Indirect Purchaser Antitrust Claims in Canada and the United States: Strategic Considerations for Cross-Border Class Action Litigation

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The Supreme Court of Canada recently issued three decisions that make it easier for indirect purchasers to bring antitrust class action claims. The legal landscape south of the Canadian border in the United States, however, is far more restrictive for indirect purchasers. This article highlights some procedural and substantive differences between the Canadian and U.S. legal systems and provides guidance on representing clients in cross-border cases in light of the widening gap between the two jurisdictions.

The Canadian Landscape

Indirect Purchasers May Bring Antitrust Actions Under Canadian Law

On October 31, 2013, the Supreme Court of Canada released a trilogy of long-awaited decisions in proposed class proceedings brought by purchasers of products alleging antitrust law violations.[266] The Supreme Court concluded that

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[266] *Pro-Sys Consultants Ltd v. Microsoft Corp.*, 2013 SCC 57, [2013] SCJ No 57 (certification granted); *Sun Rype Products Ltd v. Archer Daniels Midland Co.*, 2013 SCC 58, [2013] SCJ No 58 (certification denied); *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59, [2013] SCJ No 59 (certification granted).

indirect purchasers have a cause of action, resolving a conflict in appellate jurisprudence in Canada.[267] The Supreme Court held that while defendants cannot rely on a "passing-on defense," indirect purchasers could sue for an overcharge that was passed on to them.

Traditionally, a party responsible for an overcharge invoked the passing-on defense against a direct purchaser who passed that overcharge on to its own customers. The defense is based on the proposition that a direct purchaser suffers no loss when it passes on an overcharge. However, the Supreme Court of Canada rejected this defense, finding it inconsistent with restitutionary law and "economically misconceived."[268]

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At the same time, the Supreme Court of Canada held that its rejection of the passing-on *defense* does not lead to a corresponding rejection of the *offensive* use of passing on.[269] Accordingly, indirect purchasers are not foreclosed from claiming losses that have been passed on to them.[270]

Canadian Class Action Standards

The Supreme Court of Canada also made a number of salient findings regarding class certification and jurisdiction, several of which illuminate differences with U.S. antitrust law and class action procedures:

- The standard of proof on class certification motions (other than motions testing whether the pleadings disclose a cause of action) is the "some basis in fact test."[271] It is not the higher and more traditional balance of probabilities (i.e., "more probable than not") civil standard of proof.[272]
- A single mixed class of direct and indirect purchasers is permitted.[273]
- Resolving conflicts between experts is not an issue for a certification judge to decide on a certification motion, but for the trial judge in the common issues trial. The Supreme Court confirmed that plaintiffs

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[267] The Supreme Court of Canada's conclusion is applicable to claims commenced under both provincial and federal class action legislation.

[268] *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at paras. 22-23.

[269] *Id.* at paras. 34 and 60.

[270] Interestingly, in its decision, the Supreme Court of Canada referred to an Antitrust Modernization Commission report issued to the U.S. Congress in 2007 recommending that U.S. law be changed in this regard. See *id.* at para 51 (citing ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, at vi-vii (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("AMC REPORT")).

[271] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158.

[272] *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at para. 99.

[273] *Sun Rype Products,* 2013 SCC 58, *supra* note 2 at para. 18.

generally must use expert evidence to show that loss can be established on a class wide basis. The Supreme Court also confirmed that the expert methodology cannot be theoretical or hypothetical but must be sufficiently credible or plausible to establish a realistic prospect of establishing loss on a class-wide basis.[274]

- The aggregate damages provisions of class action legislation are procedural only.[275] They cannot be used to establish liability.[276]

- The class must be "identifiable." Prospective class members must be able to prove whether they are part of the class based on available evidence. In particular, putative indirect purchaser class members must be able to show that the end product they purchased actually contained the price-fixed part or product at issue. In *Sun-Rype*, the majority of the Supreme Court denied certification for the indirect purchaser claims on the grounds that no evidence was offered showing that two or more persons could prove that they purchased a product containing high-fructose corn syrup made by a defendant during the class period.[277]

The U.S. Landscape

The Ability of Indirect Purchasers to Seek Damages

Similar to Canadian law, in *Hanover Shoe, Inc. v. United Machinery Corp.*, the U.S. Supreme Court barred a defendant overcharger from asserting a defense against a direct purchaser that the plaintiff had passed on the overcharge to an indirect purchaser.[278] However, unlike Canadian law, in *Illinois Brick Co. v. Illinois*, the U.S. Supreme Court barred indirect purchasers from recovering damages for federal claims.[279] The Court gave three reasons: to avoid double recovery in light of *Hanover Shoe*; apportioning damages between direct and indirect purchasers is complex and burdensome; and indirect purchasers' damages are too remote. Some important exceptions to *Illinois Brick* exist, however, that permit indirect purchasers to bring a Sherman Act claim where:

- they are seeking injunctive relief;

- the direct purchaser is almost certain to have passed on an overcharge due to a pre-existing "cost-plus" contract; or

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[274] *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at paras. 114-26.

[275] Generally, aggregate damages provisions of class action legislation permit the court in prescribed circumstances to determine the aggregate or part of a defendant's liability to class members.

[276] *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at paras. 127-35.

[277] *Sun Rype Products Ltd v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] SCJ No 58, *supra* note 2 at paras. 52-79.

[278] 392 U.S. 481 (1968).

[279] 431 U.S. 720 (1977). As a result, the proper characterization of a plaintiff as either an indirect or direct purchaser remains a contentious issue. For example, in *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 533 F.3d 1, 4-5 (1st Cir. 2008), the First Circuit affirmed dismissal of Sherman Act claims for damages because plaintiffs, who leased allegedly price-fixed cars imported from Canada into the U.S., were found to be "indirect purchasers." The First Circuit concluded that car dealers were the direct purchasers since the only alleged conspirators in the horizontal conspiracy were car manufacturers.

- the direct purchaser is a conspirator or is owned or controlled by a conspirator.[280]

In addition, the District of Columbia and at least 36 states, including some of the largest, have so-called "*Illinois Brick* repealer" laws that permit indirect purchasers to recover damages under state antitrust or consumer protection laws that are analogous to the Sherman Act.[281] Moreover, antitrust plaintiffs have attempted to use other state laws, such as unjust enrichment, consumer protection, and unfair competition claims, to seek redress as well.

Finally, state Attorneys General can bring *parens patriae* lawsuits on behalf of individual purchasers from their respective states and, to date, these suits have not had to overcome the hurdles of class certification discussed below.[282] Although *parens patriae* suits can seek all of the federal remedies otherwise available to private plaintiffs, due to *Illinois Brick,* these suits are typically brought under state laws and often in state courts, where they can remain under a recent Supreme Court ruling.[283]

Class Certification Requirements

For the last decade, the U.S. Supreme Court and federal appellate courts have increasingly scrutinized plaintiffs' attempts to seek recovery through class action lawsuits in several respects:

- The Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation* held that class certification requirements under Federal Rule of Civil Procedure 23 require more than a mere "threshold showing;" plaintiffs must show by a preponderance of the evidence – including expert testimony if necessary – that the Rule's requirements have been met, and the court may have to weigh conflicting expert opinions.[284]

- The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* reiterated that trial courts must conduct a "rigorous analysis" of all elements of Rule 23 and that such an analysis may "overlap with the merits of the plaintiff's underlying claim" and include consideration of a defendant's affirmative defenses.[285]

- Most recently, in *Comcast Corp. v Behrend*, the Supreme Court held that a plaintiff's common proof for damages cannot be disconnected from the theory of liability.[286]

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[280] See, e.g., *Howard Hess Dental Labs v. Dentsply Int'l*, 602 F.3d 237, 258-60 (3rd Cir. 2010); *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326-27 (9th Cir. 1980).

[281] *See, e.g.*, CAL. BUS. & PROF. Code § 16720 (California Cartwright Act); N.Y. GEN. BUS. LAW § 340(6) (New York Donnelly Act); AMC REPORT, *supra* note 4, at vi-vii.

[282] 15 U.S.C. §§ 15c-15h. These suits can only be brought on behalf of individuals, not corporations.

[283] *Mississippi ex rel. Hood, Attorney General v. AU Optronics Corp., et al.*, 134 S. Ct. 736, 737 (2014) (holding that the Class Action Fairness Act of 2005 does not require removal of *parens patriae* suits).

[284] 552 F.3d 305, 307, 320, 324 (3rd Cir. 2008); s*ee also In re Initial Public Offering Securities Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006) ("disavowing" the "some showing" standard as being the test for satisfying Rule 23's requirements).

[285] 131 S. Ct. 2541, 2551 (2011).

[286] 133 S. Ct. 1426, 1433 (2013) ("a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [plaintiffs'] theory" in order for it to "establish that damages are susceptible of measurement across the entire class").

- Courts continue to grapple with whether motions to exclude expert testimony, brought under *Daubert v. Merrell Dow Pharmaceuticals*,[287] should be permitted at the class certification stage.[288]

These evolving standards for class certification have played out inconsistently in recent antitrust cases. For example, the D.C. Circuit vacated a pre-*Comcast* grant of class certification because the lower court did not properly consider that the plaintiffs may have failed to show class-wide injury because their expert's damages model indicated injury from the alleged conspiracy to purchasers who in fact had never paid an overcharge.[289] By contrast, in another post-*Comcast* ruling, a federal trial court certified a damages class on the basis of an expert's "aggregate damages" model that included "uninjured class members" who suffered no "economic injury."[290] These illustrative decisions suggest that class certification standards will continue to evolve in the courts over time.

Cross-Border Implications and Strategic Considerations

There are a number of cross-border implications and strategic considerations arising from the Supreme Court of Canada's decisions and the divergent approaches between the U.S. and Canada regarding indirect purchasers.

Continuing efforts will be made by plaintiffs facing class certification in Canada proceedings to access discovery materials from parallel proceedings in the United States.

More Antitrust Class Action Filings in Canada

The most immediate impact in Canada is that a number of cases put on hold pending the release of the Supreme Court's decisions will now proceed. But additionally, the finding that indirect purchasers have a cause of action, together with an arguably low standard of proof for plaintiffs to meet on certification motions, will likely result in more class action filings – and possible certifications. In contrast, indirect purchasers in the U.S. have faced significant barriers to bringing federal damages actions for almost 50 years, and class certification has increasingly become a more difficult hurdle to clear. As a result, plaintiffs' lawyers confronting challenges under U.S. law may be inclined to consider working with Canadian lawyers to commence national indirect purchaser class actions in Canada.

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[287] 509 U.S. 579 (1993).

[288] *See, e.g., In re Polyurethane Foam Antitrust Litig.,* No. 10-MD-2196, Preliminary Comments by Court Prior to Class Certification Hearing, at *2-3 (N.D. Ohio, Jan. 14, 2014) ("In a case of this magnitude, it makes little sense to grant class certification if the 'critical' expert testimony supporting that decision is so flawed or unreliable as to be inadmissible at trial.").

[289] *In re: Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (summarizing a trial court's obligation to scrutinize expert testimony: "No damages model, no predominance, no class certification.").

[290] *In re: Nexium (Esomeprazole) Antitrust Litig.*, No. 12-MD-02409, Memorandum and Order, at *20, *27 (D. Mass. Nov. 14, 2013) ("[The] Court determines that the incidence of uninjured consumers and TPPs are insufficient to overcome the showing of common antitrust impact to the putative class, but the Court preserves the Defendants' right to challenge individual damage claims at trial.").

Double Recovery

It remains unclear how U.S. and Canadian courts will resolve the potential double or multiple recovery that can arise from permitting purchasers at multiple levels of the distribution chain to file claims on the same overcharges. In its trilogy of decisions, the Supreme Court of Canada noted that Canadian courts have practical tools at their disposal to avoid these risks at the distribution stage after a judgment or settlement. In the U.S., the multi-district litigation process typically consolidates these issues before one judge but only for pre-trial purposes, and even then *parens patriae* actions can avoid consolidation.

Cooperation Between U.S. and Canadian Plaintiffs' Counsel

Continuing efforts will be made by plaintiffs facing class certification in Canada proceedings to access discovery materials from parallel proceedings in the United States. Canadian plaintiffs have done this with some success in the last decade.[291] The ability to access such documents at an early stage is potentially a significant advantage for plaintiffs because there is no pre-certification right to discovery in Canada.

Extensive Coordination Between U.S. and Canadian Defense Counsel

Defendants are likely to face a potentially-increasing number of contemporaneous class actions in Canada and the United States based on different substantive legal standards and running on different procedural tracks in each jurisdiction. Coordination between U.S. and Canadian defense counsel is especially important in these circumstances, in particular:

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- monitoring and managing the pace at which one class action proceeds in one jurisdiction vis-à-vis the other. For example, plaintiffs may try to push the Canadian class actions ahead of the contemporaneous U.S. proceedings with the hope of achieving a good result in Canada and using that success in the United States.
- overseeing parallel class proceedings within the two jurisdictions. Unlike the United States, Canada has no equivalent to the multi-district litigation procedure and it is very common for antitrust class actions arising from the same alleged collusive activity to be commenced – and remain throughout the course of the litigation – in multiple provinces. Now that *parens patriae* actions can avoid multi-district consolidation in federal court before a single judge and remain in state court, a similar level of oversight is needed in the United States.
- the availability of national indirect purchaser class actions in Canada means that the number of persons who can pursue claims has increased significantly. Accordingly, the outcome of U.S. and Canadian criminal proceedings that typically precede class action litigation will now have even larger implications for class action

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[291] *See, e.g.*, *In re Baycol Products Litig.*, 2003 U.S. Dist. LEXIS 28398, at *9-10 (D. Minn., May 6, 2003); *In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333, 342 (E.D. Pa. 2004).

defendants. For example, decisions to plead guilty and, if so, to what, may have greater significance to the scope of damages that plaintiffs may seek in Canadian and U.S. class actions.

The Supreme Court of Canada has made it easier for indirect purchasers to bring class action lawsuits. This development deepens a growing divergence between Canada and the United States in this important area of antitrust litigation. Practitioners need to be mindful of these differences and how to exploit them to their client's advantage, especially when advising clients that are facing cross-border litigation.

Reforms to the Criminal Cartel Regime in the UK: Lame Duck No More?

by Kirsten Donnelly & Verity Doyle[292]

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Following years of consultation and debate, amendments to the Enterprise Act[293] will come into force in the UK on 1 April 2014. In addition to reform at an institutional level,[294] April will herald significant amendments to the criminal cartel offence. These amendments considerably expand the scope of the offence and lower the evidential test for bringing a prosecution, in particular by the removal of the 'dishonesty' element. In addition, the new Competition and Markets Authority ("CMA") will have vastly expanded powers of, which will allow, amongst other things, compulsory interview of individuals on civil dawn raids, with the possibility of personal financial penalties for uncooperative employees.

Since its introduction in 2003, only three individuals have been convicted under the existing criminal cartel offence,[295] all of whom pled guilty. The high-profile failure of the OFT's first contested prosecution in the BA/Virgin Case[296] in 2010 exposed manifold flaws in the existing regime. The reforms are intended to make it easier for the CMA to bring successful prosecutions against individuals who engage in serious cartel conduct, but—at least in the absence of clear

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[293] Reforms are contained in the Enterprise and Regulatory Reform Act 2013.

[294] The reforms abolish the Office of Fair Trading (OFT) and the Competition Commission (CC), replacing them with a single body, the Competition and Markets Authority.

[295] In *R v. Whittle, Allison, Brammar*, [2008] EWCA Crim. 2560, the defendants entered into a plea agreement with U.S. prosecutors that they would not seek a lesser penalty than that imposed by the U.S. courts and nor would they seek to appeal any such penalty.

[296] *R v. George, Crawley and Others*, [2010] EWCA Crim. 1148.