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Price-fixing class actions in Canada

Davit Akman, Mark Katz and Jessica Norman

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OPINION

Price-fixing class actions in Canada

The recent decision by the Ontario Superior Court of Justice in the Irving Paper case could have a dramatic long-term impact

*Davit Akman, Mark Katz and Jessica Norman**

On 28 September 2009, the Ontario Superior Court of Justice issued the first decision by a Canadian court in a contested case certifying a price-fixing class action on behalf of a class which includes indirect purchasers. If left undisturbed on appeal, the decision could significantly broaden the scope under the Ontario Class Proceedings Act 1992 (the CPA) for indirect-purchaser, price-fixing class actions. It could also mean that class action law in Ontario will be inconsistent with the law and practice in other Canadian jurisdictions (such as British Columbia) where courts have refused to certify proposed indirect-purchaser, price-fixing class actions.

The claim

The case at issue – *Irving Paper Ltd v Atofina Chemicals Inc* – involves allegations by the plaintiffs that the defendants conspired to, and did in fact, allocate markets, restrict supply and increase the price of hydrogen peroxide in Canada over an 11-year period (1994-2005). The plaintiffs asserted claims for general and punitive damages based on the common law tort of conspiracy, the statutory cause of action for damages under section 36 of the Competition Act (Canada) and the tort of intentional interference with economic interests. The last of these three causes of action was not pursued at certification.

The class in *Irving Paper* consists of both direct purchasers (ie people who allegedly purchased hydrogen peroxide from one or more of the defendants) and indirect purchasers (ie people who allegedly purchased hydrogen peroxide or products containing or using hydrogen peroxide from someone other than a defendant). As the certification judge acknowledged, the class is enormous and could conceivably include all residents of Canada.

The certification decision

The key issue on the motion for certification was whether the plaintiffs had demonstrated that there was a workable methodology for establishing loss or harm on a class-wide basis, such that harm and damages were “viable and appropriate common issues”. Proof of loss or harm is a required element for liability both in the tort of conspiracy and under section 36 of the Competition Act. Without a workable methodology, the need for individualised inquiries to determine liability to each of the millions of class members would make the proposed class action unmanageable and therefore not appropriate for certification because it would not be the “preferable procedure” for resolving the claim.

Decisions prior to *Irving Paper*, in both Ontario and other provinces (such as British Columbia), had denied certification in similar circumstances on the ground that the plaintiffs had failed to adduce sufficient evidence to support a methodology for calculating harm on a class-wide basis. In those cases, defendants had argued successfully that:

- the issue of whether indirect purchasers had suffered any loss as a result of alleged overcharges could not be determined on a class-wide or common basis, and instead required complex and lengthy individual trials to determine whether the alleged overcharges had been passed through to each of the indirect purchasers; and

- these individual inquiries would overwhelm any common issues, with the result that a class proceeding would not be appropriate

The seminal case in Canada on indirect-purchaser class actions is the decision of the Ontario Court of Appeal in *Chadha v Bayer Inc.* That case involved a proposed class action on behalf of indirect purchasers alleging that the defendant manufacturers had (among other things) conspired, contrary to section 45 of the Competition Act, to fix the price of iron oxide pigments used to colour concrete bricks and paving stones.

In concluding that the proposed class action should not have been certified at first instance, the Court of Appeal ruled that the certification motion judge had erred in certifying liability as a common issue. Noting the "many problems of proof facing the [plaintiffs] with respect to the pass-on issue, including the number of parties in the chain of distribution and the 'multitude of variables' which would affect the end-purchase price of a building", the Court of Appeal decided that the plaintiffs had not shown that there was a "method [that] could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result". In the Court of Appeal's view, the absence of an acceptable methodology meant that individual trials would be needed to establish loss (and therefore liability), with the result that the proposed class action would be unmanageable and therefore not the preferable procedure.

In *Irving Paper*, the certification judge concluded that two recent decisions of the Ontario Court of Appeal signalled a relaxation of the evidentiary threshold established in *Chadha*, so that it was no longer necessary for plaintiffs seeking certification to show damages on a class-wide basis. The judge also found that, at the certification stage, there is no need to reconcile conflicting expert opinions regarding the existence of a workable class-wide means of proving liability; the court "need only be satisfied that a methodology *may* exist for the calculation of damages" and that "attempts to postulate such a methodology" are sufficient [emphasis added]. The certification judge also pointed to the defendants' failure to identify their own "alternate procedure" to the proposed class action as a basis for concluding that a class action was the preferable procedure in the circumstances.

Discussion and implications

The *Irving Paper* decision is open to serious question from several perspectives. Among other things, the two recent Ontario Court of Appeal decisions which the certification judge relied upon were very different cases to *Irving Paper*. Both essentially dealt with contractual claims. Neither was a price-fixing case, and neither involved indirect purchasers or a pass-through issue. Also, in neither case was damage or loss a constituent element of liability. In other words, neither case had to consider the key certification issue in *Irving Paper*, namely whether the alleged overcharge had, in fact, been passed through to indirect purchasers, thereby causing them to suffer damage or loss, and whether the plaintiffs could prove the fact of such damage or loss on a class-wide basis. Further, nothing in either case suggests that the CPA alters the requirement to prove all of the essential elements of a cause of action, which, in this context, means proving damages.

There is also no suggestion in either case that they were intended by the Ontario Court of Appeal to "overtake" *Chadha* or to "relax" the evidentiary requirement prescribed by the Court of Appeal in that decision. The approach in the *Irving Paper* decision is also at the opposite end of the spectrum from the approach taken in *Pro-Sys Consultants Ltd v Infineon Technologies AG*, a 2008 decision of the British Columbia Supreme Court. In that case, the court followed *Chadha* and stated that: "[where] the context is pass through, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology that is capable of relating harm to class members".

Further, in pointing to the defendants' failure to identify "an alternate procedure", the certification judge in *Irving Paper* appears to have imposed a form of reverse onus on the defendants. This is inconsistent with at least one decision of the Supreme Court of Canada which held that, with the exception of the requirement that the pleadings disclose a cause of action (in respect of which evidence is generally inadmissible), a plaintiff has the onus to demonstrate "some basis in fact" for each of the requirements of the certification test, including preferable procedure.

The long-term impact of the decision in *Irving Paper* remains to be seen but could be dramatic for future price-fixing class actions in the province of Ontario (Canada's largest province). Much will depend on any appellate review in this case, as well as on the British Columbia Court of Appeal's pending decision in *Pro-Sys Consultants Ltd*.

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