SEPTEMBER 24, 2019

Top Court Expands Scope of Potential Liability in Price-Fixing Class Actions

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The Supreme Court of Canada has released its long-awaited decision in two companion appeals that have significant implications for class actions alleging conduct that contravenes the criminal provisions found in Part VI of the *Competition Act* (Act).

In its decision in *Pioneer Corporation v Godfrey* and *Toshiba Corporation v Godfrey* (*Godfrey*), the Supreme Court confirmed, among other things, that "umbrella purchasers" can assert claims in connection with alleged price-fixing conspiracies. Umbrella purchasers are purchasers who acquire products directly or indirectly from non-conspirators, but who nevertheless allege they were overcharged because price-fixing by the conspirators caused firms that did not participate in the conspiracy to raise their prices.

The 8–1 ruling written by Justice Brown (with Justice Côté dissenting in part) also provided guidance on other significant issues that will affect the large number of pending and future competition class actions alleging anticompetitive conduct, including the evidentiary standard that plaintiffs are required to meet at the certification stage; the ability of plaintiffs to pursue common law and equitable claims based on alleged breaches of the criminal provisions of the Act; and the applicability of the discoverability principle to the statutory limitation period provided for in the Act.

Taken together, the Court's decision on these fundamental issues could open the door to a greater number of more complex class actions that seek higher damages on behalf of larger classes of claimants.

Background

Godfrey arises from an alleged conspiracy among certain manufacturers, marketers, distributors and sellers of optical disk drives (ODDs) to fix the price of their products. In 2010, a proposed class action was commenced in British Columbia, with representative plaintiff Neil Godfrey seeking damages on behalf of all B.C. residents who purchased ODDs between 2004 and 2010. The proposed class included not only persons who directly or indirectly purchased products from the alleged conspirators but also so-called umbrella purchasers who purchased ODDs (directly or indirectly) from the defendants' non-conspiring competitors.

Issues on Appeal to the Supreme Court of Canada

The B.C. Court of Appeal affirmed the decision of the B.C. Supreme Court and certified a class including the direct, indirect and umbrella purchasers. The Court of Appeal's decision was appealed to the Supreme Court separately by two groups of defendants. The appeals raised four principal issues:

1. **Umbrella Purchasers.** The appeals considered whether umbrella purchasers have a cause of action under section 36(1) of the Act. The defendant appellants argued against recognizing the claims of umbrella purchasers, in part on the basis that doing so would give rise to indeterminate liability.
2. **Evidentiary Standard at Certification.** The Supreme Court was also asked to consider whether the B.C. Court of Appeal (and a number of other Canadian courts) had misinterpreted the Supreme Court's statements in *Pro-Sys Consultants Ltd. v Microsoft Corp.* (*Microsoft*) regarding the standard for certifying loss as a common issue. The defendant appellants argued that *Microsoft* should be read to require plaintiffs to adduce at certification an expert methodology that is capable of showing harm to all members of an indirect purchaser class or distinguishing between those class members who suffered a loss and those who did

not. This stood in contrast to the plaintiffs' interpretation that *Microsoft* requires only that a plaintiff proffer an expert methodology capable of showing that harm was passed from the direct purchasers to the indirect purchaser *level*.

3. **Complete Code.** The Supreme Court was also asked to consider whether the availability of a statutory cause of action under section 36 of the Act bars a plaintiff from bringing concurrent common law and equitable claims (i.e., whether the Act forms a "complete code" for recovery).

4. **Discoverability and Fraudulent Concealment.** Finally, the Supreme Court considered whether the two-year limitation period in section 36(4) of the Act can be tolled by common law principles of discoverability and fraudulent concealment. Certain defendants were proposed to be added to the proceedings more than two years after the alleged anticompetitive conduct occurred. Those defendants argued that the plaintiff's claims were accordingly statute-barred and not subject to the common law doctrines of discoverability and fraudulent concealment.

Key Takeaways

Umbrella Purchasers Have a Cause of Action

- The Supreme Court held that umbrella purchasers do have a cause of action under section 36(1)(a) of the Act, rejecting concerns of indeterminate liability and potential difficulties in proving harm on a class-wide basis. The Court confirmed that section 36(1)(a) of the Act allows a claim by *any* person capable of demonstrating that they have suffered harm as a result of the defendant's actions. Justice Côté disagreed with the majority's conclusion on this point, drawing on the principles of remoteness and indeterminacy to conclude that the defendants should not be forced to bear liability for the pricing decisions of non-parties.
- We expect that umbrella purchaser claims will be included in most, if not all, future competition class actions. This is likely to result in larger and more complex classes, difficult and complex challenges for plaintiffs related to proving damages caused to umbrella purchasers and increased costs for defendants at both the certification and the merits stages.

Evidence Adduced on Certification Need Not Show Harm to All Class Members or Identify Who Was Harmed

- The Supreme Court clarified its comments in *Microsoft* and confirmed that, at certification, the plaintiffs need only provide a plausible and credible expert methodology that can establish that loss flowed to the relevant purchaser level (meaning that the methodology is capable of showing harm was suffered by at least one or more class members). At the certification stage, the methodology does not need to be capable of either showing that all members of the proposed class were harmed or identifying who was harmed and who was not.
- Justice Côté offered a vigorous dissent on this point, criticizing the majority's decision for reducing the utility and efficiency of the certification process. In part, this criticism stems from the majority's decision allowing claims to proceed to trial in circumstances in which the plaintiff may still be incapable of proving liability to the class.

The Act Is Not a Complete Code for Recovery

- The Court held that section 36(1) of the Act does not oust common law or equitable claims that are based on alleged breaches of the Act. The decision confirms that alleged breaches of the criminal provisions of the Act can satisfy the "unlawfulness" element found in common law torts, such as unlawful means conspiracy.

Discoverability and Fraudulent Concealment Apply to Claims Under Section 36(1) of the Act

- The Court held (with Justice Côté dissenting again on this point) that the common law principle of discoverability operates to extend the limitation period in section 36(4) of the Act.

- While the majority did not find it necessary to decide on whether fraudulent concealment could toll the limitation period in section 36(4), the Court nevertheless clarified that fraudulent concealment is available whenever it would be unconscionable for the defendants to rely on the limitation period, and is not limited to situations in which a "special relationship" exists between the parties.
- This finding confirms that, in some circumstances, plaintiffs may pursue section 36(1) claims against defendants even when the underlying actions occurred more than two years earlier.

The Court's decision in *Godfrey* has put to rest several of the most contentious issues recently debated in Canadian competition class action litigation. In doing so, it has not only set the stage for larger and costlier claims with the addition of umbrella purchasers but also increased the potential for battles between plaintiffs and defendants to be increasingly fought at the trial stage, after a lengthy and expensive discovery period, rather than at certification.

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