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Private Competition Suits Gain Momentum

By Mark Katz

A superior line of thought

DAVIES

Private competition suits gain momentum

MARK KATZ

One of the historical distinctions between competition law enforcement in Canada and the U.S. has been the much smaller role played in Canada by private litigation, as opposed to government-instituted enforcement.

Canadian law has for decades permitted plaintiffs to sue for damages caused by conduct violating the *Competition Act*'s criminal offences. However, it is only recently, with the advent of class action litigation, that private competition suits in Canada have been anything more than sporadic. Two recent decisions — one by the Ontario Superior Court of Justice and the other by the British Columbia Court of Appeal — may signal the advent of an even more receptive climate for private competition actions in Canada.

First, on Sept. 28, 2009, the Ontario Superior Court of Justice certified a class action on behalf of all persons in Canada (excluding the defendants) who had purchased either hydrogen peroxide, products containing hydrogen peroxide or products using hydrogen peroxide in Canada between Jan. 1, 1994 and Jan. 5, 2005 (*Irving Paper Limited v. Atofina Chemicals Inc. et al.*, [2009] O.J. No. 4021). A month and a half later, on Nov. 12, 2009, the British Columbia Court of Appeal certified a class action on behalf of a class of direct and indirect purchasers of semiconductor memory chips (known as dynamic random access memory (DRAM)), overruling a lower court decision denying certification (*Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2009] B.C.J. No. 2239).

Both decisions dealt with an issue that has been at the forefront of class action litigation under the *Competition Act* — whether "indirect purchasers"

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of cartelized products be part of the class of plaintiffs seeking damages from defendants. The sticking point is typically whether the "indirect purchasers" (i.e., purchasers that did not buy the cartelized product directly from the supplier but as a component of further processed goods) can demonstrate on a class-wide basis that the overcharge paid by direct purchasers on the product was passed through to them. Without a credible methodology for demonstrating class-wide harm, damages to indirect purchasers would have to be established on an individual basis, thereby negating the justification for proceeding by class action.

By allowing the class actions to proceed, both decisions also marked a significant departure from previous case law, in which courts had denied certification to indirect purchaser class actions because of the failure to establish a satisfactory methodology for calculating harm on a class-wide basis.

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The leading decision on point was the Ontario Court of Appeal's decision in *Chadha v. Bayer*, [2003] O.J. No. 27. *Chadha* involved a proposed class action on behalf of indirect purchasers of concrete bricks and paving stones used in home construction. The allegation was that the defendants' conspiracy to fix the price of iron oxide pigment — used as an additive to colour bricks and paving stones — resulted in overcharges not only to the manufacturers of these products, but also to the purchasers of buildings constructed using materials containing the iron oxide pigment. The class action was certified at first instance but the Ontario Court of Appeal reversed that decision. The Court of Appeal held that the indirect plaintiffs had not established a methodology that could be used at trial to prove that all of the indirect purchasers had overpaid for their houses because of the conspiracy.

In both *Irving Paper* and *Pro-Sys*, the courts took a more relaxed approach to the proof needed at the certification stage to support the indirect plaintiffs' proposed methodologies. For example, Justice Rady of the Ontario Superior Court of Justice held that a judge at the certification hearing need only be satisfied that a credible methodology for calculating indirect purchaser damages may exist and that even "attempts to postulate such a methodology" are sufficient.

Similarly, the B.C. Court of Appeal held that only a "minimum evidentiary basis" is necessary and that plaintiffs need only show that they have "a credible or plausible methodology" that, in theory, might be able to address class-wide issues.

If left undisturbed on appeal, *Irving Paper* and *Pro-Sys* will lower the bar in at least two key Canadian jurisdictions, and potentially across the country, for the certification of indirect purchaser, price-fixing class actions. The impact of this change in the law could be magnified even further by the coming into force in March of a new *per se* conspiracy offence, which will eliminate the requirement to prove market impact ("undue lessening of competition") in establishing criminal liability.

The combination of these two developments could significantly expand the scope in Canada for civil liability arising from competition law violations. ■

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