The plaintiffs allege that the SNC-Lavalin Group Inc. ("SNC") bribed governmental officials around the world between during the class period (November 6, 2009 and February 27, 2012) in order to secure contracts financed by the World Bank, and failed to disclose those material facts to investors.

The World Bank is an inter-governmental financial corporation which funds development projects. It is governed by Articles of Agreement between its 185 shareholder states, including Canada. SNC bid on a Bangladeshi development project, the "Padma bridge project". In 2011, the World Bank investigated a subsidiary of SNC with respect to the bidding process on the Padma bridge project. The World Bank temporarily suspended SNC after its investigation yielded evidence of corruption. SNC and the World Bank ultimately negotiated a settlement to the proceedings. The settlement barred SNC from bidding on any World Bank projects for a period of 8 years if SNC complied with certain conditions; the ban would be increased to 10 years in the event of non-compliance.

While the World Bank made a few documents public, its proceedings are generally confidential. Class counsel sought production of all non-privileged communications with the World Bank and a copy of the settlement agreement. SNC claimed settlement privilege over the requested documents. The World Bank took no position. The plaintiffs subsequently moved to compel disclosure.

Update:
On October 8, 2013, Justice Perell dismissed the plaintiffs' motion for production. The Court held that the requested documents, which it assumed were not simply collected evidence which would be properly discoverable, were covered by settlement privilege which had not been waived or was subject to any exceptions.

The Court noted that the World Bank has its own sanction procedures to deal with violations of its procurement and anti-corruption guidelines. The process includes procedures for investigations, responses by the accused company, temporary suspensions, hearings before sanction boards, possible sanctions, privilege over documents, and confidentiality.

The plaintiffs requested production of documents created throughout the sanctions procedure, including Notices of Temporary Suspensions, Notices of Sanction Proceedings, correspondence, and the settlement agreement. The plaintiffs argued that the three part test for settlement privilege had not been met: (1) litigation had been commenced or was within contemplation; (2) the communication was made with the express or implied intention it would not be disclosed; and, (3) the purpose of the communication was to effect a settlement.

The plaintiffs' main argument was that the World Bank process is not "litigation" since it is not a Court procedure and therefore cannot attract settlement privilege. The Court rejected this submission on the basis that litigation in today's environment is conducted through numerous administrative tribunals and private mediations or arbitrations. The Court held that the same policy arguments that militate in favor of maintaining confidentiality in traditional Court litigation apply to private adjudications such as the World Bank sanctions procedure.

The Court held that the privilege was not waived, notwithstanding the press releases by the World Bank and SNC which advertised the settlement agreement. The Court held that the public relations purpose of the releases did not detract from the overall confidentiality of the process. The Court also held that there was no basis to carve a new exception to the privilege to allow the plaintiffs to access the "best evidence" which would otherwise be too difficult to obtain, on the basis that the documents requested contained the best evidence of bribery by SNC. The Court held that the plaintiffs were not truly arguing for a new exception but rather objecting to the application of privilege because reproducing the evidence independently would be difficult.

This decision illustrates the reluctance of Courts to intrude into the independent processes of outside bodies. The plaintiffs' dilemma, namely the difficulty in extracting evidence of SNC's alleged corruption in Bangladesh, did not garner any sympathy from the Court. It would appear unfair for SNC to be permitted to keep some documents secret while simultaneously allowing it to disclose a select few of the same class of documents in its press releases for public relations purposes. Given Ontario's liberal discovery rules, there does not appear to be a compelling reason to allow defendants to influence public opinion with selectively released information while simultaneously relying on settlement privilege to refuse disclosure of the entire record if that full record is relevant to the litigation. It will be interesting to see if the plaintiffs seek leave to appeal this decision.

Related Cases:
Gray v. SNC-Lavalin Group Inc., 2012 CarswellOnt 7959 (Ont. S.C.J.)

Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees) v. SNC-Lavalin Group Inc., 2012 CarswellOnt 11520 (Ont. S.C.J.)

Related Articles:
See Issue 2012-17 - Case Update - "*The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*"

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Fontaine v. Canada (Attorney General)
2013 CarswellBC 3107 (B.C. S.C.)

Decision:	Request for Direction - Allowed in part Date of Decision: October 15, 2013
Judge:	B.J. Brown J.
Court:	Supreme Court of British Columbia
Lawyers:	**Lawyers for the Monitor:** L.J. Zivot and H. Drabinsky **Lawyers for Stephen Bronstein and Bronstein & Company:** M. Andrews and G. Cameron **Court Lawyer:** G. Bowley **Lawyer for the Chief Adjudicator, Indian Residential School Adjudication Secretariat:** C. Hofley and L. Fisher **Lawyer for the Attorney General of Canada:** C.A. Coughlan

Background:
This was a Request for Direction by the Monitor seeking authority to investigate the practice of Stephen Bronstein and Bronstein & Company ("Mr. Bronstein") relating to the Independent Assessment Process (IAP) under the Indian Residential Schools Settlement ("Settlement").

On December 15, 2006, various Courts across Canada approved a settlement in a class action involving Indian Residential Schools operated by Canada. The Settlement Agreement states that class members who suffered serious physical, sexual or psychological abuse are eligible for compensation under the Independent Assessment Process ("IAP").

A Monitor was appointed to oversee the administration and implementation of the Settlement. The Monitor previously investigated claims that David Blott and Blott & Company (a law firm) did not adequately represent IAP clients' interests, and repaid loans advanced to IAP claimants from the proceeds of compensation awards. The Monitor also investigated Honor Walk Ltd., a form filing organization that referred clients to Blott & Company and completed IAP applications for a fee. Form filling involved non-lawyers assisting claimants in filling out the application forms for the IAP. This process violated the IAP, which mandated that claimants go through the form with a lawyer, and for the lawyer to certify that the form is complete and accurate. On June 5, 2012, Justice Brown granted the Monitor's motion prohibiting Blott & Company and Honor Walk further in-

volvement in the IAP [see Issue2012-10 - Case Update - *Fontaine v. Canada (Attorney General)*].

The Monitor brought similar allegations against Mr. Bronstein. The Monitor alleged that Mr. Bronstein loaned money to his IAP clients (Mr. Bronstein, in fact, admitted to this practice). The Monitor was also suspicious of Mr. Bronstein's business relationship with Ivon Johnny ("Mr. Johnny"), a form filler employed by Mr. Bronstein. The Monitor was concerned about the possibility that Mr. Bronstein paid third parties out of IAP claimants' settlement funds. The Monitor was also concerned that funds paid or loans extended to IAP clients may have been diverted to individuals, such as Mr. Johnny.

At the suggestion of the Court, the Monitor, Mr. Bronstein and the Attorney General of Canada engaged in negotiations and reached an agreement outlining the parameters of a review of Mr. Bronstein's IAP practice. The terms of the agreement were formalized in a Consent Order issued on February 22, 2013. The Consent Order required Mr. Bronstein to provide the Monitor with information regarding nine enumerated topics within 21 days. Mr. Bronstein fulfilled his obligations under the Consent Order.

The Monitor and Mr. Bronstein have been engaged in an ongoing dispute about the quality and completeness of Mr. Bronstein's productions. The Monitor brought a Request for Direction seeking an order requiring Mr. Bronstein to:

- Produce all statements of account rendered by Mr. Bronstein to all IAP clients;

- Alternatively, produce all statements of account rendered by Mr. Bronstein to IAP clients with whom there is a connection with Mr. Johnny;

- Produce copies of all retainer agreements between Mr. Bronstein and IAP clients that received a loan from Mr. Bronstein or a third party;

- Produce copies of all records related to third party loans made to any IAP client;

- Produce copies of all cheques evidencing any form of payment by Mr. Bronstein on behalf of or relating to any of its IAP clients to Mr. Johnny

- To provide all documents already produced in a form not covered or obscured as being redacted and provide adequate explanation for the redaction; and

- To provide an identifying description of any redaction and the reasons for each redaction for all documents produce so that the Monitor can assess the claim for privilege or relevancy.

Update:
The Monitor's Request for Direction was allowed in part.

Justice Brown stated that the Consent Order set out a limited and consensual review of Mr. Bronstein's IAP practice upon terms

agreed to by the Monitor, Mr. Bronstein and the Attorney General of Canada. Justice Brown stated that a low threshold of relevance was not appropriate in the circumstances given the fact that Mr. Bronstein voluntarily submitted himself and his IAP practice to a limited consensual review. Justice Brown held that Mr. Bronstein was required to produce only documents having some relation or rational linkage to the topics of production as established by the Consent Order.

The Monitor argued that Mr. Bronstein's counsel sought to delay the review process through inappropriate objections to the Monitor's requests for additional productions. Justice Brown held that, although the review process was taking an inordinate amount of time, there was no basis for the allegation that Mr. Bronstein was deliberately delaying the process.

The Monitor argued that "production of all statements of account rendered to [Mr. Bronstein's] IAP claimants is necessary in order to 'verify that each claimant received all funds owing' and whether deductions, if any, were authorized" [para.45]. Justice Brown refused to grant this relief because the scope of the review set out in the Consent Order did not extend to verifying that all of Mr. Bronstein's IAP clients obtained the funds owing to them.

Justice Brown found that the following documents fell within the scope of the Consent Order and should be produced:

- Statements of accounts rendered by Mr. Bronstein's IAP clients that included deductions from settlement funds in consideration of services provided by Mr. Johnny;

- Retainer agreements for all IAP claimants in receipt of loans from Mr. Bronstein;

- Any records relating to third party loans; and

- Copies of cheques issued by Mr. Bronstein to IAP clients.

The Chief Adjudicator and the Attorney General of Canada asked the Court to convert the review set out in the Consent Order into a "full investigation" of Mr. Bronstein's IAP practice, to suspend Mr. Bronstein from further participation in the IAP, to impose a 20% holdback of legal fees payable to Mr. Bronstein to cover the costs of an investigation and the review, and to direct all settlement funds payable to Mr. Bronstein to the Monitor. Justice Brown denied this request and stated that such relief should be sought by formal application.

Related Cases:
Fontaine v. Canada (Attorney General), 2013 CarswellBC 1123 (B.C. S.C.)

Fontaine v. Canada (Attorney General), 2013 CarswellOnt 979 (Ont. S.C.J.)

Fontaine v. Canada (Attorney-General), 2012 CarswellBC 1648 (B.C. S.C.); additional reasons 2012 CarswellBC 3529 (B.C. S.C.)

Fontaine v. Canada (Attorney General), 2012 CarswellBC 3529 (B.C. S.C.)

Fontaine v. Canada (Attorney General), 2012 CarswellOnt 8351 (Ont. C.A.)

Fontaine v. Canada (Attorney General), 2012 CarswellBC 1648 (B.C. S.C.); additional reasons 2012 CarswellBC 3529 (B.C. S.C.)

Related Articles:
Issue 2013-11 - Case Update - "*Fontaine v. Canada (Attorney General)*"

Issue 2013-04 - Case Update - "*Fontaine v. Canada (Attorney General)*"

Issue 2012-12 - Case Update - "*Fontaine v. Duboff Edwards Haight & Schachter*"

Issue 2012-10 - Case Update - "*Fontaine v. Canada (Attorney General)*"

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IN THE NEWS

Court of Appeal to revisit certification in *Brown v. CIBC*

The Court of Appeal for Ontario will hear an appeal from the Divisional Court's refusal to certify the action in *Brown v. Canadian Imperial Bank of Commerce*. The plaintiffs moved to certify a class on behalf of "Analysts," "Investment Advisors" and "Associate Investment Advisors" at CIBC who were denied overtime pay as a result of their job classification. Justice Strathy held that the action was not suited for certification because a class definition based on job title lacked the commonality to make binding determinations of fact for all class members [see Issue 2012-08 2012-08 - Case Update - *Brown v. Canadian Imperial Bank of Commerce*].

The plaintiffs appealed Justice Strathy's certification decision to the Divisional Court and amended their class definition by dropping "Analysts" from the class. The Divisional Court relied on the Court of Appeal's decision in*McCracken v. Canadian National Railway*, 2012 CarswellOnt 8010 (Ont. C.A.); additional reasons 2012 CarswellOnt 14475 (Ont. C.A.), ("*McCracken*"), another misclassification case where the Court stated that misclassification cases are suitable for certification "where the similarity of job duties performed by class members provides the essential element of commonality" (at para. 91). The Divisional Court held that, notwithstanding the amended class definition, the proposed class continued to include individuals exercising managerial functions who would be ineligible for overtime. The Divisional Court, therefore, dismissed the appeal [see Issue2013-10 2013-10 - Case Update - *Brown v. Canadian Imperial Bank of Commerce*].

The Court of Appeal's decision to revisit the certification of an overtime class action follows its decisions in *Fresco v. Canadian Imperial Bank of Commerce*, 2012 CarswellOnt 7956 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 3154, 2013

CarswellOnt 3155 (S.C.C.) ("*Fresco*"), *Fulawka v. Bank of Nova Scotia*, 2012 CarswellOnt 7951 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 3152, 2013 CarswellOnt 3153 (S.C.C.) ("*Fulawka*") and, *McCracken*, known as the "overtime trilogy." The Court held that both *Fresco* and *Fulawka*should be certified, and denied certification in McCracken [see2012-11 2012-11- Special Focus - *Court of Appeal Clarifies Commonality in Overtime Pay Class Actions*].

Following the "overtime trilogy" and the Divisional Court's decision in *Brown*, Justice Belobaba certified *Rosen v. BMO Nesbitt Burns* as a class proceeding. In that case, the plaintiff commenced an action on behalf of Investment Advisors, Associate Investment Advisors and Investment Advisor Trainees at BMO Nesbitt Burns and alleged that the defendant misclassified class members, making them ineligible for overtime pay. In certifying the action, Justice Belobaba expressed disagreement with the Divisional Court's assessment of commonality in *Brown* [see Issue 2013-19 2013-19 - Special Focus - *Ontario Superior Court Lowers the Bar for Common Issues in Overtime Case*]. In granting leave to appeal in Brown, the Court of Appeal will have the opportunity to clarify potential inconsistencies in Rosen and Brown and discuss the commonality requirement in greater detail.

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Class action involving Alberta commercial real estate scheme certified

An Alberta class action commenced by unhappy investors in a commercial real estate investment has been certified (*Harnam v. Chandran*, 2013 CarswellAlta 1976 (Alta. Q.B.)).

The action involves a developed strip mall in Calgary. The plaintiffs invested funds in the Glenmore Investment, a real estate scheme developed and marketed by the Platinum Defendants, who also managed the Glenmore Partnership. The action alleges that the Platinum Defendants and the Strategic Defendants knowingly caused the Glenmore Partnership to overpay for the strip mall, which was purchased using funds contributed by the plaintiff investors and other class members, along with take-back financing provided by the Strategic Defendants. The plaintiffs allege that the Platinum Defendants and Strategic Defendants structured the purchase and take-back financing to encumber the property with a mortgage that exceeded the true fair market value of the property and allowed the Strategic Defendants to maintain full control over the property. The plaintiffs claim that the defendants used the Glenmore Investment to take investors' funds for their personal benefit. The plaintiffs further allege that the Platinum Defendants were negligent in their management of the Glenmore Investment and Glenmore Partnership, that they breached the terms of the Limited Partnership Agreement (LPA) with investors and that they made misrepresentations in the offering memorandum giving rise to statutory causes of action under the Alberta *Securities Act*, R.S.A. 2000, c. S-4.

The Platinum Defendants did not oppose certification. The Strategic Defendants challenged the preferable procedure criteria, arguing that the claims were in fact all derivative claims of the Limited Partners. The Court rejected this argument, noting that not all investors were limited partners and that in any event, the claims under the securities legislation were independent of any claims that could be made by limited partners. The Court certified the action and ordered costs in favor of the plaintiffs against the Strategic Defendants.

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SPECIAL FOCUS

Supreme Court of Canada reaffirms the right of indirect purchasers to collectively sue for price fixing

On November 1, 2013, the Supreme Court of Canada released a trilogy of class action certification decisions originating in British Columbia and Québec [*Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 CarswellBC 3257, 2013 CarswellBC 3258 (S.C.C.);*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 CarswellBC 3259, 2013 CarswellBC 3260 (S.C.C.);*Option consommateurs v. Infineon Technologies AG*, 2013 CarswellQue 10520, 2013 CarswellQue 10521 (S.C.C.)]. This is the second trilogy of class action cases released by the Court. In 2001, the first trilogy set out the fundamental principles of class actions in Canada. With the second trilogy, the Court has preserved the right of indirect purchasers to claim damages for price fixing while providing guidance with respect to the evidentiary requirements for certification or authorization proceedings in Canada.

The three cases were actions by direct and indirect purchasers against the defendants who were alleged to have passed down an overcharge by engaging in anti-competitive conduct such as a price fixing. The concept of direct and indirect purchasers refers to the intermediate and final consumers of a product, respectively. The fundamental allegation in price-fixing class actions brought by indirect purchasers is that the manufacturer imposed or conspired to create an overcharge which was passed down the supply or retail chain to the ultimate consumer (the indirect purchaser). Direct purchasers on the other hand purchased subject product directly from the manufacturer and either absorbed the overcharge in-whole, in-part or not at all.

The plaintiffs in *Pro-Sys* are indirect purchasers who commenced an action alleging that the defendants' anti-competitive behavior led them to pay higher prices for operating systems and software applications pre-installed on personal computers. The primary cause of action pleaded was for damages under s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34. The plaintiffs also pleaded common law causes of action in conspiracy, intentional interference with economic interests, unjust enrichment and waiver of tort.

While *Pro-Sys* concerned end user indirect purchasers, *Sun-Rype*was a class action brought on behalf of both indirect purchasers and direct purchasers. The plaintiffs in Sun- Rype raised similar common law and statutory causes of action as the plaintiffs in *Pro-Sys*.

Both *Sun-Rype* and *Pro-Sys* were commenced in British Columbia. Both actions were initially certified but the defendants' respective appeals were later allowed by the British Columbia Court of Appeal. In *Pro-Sys*, the Court of Appeal decertified the entire action, holding that it was plain and obvious that indirect purchasers had no cause of action [2011 CarswellBC 930]. In *Sun-Rype*, the B.C. Court of Appeal came to the same conclusion with respect to indirect purchasers but remitted the claims of the direct purchasers to the application judge for redetermination [2011 CarswellBC 931]. The plaintiffs successfully sought leave to appeal to the Supreme Court of Canada in both cases. The defendants in Sun-Rype successfully obtained leave to cross-appeal the order remitting the direct purchaser claims for redetermination.

In *Infineon*, direct and indirect purchasers commenced a class action in Québec against four manufacturers for allegedly artificially inflating the price of Dynamic Random Access Memory (DRAM). Unlike the B.C. actions, the Québec plaintiffs based their claims on the *Civil Code of Québec*, L.R.Q. c. C-1991 ("*CCQ*"), in addition to the statutory cause of action under section 36 of the *Competition Act*. In *Infineon*, the motion judge dismissed the motion to authorize the class action on the basis that the Court did not have territorial jurisdiction to hear the class action, since there was inference of damage suffered in Quebec. In the alternative, the motions judge held (among other merit-based issues) that the action would not be authorized because there was a conflict of interest between the direct and indirect purchaser class members. The Québec Court of Appeal reversed the lower Court and certified the action, holding that indirect purchasers had a cause of action on the basis of the passing down of price increases to the ultimate consumers.

The main issue which divided the B.C. and Québec Courts of Appeal was whether the inability of defendants to plead a pass-on defence against direct purchasers by arguing that any damages suffered were passed on to the subsequent purchasers necessarily meant that indirect purchaser could not found an action on the basis of the same conduct. The pass-on defence was rejected in both the U.S. and Canada in previous cases for a number of reasons, including the technical complexity issues involve. The necessary corollary argument was subsequently adopted by the U.S. Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (Ill. S.C., 1977) which prohibited indirect purchaser actions for the same reasons that the pass-on defence was rejected as well as on the grounds of fairness and consistency between defendants and plaintiffs in competition class actions.

The Supreme Court of Canada heard the three cases concurrently. All of the defendants argued that indirect purchasers should not have a cause of action based on overcharges allegedly passed down to them due to alleged price fixing. The defendants argued that Canada should follow the prohibition on indirect purchaser action set out in the *Illinois Brick* doctrine, as it later became known.

The Supreme Court declines to follow *Illinois Brick*

In *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (Pa. S.C., 1968), the U.S. Supreme Court held that defendants that illegally overcharge for their goods cannot escape liability by proving that the direct purchasers passed on the overcharge to subsequent purchasers. Several years later, the U.S. Supreme Court held in*Illinois Brick* that, a necessary corollary to the rejection of the passing-on defence was the rejection of a cause of action for the same conduct by plaintiffs, i.e., offensive use of passing-on. The U.S. Supreme Court held that whatever rule existed with respect to pass-on in competition class actions must apply equally to defendants and plaintiffs.

The Supreme Court of Canada has noted that the *Illinois Brick*doctrine has been controversial in the U.S. The decision itself contained a powerful dissent. Academic scholars have been divided on the appropriateness of the decision. Most states have since enacted "repealer" statutes of the decision which allow for indirect purchaser actions.

The Court acknowledged that the passing-on defence has also been rejected in Canada in the context of claims for recovery of taxes paid pursuant to ultra vires legislation [*Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 CarswellNB 6 (S.C.C.)]. In Kingstreet, the Court found the passing-on defence to be inconsistent with the basic premise of restitution law, which is concerned with what has been taken away from the plaintiff as opposed to direct compensation. The Court also noted the difficulties in locating the ultimate victim of the overcharge and the accounting difficulties such a defence would entail.

While the arguments against the passing-on defence continue to be strong, the Court held that mere symmetry between defendants and plaintiffs could not by itself justify taking away the right of indirect purchasers to sue (also referred to as offensive use of pass-on). The Court cited five reasons for sustaining a cause of action for indirect purchasers: (1) multiple recovery and complexity are not sufficient reasons to preclude actions by indirect purchasers; (2) the deterrence function of competition law would not be impaired by indirect purchaser actions; (3) restitutionary law principles would be promoted by the indirect purchaser actions; (4) the *Illinois Brick*doctrine is being questioned in the U.S.; and (5) recent academic commentary supports overturning *Illinois Brick*.

In hindsight, the main argument in favor of the *Illinois Brick*doctrine was the promotion of symmetry between plaintiffs and defendants. However, the force of that argument was spent in Canada due to the different considerations which animate the issue of pass-on, namely equity and restitution.*Illinois Brick* was simply not sensitive to its incompatibility with restitution law principles, which motivate the policy calculus in overcharge cases. Ultimately, the trilogy is a good representation of the difficulty in importing U.S. legal doctrines which may be divorced from the predominant legal and policy environment in Canada.

The affirmation of indirect purchaser actions however came at a price. In Sun Rype, the Court ultimately refused to certify the action because it was not plain and obvious that two or more persons would in fact be able to determine if they are a member of the combined class of direct and indirect purchasers. The problem results from the inherent substitutability of the allegedly overcharged product, high fructose corn syrup ("HFCS"). Unlike *Infineon*and *Pro-Sys*, where class members could be identified or identify themselves on the basis of the products they purchased, in *Sun-Rype*, neither direct or indirect purchasers would know whether the soft drinks or food products they consumed during the historic class period (1988-1995) contained HFCS, or another substitute such as liquid sugar. The identification problem was exacerbated by the labeling requirements prevalent during the class period which did not require specific listing of the type of sweetener used. Accordingly, the action failed to disclose an identifiable class. The Court held that while expert testimony could help prove loss and damages for the class as a whole, even for indirect purchasers, the inability of two or more people to prove they individually suffered loss meant the action could not be certified. The majority of the Court held that the aggregate assessment provisions could not remedy this problem.

The rejection of *Illinois Brick* demonstrates the Court's overall commitment to ensuring access to justice to the wider public. However, the Court has simultaneously made it significantly more difficult to pursue class actions concerning the price fixing of products which are blended or mixed with other products on an industrial scale. Inability to practically identify class members effectively insulates a wide swath of potential defendants from indirect purchaser actions, potentially undermining the behavior modification goal of class proceedings.

Evidentiary requirements for certification

The defendants' arguments against certification (or authorization) were also informed by the *Illinois Brick* doctrine. Specifically, the defendants argued that determining the class composition, damages distribution, and even the amount of the overcharge that was passed-on would be unduly complex. The Court dismissed those concerns as part of its discussion on the evidentiary requirements for certification.

The defendants argued that the Court should adopt a "balance of probabilities" assessment of the evidence and allow Courts to conduct factual determinations at the certification stage on a preponderance of the evidence. The Court dismissed those arguments, affirming the existing standard of "some basis in fact" for the certification test. The Court declined to precisely define that standard, instead holding that a Court should be able to find "that the conditions for certification have been met to a degree

that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements" of the certification test not having been met [*Pro-Sys* at para. 104]. The Court resisted importing U.S. procedures and approaches to certification which would have tightened the evidentiary requirements, noting that "the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues" [para. 105].

Significantly for the common law provinces, the Court held that in competition class actions, the "some basis in fact" would require expert evidence to establish economic models or analysis before satisfying the common issues criteria in indirect purchaser cases. This is consistent with Ontario's approach under *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 CarswellOnt 4305 (Ont. C.A.); additional reasons 2010 CarswellOnt 6924 (Ont. C.A.); leave to appeal refused 2011 CarswellOnt 499, 2011 CarswellOnt 500 (S.C.C.) which only requires expert evidence to establish a viable and workable methodology for relating harm to class members from alleged price fixing.

While plaintiffs in common law provinces have gained important guidance for price fixing cases, the Court's comments with respect to Infineon may well direct a significant portion of such cases to Québec. After affirming the Québec Court of Appeal's jurisdictional decision, the Court analyzed in detail the unique evidentiary rules which govern authorization procedures. In contrast to the common law provinces, in Québec the *Code of Civil Procedure*, R.S.Q. c. C-25 does not require plaintiffs to file affidavit evidence on a motion for authorization. This has allowed plaintiffs to approach certification on the basis of pleadings motion argument together with attached exhibits. The indirect purchaser plaintiffs were therefore only required to plead facts necessary to establish an inference of fault. They were similarly not required to provide expert evidence in support of the common issues. The even lower evidentiary standards which the Court has affirmed may well shift a greater number of proposed price-fixing class actions to Québec, especially those actions that would otherwise require expensive expert modeling evidence in the pre-certification stage.

This trilogy ultimately represents an affirmation of the first trilogy's foundational guidelines on the conduct of class actions in Canada.

Court of Appeal upholds dismissal of *Arora v. Whirlpool Canada LP*

The Court of Appeal for Ontario has upheld the dismissal of both the certification motion and the action in *Arora v. Whirlpool Canada LP*, 2013 ONCA 657 (Ont. C.A.) on the basis that the appellants did not meet the cause of action criterion. The Court's decision effectively sounds the death knell for many non-dangerous product liability class actions in which there is no privity of contract or statutory remedy available against the manufacturer.

Background

The appellants brought a motion to certify a class action on behalf of Canadian residents, excluding residents of Quebec, who owned a 2001 to 2008 Whirlpool front-loading washing machine or who previously owned the machine.

The appellants alleged that the front-loading washing machines manufactured by the defendants Whirlpool Canada LP and Whirlpool Corporation ("Whirlpool") between 2001 and 2008 did not effectively self-clean, as the wash cycle could not reach inaccessible areas within the washing machine. The appellants claimed that this design defect caused a build-up of biofilm, and over time emitted an unpleasant odor.

The appellants advanced claims against Whirlpool for negligent design and failure to warn of the design defects in the washing machines. The plaintiffs further claimed that Whirlpool breached both an express warranty, and an implied warranty that the machines were fit for their intended purpose, and that Whirlpool's failure to disclose the defects was a misrepresentation contrary to the *Competition Act*, R.S.C. 1985, c. C-34 ("*Competition Act*"). Waiver of tort was also advanced as a cause of action.

Certification Motion

The certification motion was heard before Justice Perell of the Ontario Superior Court of Justice on July 24-26, 2012. In reasons released on August 16, 2012, Justice Perell dismissed the certification motion for failing to disclose a cause of action under s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") [2012 CarswellOnt 10102 (Ont. S.C.J.)].

In doing so, Justice Perell characterized the main issue in the motion as whether a product liability action against the manufacturer of a shoddy non-dangerous product is certifiable as a class action.

After examining claims of breach of express and implied warranty, Justice Perell found it plain and obvious that the plaintiffs did not have a contractual claim against Whirlpool, as the design defect was not encompassed by the express warranties, and there was no privity of contract to ground a claim for breach of implied warranty (because the plaintiffs did not purchase the machines directly from Whirlpool). Justice Perell also found that Whirlpool did not have a duty to disclose the alleged design defect under the *Competition Act*because the alleged design defect did not make the washing machines dangerous.

With respect to the plaintiffs' claim for negligence, Justice Perell held that policy reasons negated the existence of a duty of care with respect to non-dangerous goods and, as a result, there was no recovery for pure economic losses resulting from shoddy but non-dangerous products.

Justice Perell also dismissed the plaintiffs' waiver of tort claim, finding that there was no predicate wrongdoing upon which the plaintiffs could base the claim.

Notwithstanding his finding that the plaintiffs had failed to disclose a cause of action, Justice Perell went on to consider the remaining requirements for certification under s. 5(1) of the *CPA*. Justice Perell found that the identifiable class criterion was met, and that in the event his finding on the causes of action was incorrect, a number of questions could be certified as common issues.

Justice Perell found that a class action would have been the preferable procedure for all of the common issues he would have certified, except for the questions related to the negligence claim, which he determined were unmanageable. Justice Perell found that the plaintiffs would have been appropriate representative plaintiffs, and took no issues with the litigation plan.

In two orders, Justice Perell dismissed the certification motion and the appellants' action against Whirlpool. Appeals by the plaintiffs from both orders were consolidated into a single appeal before the Court of Appeal, which was heard on July 2, 2013.

Decision of the Court of Appeal

On October 31, 2013, the Court of Appeal released its reasons upholding Justice Perell's decision to dismiss the certification motion and the action.

The Court found that it was plain and obvious that the express warranties provided by Whirlpool, which pertain to defects in materials or workmanship, did not cover the defective design claims advanced by the appellants. The Court found that although the principle of *contra preferentum* applied, this did not assist the appellants because there was no ambiguity in the language of the warranty. The Court also noted that the claims of all three appellants on the express warranties were made more than a year after purchase. The express warranties were limited to one year from the date of purchase.

With respect to the claim of breach of implied warranty, the Court agreed with the respondents that s.15 of the *Sale of Goods Act*, R.S.O. 1990, c. S.1 ("*SGA*") did not apply because Whirlpool did not sell the machines directly to consumers and was therefore not a "seller" within the meaning of the *SGA*.

The Court found that the two-part test in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CarswellBC 1927 (S.C.C.), ["*Fraser River*"] to determine when a new exception should be made to the law of privity of contract did not assist the appellants. The Court found that to fit within that test, the appellants must have pled that the contracts between Whirlpool and its retailers included the implied condition that the appellants sought to rely on, and that Whirlpool and the retailers intended to extend the benefit of that implied warranty to class members who purchased machines from those retailers. The Court noted that even if there were an implied condition between Whirlpool and the retailers, the *SGA* claim could not succeed as it relates to class members such as the representative plaintiff Ms. Jacobs, who did not buy her washing machine from a retailer but rather acquired it from its original owner when she purchased a new house.

The Court also noted that the *Fraser River* test recognized an exception to the doctrine of privity of contract to protect a party from liability, not to permit a party to sue. In order for an additional exception to be recognized, the appellants would have to establish that allowing third party appellants to sue under the contracts between Whirlpool and the retailers would be an incremental change to the doctrine of privity.

The Court agreed with Justice Perell that, where there is no common express representation pleaded which could convert an omission into a representation by implication and there is no duty to disclose, it is plain and obvious that a claim for breach of s. 52 of the *Competition Act* cannot succeed. The Court found that to be the case here, and adopted Justice Strathy's holding in*Williams v. Canon Canada Inc.*, 2011 CarswellOnt 12407 (Ont. S.C.J.); additional reasons 2012 CarswellOnt 3711 (Ont. S.C.J.); affirmed 2012 CarswellOnt 8439 (Ont. Div. Ct.) that "the failure to disclose the alleged defect cannot be a 'representation' for the purpose of s. 52" [para. 227].

The most significant aspect of the Court's reasons arose with respect to the appellants' claim for recovery of pure economic loss from negligent design and failure to warn. In setting out the framework and policy implications of a claim for pure economic loss, the Court observed that "to date, Canadian courts have limited tort recovery for economic loss absent physical harm or damage to property" [para. 52]. The Court placed particular import on the fact that Justice La Forest in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, 1995 CarswellMan 19 (S.C.C.) ["*Winnipeg Condominium*"] expressly declined to consider whether a duty of care should be recognized when the defect is not dangerous.

The Court held that Justice Perell did not err in concluding that the appellants' claim was not one for damage to property. The Court found that the appellants initially conceded that their negligence claim was one for pure economic loss and sought to re-characterize their claim on appeal. The Court noted that damaged clothing was not claimed in the amended pleading as a head of damage, and that counsel for the appellants conceded in their submissions that many of the proposed class members may not have suffered "damage" to their clothing. The Court also found that the alleged "damage" stemmed from a temporary smell imparted on the clothing, and this constituted*de minimus* harm, insufficient to give rise to actionable negligence.

The Court agreed with the appellants that *Winnipeg Condominium* did not settle whether there is recovery in tort for economic loss caused by defective, non-dangerous consumer products. However, the Court noted that Justice Perell conducted the appropriate duty of care analysis on the basis that the issue was not yet settled, and found that, assuming a prima facie duty of care at step one of the *Anns* test, the duty should be negated for policy reasons at step two.

The Court rejected the appellants' submission that Justice Perell erred in conducting this policy analysis without a full evidentiary record. The Court noted that in certain circumstances, a policy analysis can be conducted on a pleadings motion, and cited the policy analysis by the Supreme Court in *Winnipeg Condominium* as an example. The Court also cited Justice Lax' determination at the end of the trial in , 2012 CarswellOnt 8061 ["*St. Jude*"] that a full record would not have assisted in deciding whether the plaintiffs' waiver of tort claim was a viable cause of action.

The Court concluded that "the continued uncertainty in the law in this area promotes increased litigation and litigation costs that hinder the access-to-justice function of class proceedings," pointing to as an example the $278,500 in costs ordered against the appellants on the certification motion.

The Court characterized the core of the appellants' economic loss claim as one for "diminution in value—the difference in value between the product they thought they were getting and the one they actually received" [para. 96]. According to the Court, such a claim has no reasonable prospect of success. In support of its view, the Court cited Justice La Forest's observation in *Winnipeg Condominium* that "warranties respecting quality of construction are primarily contractual in nature and cannot be easily defined or limited in tort" [para. 44]. Although the Supreme Court in *Winnipeg Condominium* found it appropriate to make an exception to recognize a tort duty to construct a building without dangerous defects independent of contract, it specifically disallowed the cost of any repairs that would merely improve the quality of the building.

The Court characterized the relief sought by the appellants as expectation damages for breach of contract, calculated as if Whirlpool had warranted that the machines would be of the same quality as those subsequently designed and manufactured by Whirlpool in 2007-2008. The Court held that "requiring the courts to analyze a myriad of consumer transactions...in tort without the framework of consumer protection legislation, to determine whether the consumer received value for his or her money, would burden an already taxed court system" [para. 105].

The Court agreed with the appellants that policy considerations which may negate the duty of care in the commercial context should not apply in the consumer context, and that a major impetus for class proceedings legislation in Ontario is to provide access to justice for consumer claims, including those for defective products. However, the Court took the view that remedies under the former *Business Practices Act*, R.S.O. 1990, c. B.18 ("*BPA*") and the *Consumer Protection Act, 2002*, S.O. 2002, C.

30 ("*Consumer Protection Act*") were available with respect to the purchase of a washing machine, including remedies for unfair practice including false, misleading, deceptive and unconscionable representations.

The Court recognized that the *Consumer Protection Act* does not provide an exception to privity of contract so as to allow consumers to recover against manufacturers for breach of implied warranties of quality or fitness for purpose, even though equivalent legislations in other jurisdictions do. The Court placed import on the fact that when the *Consumer Protection Act*was enacted, written submissions highlighting the issue of privity of contract were received by the legislature's Standing Committee on Finance and Economic Affairs, but the Committee rejected a proposed amendment that would have addressed the issue.

The Court concluded that "where, as here, the legislature considered and did not enact the doctrinal change that would provide the consumer remedy against Whirlpool that the appellants seek, there is in my view no reasonable prospect that a court would fundamentally alter the law of negligence to effectively provide such a remedy" [para. 114]. The Court reiterated its view that "this is not a case where the appellants were without a remedy. The *SGA* and *CPA* provided a statutory remedy against the seller of the machines for breach of implied warranties of quality and fitness for purpose, and the BPA and the CPA provided remedies against Whirlpool for unfair practices" [para. 115].

Having found that the plaintiffs had failed to plead a tenable cause of action, the Court held that there is no predicate wrongdoing upon which to base a plea of waiver of tort.

Commentary

The Court of Appeal's reasons in *Whirlpool* are in direct conflict with a line of cases, including Justice Lax' decision in *Griffin v. Dell Canada Inc.*, 2009 CarswellOnt 560 (Ont. S.C.J.); affirmed on reconsideration 2009 CarswellOnt 2085 (Ont. S.C.J.); leave to appeal refused 2009 CarswellOnt 4742, [2009] O.J. No. 3438 (Ont. Div. Ct.); affirmed 2010 CarswellOnt 177 (Ont. C.A.); additional reasons 2010 CarswellOnt 1192 (Ont. C.A.); leave to appeal refused 2010 CarswellOnt 3418, 2010 CarswellOnt 3417 (S.C.C.) ("*Griffin*") which was upheld by the Divisional Court that found it is not plain and obvious that a negligence claim for pure economic loss with respect to non-dangerous products could not succeed. *Griffin*, along with a similar decision in *Bondy v. Toshiba of Canada Ltd.*, 2007 CarswellOnt 1419 (Ont. S.C.J.) involved claims of negligent design with respect to defective notebook computers. Negligence claims in both actions survived the plain and obvious test, and the plaintiffs in *Griffin* were ultimately able to obtain a settlement [2011 CarswellOnt 4190]. It is interesting that despite this direct conflict, the Court of Appeal did not mention these cases, focusing instead on policy reasons for why recovery of economic losses from non-dangerous products should be foreclosed at the pleadings stage.

The Court of Appeal's reasons also reveal a fundamentally different approach to certification and consumer protection than that expressed in the Supreme Court of Canada's reasons in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 CarswellBC 3257, 2013 CarswellBC 3258 (S.C.C.) ("*Pro-Sys*"), which were released on the same day. Although the recovery of pure economic loss for negligence claims was not an issue in *Pro-Sys*, the consumer protection focus by the Supreme Court in its reasons can be contrasted with the Court of Appeal's emphasis in *Whirlpool* on reducing litigation costs by screening out novel cases at the certification stage. The Supreme Court recognized that "the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial" [*Pro-Sys*at para. 105]. In contrast, the Court of Appeal's decision appears to reflect a reluctance

(possibly influenced by the recent *St. Jude* common issues trial experience) to allow class proceedings to move forward to trial where the chances of success appear remote.

Ultimately, the Court of Appeal's decision in *Whirlpool* will have significant and negative implications for non-dangerous defective product liability class actions in Ontario. Practically speaking, individuals who purchase defective products from a retail intermediary in Ontario will have no legal recourse against the manufacturers, who, as the Supreme Court found in the price-fixing context in *Pro-Sys*, are not likely to face action from the retailers who rely on their business. This will result in the manufacturers being permitted to operate with effective impunity with respect to non-dangerous products, beyond the reach of the behavior modification objective of the *CPA*.

Although the Court of Appeal suggested that claimants have a remedy against *Whirlpool* for unfair practice under the *CPA*, it is difficult to conceive of how an omission that does not constitute a misrepresentation under the *Competition Act* could be actionable as an unfair practice under the *Consumer Protection Act*. While recent B.C. Court of Appeal decisions have certified claims under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 for non-disclosure of information as an unfair or deceptive practice, Ontario courts have generally held that s. 14(2) of the *Consumer Protection Act* requires an express representation, and that the statute does not give rise to a general duty to disclose a defect [see Issue 2013-09 2013-09 - Special Focus - “Certifying Consumers' Cause of Action for Non-Disclosure as an Unfair or Deceptive Practice in Class Actions”].

It would seem that, in the absence of a dramatic shift in the Ontario jurisprudence with respect to statutory remedies for non-disclosure of defects, consumers will have no recourse against manufacturers unless the legislature revisits the privity of contract issue in the *Consumer Protection Act*.

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