CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
December 2013 (1)

Green Light For Indirect Purchaser Claims in Canada

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I. INTRODUCTION

On October 31, 2013, the Supreme Court of Canada (the "SCC") issued a trilogy of decisions holding that indirect purchasers (such as consumers and retailers) are entitled to assert claims for damages and restitution in class actions relying upon alleged competition law offenses. The SCC also set a relatively low bar for certification of competition class action claims. With this trilogy of decisions, the SCC resolved disagreements between various provincial courts of appeal over these issues.[2]

Although the SCC's decisions have been interpreted by many as being plaintiff-friendly, it is important to note that the SCC also confirmed that certification judges are not mere "rubber stamps" and must apply "more than symbolic scrutiny" to the sufficiency of class action claims. The SCC's decisions can thus be interpreted as merely shifting the day of reckoning for class plaintiffs from the certification hearing to a later date, whether that be a decertification hearing or the trial of the common issues on the merits.

Also noteworthy is that the SCC expressly declined to follow the lead of the U.S. Supreme Court in *Illinois Brick Co. v. Illinois*, a decision which denied the availability of indirect purchaser claims under U.S. federal law.[3] The SCC also adopted a more lenient approach than U.S. courts to the level of scrutiny that should be applied in evaluating competition class action claims at the certification stage. Although the gap between Canada and the United States on these points should not be exaggerated (particularly given that indirect purchaser claims are permitted under certain state laws), it is nonetheless important for counsel involved in cross-border claims to recognize that there is now an increased prospect for Canadian courts to certify class actions that may not be permitted to proceed in the United States.

II. PRIVATE ACTIONS UNDER CANADIAN COMPETITION LAW

Section 36 of the *Competition Act* (the "Act") provides a statutory right of civil action with respect to losses suffered as a result of criminal conduct under the Act, such as conduct covered by the Act's cartel offenses. Specifically, a party suing under section 36 of the Act is entitled to claim "an amount equal to the loss or damage proved to have been suffered," as well as the full cost of any investigation initiated in connection with the matter.

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[2] *Infineon Technologies AG., et al. v. Option Consommateurs, et al.*, [2013 SCC 59 [*Infineon*]; *Pro-Sys Consultants Ltd., et al. v. Microsoft Corporation, et al.*, 2013 SCC 57 [*Pro-Sys*]; and *Sun-Rype Products Ltd., et al. v. Archer Daniels Midland Company, et al.*, 2013 SCC 58 [*Sun-Rype*].

[3] 431 U.S. 720 (1977) *[Illinois Brick]*.

Section 36 claims require that plaintiffs prove: (i) all of the elements of the relevant substantive offense; and (ii) that they have suffered damages as a result of the conduct proven in (i). Claims under section 36 must be commenced within two years of the day on which the conduct was engaged in, or within two years of the day on which criminal proceedings were finally disposed of, whichever is later.

Although a private action under section 36 can be launched by a plaintiff acting in an individual capacity, most section 36 claims are now brought as class proceedings by a representative plaintiff on behalf of a plaintiffs. Recent competition class actions in Canada have involved products such as chocolate confectionery, gasoline, and various automotive parts.

III. INDIRECT PURCHASER CLAIMS

Many of the competition class actions in Canada have been brought on behalf of "indirect purchasers," either alone or in conjunction with claims on behalf of "direct purchasers." "Indirect purchasers" are plaintiffs who are one or more steps removed from the defendants in the chain of distribution, such as retailers and consumers. By contrast, "direct purchasers" are plaintiffs who purchased the product in question directly from those suppliers alleged to have engaged in the anticompetitive conduct.

Although easily stated, the causal connection between the alleged illegal conduct and the alleged damages or restitution in indirect purchaser cases is subject to considerable evidentiary uncertainty, in particular as to how a court can be certain that any initial price increase was actually passed along the supply chain and incorporated in a higher price paid by consumers for the end product.

That is why, at least initially, Canadian courts took a skeptical view of indirect purchaser claims, imposing a fairly rigorous standard for certification. The height of this skepticism was evident in the British Columbia Court of Appeal brought decisions in *Pro-Sys* and *Sun-Rype*, *supra*, where the Court struck down proposed class actions on behalf of indirect purchasers on the grounds that indirect purchasers have no cause of action maintainable in Canadian law. In *Pro-Sys*, the proposed class was composed exclusively of indirect purchasers, namely persons resident in British Columbia who indirectly acquired Microsoft operating systems, such as by purchasing new computers pre-installed with Microsoft software. The plaintiffs alleged that Microsoft had engaged in anticompetitive conduct, which resulted in overcharges that were passed through to consumers by computer manufacturers. In *Sun-Rype*, a class action was brought on behalf of direct and indirect purchasers alleging that they had been harmed by a price-fixing conspiracy involving the supply of high fructose corn syrup.

Other courts, however, including the Courts of Appeal in the provinces of Ontario and Quebec, not only accepted the availability of indirect purchaser claims under Canadian law but also favored a liberal standard for certification. This was the approach adopted, for example, by the Quebec Court of Appeal in the *Infineon* case, *supra*, which involved a proposed class action based on allegations of price-fixing with respect to the supply of dynamic random-access memory ("DRAM") chips. The Quebec Court of Appeal held, among other things, that (a) precluding an action by indirect purchasers could lead to the unjust enrichment of direct purchasers and (b) that it would be wrong to require plaintiffs at the certification stage to advance a sophisticated methodology of proof of loss.

The SCC accepted leave to appeal from the provincial Court of Appeal decisions in *Pro-Sys*/*Sun-Rype* and *Infineon* with a view to resolving the disagreement over indirect purchaser actions at the provincial level. In the end, the SCC not only confirmed the right of indirect purchaser plaintiffs to assert a cause of action in class actions involving alleged competition law offenses, but also held that judges should not apply a very strict standard for assessing evidence adduced at the certification stage of proceedings.

IV. THE SUPREME COURT OF CANADA'S TRILOGY

A. Issue One: Is There a Cause of Action for Indirect Purchasers in Canada?

Under Canadian law, a defendant in a price-fixing civil action is not permitted to defend against a claim by a direct purchaser by arguing that the direct purchaser simply "passed on" any alleged overcharge and was therefore not harmed. The issue before the SCC was whether the absence of a "passing on" defense in Canadian law also means that indirect purchasers are barred from asserting a positive claim for damages on the basis that an illegal overcharge had been "passed on" to them by direct purchasers through the supply chain.

The British Columbia Court of Appeal held in *Pro-Sys/Sun-Rype* that indirect purchasers are not entitled to rely on the "passing on" of an alleged overcharge to maintain a cause of action. This view was consistent with the seminal decision of the U.S. Supreme Court in *Illinois Brick*.

The SCC, however, did not agree. Rather, it held that "despite the rejection of the passing-on defence, the arguments advanced … as to why there should be a corresponding rejection of the offensive use of passing on are not persuasive."

Among other things, the SCC dismissed the argument that allowing indirect purchasers to bring claims raises the prospect of "double" or "multiple" recovery, i.e., that defendants could be liable to direct purchasers for the total amount of the overcharge they paid and then could be liable again to indirect purchasers at various levels for whatever amount of the overcharge may have been passed-on to them. Rejecting these concerns, the SCC held that trial courts are able to guard against the prospect of double or multiple recovery; for example, by denying or modifying damages awards to avoid overcompensation. The SCC also held that allowing indirect purchaser claims in Canada is consistent with the remedial objectives of restitution law and the deterrence objectives of the Act.

Interestingly, the SCC expressly acknowledged that this approach differs from that of the U.S. Supreme Court in *Illinois Brick*. However, the SCC observed in this regard that (a) many U.S. states permit indirect purchaser claims; (b) there exists a significant body of academic authority in favor of overturning the decision in *Illinois Brick*; and (c) there have been calls for legislative amendments to overturn *Illinois Brick* at the U.S. federal level.

B. Issue Two: What is the Scope of a Court's "Gatekeeper" Function at the Certification Stage of Class Actions?

The second major issue considered by the SCC was what degree of scrutiny should courts apply to proposed competition class action claims at the certification stage, and, in particular, to the proposed methodology for establishing indirect purchasers' damages on a class-wide basis.

The SCC reaffirmed the importance of the "gatekeeper" function performed by certification judges, emphasizing that certification must serve as a "meaningful screening device."

At the same time, the SCC was not prepared to impose an "overly onerous burden" on plaintiffs at the certification stage. With respect to the specific issue of damages methodologies for indirect purchaser claims, the SCC held that certification judges in common law provinces need only be satisfied that there is "some basis in fact" to conclude that there is a "relative prospect" of establishing loss on a class-wide basis at trial. While this standard involves more than a "superficial" or "symbolic" assessment of the sufficiency of the indirect purchasers' proposed methodology, it does not require the certification judge to resolve conflicting facts and evidence nor to engage in an extensive assessment of the potential complexities and challenges that indirect purchasers may face in proving their case at trial. This is a more liberal standard than is typically used in U.S. federal class actions, where the approach is to apply more rigorous scrutiny to proposed claims at the certification stage.

The SCC took a similar view in the *Infineon* case with respect to indirect purchaser claims under the relevant legislation in the province of Quebec (the Quebec *Civil Code*). The SCC held that while the court's role is to be a "filter" at the authorization stage, cases should only be prohibited from proceeding if based on "untenable claims." Stated otherwise, plaintiffs are only obliged to satisfy the court at the authorization stage in Quebec that they have an "arguable" case in light of the applicable facts and law.

Underscoring its view that certification judges are not mere "rubber stamps," the SCC declined to certify the proposed class in the *Sun-Rype* case because there was no identifiable class of at least two persons that suffered a loss. The proposed class consisted of consumers who purchased products containing high-fructose corn syrup ("HFCS") between 1988 and 1995. However, the SCC found that the plaintiffs had failed to provide evidence demonstrating that it was possible for prospective class members to determine whether they had actually consumed products containing HFCS during the relevant period.

C. Other Issues

The SCC also dealt with two other issues that are interesting from an international perspective:

First, the SCC held that plaintiffs can rely on evidence of investigations, pleas, fines, and litigation in jurisdictions outside of Canada to help establish that their pleadings disclose a cause of action in Canada. The SCC found that it was not unreasonable to infer that anticompetitive conduct outside of Canada involving large multinational corporations and international markets could also affect consumers in Canada.

Second, the SCC rejected the argument that a section 36 claim does not arise where the alleged conspiracy involves foreign defendants entering into agreements outside of Canada to fix the prices of products sold to foreign direct purchasers. The SCC held that there could be sufficient jurisdictional nexus by virtue of the fact that sales of the products were made in Canada to Canadian customers pursuant to contracts entered into in Canada even if the foreign defendants were not parties to those contracts.

V. CONCLUSION

In its trilogy of decisions, it does not appear that the SCC sympathized with the view that the complexities involved in indirect purchaser claims justify either (a) denying indirect

purchasers a right of action, or (b) subjecting these claims to "overly onerous" scrutiny at the certification stage.

However, it would be going too far to label the SCC's decisions as unreservedly "pro-plaintiff" in nature and result. As noted above, the SCC re-affirmed the "gatekeeper" or "filtering" role of certification judges and even rejected a proposed class in the *Sun-Rype* case because the plaintiffs could not meet the requisite certification threshold.

Instead, it would be more accurate to characterize the SCC's decisions as being "pro-trial judge" more than anything else. The SCC clearly recognized the difficulties involved in dealing with indirect purchaser claims, but seemed confident that these difficulties could be managed at trial. At no point, however, do the SCC decisions absolve competition class action plaintiffs (indirect or otherwise) of the ultimate burden of proving their claims at trial, including the potentially vexing burden of proving cognizable class-wide losses.