Two recent decisions of the British Columbia Court of Appeal have held that indirect purchasers have no cause of action for recovery of unlawful overcharges.

The majority decisions in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company* and *Pro-Sys Consultants Ltd. v. Microsoft Corporation* diverge from prior decisions in Canadian competition class actions and will likely be appealed to the Supreme Court of Canada.

the Canadian approach to "passing on" and indirect purchaser claims

Previously, Canadian courts had held that indirect purchasers had recognizable claims that could be advanced at trial. In *Chadha v. Bayer Inc.* (2003), the Ontario Court of Appeal refused to foreclose the possibility of indirect purchaser class actions. Although the Court of Appeal denied certification of the entirely indirect consumer class in *Chadha*, it expressly declined to adopt the approach of the United States Supreme Court in *Illinois Brick Co. v. Illinois* (1977) and exclude indirect purchaser claims. The *Chadha* Court indicated that indirect purchaser classes might be certified on appropriate evidence. The many courts that approved indirect purchaser settlements and allocated settlement funds as between direct and indirect purchasers or that commented on the tensions inherent in any class that included both direct and indirect purchasers all implicitly agreed.

Until the past few years, however, plaintiffs in provinces outside Quebec had relatively limited success in contested certification applications in competition class actions because of the difficulty of establishing harm on a class-wide basis. Plaintiffs faced serious evidentiary challenges in showing that all or any part of an alleged overcharge was passed on through various steps in a supply or distribution chain. Actual damage or loss is an element of liability for the tort of conspiracy, as well as a prerequisite to pursuing a private action for damages based on the *Competition Act*. Where a plaintiff was unable to show a workable methodology for assessing pass-through, courts typically found the claim could not be certified as a class proceeding.

More recently, however, courts in several provinces have certified competition class actions including both direct and indirect purchasers combined into "universal" classes. They have done so on the basis of novel applications of statutory aggregate damages and by permitting plaintiffs to advance disgorgement claims instead of, or in addition to, damage claims and pursuant to proposals by plaintiffs' counsel to subdivide any overall award of damages between various levels of claimant. They have done so, despite allegations by defendants of a serious and irreconcilable conflict between the direct and indirect members of the putative class. These issues now appear to be sidelined, if the two recent decisions survive further appellate review.

rejection of indirect purchaser claims in B.C.

Sun-Rype involves an alleged price-fixing conspiracy relating to high fructose corn syrup, a sweetener used in food and beverage products. The plaintiffs allege that an overcharge was imposed on direct purchasers, and that the overcharge was passed through to indirect purchasers who consumed the end products. The motions judge certified a class that included both direct and indirect purchasers. In *Microsoft*, the plaintiffs allege unilateral anti-competitive conduct which resulted in an overcharge to direct purchasers. The plaintiffs were all indirect purchasers who purchased computers with Microsoft operating systems and applications software. They claimed the overcharge was passed on to them. The motions judge certified the class.

In reasons released concurrently, a majority of the British Columbia Court of Appeal overturned certification of the indirect purchaser classes, holding that it is "plain and obvious" that Canadian law does not recognize any cause of action for indirect purchasers. The majority reasons concluded that:

- there is no "pass on" defence in Canadian law;
- direct purchasers have claims unaffected by whether or to what extent they passed on any harm they suffered; and
- the claims of indirect purchasers are not recognized in Canadian law.

The majority relied on the Supreme Court of Canada's decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)* (2007) for its conclusion that the passing-on defence has been conclusively rejected in Canada. *Kingstreet* rejected the passing-on defence in the context of a claim for the recovery of taxes paid pursuant to *ultra vires* legislation. According to the majority of the B.C. Court of Appeal, *Kingstreet* established a general principle of Canadian law that a defendant cannot avoid or reduce its liability by claiming that an unlawful charge was passed on in whole or part to others. The B.C. majority then concluded that there could be no cause of action for indirect purchasers because that could result in double recovery (claims by direct purchasers for 100% recovery of any overcharge in addition to claims by indirect purchasers for any actual overcharge that was passed on to them).

a change in the legal landscape?

Most proposed and certified competition class actions in Canada include both direct and indirect purchaser classes. If the recent decisions in British Columbia survive an attempt to appeal them, defendants are now likely to seek decertification and/or summary dismissal of indirect purchaser claims.

We expect that in most cases such motions should be successful in B.C. However, the decisions in *Sun-Rype* and *Microsoft* are not binding on the courts of other Canadian jurisdictions. It remains to be seen whether these decisions will persuade the Ontario Court of Appeal to reconsider the position it took in *Chadha*. Other provinces without their own jurisprudence on the subject will now have two conflicting approaches to consider.

Canada does not have a process for consolidating parallel class actions arising in multiple provinces. In addition, several provinces have allowed class actions to proceed on the basis of nation-wide classes. One possible scenario is that indirect purchasers in British Columbia may seek to recover as members of national classes in other provinces that continue to recognize indirect purchaser claims, at least until the law of the common law jurisdictions settles out on this important issue.

In summary, unless and until reversed on appeal, *Sun-Rype* and *Microsoft* may result in increased, and increasingly complex, litigation while parties grapple with whether and how these rulings affect new and existing proceedings.

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