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Competition Class Action Certification Made (Even) Easier

The Supreme Court of Canada released a long anticipated decision in *Pioneer Corporation et al. v. Godfrey*, wrestling with a number of important questions covering Canada's Competition Act.

Canadian courts have patiently waited for the Supreme Court of Canada's decision in *Pioneer Corporation et al. v. Godfrey*, which addresses several open questions involving class actions under Competition Act (the "Act"). On September 20, 2019, the Court issued a decision grappling with issues that have been the subject of debate amongst lower courts over the last number of years handling Canada's price fixing class actions. These issues include:

- (1) the applicable limitation period for alleging breach of the Act;
- (2) whether umbrella purchasers (i.e., purchasers from suppliers who did not participate in the cartel conduct) have a cause of action;
- (3) whether the Act excludes parallel or similar common law causes of action, such as civil conspiracy; and,
- (4) whether class certification necessitates a methodology which can demonstrate injury to each individual proposed class member, or merely injury to "the level" of purchaser.

Applicable Limitation Period

Section 36(4) of the Act provides:

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

Since the limitation period 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. The Supreme Court's majority therefore ruled that the limitation period does not accrue until the material facts on which the cause of action is based have been discovered or ought to have been discovered by the exercise of reasonable diligence.

The Court also held that fraudulent concealment could also suspend the limitations period until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud. While a 'special relationship' between the parties may be one reason for the doctrine of fraudulent concealment to apply, but is not necessary for the doctrine to apply. The Court also stated that the equitable doctrine would apply if it was unconscionable for the defendant to rely on an advantage gained by having concealed the existence of a cause of action.

Umbrella Purchasers

Umbrella purchasers are those customers who buy cartelized products from third parties that are not participants in the conspiracy. The Supreme Court determined that umbrella purchasers have a cause of action against the conspirators if the umbrella purchaser can prove such loss or damage they suffered resulted from unlawful conduct proscribed by the Act.

Parallel Causes of Action Allowed

The Supreme Court held that other common law causes of action, such as civil conspiracy to injure, are not duplicative of claims brought under section 36 of the Act. Since the Act was not a comprehensive or exhaustive code covering all anticompetitive conspiratorial conduct, parallel common law causes are not proscribed by the Act.

Loss as a Common Issue

Tackling a similar issue recently addressed by [the United States Court of Appeals for the District of Columbia Circuit](#), the Supreme Court considered whether it is appropriate to certify a class absent a methodology demonstrating injury to all class members at a particular level of purchase, or whether the methodology simply must show that the injury reached the requisite purchaser level. The Court found that a methodology showing that the loss reached a particular level of purchaser will significantly advance litigation. As such, it was not necessary to have a methodology, which could show that each class member suffered a loss; rather, the only requirement is that the methodology proposed is sufficiently credible to establish that the loss reached the requisite purchaser level.

Conclusion

Godfrey case represents a clear victory for plaintiffs seeking to certify price fixing class actions. It reduces the burden to prove injury as a condition for class 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. Certification of price fixing class actions is easier and getting easier still in Canada – perhaps the easiest jurisdiction in the world. The pendulum may swing back at some point, but for now it is a plaintiff friendly jurisdiction.

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