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Class action and competition law: Toyota wins in the Court of Appeal

For the first time, the Court of Appeal has rendered a decision on a class action instituted under the Competition Act. A unanimous decision in favour of our client, Toyota Canada Inc. and 37 of its dealers in the Montreal region, was handed down on February 26, 2008.

IT IS NOT ENOUGH TO ESTABLISH THE APPEARANCE OF AN INFRINGEMENT OF THE COMPETITION ACT TO BE AUTHORIZED TO INSTITUTE A CLASS ACTION

The class action was instituted by the Petitioner, André Harmegnies, who claimed that the "Access Toyota" program set up by Toyota Canada Inc. breached the *Competition Act* (the "Act"). More specifically, he alleged that the program breached the Act in that Toyota and its dealers unduly restricted competition and artificially inflated the price of vehicles. The Court of Appeal unanimously confirmed the judgment rendered by the Honourable Justice Hélène Poulin of the Quebec Superior Court on February 12, 2007, who had refused to authorize the class action.

The Court of Appeal began by pointing out that, at the authorization stage, the judge has a certain discretionary power in assessing the conditions necessary to bring a class action. It also held that it is well established that the judge's discretion should be respected and the Court of Appeal will only intervene if that discretion is manifestly unfounded or the analysis underlying it contains an error of law.

Furthermore, with respect to the appearance of right, the Court of Appeal was of the opinion that the Petitioner did not show that the 37,000 members of the group had suffered damages. On the contrary, the allegations, which had to be assumed to be true, were only based on hearsay and vague and imprecise impressions. Accordingly, the Petitioner was unable to demonstrate that he or the members of the group had suffered a loss. The Court of Appeal held that it is not sufficient to allege that there is automatically damages because of an alleged breach of the law.

The Court of Appeal also held that a class action is not the appropriate way to punish a person who breaches the law, but rather, it is a vehicle which can be used to compensate a group of people who have suffered real losses in common.

With respect to the issue of common questions, the Court of Appeal confirmed that, even if we accept that there was a loss, [Translation] "The loss suffered by certain members of the group is subject to considerable individual variations and subjective unknown elements". Firstly, the Court notes that the fact that the purchase price could not be negotiated may constitute a loss for those who like to bargain but, on the contrary, it could be an advantage for those who do not like to bargain, not to mention the difficulty of putting a dollar amount on the damage resulting from being deprived of the possibility of negotiating the price.

Secondly, the exact value of each vehicle purchased or leased also depends on factors which are essentially individual and specific (inclusion in the price of accessories, options or after-sale service as well as any exchange value of the automobile, the transaction date, the date new models came out and old ones were liquidated, etc.).

Finally, the Court held that it is essential to demonstrate the collective nature of the damages suffered and a class action is not appropriate where it would give rise at the hearing on the merits to a multitude of mini-trials due to numerous subjective factors.

The Court added that, [Translation] "In this case, the judge deciding on the merits would have to conduct a detailed review of a multitude of individual factors and take into account a series of varied circumstances before being able to determine whether one of the members suffered a loss and, where applicable, the scope thereof."

In summary, this case is especially important as it provides a warning to any person wishing to institute a class action in competition law in that it is not sufficient to establish an appearance of an alleged infringement of the *Competition Act*. It must also be shown *prima facie* that the person and those he intends to represent also suffered a loss as a result of said infringement.

In this case, **Guy Lemay** and **Jean Saint-Onge** were responsible of the file, assisted by **Anne-Marie Lévesque**.

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