THE GODFREY DECISION: COMPETITION CLASS ACTION CERTIFICATION MADE (EVEN) EASIER

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> **These appeals raise a fundamental question: are courts at a stage where the balance struck by Parliament of Canada's competition law should be upset by applying new principles of liability for price-fixing cases, resulting in near-automatic certification of class actions? In doing so, are courts going a bridge too far?**[1]

Introduction

On September 20th of this year the Supreme Court of Canada released its long anticipated decision in *Pioneer Corporation et al* v. *Godfrey*, which dealt with a number of important cartel class action questions. It is the first meaningful decision by the Supreme Court in the area in more than 6 years[2]. So much anticipated was the decision that many pending cartel class actions had been halted or paused pending the decision in *Godfrey*. Presumably those paused cases will now commence again and the ruling in *Godfrey* will inform those cases. As foreshadowed in the title of this Brief, by and large that information will not be welcome for defendants.

The Godfrey Issues

Godfrey brought to the Supreme Court a number of key issues which had been the subject of debate within and amongst lower courts over the last number of years. These included the applicable limitation period for actions alleging a breach of the *Competition Act* ("Act"); whether umbrella purchasers (that is, purchasers of the relevant product who buy it not from alleged conspirators, but rather from third parties who did not participate in a conspiracy) have a cause of action; whether the Act excludes parallel or similar common law causes of action, such as civil conspiracy; and, finally, whether it is necessary at the certification stage to be able to show a methodology which can demonstrate injury to each individual proposed class member, or merely injury to "the level" (of purchaser – that is indirect purchasers once, twice, thrice, etc. removed from the initial purchase). As noted, these questions were all answered to the advantage of plaintiffs and the disadvantage of defendants, with the exception of an important subset of the proof of injury question, discussed below.

Limitation Period Issues

(i) Discoverability

Section 36 of the Act provides for a right of civil recovery for those who are injured as a result of breaches of the criminal provisions of the Act. Section 36(4) provides the following specific statutory limitation period:

> "No action may be brought…after two years from (i) a day on which the conduct was engaged in…

The question which the Supreme Court was asked to answer in relation to this provision was whether it means that the limitation period runs from the last day on which the conspirators conspired, or whether the *discoverability* principle applies, such that the cause of action does not accrue for the purposes of the running of the limitation period until the material facts on which it is based have been discovered or ought to have been discovered by the exercise of reasonable diligence. The Court noted that whether or not the discoverability principle applies is a matter of construction of the relevant statute. Where the event triggering a limitation period is an element in a cause of action, discoverability will apply. The Court found that because the limitation period states that it runs two years from "a day on which the conduct [contrary to Part VI] was engaged in" the event triggering the limitation period is an element of the underlying cause of action. Therefore, the limitation period is subject to the discoverability principle.[3]

The majority of the Court was bolstered in its conclusion that this was the appropriate way to approach the matter by considering the overall statutory scheme, noting that price fixing conspiracies are invariably conducted through secrecy and deception, meaning they are by their very nature unknown to potential claimants. Therefore it would have been absurd, in the Court's view, and would render the cause of action granted by section 36 almost meaningless, if the discoverability principle did not apply. The Court also noted that application of discoverability to the limitation period was supported by the objects of the statute, and by the unfairness of allowing wrongdoers to escape liability.

(ii) Fraudulent Concealment

The plaintiff had argued that, even if the discoverability principle did not apply, the limitation period should be extended beyond two years pursuant to the doctrine of fraudulent concealment. Because of its decision on discoverability the Court did not have to consider fraudulent concealment, but it did. It noted that fraudulent concealment is an equitable doctrine that prevents limitation periods being used as an instrument of injustice. It provides that where a defendant fraudulently conceals the existence of the causes of action the limitation period is suspended until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud. The issue was whether there has to be a 'special relationship' between the two parties concerned for fraudulent concealment to apply. The Court found that was not the case. A special relationship could be one reason for the doctrine of fraudulent concealment to apply but that, in addition, if it was unconscionable for the

defendant to rely on an advantage gained by having concealed the existence of a cause of action the equitable doctrine could apply.

Umbrella Purchasers

As noted above, the concept of umbrella purchasers relates to whether or not customers buying the cartelized product from third parties, not participants in the conspiracy, have a cause of action against the conspirators. The claim is based on the theory that, as the Court in *Godfrey* put it, "a rising tide lifts all boats".

This issue had been a debate in a number of courts of appeal. The defendants argued that allowing claims by umbrella purchasers would expose defendants to indeterminate liability.

The Supreme Court determined that the question was one of statutory interpretation and, if the alleged injured person can prove injury, section 36 provides that they have a cause of action against those who engaged in the conduct and caused the injury. It noted that while proof might be difficult, if the umbrella purchaser can prove such loss or damage the Act gives them a cause of action. It found that approach to be consistent with the purposes of the Act to discourage anticompetitive conduct and provide a recourse for those who suffer damages as a result. It found that this did not expose defendants to indeterminate liability because the umbrella purchasers would have to show that they suffered injury resulting from the unlawful conduct.

Additional Causes of Action Beyond The *Competition Act*

The defendants in *Godfrey* argued that section 36 of the Act, providing for the right to claim damages following from breach of the criminal provisions of the Act, represented a complete code, ousting other parallel common law causes of action such as civil conspiracy to injure. Again, a number of lower Court rulings had explored this issue with varying outcomes. The Supreme Court has answered that question reasonably clearly. It found that section 36 is not duplicative of the tort of civil conspiracy nor does it represent a comprehensive and exhaustive code regarding anticompetitive conspiratorial conduct.

Loss as a Common Issue

The most complex and lengthy aspect of the majority decision in *Godfrey*, and likely that which will have the most practical impact, is the question of what proof the plaintiff must offer of loss or injury, at the certification stage, in order to have a class action certified.

In order to certify a class action there must be proof of injury, as injury is an element of the cause of action itself. That has led to a debate in the cases over the years as to whether the plaintiff has to offer a methodology to show injury to all proposed class members, or only need offer a methodology to show that injury resulted to

"the level" of purchaser (that is to the level of direct purchaser, to the level of the immediate indirect purchaser, to the level of the secondary indirect purchaser, etc.) of the cartelized product.

In considering this question, the Supreme Court in *Godfrey* first confirmed its earlier decision in *Vivendi*[4] that success for one class member cannot be failure for another class member. Courts are not to certify a class action where some members of the proposed plaintiff class will be injured by the success of the action. But then the question is whether the methodology proposed must be able to demonstrate that there was injury to all class members at a particular level of purchase, or simply that the injury reached that level of purchaser, whether or not such methodology can demonstrate injury to any particular purchaser at that level.

The Court found that the issue in *Godfrey* may be moot in that the plaintiffs' expert purported to opine that he could show injury to all class members at various levels of purchase. Leaving that aside, the Court found that it was not necessary to have a methodology which could show that each and every class member suffered a loss; rather, only that the methodology proposed be sufficiently credible to establish that the loss reached the requisite purchaser level. It found that showing that loss reached a particular level of purchaser will significantly advance litigation, and is therefore all that is necessary to certify the action.

One bright spot for defendants is that the Supreme Court criticized the court below for stating "the aggregate damages provisions…allow for an aggregate award even where some class members have suffered no financial loss". The Supreme Court found that this was not so. Rather, the Court found that, where the evidence at trial showed that the damage could be shown to reach the relevant level of purchaser by way of aggregate evidence, but that it was not possible to determine which purchasers at that level had suffered damage and which had not, then ultimately it might be that individual issues trials would be required to determine which of the class members suffered damage and which did not. Aggregate damages could not be awarded to obviate proof of injury.

Conclusion

As noted at the outset, the *Godfrey* case represents a fairly clear victory for plaintiffs seeking to certify price fixing class actions. It reduces the burden on plaintiffs to show a methodology to prove injury as a condition of certification; it extends the potential limitation periods; it expands the class of plaintiffs to those who did not buy from the price-fixers; and it confirms a broader potential set of causes of action.

If there is a silver lining for defendants it falls on the post-certification side of the ledger. The Court noted that, while it is possible to bring an action on behalf of umbrella purchasers, it is likely to be difficult for them to prove damages. As well, and more significantly, it noted that while an action may be certified even if the plaintiff cannot offer a methodology which demonstrates who suffered injury by use of common evidence; nevertheless, if class members seek to actually obtain damages they must prove injury at trial, either with

common evidence, if it is available, or by separate trials, if necessary.

There is no doubt that making class actions easier to certify will result in more payments to plaintiffs – simply because the vast majority of class actions settle if certified. But, if cases become easier and easier to certify – as appears to be the case, such that it is now unambiguously easier to certify class actions in Canada than it is in the United States – the result may be that more cases will be taken to trial, where proof of injury may not be possible. At some point Canadian courts may decide that ease of certification has gone too far. As Madam Justice Côté, in dissent, seems to have indicated in the quote which begins this Brief, the balance may be somewhat off kilter in the certification of competition law class actions at the moment. When things are unbalanced they tend to come back into balance over time. In the interim we may see fewer, or more focused certification battles, with some defendants choosing to go directly to trial, where their prospects may be brighter. Time will tell.

The authors were not part of the McMillan LLP team which represented one of the parties in *Godfrey*.

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[1] Côté J., in dissent, in *Godfrey*.[ps2id id='1' target='/]
[2] Since *Pro-Sys Consultants Ltd.* v. *Microsoft Corporation*, [2013] 3 S.C.R. 447.[ps2id id='2' target='/]
[3] This was the decision of the majority, but not of Madam Justice Côté, in dissent.[ps2id id='3' target='/]
[4] *Vivendi Canada Inc.* v. *Dell'Ariello*, [2014] 1 SCR 3.[ps2id id='4' target='/]

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.