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Competition class actions in Canada: The Supreme Court resets the ground rules

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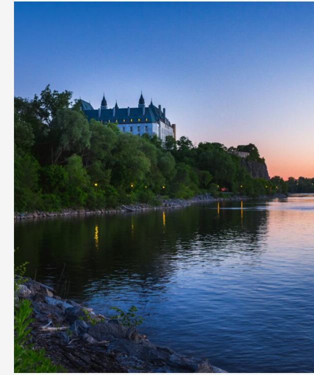

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In a landmark decision that was released this morning, the Supreme Court has revisited and reset the ground rules governing the availability of collective relief for consumers in Canada, particularly in respect of class actions that seek damages for anti-competitive harm. In its decision involving a twin set of appeals in *Pioneer Corp. v Godfrey*, the Supreme Court has provided critical new guidance and resolved appellate conflict on four fundamental issues relating to class certification and the scope of relief under the *Competition Act*, including the evidentiary standard of class certification, the ability of umbrella purchasers to assert a claim for damages, the ability of class members to pursue parallel claims in tort or restitution that fall outside the statutory remedy under the *Competition Act* (the *Act*) and finally, the operation of the statutory limitation period under the *Act.* Given the large number of pending class actions that have been filed in Canada on the heels of enforcement action by the Competition Bureau and other international competition regulators, the Court's decisions are likely to have a significant impact on the availability of collective relief for Canadian consumers. The Court's decision may also impact the certification of other types of class actions in Canada, particularly in circumstances where class plaintiffs are required to prove loss as a component of liability.

In summary, the Court dismissed the two appeals, and upheld the certification of a class action in British Columbia that included direct, indirect and umbrella purchasers of optical disk drives and products containing such drives (an optical disk drive is a form of storage media contained in a range of consumer and business electronic products, or an "ODD"). In an 8-1 ruling authored by Justice Brown, the majority Court held that the class plaintiffs had satisfied the evidentiary threshold for certification of an indirect purchaser class by adducing an expert methodology that could demonstrate the existence of some loss to some purchasers at the "indirect purchaser level" – a standard far lower relative to the standard of certification that exists in other areas of law in Canada or in U.S. courts. In addition, the Court found that umbrella purchasers had a right to assert a claim for anti-competitive harm under the *Act*, and that class members could assert parallel claims in tort and restitution for violations of the *Act* – even in respect of damages that went beyond the limits of the statutory remedy under the *Act.* Finally, the Court held that the special two-year limitation period under the *Competition Act* was subject to a principle of discoverability and declined to strike a claim against a defendant that had been commenced outside this window.

On the face of its decision, the Court appears to have reinterpreted some parts of its earlier ruling in *Microsoft* and relaxed the rules for pursuing collective relief for anti-competitive harm in Canada, particularly relative to the prevailing rules that exist in the United States, the

UK and Europe. The Court also appears to have increased the potential exposure to defendants, by opening the door to larger classes and additional claims for damages. Indeed, in a spirited dissent, Justice Côté questioned whether competition class actions were now being treated differently from other class actions, and expressed concern that the majority had upset "the balance struck by Parliament in Canada's competition law."

However, the Court did not overrule *Microsoft*, and did not disturb the Court's prior guidance that the certification stage of a class action must serve as a "meaningful screening device." Moreover, the majority of the Court reiterated that there were no shortcuts to proving class-wide liability at trial – namely, the class plaintiff must demonstrate that each class member has actually suffered a loss as an essential component of establishing liability to the class at trial. The Court also clarified that a class plaintiff may only seek an award of aggregate damages at trial once liability has been proven on a class-wide basis. For the purpose of class certification, the class plaintiff still bears the onus of proving all the requirements of the *Class Proceedings Act*, and the class plaintiff must still adduce a plausible and workable expert methodology as part of that onus that addresses the distribution and pricing dynamics of a particular product . But the Court's decision appears to create new risks and new uncertainties for defendants in competition and consumer class actions. The significance and meaning of the rulings will no doubt be examined and debated among the class action bar and the courts in Canada in the years to come.

Brief background

Since 1976, consumers in Canada have had a statutory remedy under federal law for pursuing damages arising from anti-competitive harm. More specifically, under Section 36 of the *Act*, any person that has suffered loss or harm as a result of criminal anti-competitive conduct under the *Act* has a right to pursue an action in single damages, as well as seek recovery of certain investigation costs. The right is subject to some important limits, including a limit to pursuing compensatory damages (i.e., no punitive damages or injunctive relief) and a special limitation period that generally precludes claims brought more than two years after the conduct in question.

Over time, Section 36 of the *Act* has emerged as a powerful remedy for consumers and an important deterrent of anti-competitive conduct. Indeed, following the adoption of class proceedings legislation in Canada in the 1990s, class plaintiffs have filed numerous class actions across Canada that have sought aggregate damages under Section 36 on behalf of a national class of direct and indirect purchasers who have been harmed by anti-competitive conduct. According to the National Class Action Database that was established by the Canadian Bar Association in 2014, 193 class actions have been filed across Canada that assert claims relating to or otherwise referencing the *Act*. In 2018 alone, 36 such class actions were filed.

To establish a claim under Section 36, a plaintiff must demonstrate that he or she has suffered an actual loss as a result of the defendant's conduct (i.e., as an essential component of establishing liability). However, given the complexity of many product distribution chains particularly for input or intermediary products, class plaintiffs typically face a significant evidentiary challenge in seeking to demonstrate that the core issues of "loss" and "liability" can be tried on a class-wide basis across a diverse class of direct and indirect purchasers. In short, in a distribution chain involving various intermediaries and resellers in different geographic markets, it is difficult to establish a methodology that can assess the incidence of a "pass-through" of an overcharge using common evidence.

Nonetheless, over the years, the courts in Ontario, Québec and B.C. have certified a number of antitrust class actions in Canada on a contested basis. In these decisions, the courts have certified claims in respect of both vertical and horizontal anti-competitive conduct, and the

courts have certified classes consisting of both direct and indirect purchasers, often within the same consolidated class. In many instances, plaintiffs have filed these class actions on the heels of the announcement of a domestic investigation by the Competition Bureau or an international investigation by a foreign competition regulator. Indeed, in many cases, specialized plaintiff firms in Canada have filed class proceedings in Canada that mirror the claims that have been asserted in parallel class proceedings in the United States.

The Supreme Court's trilogy in Microsoft, Sun-Rype and Infineon

In 2013, the Supreme Court released an important trilogy of decisions that addressed a number of key questions relating to the test for the certification of competition class actions in Canada.[1] In the lead case of that trilogy (the *Microsoft* case), the Court recognized that indirect purchasers have a cause of action under the *Act*. However, the Court ruled that class plaintiffs face a significant evidentiary onus to obtain class certification. In particular, the Court held that class plaintiffs will generally be expected to adduce an expert methodology to address whether the question of loss and pass-through to indirect purchasers can be determined on a class-wide basis. In speaking for a unanimous Court, Justice Rothstein held that "the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement." In other words, "the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class ..." In indirect purchaser actions, Justice Rothstein further noted that the "methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain."

However, in the subsequent case law, a number of courts adopted divergent interpretations of *Microsoft.* In some cases, the courts interpreted *Microsoft* to mean that the plaintiff's methodology only needed to show that some harm had been passed down to the "indirect purchaser level" (i.e., some purchasers at that level in the distribution chain had been harmed). In other cases, the courts interpreted *Microsoft* to mean that the plaintiff's methodology only needed to be able to estimate an average overcharge that had been passed down to the "indirect purchaser level" (again, that some purchasers had been harmed, on an average basis). But both of those interpretations appeared to be fundamentally at odds with other parts of *Microsoft* and the trilogy, which strongly suggested that class plaintiffs must adduce a methodology that can determine the core issues of loss and liability on a class-wide basis vis-à-vis *all class members*. The methodology may not require proof of harm to all class members – but it should at least advance a class-wide methodology for distinguishing between class members who had suffered harm and those who had not. It has always been a core principle of Canada's class action jurisprudence that class proceeding legislation is only a procedural vehicle and does not change substantive law. But if class plaintiffs can seek to certify a class action and establish liability in a common issues trial by demonstrating only that *some purchasers at some levels* had been harmed, it could result in a perverse outcome whereby class members/purchasers could obtain relief in a class action that they could not otherwise establish in their own individual actions.

There were other unsettled issues that arose in the ensuing case law. For instance, following *Microsoft*, a number of class plaintiffs started including claims of umbrella purchasers – namely, purchasers who purchased the disputed product from other manufacturers/suppliers who were not participants in the anti-competitive conduct, on the theory that the anti-competitive conduct raised prices across the entire market. In addition, for many years, class plaintiffs had asserted tort claims in conjunction with statutory claims under the *Act*, often for the tactical purpose of seeking punitive damages and avoiding the special limitation period in the *Act*. However, defendants legitimately questioned whether

such claims were circumventing the provisions of the *Act.* In particular, there were strong indications that in 1976, Parliament had adopted the statutory remedy under Section 36 as a "complete code" for private relief arising from anti-competitive conduct. If a plaintiff could simply assert tort claims for punitive damages outside the statutory limitation period based on a violation of the *Act*, the plaintiff would appear to be defeating Parliament's intention in establishing a balanced and limited remedy under the *Act*.

The lower court rulings in Godfrey

These issues came to a head in two appeals arising from a class action in B.C. relating to optical disc drives and productions continuing such drives (again, "ODDs"). In that case, the class plaintiffs had alleged that a number of foreign defendants had participated in a global, criminal price-fixing cartel that raised the price British Columbians paid for ODDs and products containing ODDs. The proposed class was a "hybrid" class, in that it involved direct, indirect and umbrella purchasers. The representative plaintiff alleged five causes of action on behalf of the class: a breach of the *Competition Act*; the tort of civil conspiracy; the unlawful means tort; unjust enrichment and waiver of tort.

At first instance, the B.C. Supreme Court certified the class action and held that: (i) it is not necessary for the plaintiff's methodology for determining "commonality of harm" to establish that each and every class member suffered harm – rather, the methodology must offer a reasonable prospect of establishing that overcharges have been passed through to the "indirect purchaser level"; (ii) an alleged breach of the *Competition Act* could supply the "unlawful" element of various civil causes of action, such as the plaintiff's claims in civil conspiracy, the unlawful means tort, unjust enrichment, and waiver of tort; and, (iii) the umbrella purchasers had a cause of action against the defendants under the *Competition Act*; and (iv) the claim against certain defendants was not bound to fail even though it was commenced after the expiry of the two-year limitation period in the *Act.*

On appeal, the B.C. Court of Appeal upheld the B.C. Supreme Court's decision to certify the class action and dismissed the defendants' appeal. In doing so, the Court of Appeal generally affirmed each of the lower court's findings regarding: (i) the methodology necessary to establish "commonality of harm"; (ii) the ability of a plaintiff to assert civil causes of action based on an alleged breach of the *Competition Act*; (iii) the availability of umbrella purchaser claims; and (iv) the application of the limitation period in Section 36(4) of the *Competition Act*.

The Supreme Court's ruling in *Godfrey*

In speaking for an 8-1 majority of the Court, Justice Brown addressed each of these questions in his decision. While the majority was addressing the outcome of two appeals, it released a single consolidated decision.

The evidentiary standard of class certification

In the majority decision, Justice Brown accepted the plaintiff's interpretation of the *Microsoft* case on the evidentiary standard of class certification. More specifically, the majority found that a plaintiff must adduce a plausible and workable methodology that can assess whether the overcharge impacted the "indirect purchaser level." As the majority put it, the certification judge must be satisfied that "the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers – that is claimants at the "purchaser *level.*"" For indirect purchasers, "this would involve demonstrating that the direct purchasers passed on the overcharge." While Justice Brown appeared to accept such a finding would not establish class-wide harm for the purposes of determining liability at trial, he reasoned that the

proposed common issue relating to loss would still "advance the litigation."

In her dissent, Justice Côté directly challenged this logic, and questioned why competition class actions were being treated differently from other class actions at the certification stage. She noted bluntly that a determination at the common issues trial of whether loss reached the indirect purchaser level "is of no assistance in resolving the question of whether the Defendants are actually liable to any or all of the indirect purchasers." While a determination of the common issue might result in the complete rejection of the class member's claim at the common issues trial (i.e., if the court finds that no harm reached the indirect purchaser level), it would not resolve any other issues. She questioned why any representative plaintiff would seek to certify such a common issue, if its determination would result "in failure for all indirect purchasers." As such, since a determination of the common issue at trial would not actually determine liability to the class, Justice Côté concluded "it would be a waste of public and private resources" to litigate such an issue in a class proceeding.

The Competition Act is not a complete code

In speaking for the majority, Justice Brown found that Section 36 of the *Competition Act* is not a "comprehensive and exclusive code" for civil claims seeking compensation for anti-competitive conduct. As a result, he held that it was open to the class plaintiff in *Godfrey* to assert parallel claims in tort and in restitution for damages that relied on a violation of the Act. In particular, he held that the class plaintiff could assert a claim for civil conspiracy that relied on a violation of the conspiracy provisions of the *Act* to support the "unlawful means" component of the tort. In her dissent, Justice Côté reached a similar conclusion based on her reading of Section 62 of the *Act* (a general provision that states that nothing in that part of the Act shall be construed as depriving a person of "any civil right of action").

The class can include umbrella purchases

On behalf of the majority, Justice Brown also concluded that the class plaintiff could assert claims on behalf of umbrella purchasers. In particular, the Court found that the language of Section 36 ("any person") was broad enough to include claims by purchasers that had made their purchases with non-defendants. He concluded that such an interpretation advanced the deterrence functions of the *Act*, and he rejected any concern relating to the risk of indeterminate liability. In her dissent, Justice Côté rejected this conclusion, since the defendants in the case should not be liable for the pricing decisions of other non-parties under principles of remoteness and indeterminacy.

Limitation period under the Competition Act

Justice Brown further found that the discoverability principle does apply to claims under the statutory remedy in Section 36 of the *Act*. Even though the statutory language under Section 36 made no reference to discoverability, he concluded that it remained open for a class plaintiff to assert claims under the *Act* in respect of historical conduct, provided that the class plaintiff could establish that they had only reasonably discovered the conduct within the two-year window. In other words, in this reasoning, class plaintiffs could assert claims in respect of historical conspiracies and other anti-competitive conduct going back decades, provided that they had a plausible basis to assert that they had only recently discovered the conduct within the past two years. In her dissent, Justice Côté again rejected this conclusion, given the clear statutory language adopted by Parliament

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Aggregate damages

Finally, Justice Brown also addressed the issue of aggregate damages. At certification, the certification judge had certified a common issue relating to aggregate damages, and had stated that the aggregate damages provisions in the *Act* allow for an aggregate award even when some class members have suffered no financial loss. While no party appealed the certification of that common issue, Justice Brown agreed with the submission of the defendants that the certification judge's statement was incorrect, and inconsistent with the Court's prior jurisprudence. More specifically, Justice Brown confirmed that where loss is an element of the cause of action (as it is with a claim for damages under Section 36), aggregate damages cannot be used to distribute damages to class members who did not suffer a loss. Rather, in order for individual class members to participate in any award of damages, the trial judge must be satisfied that each class member has actually suffered a loss. Thus, to use the aggregate damages provision, the trial judge must be satisfied following the common issues trial either that *all* class members suffered a loss, or that he or she can distinguish those who have suffered loss from those who have not.

In discussing the issue of aggregate damages, Justice Brown reiterated that class proceedings legislation is purely procedural, and does nothing to diminish the class plaintiff's significant burden at the common issues trial. While the class plaintiff's methodology might be sufficient to certify a common issue at the certification stage, Justice Brown noted that it may not be sufficient to establish the defendant's liability to all class members at trial. Justice Brown further confirmed that in order for individual class members to be entitled to a remedy at trial, "the trial judge must be satisfied that each has *actually suffered* a loss where proof of loss is essential to a finding of liability" (emphasis in decision). In other words, the majority confirmed that the certification of certain common issues at the certification stage does nothing to diminish the class plaintiff's heavy onus under existing law in establishing liability to the class at trial.

Conclusion

The Court's decision provides important direction on four key issues relating to class certification in competition class actions, increasing the potential exposure for defendants by opening the door to larger classes and additional claims for damage. Given the prevalence of cases of this nature, the implications of the rulings will no doubt be felt in the years to come.

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[1] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477; *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] 3 SCR 545.