Indirect purchaser claims

The Supreme Court of Canada has broken new ground in a trio of cases

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In its first decisions in over 20 years addressing private competition law claims, the Supreme Court of Canada has found 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 offences. These highly anticipated decisions may have significant implications for competition policy and class certification in Canada. The decisions are also likely to result in an increase in private competition litigation, providing a boost to class action lawyers, while placing a heavy burden on trial judges to grapple with complex evidentiary issues that arise in the context of such claims.

On 31 October 2013, the Supreme Court issued three judgments relating to competition class action cases: *Infineon Technologies AG v Option Consommateurs* 2013 SCC 59 (*Infineon*); *Pro-Sys Consultants Ltd v Microsoft Corporation* 2013 SCC 57 (*Pro-Sys*); and *Sun-Rype Products Ltd v Archer Daniels Midland Company* 2013 SCC 58 (*Sun-Rype*). The appeals of these decisions were heard together by the Supreme Court over a year ago on 19 October 2012.

Private competition litigation, particularly class action litigation, is of growing importance in Canada, and many of the proposed competition class actions in this jurisdiction have been brought on behalf of "indirect purchasers". "Direct purchasers" are plaintiffs who purchased the product in question directly from those suppliers alleged to have engaged in the anticompetitive conduct. In contrast, "indirect purchasers" are plaintiffs who are one or more steps removed from the defendants in the chain of distribution, such as retailers and consumers.

Indirect purchaser claims

Much litigation has revolved around the issue of whether indirect purchasers are entitled to recover damages or other monetary relief in competition class actions. Like direct purchasers of products, indirect purchasers in Canada have pursued various causes of action and remedies to recover damages and/or restitution based on allegations of illegal price-fixing or other anticompetitive conduct.

For example, in the *Pro-Sys* case, 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 preinstalled with Microsoft software. The plaintiffs alleged that Microsoft had engaged in anticompetitive conduct, which resulted in overcharges that were passed through by computer manufacturers to consumers.

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 uncertainties – in particular, as to how the 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. Some supply chains have numerous different participants operating in distinct markets. Simply put, at some points in the supply chain it may be possible to pass on some or all of the price increase to the next participant. At other points, the price increase may have to be absorbed by the distributor.

Recognising this economic reality raises a number of questions, such as which participants along the supply chain have a cause of action and how the court can determine with any accuracy the amount of any price increase that was ultimately passed on to a consumer or other end user. The Supreme Court acknowledged that such evidentiary difficulties may exist, but held that they are better dealt with at trial and are not a bar to certification.

Conflicting provincial decisions

In recent years, the attitude of Canadian courts towards indirect purchaser actions has swung back and forth as if on a pendulum.

In 2009, two plaintiff-friendly decisions from British Columbia and Ontario courts allowed indirect purchaser claims to proceed (see *Irving Paper Ltd v Atofina Chemicals Inc* [2009] OJ No 4021 (Sup Ct) (QL), leave to appeal to Div Ct refused, 2010 ONSC 2705 (Div Ct); *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2009] BCJ No 2239 (CA) (QL), rev'g [2008] BCJ No 831 (SC) (QL)).

However, in 2011, that attitude moved in a decidedly defendant-friendly direction as a result of the British Columbia Court of Appeal's decisions in *Pro-Sys* and *Sun-Rype*. In those cases, the BC Court of Appeal struck out proposed class actions on behalf of indirect purchasers on the ground that indirect purchasers have no cause of action maintainable in law. These decisions brought Canadian law into line with US federal law as reflected in the seminal decision of the US Supreme Court in *Illinois Brick Co v Illinois* 431 US 720 (1977) (*Illinois Brick*). In that case, the US Supreme Court found that because there was no defence of passing-on to a charge of price-fixing, indirect purchasers could not assert a positive claim for damages on the basis that an illegal overcharge had been passed on to them by direct purchasers and on down through the supply chain.

These are important issues given that a significant number of Canadian competition law class actions have been instituted on behalf of plaintiff classes that largely or entirely comprise indirect purchasers. Indeed, a number of class actions across Canada that have been on hold pending the outcome of these appeals to the Supreme Court can be expected to return to life in short order.

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The Supreme Court of Canada's decisions

In the decisions released on 31 October, the Supreme Court once again swung the pendulum in the direction of plaintiffs. Contrary to the BC Court of Appeal decisions in *Pro-Sys* and *Sun-Rype* and the established US federal law as reflected in *Illinois Brick*, the Supreme Court of Canada found that indirect purchasers are entitled to assert claims in competition law cases.

One of the central issues considered by the Supreme Court was the implications of the rejection of the passing-on defence. The Supreme Court confirmed that, under Canadian law, it is not a defence to a claim by direct purchasers that these buyers merely passed on any price increases to their customers and, accordingly, did not suffer any damages. The defendants in *Pro-Sys* argued that if they cannot defend the case on the basis that the direct purchasers passed on all the alleged price increase, then it follows that indirect purchasers should not be entitled to rely on such passing-on to maintain a cause of action. The Court rejected this argument, reasoning that "despite the rejection of the passing-on defence, the arguments advanced by Microsoft as to why there should be a corresponding rejection of the offensive use of passing-on are not persuasive".

In this context, the Court examined the argument that allowing indirect purchasers to bring claims raises the prospect of double recovery. Specifically, the Court addressed the concern that defendants could be liable to direct purchasers for the total amount of the overcharge they paid and then could also be liable to indirect purchasers for whatever amount of the overcharge may have been passed on to them by direct purchasers. Ultimately, the Court found that trial courts would be equipped to guard against the prospect of double or multiple recovery, such as by denying or modifying damages awards to avoid any overlapping recovery. The Court also found that allowing indirect purchaser claims is consistent with the remedial objectives of restitution law and the deterrence objectives of Competition Act offences that form the basis of class action claims in this area.

In addition, the Supreme Court provided some guidance with respect to the scrutiny to be applied to plaintiffs' proposed methodologies for establishing damages in indirect purchaser claims at the class-certification stage. In the past, some Canadian courts have found that plaintiffs have discharged their burden of showing that harm can be established on a class-wide basis without having to demonstrate that the plaintiffs' proposed methodology has been developed with some rigour and will be sufficiently robust. The importance of the gatekeeper function to be exercised by the court when class certification is sought cannot be overstated. Granting certification orders based on junk science rather than on the basis of carefully considered and reliable methodologies that will permit sound conclusions to be reached at trial would be manifestly unfair and would defeat the important objectives underlying class action legislation.

The Supreme Court recognised the importance of the gatekeeper function at certification in indirect purchaser cases and reaffirmed "the importance of certification as a meaningful screening device". The Court held that expert evidence used to establish harm on a class-wide basis "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 (ie that passing-on has occurred)". Further, "[the] methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question". Hopefully, certification judges will take the Court's reasoning in this regard as a signal to exercise the gatekeeping function and fully inquire into the relevant issues, rather than simply passing the buck to the trial judge.

Further issues

In the *Sun-Rype* case, the Supreme Court declined to certify the proposed class. With respect to the claims of indirect purchasers, the Court found that there was no identifiable class of at least two persons that suffered a loss. The proposed class consisted of consumers of products that contained high-fructose corn syrup (HFCS) who purchased those products between 1988 and 1995. However, the plaintiffs failed to lead evidence demonstrating that it was possible for consumers to determine whether products they consumed contained HFCS or some other form of sweetener. The Court noted that the label on products sold in Canada did not identify which type of sweetener was used. In these circumstances, the plaintiffs had failed to establish some basis in fact that there was an identifiable class of two or more indirect purchasers who could prove that they actually suffered a loss.

With respect to the claims of direct purchasers, the Supreme Court declined to certify the cause of action in constructive trust. The Court found that the plaintiffs had failed to establish either the required "proprietary nexus" (ie the plaintiffs had failed to identify any property that could be considered to be held in trust by the defendants for the plaintiffs) or that a monetary remedy would be inadequate.

Finally, in the *Infineon* decision, the Supreme Court also dealt with an issue of jurisdiction particular to the province of Québec. In that case, the certification court judge dismissed the action on the basis that the Québec court had no jurisdiction over the defendants, noting that the defendants had no offices in Québec and did not operate in that province. The Québec Court of Appeal reversed this decision on the basis that the contract by which the end-user acquired the product from a retailer had been entered into in Québec, and this was a sufficient nexus to ground jurisdiction in the Québec courts, even though none of the defendants was party to that contract. The Supreme Court adopted the Court of Appeal's reasoning in its entirety.

Unresolved questions

While the Supreme Court's trilogy of cases has provided direction in some areas, such as the ability of indirect purchasers to assert claims in competition law cases, the decisions also leave other questions unresolved, such as the appropriate standards and methodologies for resolving the complex evidentiary issues inherent in indirect purchaser claims, and how trial judges are going to grapple with and resolve these complex issues. Although the full impact of the decisions on competition policy and class actions remains to be determined, the decisions will undoubtedly be the focal point of debate in future cases for years to come.