

DRAM Class Proceeding May Impact U.S. Companies Doing Business in Canada

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Breaking Developments In Business Law

In *Pro-Sys Consultants v. Infineon Technologies AG*, the British Columbia Court of Appeal recently issued a decision that may have significant implications for U.S. companies doing business in Canada. Though Canada has competition laws similar to those in the U.S., there have been few class actions following in the wake of Canadian government investigations of cartel activity. The common supposition has been that Canadian courts were less hospitable to such class actions than the U.S. courts.

Now the British Columbia Court of Appeal has issued a decision reversing the lower court and certifying a class of indirect purchasers of dynamic random access memory ("DRAM") products. In this case, the defendants are manufacturers of a semiconductor DRAM memory chip, which provides high-speed electronic storage and retrieval of information in nearly all computer, telecommunication and other electronic products in use today.

Most of the defendants have pleaded guilty in the U.S. to criminal charges arising out of an international conspiracy to fix prices of DRAM between 1999 and 2002. They have paid fines totaling \$731 million in the U.S., and a number of their executive officers have also served prison terms for criminal conduct. They are currently under investigation in Canada, while some defendants have settled class actions in the U.S.

In reversing the trial court decision and certifying the class of indirect purchasers, the British Columbia Court of Appeal noted:

- The case departs from earlier decisions, most notably the Ontario Court of Appeal decision in *Chada v. Bayer*, which had denied certification in similar circumstances.
- The case establishes a relatively low threshold for showing a methodology for establishing harm on a class-wide basis at the certification stage, even in complex indirect purchaser cases.
- The case gives broad scope for the application of the use of aggregate damages to overcome difficulties in establishing harm.

The defendants will likely seek leave to appeal to the Supreme Court of Canada. The case may foreshadow Canada's emergence as a player in the antitrust class action game.

For more information, please contact the Business Practice Group at Lane Powell:
206.223.7000 Seattle
503.778.2100 Portland
businesslaw@lanepowell.com
www.lanepowell.com

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