Supreme Court of Canada trilogy holds that indirect purchasers may advance class action for recovery of unlawful price-fixing

The Supreme Court of Canada rulings in three consumer class actions have been long anticipated by competition and class action lawyers on several key questions, including the extent to which indirect purchasers may claim private law remedies for anti-competitive conduct. In the past two years, appellate decisions in British Columbia and Quebec diverged on the ability of indirect purchasers to advance class action claims. The new rulings have changed the legal landscape by confirming the ability of consumers to bring indirect purchaser claims (i.e. their purchase was made through an intermediary) and outlining the low threshold for doing so as a class proceeding.

The BC Court of Appeal majority decisions in Pro-Sys Consultants Ltd. v Microsoft Corporation\(^1\) and Sun-Rype Products Ltd. v Archer Daniels Midland Company\(^2\) had diverged from prior decisions in Canadian competition class actions in holding that indirect purchasers had no claim recognized in Canadian law. Meanwhile, the Quebec Court of Appeal decision in Infineon Technologies AG

\(^{1}\) 2011 BCCA 186.
\(^{2}\) 2011 BCCA 187.
et al. v Option Consommateurs, et al.\(^3\) tipped the scales in favour of claimants, allowing indirect purchasers to advance a claim.

These decisions will impact potential defendants significantly, by making it easier to bring claims for antitrust damages.

Five key points of interest in the Supreme Court trilogy include:

- Indirect purchasers do have the ability to maintain Competition Act claims for damages against price fixers;
- Foreign defendants whose price fixing conduct was outside of Canada are nonetheless subject to Canadian laws where there is evidence of economic harm within the jurisdiction;
- The plaintiffs must show "some basis in fact" for each of the certification requirements, but are not required to establish the merits of the action at the certification stage;
- The court allowed certain claims in restitution to proceed to certification, including waiver of tort; and
- The damages for price fixing must be limited to the aggregate of the overcharge to avoid double recovery.

the background

In contrast to the United States, Canadian courts had not previously foreclosed the possibility of indirect purchaser competition class actions. Plaintiffs have had, though, evidentiary difficulty establishing on a class-wide basis that all or any part of an alleged overcharge was passed on through various steps in a supply or distribution chain, or a clear methodology to calculate pass-through damages. However, as these decisions indicate, courts may proceed to certify competition class actions which include 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

\(^3\) 2011 QCCA 2116.
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 claimants.

the British Columbia cases

In Microsoft, the plaintiffs also advanced claims under the Competition Act, in economic tort, in unjust enrichment and constructive trust. They alleged a "vertical" cartel comprising Microsoft and computer manufacturers, acting illegally to inflate its revenues by deliberately inflating prices for the end consumers. The plaintiffs purchased computers with Microsoft operating systems and applications software from the direct purchasers; they claimed the overcharge was passed on to them as indirect purchasers. The motions judge certified the class of indirect purchasers.

In Sun-Rype, the plaintiffs alleged North America's major high fructose corn syrup manufacturers conspired to illegally fix the prices of the popular sweetener used in food and beverage products. The direct purchasers claimed in constructive trust. As in Microsoft, the indirect purchasers advanced claims under the Competition Act, in economic tort, and in unjust enrichment. They alleged that an overcharge was imposed on direct purchasers (the juice manufacturer Sun-Rype), which overcharge was passed through to indirect purchasers who purchased, sold or consumed the end products. The motions judge certified a class that included both direct and indirect purchasers.

the Quebec case

Manufacturers of dynamic random access memory (DRAM), found in many common electronic devices, pleaded guilty to allegations of a price fixing conspiracy in the US in 2004. Option Consommateurs brought a motion in Quebec soon after, seeking to certify as a class anyone who had bought a product equipped with a DRAM chip in Quebec. The claim relied on breach of the
Competition Act and conduct amounting to a fault giving rise to civil liability under the Civil Code of Quebec. The putative class included both direct and indirect purchasers. The pleadings did not distinguish between types of products or even types of end consumers, such as purchasers who bought DRAM equipped products second-hand. The certification judge found he lacked territorial jurisdiction but in any event would have denied certification for the indirect purchasers, finding the pleadings failed to argue why indirect purchasers would have suffered harm.

On appeal, the indirect purchasers were successful. The Quebec Court of Appeal held the class claimants were not required to demonstrate a "clear methodology" to show pass-through damages; the subsequent trial on the merits will show who among all the class claimants grouped together actually had valid claims for damages.

SCC decisions

Pro-Sys Consultants Ltd. v Microsoft Corporation, 2013 SCC 57

The SCC unanimously allowed the appeal and restored the certification judge's decision,

The key holding of this case is that indirect purchasers "have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured the indirect purchasers as a result of the overcharge being 'passed on' to them through the chain of distribution."

The Court rejected the lower court's view, finding that while passing-on as a defence was rejected in the whole of restitutionary law in Kingstreet, the offensive use of passing on is still very much alive. The risks of double or multiple recovery can be managed by the courts and the plaintiffs willingly assume the daunting evidentiary burdens associated with proof of damages. In some cases, suits initiated by indirect purchasers at the end of
the chain may be the only means of promoting the deterrence aims of competition law.

It was not plain and obvious that the tort and unjust enrichment pleadings struck in this case were bound to fail. Issues of whether the claimants can recover in unjust enrichment in the absence of a direct relationship should be left to the trial judge and certain elements of the tort claims are subject to a pending SCC decision.

Finally, the Court said the requirement of plaintiffs to show "some basis in fact" for each of the certification requirements is not an investigation of the merits of the action. The certification judge's decision that the claims raised common issues, that damages can be determined on an aggregate basis and that a class proceeding is the preferable proceeding should not be disturbed.

*Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58

The SCC dismissed the appeal, having decided that indirect purchasers do have a right to bring an action, and that combining direct and indirect purchasers into one class does not raise the spectre of double or multiple recovery because the evidence at trial will determine the aggregate amount of the overcharge. Courts can modify awards in accordance with awards already received in other jurisdictions to prevent double recovery.

However, unlike in *Microsoft*, the indirect purchasers here were unsuccessful due to lack of sufficient evidence of the putative class. The majority held that the appellants did not produce evidence to establish some "basis in fact" that there were class members who could prove they actually purchased products containing high fructose corn syrup. Even though indirect purchasers may have suffered harm from the alleged price-fixing scheme, they cannot self-identify based on the proposed definition. Two judges disagreed taking the view that the majority was imposing a merit test on the appellants.
All nine judges agreed the direct purchaser claim in constructive trust had no chance of succeeding.

*Infineon Technologies AG v Option consommateurs*, 2013 SCC 59

The SCC unanimously dismissed the appeal and upheld the Court of Appeal’s authorization of the action, finding the respondents (Option Consommateurs) had met the relatively low threshold under the *Code of Civil Procedure* for authorization of class actions. At the authorization stage, the case is not to be decided on its merit and essentially class claimants are simply required to establish that they have an arguable case. The evidence surrounding the alleged fault was premised on a conspiracy in the United Stated with no explicit connection to Quebec. This nonetheless gave rise to an inference of an impact on the Canadian market and therefore supported an inference of fault giving rise to an actionable claim. Pursuant to the Quebec rules of extra-contractual liability, damages have to be a direct consequence of an injurious act (fault), but indirect purchasers further down the chain are not barred from recovery. Direct and indirect purchasers may form the class where the allegation is of passing on of price increases. Unlike in common law provinces, claimants in Quebec do not need to advance a methodology capable of demonstrating aggregate loss that would apply to both direct and indirect purchasers; rather they need to demonstrate an arguable case that injury was suffered. Moreover, class claimants are not required to demonstrate that each class member suffered a loss nor to quantify the loss at the authorization stage. A more detailed analysis is contained in a recent McMillan bulletin by Sidney Elbaz and Eric Vallieres.
conclusion

The implications of this trilogy will be litigated in the years to come as plaintiffs cite the low threshold for certification seemingly endorsed by the court. One can easily envision that more class actions will be filed and certified regardless of the merits of the claim. Canada’s highest court has made it clear that the more stringent evidentiary approach as endorsed in the US Supreme Court in *Wal-Mart v Dukes* has little application to Canadian class actions.

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a cautionary note

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