

THE LITIGATOR

FEBRUARY, 2008



Class action attacks “economic effect” of DuPont’s prices *Canada’s first vertical price maintenance class action certified against DuPont*

BY W. MICHAEL G. OSBORNE AND G. L. SONNY INGRAM, AFFLECK GREENE ORR LLP.

Canada’s first class action alleging vertical price maintenance contrary to the *Competition Act* was certified last summer with potentially far reaching consequences for Canadian manufacturers and distributors.

The representative plaintiff, Axiom Plastics Inc., commenced the action on behalf of a class comprising a number of plastics manufacturers that supply the automotive industry against E.I. DuPont Company Canada.

Axiom alleges that DuPont conspired with its authorized distributors to inflate artificially the price of DuPont engineering resins in order to control the distributors’ resale price. Engineering resins are a class of plastic resins used in the production of automobile parts.

The class action attacks two aspects of DuPont’s arrangements with its distributors in the automotive industry. The first is DuPont’s pricing policy. DuPont supplies engineering resins both to so-called “Tier 1 manufacturers” (manufacturers that supply automakers directly) and “Tier 2 manufacturers” (manufacturers that supply Tier 1 manufacturers) through distributors as well as directly.

DuPont supplies its engineering resins to its distributors at “list price” less an agreed discount. DuPont has some agreements with Tier 1 manufacturers to supply them and their moulders (Tier 2 suppliers that use resin to make parts) at preferential prices. For those customers, DuPont further reduces the price at which it sells to its distributor by way of a credit after sale. This is referred to as “price support”. Axiom’s theory seems to be that this distribution system has the

economic effect of forcing distributors not to sell below list price unless DuPont agrees, and that, by entering into this arrangement, DuPont has violated the *Competition Act’s* price maintenance provisions. Axiom also alleges that this system constitutes a conspiracy between DuPont and its distributors to enhance unreasonably the price of engineering resins.

The second aspect challenged in this case is DuPont’s agreements with Tier 1 manufacturers. DuPont has arrangements with some Tier 1 manufacturers that provide a rebate to the Tier 1 manufacturer if the Tier 1 manufacturer requires its moulders to use DuPont engineering resins. With one exception, these rebates are not disclosed to the moulders. These agreements specify the prices at which DuPont will sell to the Tier 1 manufacturers and their moulders. However, only one of these agreements requires the Tier 1 manufacturers to buy DuPont resins from DuPont’s distributors rather than on the grey market. Axiom alleges that these agreements constitute a conspiracy between DuPont and the Tier 1 manufacturers, and also constitute price maintenance.

In determining whether to certify Axiom’s case as a class action, Justice Hoy, of the Ontario Superior Court, had to consider, among other things, whether the pleadings disclose a cause of action. The test is the same as on a motion to strike: unless it is “plain and obvious” that the plaintiff cannot succeed, the pleading stands. Hoy J. held that it was not plain and obvious that Axiom’s claims that DuPont had violated the *Competition Act’s* price maintenance and conspiracy provisions could not succeed.

Hoy J. found that Axiom's proposed class definition of all purchasers in Canada of DuPont engineering resins was overly broad, and narrowed it to include only purchasers required by a customer to use only engineering resins manufactured by DuPont.

Hoy J. only certified as common the issue of whether DuPont's pricing policy constitutes price maintenance or a conspiracy, but only as regards the class definition as narrowed. She held that whether DuPont's agreements with Tier 1 manufacturers amount to conspiracy and price maintenance are not common issues because of differences between the agreements.

Proof of damages is required for a private action under the *Competition Act*. Hoy J. found loss, as a component of liability, to be a common issue. Based on limited expert evidence, Hoy J. held there was "some basis in fact" for finding that loss was suffered as a result of the alleged vertical price-fixing and conspiracy in the case of persons required by their customers to buy DuPont resins.

In her reasons, Justice Hoy noted that although DuPont can raise the defence that class members passed on their loss to another purchaser, the possibility that passing-on might prevail at trial does not preclude "some basis in fact" for finding that class members suffered loss at the certification stage.

Hoy J.'s finding of "some basis in fact" that loss was suffered was made notwithstanding Axiom's concession that at times, DuPont's distributors' prices were actually competitive with the prices at which Axiom and other manufacturers could acquire DuPont resins on the grey market.

In spite of Axiom's relative size and clout in the automotive industry, Justice Hoy found that the promotion of judicial economy and access to justice favoured the certification of Axiom's action against DuPont.

Justice Hoy highlighted that the narrowed class means that smaller manufacturers, many of whom have been in dire financial straits and otherwise unable to proceed with the litigation, will make up the majority of the class

This case has potentially far reaching effects as it represents an attack on a pricing model that is common in many industries. However, Axiom's attack on DuPont's distribution system is based on its "economic effect". Section 61 of the *Competition Act* makes it an offence to attempt "by agreement, threat, promise or any like means" to influence upward, or discourage the reduction of, the price at which another person supplies a product. It is extremely unlikely that "economic effect" could fit within the ambit of "agreement, threat, promise or any like means". Every price at which one firm sells to another has the economic effect of forcing the buyer to resell above that price, unless the buyer is prepared to suffer a loss. DuPont's practice of pricing by way of a discount from a notional list price is no different in this regard.

In the end, it remains to be seen whether in this case, like in so many class actions, certification was the real battleground. Interestingly, both sides have sought leave to appeal from the certification decision.



For more information contact:

W. Michael G. Osborne, Affleck Greene Orr LLP

Tel: 416-360-5919

Email: mosborne@agolaw.com

G.L. Sonny Ingram, Affleck Greene Orr LLP

Tel: 416-360-00668

Email: singram@agolaw.com