The Supreme Court of Canada Clarifies the Law

Canadian Price-Fixing Class Actions

By Steven F. Rosenhek and Vaso Maric

On October 31, 2013, the Supreme Court of Canada released highly anticipated rulings in a trilogy of price-fixing cases: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, *Sun-Rype Products Ltd. v. Archer Daniels Midland Company* and *Infineon Technologies AG v. Option consommateurs*. This column will discuss four important aspects of these decisions. In these decisions the Supreme Court of Canada rejected the passing-on defense, permitted indirect purchasers to pursue class actions for various reasons, found that Canadian courts did have jurisdiction, and confirmed the certification proof standard.

Similar to the Supreme Court of the United States in *Hanover Shoe Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), the Supreme Court of Canada rejected the passing-on defense, holding that it is "inconsistent with the basic premise of restitution law," "economically misconceived" and "would force a difficult burden of proof on the plaintiff to demonstrate not only that it had suffered a loss, but that it did not engage in any other transactions that would have offset the loss."

Unlike the approach taken by the majority of the Supreme Court of the United States in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the Supreme Court of Canada concluded that prohibiting the "offensive use of passing on" was not a necessary corollary to rejecting the passing-on defense. In reaching that conclusion, the Supreme Court of Canada held that (1) a court could manage the risk of double or multiple recovery, which the majority in *Illinois Brick* identified as a key reason for barring indirect purchaser claims; (2) complexity and remoteness concerns could not suffice as bases for denying indirect purchasers a right of action; (3) the deterrence function of Canadian competition law would not likely be impaired by indirect purchaser actions; and (4) allowing indirect purchaser actions is consistent with restitutionary principles. In addition, the Supreme Court of Canada indicated that while the rule in *Illinois Brick* remains good law at the federal level in the United States, the existence of numerous so-called "repealer" statutes at the state level, a report to the U.S. Congress recommending reversing it on the federal level, and recent doctrinal commentary calling for overturning *Illinois Brick*, all called the rationale of that decision into question.

The Supreme Court of Canada also held that classes may be composed of both direct and indirect purchasers, and any conflict between those groups about how to distribute aggregate damages among them should not bar the certification of a combined class.

In the *Sun-Rype* case, the respondents argued that the plaintiffs' claims failed to disclose a reasonable cause of action because, among other things, the alleged price-fixing conspiracy lacked a real and substantial connection to Canada and therefore did not give rise to a civil remedy under section 36 of the Competition Act. Although the Supreme Court of Canada agreed that the plaintiffs' claims must have a real and substantial connection to Canada, it disagreed with the respondents' characterization of the factual situation in the case before it. According to the plaintiffs, the alleged conspiracy involved each respondent's Canadian subsidiary acting as its agent, and the sales in question were made in Canada to Canadian customers and Canadian end-consumers. Noting that "there 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 Supreme Court of Canada concluded that the respondents had failed to demonstrate that it was "plain and obvious that Canadian courts have no jurisdiction over the alleged anti-competitive acts committed in this case."

Further, in the *Infineon Technologies* case, the Supreme Court concluded that under Quebec civil law, the Quebec Superior Court had jurisdiction over price-fixing arrangements executed outside Canada if some evidence demonstrated that a Quebec consumer suffered injury or economic damage.

The Supreme Court of Canada confirmed that other than the requirement that there be a reasonable cause of action, the standard of proof applicable to each of the remaining individual certification requirements con-

■ Steven F. Rosenhek is a senior partner in Fasken Martineau's Litigation, Antitrust and Class Actions Groups, whose practice encompasses the defense of major class action proceedings in Canada as well as complex commercial disputes at all Canadian court levels. Vaso Maric is a research lawyer with Fasken Martineau, whose practice focuses on providing strategic advice and analysis in complex litigation and commercial matters. He has appeared before all levels of court in Ontario, the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada. Both authors practice in the firm's Toronto office.

tained in provincial class proceedings legislation was whether there was "some basis in fact." However, while finding that this test did not rise to the standard of proof on a balance of probabilities, the Supreme Court of Canada declined to define precisely the evidentiary threshold required to meet this standard of proof. Rather, each case must be decided on its facts and there must be sufficient facts to satisfy the court that "the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage."

Further, respecting expert evidence tendered by indirect plaintiffs to address whether loss could be established on a classwide basis, the Supreme Court of Canada held that it would be inappropriate during the certification stage to subject such evidence to the robust and rigorous level of scrutiny required by the Supreme Court of the United States in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Instead, the expert methodology must (1) be sufficiently credible or plausible to establish some basis in fact for the commonality requirement; (2) offer a realistic prospect of establishing loss on a classwide basis so that if the overcharge is eventually established during a trial of the common issues, there is a means by which to demonstrate that it is common to the class; and (3) be grounded in the facts of a particular case, rather than being purely theoretical or hypothetical. There must also be some evidence of the availability of the data to which the methodology is to be applied.

These decisions will have an immediate effect on both ongoing and new price-fixing class actions in Canada.