CANADIAN CARTEL NEWS VOLUME 6 WHAT FRESH HELL IS THIS? THE CANADIAN CARTEL CLASS ACTION SYSTEM

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The answer to Miss Parker's question, for those in the midst of a cartel investigation, is, almost certainly, a follow-on class action claim. In this volume of Canadian Cartel News we aim to give a rough and ready overview of the class action system for cartel cases in Canada. A book could be written on this subject – some have been – so these are merely the highest of lights.

The first point to note is that what used to be called follow-on class actions (that is, follow-on after a criminal conviction) is now a misnomer. Like in the US, these are now parallel or even precursor class actions. The merest hint of a cartel investigation results in the filing of class action applications.

Canadian class actions are similar to those in the US in many respects. Whether it is auto parts, computer screens or memory chips, most international price fixing cases have their parallel Canadian class actions. As well, domestic cartels – such as in retail gasoline or chocolate – also give rise to specific Canadian class actions. Since most readers will be familiar with the US system, the most effective way to provide quick advice on the Canadian system may be to note some of the differences. In no particular order, the principal differences include the following:

1. The Supreme Court of Canada recently confirmed[1] that indirect purchaser actions are permitted. This is particularly important in Canada, given that many products only come to Canada indirectly – often as components in end-use products. The Canadian courts are instructed to seek to avoid double recovery – given the fact that these same products may have been the subject of litigation abroad – but how this will be achieved is uncertain.

2. Certification in Canada is probably, at least right now, somewhat easier than it is in the US. The standard established by the Supreme Court of Canada in *Microsoft* is

> "the expert methodology must be sufficiently credible or plausible to establish *some basis in fact* for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis.... The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must

be *some evidence* of the availability of the data to which the methodology is to be applied."[2]

This appears to be a lower standard than the *Hydrogen Peroxide*[3] standard in the US, but see below.

3. Any meaningful "battle of the experts" is typically left to trial, and will not be resolved on certification.

4. There is no multi-jurisdictional consolidation process in Canada. Virtually all provinces have class action procedures (while the *Competition Act* is federal, the class action law is provincial). Class actions for antitrust matters are most common in Ontario, Quebec and British Columbia – and can be expected to be filed in at least those provinces in any meaningful national case. But, actions can also be expected with some frequency in Saskatchewan, Alberta and Manitoba. Plaintiffs' counsel tend to work with one another, and with defence counsel, so that one jurisdiction generally takes the lead in a particular case – but there is no formal procedure to ensure this, and no guarantee that it will occur.

5. There are no treble damages available in Canada. A review of major US and Canadian class action resolutions in respect of the same products indicates that Canadian settlements tend to be on average somewhat less than 10% of the average amount of the US settlement.

6. Claims in class actions tend to be asserted on the basis of the statutory right of action under the *Competition Act* for damages, but also for damages in common law conspiracy, in waiver of tort, unjust enrichment and constructive trust. However, a recent case in the British Columbia Court of Appeal[4] has indicated that *Act* claims for damages should be limited to those statutorily provided for in the *Competition Act*. This change, if it flows across Canada, may significantly reduce the limitation period for cartel class actions.

The Canadian class action landscape is dynamic. Issues of available causes of action are just now sorting themselves out. The indirect purchaser question has just been settled, but mechanisms to avoid double recovery are not yet determined. The "ease of certification" pendulum has swung a long way towards plaintiffs, and is probably due to come back some distance. Indeed, the *Microsoft* requirement that the methodology proposal cannot be purely theoretical or hypothetical, and must be grounded in the facts, suggests that the pendulum may have started its return swing.

Despite these uncertainties, hundreds of millions of dollars in settlements have been paid over the last decade. It is also true, still, however, that no competition class action has yet resulted in damages payable after trial and confirmation on appeal the merits. Stay tuned!

by James B. Musgrove and Joshua Chad

[1][ps2id id='1' target='/] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [Microsoft]; *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58; *Infineon Technologies AG v Option*

consommateurs, 2013 SCC 59.

[2][ps2id id='2' target='/] Microsoft, ibid, at para 115 (emphasis added).

[3][ps2id id='3' target='/] In re Hydrogen Peroxide Antitrust Litigation 552 F. 3d 305.

[4][ps2id id='4' target='/] *Wakelam v Wyeth Consumer Healthcare et al*, 2014 BCCA 36.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.