Has the Canadian Supreme Court altered the competition landscape?

19/11/2013

Competition analysis: Following a decision by the Supreme Court of Canada, consumers can bring indirect purchaser claims where their purchase was made through an intermediary. Mark Katz, partner, Sandra Forbes, partner, and Chantelle Spagnola, associate at the Canadian firm Davies Ward Phillips & Vineberg, consider the issues and possible consequences of the decision.

Original news

The Supreme Court of Canada has released long-awaited decisions in three related appeals, two from the British Columbia Court of Appeal and one from the Quebec Court of Appeal, all dealing with the certification of price-fixing claims as class actions.

The key issue before the court in all three appeals related to the viability of claims by 'indirect purchasers'--consumers and others who did not purchase products directly from a defendant, and instead purchased such products indirectly, often as a component or ingredient of a finished product, from a non-defendant further down the product distribution chain.

The three decision were:

- *Sun-Rype Products Ltd v Archer Daniel Midland Company*
- *Pro-Sys Consultants Ltd v Microsoft Corporation*
- *Infineon Technologies AG v Option consommateurs (Quebec)*

What is the background to (and significance of) these decisions?

There were a series of conflicting decisions regarding the certification of indirect plaintiff claims in competition law class actions in Canada. Certain decisions imposed a rigorous standard for certification, other decisions posited a more lenient standard, while yet other decisions held that indirect plaintiff class claims could not be certified as a matter of law.

The Supreme Court of Canada has now resolved the uncertainty with its trilogy of recent 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 offences. The court also set a relatively low bar for certification.

These cases represent the Supreme Court of Canada's first consideration in over 20 years of private competition law claims, and its first decisions in over a decade considering the issue of certification of class actions in a common law jurisdiction.

Do the decisions--insofar as they explicitly permit certification of indirect purchaser claims--create a risk of differing legal standards as between the US and Canada, in particular for companies that do significant business in both countries?

It must be recognised that while indirect purchaser claims are not available under US Federal law, they are permitted under certain state laws. Accordingly, the gap between US and Canadian law should not be exaggerated in this regard. That said, the Supreme Court of Canada's decisions establish a lower standard for

certification of class action claims than that which we understand is employed in the US (at least at the Federal level). The court decided that Canadian courts are not required to weigh or resolve conflicting facts and evidence at the certification stage. In light of these differences, it is possible that cases may now be certified more quickly in Canada than in the US.

What is the position in Canada regarding the 'passing-on' defence?

The Supreme Court of Canada confirmed that the passing-on defence is not available under Canadian law. The court recognised that there may be a risk of double recovery where actions by direct and indirect purchasers are pending at the same time or where parallel suits are pending in other jurisdictions. However, it decided that the courts can effectively manage this risk at trial and the fact that damages issues may be complex is not a reason to deny indirect purchasers the right to participate in a class action by imposing a strict standard for certification.

Will these decisions have implications for Bureau administrative procedures--ie the attractiveness and efficacy of leniency programmes?

The decisions are unlikely to have any impact on the attractiveness of the Bureau's immunity/leniency policies except perhaps in the most marginal of cases where the arguments in favour of proactively approaching the Bureau are already weak--for example if there are serious questions about substantive liability or effects in Canada. Otherwise, most parties in the position to apply for immunity/leniency simply take it as a given that they will be sued for damages and consider that to be part of the ultimate cost they will be obliged to pay in order to resolve the matter.

Are these decisions purely claimant-friendly or are there any helpful developments for defendants?

The decisions are generally claimant-friendly in that they set a low bar for certification and defer to trial the resolution of all of the complicated liability and damage issues which are at the centre of competition class actions involving indirect purchaser claimants. However, in some sense this is simply a question of shifting the 'day of reckoning' for class plaintiffs to a later date. They will still have to substantiate their damages claims at trial.

The Supreme Court of Canada also confirmed that certification judges ought not to be mere 'rubber stamps' and must apply 'more than symbolic scrutiny' to the sufficiency of class action claims. Indeed, in one of the cases making up the trilogy, the court decided that certification ought to be denied because the indirect plaintiffs were not able to satisfactorily demonstrate the existence of an identifiable class (which only requires showing that two or more persons exist with a claim in common).

Finally, it is quite possible that the courts will eventually adopt a more rigorous approach to certification in practice if and when a few of these cases go to trial and courts experience first-hand the difficulties of adjudicating these complex issues at trial.

Interviewed by Anne Bruce.

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