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Antitrust Class Actions: The Supreme Court of Canada Grants Leave to Consider the Application of Illinois Brick in Canada

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In a decision released earlier this morning, the Supreme Court of Canada granted leave to appeal from the B.C. Court of Appeal's certification decisions in the parallel antitrust class actions in *Sun-Rype*[1] and *Microsoft*.[2] The Supreme Court's decision will have significant implications for antitrust policy and class certification in Canada, since this is the first time in two decades that the Supreme Court has agreed to hear an appeal from a private antitrust enforcement case. In granting leave, the Supreme Court has also strongly signaled that it will consider whether the rule of *Illinois Brick*[3] should be adopted in Canada.

In a ruling over twenty years ago in response to a federal constitutional challenge, the Supreme Court upheld the private right of action for damages that are contained in the *Competition Act*.[4] Since that time, private actions have become a permanent feature of the antitrust enforcement landscape in Canada. Indeed, following the gradual adoption of class proceedings legislation across the provinces in the 1990s, antitrust class actions have become commonplace in Canada. Currently, there are dozens of antitrust class actions pending before courts across Canada that seek relief on behalf of direct and/or indirect purchasers for damages caused by horizontal and/or vertical anti-competitive conduct. In many instances, these cases have been brought in conjunction with parallel proceedings in the U.S., and plaintiffs have sought to recover damages for consumers based on domestic and foreign anti-competitive conduct. And over the past twenty years, there have been a number of significant antitrust settlements that have provided for substantial compensation for class members.

In contested cases, the jurisprudence is still evolving. While the applicable standard for certification in antitrust cases remains very contested, there have been a number of recent decisions where the courts in Ontario, Quebec and B.C. have certified consolidated direct and indirect classes.[5] Given the uncertainty in the jurisprudence, a number of litigants have sought the Supreme Court's intervention to address the applicable evidentiary test for certification, the application of restitutionary theories to a pre-existing private statutory remedy, and the significant conflict issues that are raised *vis-à-vis* direct and indirect purchasers. However, to date, the Supreme Court has declined to intervene in these cases.[6]

Nonetheless, in the past number of months, an appellate conflict has emerged as to whether indirect purchasers/consumers have a cause of action for antitrust harm under the *Competition Act*. In the *Sun-Rype* proceedings in British Columbia, the plaintiffs alleged the existence of a horizontal conspiracy to fix the price of high-fructose corn syrup, and they sought to certify a class of direct and indirect purchasers. In the *Microsoft* proceedings, the plaintiffs alleged the existence of a vertical conspiracy to fix the price of branded software products, and they sought to certify a class of indirect purchasers only. At first instance, the B.C. Supreme Court certified both cases. However, on appeal, the B.C. Court of Appeal reversed, on the basis that there was no cause of action for indirect purchasers – and it thereby set aside the certification order and remitted the certification application to the B.C. Supreme Court for further consideration in *Sun-Rype* and rejected certification entirely in the *Microsoft* case. These decisions created an immediate appellate conflict within British Columbia, since the B.C. Court of Appeal had previously certified a direct and indirect case in the *DRAM* case a number of months earlier.[7] In addition, the decisions created an appellate conflict within other provinces, since the Ontario courts had certified direct and indirect classes in other cases.[8]

This appellate conflict became more glaring in recent weeks, since the Quebec Court of Appeal expressly endorsed the dissenting decision in the B.C. Court of Appeal's judgment in *Sun-Rype* and certified a direct and indirect purchaser class.[9] In addition, the Ontario Divisional Court granted leave to appeal from a recent certification decision in the *LCD* case on the basis of this emerging appellate conflict.[10]

In accordance with its usual practice, the Supreme Court of Canada did not release reasons in respect of its grant of leave. However, given the factures in the existing jurisprudence, the Supreme Court appears intent on addressing once and for all whether indirect purchasers and/or consumers have a remedy for anti-competitive harm under Canadian competition law. No date for the appeal has been scheduled, but it will likely be heard in 2012.

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[1] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187.

[2] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186.

[3] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[4] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

[5] See, for example, *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (Ont. S.C.J.) ("*Irving Paper*"); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (2009), 98 B.C.L.R. (4th) 272 (C.A.); *Option Consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116.

[6] See, for example, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (2009), 98 B.C.L.R. (4th) 272 (C.A.), reversing 2008 BCSC 575, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 32, S.C.C. Bulletin, 2010, p. 795.

[7] See our previous Osler Update of April 15, 2011 on the B.C. Court of Appeal's decisions in *Sun-Rype* and *Microsoft*.

[8] See, for example, *Irving Paper*, above.

[9] See our previous Osler Update of November 17, 2011 on the Quebec Court of Appeal's decision in *Option Consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116.

[10] *Fanshawe College of Applied Arts and Technology v. LG Philips LCD Co.* (the decision of the Divisional Court granting leave to appeal has not yet been reported).