Canada Says “Goodbye Columbus” to the U.S. Approach to Antitrust Class Actions

Casey W. Halladay, 
Partner, McMillan LLP 
Toronto, Canada 

Inside this Issue

Letter from the Editors – page 1
Letter from the Committee Chairs – page 2
Focus on Canada – page 3
• The Defense View: Canada Says “Goodbye Columbus” to the U.S. Approach to Antitrust Class Actions, by Casey W. Halladay, Partner, McMillan LLP, Toronto, Canada – page 3
• The Claimant View: Walking Comfortably in a Pair of Hanover Shoes, the Supreme Court of Canada Exits the Illinois Brick Road, by Reidar Mogerman and Jennifer Winstanley of Camp Fiorante Matthews Mogerman PLC, Vancouver, Canada – page 7

Upcoming Events – page 9
• 6 February 2014 Civil Redress Committee Town Hall Meeting
• 26 March 2014 Spring Meeting Program: Global Antitrust Damages Actions: Spreading Light or Gloom?

Letter from the Editors

Welcome to the first issue of the International Civil Redress Bulletin. As Committee Co-Chairs Michael Hausfeld and Larry Sorkin explain inside, the Civil Redress Committee is a new committee of the ABA Section of Antitrust Law which seeks to bring together antitrust practitioners, public agency enforcers, and members of the judiciary from the United States and abroad to examine and address the many of questions raised by the emergence of private competition enforcement regimes around the world.

Our goal with the International Civil Redress Bulletin is to keep you abreast of the latest developments in international civil redress to help facilitate that on-going global discussion. We plan to showcase a broad range of viewpoints on this ever-changing area of international competition law, from both the claimant and defense perspectives, and from jurisdictions around the world. We therefore encourage your comments, ideas, and submissions, which you can provide directly to us or through any of the Chairs or Vice-Chairs listed below.

We look forward to your contributions.

Eric Mahr
WilmerHale

Judith Zahid
Zelle Hofmann Voelbel & Mason LLP

*The Committee also thanks the contribution of Scott Wagner, Bilzin Sumberg (Young Lawyers Division Representative).
Canada Says “Goodbye Columbus” to the U.S. Approach to Antitrust Class Actions

Casey W. Halladay, Partner, McMillan LLP, Toronto, Canada

In October 2013, the Supreme Court of Canada (“SCC”) released three groundbreaking decisions on antitrust class actions. Affectionately known as the “Trilogy” in Canadian antitrust circles, these decisions radically reshape Canadian jurisprudence in this area, generally speaking in favour of plaintiffs. Along the way, the SCC reviewed — and rejected — certain well-established tenets of U.S. antitrust law. This article highlights key aspects of the Trilogy that are likely to interest practitioners outside of Canada.

Indirect Purchaser Claims Are Permissible; Passing-On Defences Are Not

As expected, the SCC upheld prior Canadian jurisprudence rejecting the “passing-on” defence (i.e., where a defendant claims that a claimant has suffered no loss because it passed-on any overcharge to its customers). However, in the Pro-Sys decision the Court then reversed course and concluded that the rejection of the passing-on defence does not prevent indirect purchasers from advancing claims that they have suffered harm from having illegal overcharges passed on to them. In other words, while passing-on cannot be used by defendants as a “shield” in antitrust class actions, it can be used by plaintiffs as a “sword” to establish indirect purchaser standing.

Defence arguments that allowing both direct and indirect purchaser claims would lead to double recovery were not convincing; the SCC stated that this was an argument for trial on the merits, not certification, and
that a trial judge can apportion damages as between direct and indirect purchasers to avoid double recovery. Similarly, where a defendant faces multiple independent suits by direct and indirect purchasers — including in multiple jurisdictions — this fact can be brought to the Court’s attention to avoid double recovery.

While acknowledging that problems of complexity and remoteness may exist for indirect purchasers in proving actual harm, especially where the particular industry has a long or complex supply chain, the SCC again held this to be an issue for a trial on the merits, which should not prevent courts from certifying antitrust class actions.

The Court opined that allowing indirect purchaser claims would also serve important policy goals. For example, it would improve deterrence of illegal conduct as there may be instances where direct purchasers refrain from bringing claims in order to avoid harming valuable business or supply relationships with members of the alleged cartel. Restitutionary law also favours indirect purchaser claims, since forbidding such claims ex ante because of the difficulties of proving harm would allow a wrongdoer to use the complexities of a distribution chain to keep the benefit of the overcharge.2

U.S. Precedent Not Compelling

Although the defendants in Pro-Sys encouraged the SCC to follow the US law established by Illinois Brick and its progeny, the SCC refused to do so. Instead, it highlighted the many state “repealer” statutes permitting indirect purchaser claims in the U.S. and expressly preferred Justice Brennan’s Illinois Brick dissent. Moreover, the SCC actively — if selectively — reviewed three decades of scholarly writing on the subject and concluded that “there is a significant body of academic literature in favour of repealing the decision in Illinois Brick in order to best serve the objective of the antitrust laws.”3

The test for certification in the common law provinces of Canada comprises five criteria: (1) the pleading must disclose a cause of action; (2) there must be an identifiable class of two or more people; (3) the claims of the class members must raise common issues; (4) a class proceeding must be the preferable procedure for resolving the common issues; and (5) the representative plaintiff(s) must fairly and adequately represent the class, have produced a workable plan of proceeding, and not have interests in conflict with other class members.

The SCC confirmed that the test for the first criterion is quite low — assuming all facts pleaded by the plaintiff are true, the case will proceed unless it is “plain and obvious” that the plaintiff’s claim, as pleaded, cannot succeed. The remaining criteria are also tested on a relatively low standard, i.e., that the plaintiff must show there is “some basis in fact” for each element. The SCC rejected the defence argument that a plaintiff must prove “some basis in fact” for each element on the balance of probabilities standard, similar to the U.S. test adopted by the Third Circuit in the Hydrogen Peroxide case. Although the Court did not precisely define the “some basis in fact” test, it made clear that this threshold falls below the balance of probabilities standard, and concluded that “the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial.”4

The Role Of Experts At Certification

Regarding the use of expert evidence at certification to establish a common basis for harm as among the class members, the Court indicated that the plaintiffs’ expert evidence must “offer a realistic prospect for establishing loss on a class-wide basis”, so that if the plaintiffs are successful in establishing the defendants’
liability at trial, there is a method by which to calculate damages as between the members of the class. In particular, the Court held that “the methodology cannot be purely theoretical or hypothetical”, it must be “grounded in the particular facts of the case”, and there must be “some evidence of the availability of the data” on which the expert’s methodology will rely. These latter two conditions may make the preparation of expert reports more onerous for plaintiffs, especially as there is no general right to discovery in Canada prior to certification being granted.

In the Infineon decision, the Court indicated that the threshold under Québec law is even lower — at certification, plaintiffs need only present “an arguable case that injury was suffered”. The Court acknowledged that this burden is “less demanding than the one that applies” in the common law provinces of Canada (i.e., that there be “some basis in fact” for the injury alleged), and stressed that, at certification, “presentation of expert evidence is not the norm” in Québec and the plaintiff “need not even propose a possible methodology” for establishing the pass-through of overcharges to any indirect purchaser members of the class.

An Expansive Approach To Jurisdiction

The SCC also adopted an expansive view of jurisdiction in international price-fixing class actions, reaffirming its 2012 decision in the Van Breda case. The Court noted that in the Sun-Rype case, the members of the alleged cartel each made sales to Canadian purchasers, and did so with Canadian subsidiaries acting as their respective agents. It stated that “[t]here is at least some suggestion in the case law that where defendants conduct business in Canada, make sales in Canada and conspire to fix prices on products sold in Canada, Canadian courts have jurisdiction.” The Court concluded that the defendants had not shown that it was “plain and obvious” that Canadian courts had no jurisdiction over the alleged misconduct in this case, and refused to strike the plaintiffs’ claims on jurisdictional grounds.

The position under Québec law is worse for defendants. In the Infineon case, the SCC reviewed Article 3148(3) of the Québec Civil Code, which confers jurisdiction on Québec courts in any matter where: (1) a fault was committed in Québec; (2) damage was suffered in Québec; (3) an injurious act occurred in Québec; (4) or one of the obligations arising from a contract was to be performed in Québec. The Court noted that any of these four factors can, standing alone, ground jurisdiction. Notably, the SCC stated that for the “damage suffered” requirement, the “damage does not need to be tied to the locus of the inquiry or fault” (i.e., the harm can be felt in a different jurisdiction than where the misconduct took place) and that “there is no principled reason to exclude purely economic damage.” The Court distinguished a prior case in which jurisdiction was refused in a matter of pure economic loss on the basis that, in the prior case, the harm was “merely recorded” in Québec instead of being “substantially suffered” in Québec.

A Minor Victory For Defendants: The Identifiable Class

In perhaps the only positive news for defendants, in the Sun-Rype case the SCC upheld the BC appellate court’s finding that the plaintiffs’ claim did not disclose an identifiable class. The class definition included both direct and indirect purchasers of high-fructose corn syrup (“HFCS”). The defendants led evidence establishing that both HFCS and liquid sugar were used interchangeably by direct purchasers, that Canadian food and beverage labelling regulations did not require disclosure of which form of sweetener is used, and that the representative (indirect purchaser) plaintiff, under cross-examination, had been unable to confirm whether any of the products she purchased had in fact contained HFCS (instead of other sweeteners). As a result, the SCC held that the plaintiffs had not provided sufficient evidence “to show some basis in fact that two or more
persons will be able to determine if they are in fact a member of the class”, since they had not shown that indirect purchasers could confirm whether the products they purchased had in fact used HFCS as a sweetener.

The SCC cautioned that its conclusions in this case did not mean that “an identifiable class could never be found in similar circumstances [...] An identifiable class could be found if evidence was presented that provided some basis in fact that two or more persons could prove that they had suffered harm.” However, “in this case no such evidence was tendered”, and certifying the class action under such circumstances “would lower the evidentiary standard necessary to satisfy the criteria at the certification stage from some basis in fact to mere speculation.”

On balance, the Trilogy represents an important victory for plaintiffs, and further divergence from long-established norms under U.S. law. With the number of class actions filed dramatically on the rise, developments in Canada will bear close watching by antitrust practitioners (and their clients) around the world.

---

1 Pro-Sys Consultants v. Microsoft Canada, 2013 SCC 57 (“Pro-Sys”); Sun-Rype Products Ltd. v. Archer Daniels Midland, 2013 SCC 58 (“Sun-Rype”); Infineon Technologies AG c. Option consommateurs, 2013 SCC 59 (“Infineon”). The Pro-Sys and Sun-Rype cases came to the SCC on appeal from the British Columbia (“BC”) Court of Appeal, where the court held, inter alia, that indirect purchasers have no standing to bring antitrust class actions in Canada. The Infineon case came from the Québec Court of Appeal, which rejected the BC position and authorized an indirect purchaser action. The SCC heard the three cases together, with a view to reconciling this Canadian version of a “Circuit split”.

2 Pro-Sys, ibid., at para. 28.

3 Ibid., at para. 55. Notably, Mr. Justice Rothstein, who previously served as a judicial member of the Competition Tribunal and has significant experience in the field, wrote the unanimous decision in this case.

4 Ibid., at para. 105.

5 Ibid., at para. 118.

6 Ibid., at para. 128.

7 Ibid., at para. 137.


9 Sun-Rype, supra note 1, at para. 45-46.

10 Infineon, supra note 1, at para. 45.

11 Ibid., at para. 46.

12 Sun-Rype, supra note 1, at para. 58.

13 Ibid., at para. 73.

14 Ibid., at para. 70.