April 15, 2011

A Significant Development in Antitrust Class Actions in Canada: The B.C. Court of Appeal Rejects Certification of Two Indirect Purchaser Class Actions and Adopts the Rule of Illinois Brick

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Earlier today, the B.C. Court of Appeal released two rulings that may have a profound impact on antitrust law and antitrust class actions in Canada. In two appeals, the B.C. Court of Appeal reversed certification in two pending antitrust class actions, and the B.C. Court of Appeal concluded that indirect purchasers have no cause of action in law for damages under the Competition Act. These rulings represent a dramatic departure from the existing jurisprudence on antitrust class actions in Canada, and if upheld, will represent a profound change in the landscape of private antitrust enforcement in Canada.

In recent years, the courts in Ontario, Quebec and B.C. have certified a number of antitrust class actions in Canada on a contested basis. In these decisions, the courts have certified claims in respect of both vertical and horizontal anti-competitive conduct, and the courts have certified classes consisting of both direct and indirect purchasers, often within the same consolidated class. In many instances, these class actions have been brought on the heels of a global price-fixing investigation – namely, in circumstances where specialized plaintiff firms in Canada have initiated class proceedings in Canada in conjunction with parallel class proceedings in the United States. For example, the Ontario Superior Court certified a consolidated class of direct and indirect purchasers in the hydrogen peroxide case in 2009, and the B.C. Court of Appeal certified a consolidated class of direct and indirect purchasers in the DRAM case in 2009. In addition to these certified cases, there remains a significant number of pending class proceedings in Canada that have not yet reached the certification stage, including class proceedings in respect of SRAM, LCD, CRT, air cargo, chocolate, motor vehicles and numerous other products sold in Canada.

However, earlier today, the B.C. Court of Appeal released two rulings that represent a significant departure from this prior jurisprudence. In Sun-Rype Products Ltd. v. Archer Daniels Midland Company (2011 BCCA 187), the plaintiffs had brought claims for horizontal price-fixing against a number of manufacturers of high fructose corn syrup (HFCS) and the plaintiffs sought to represent a class of direct and indirect purchasers of HFCS. In Pro-Sys Consultants Ltd. v. Microsoft Corporation (2011 BCCA 186),
the plaintiffs had initiated a number of vertical and other anti-competitive claims against Microsoft and the plaintiffs sought to represent a class of indirect purchasers of Microsoft software products. At first instance, the B.C. Supreme Court had granted certification in both cases, and the appeals of both cases were argued and heard by the same panel of judges at the B.C. Court of Appeal.

The Court of Appeal allowed the appeal from certification in both cases – largely on the reasoning that indirect purchasers in Canada have no cause of action for relief under the Competition Act. More specifically, on behalf of a 2-1 majority in both decisions, Mr. Justice Lowry found that the plaintiffs had failed to disclose a viable cause of action in law given the Supreme Court of Canada’s prior decision in Kingstreet Investments Ltd. v. New Brunswick (Finance). In Kingstreet, the Supreme Court of Canada had rejected the assertion of a “passing on” defence in a restitutionary case, on the reasoning that a defendant cannot reduce its liability by establishing that some or all of the unlawful harm was passed on to others. In light of the Supreme Court’s reasoning in Kingstreet, the Court of Appeal found that it followed that any claim by an indirect purchaser that was premised on the allegation of an anti-competitive overcharge that had been “passed on” through a distribution chain was not recognized under Canadian law and therefore “cannot give rise to a cause of action.” Justice Lowry held that “as a matter of law, the overcharge or the loss for which the wrongdoer is liable is sustained when the overcharge is paid at first instance.”

In other words, in Microsoft and Sun-Rype, the B.C. Court of Appeal appears to have ruled that indirect purchasers have no cause of action for damages under the Competition Act, and as a result, the law in Canada has arguably fallen in line with the federal antitrust laws in the U.S. as reflected by the U.S. Supreme Court’s book-end rulings in Illinois Brick Co. v. Illinois and Hanover Shoe v. United Shoe Machinery Corp. Given the absence of a cause of action on behalf of indirect purchasers, the B.C. Court of Appeal found that the courts had erred in the first instance by certifying a class that included indirect purchasers in both cases. More specifically, in Sun-Rype, the B.C. Court of Appeal set aside certification, and remitted proceedings for further consideration. In Microsoft, given that the proposed class consisted of exclusively of indirect purchasers in Canada, the B.C. Court of Appeal set aside certification, and dismissed the action.

In short, if upheld, these two decisions may have a significant impact in antitrust class actions in Canada, particularly since most of the pending cases involve claims by indirect purchasers who are alleged to have been harmed by price-fixing conspiracies outside Canada. However, in both cases, there was a spirited dissent. Given the existence of this dissent, and the potential impact of these decisions, the plaintiffs will undoubtedly seek leave to appeal from the Supreme Court of Canada to clarify the scope of private antitrust enforcement in Canada.

If you have any questions on the implications of these developments or if you wish to discuss further, please contact Christopher Naudie or a member of the Competition or the Litigation Group.
A Significant Development in Antrust Class Actions in Canada: The B.C. Court of Appeal Rejects Certification

Earlier today, the B.C. Court of Appeal released two rulings that may have a profound impact on the landscape of private antrust enforcement in Canada. These decisions follow that any claim by an indirect purchaser that was premised on the allegations of an – competitive conduct, and the courts have certified classes consisting of both direct and indirect purchasers, oen within the same consolidated class. In many instances, these class actions have been brought on the heels of a global price-fixing investigation – namely, in circumstances where specialized plainff firms in Canada have initiated class proceedings in Canada in conjunction with parallel class proceedings in the United States. For example, the Ontario Superior Court certified a purchaser class action in the DRAM case in 2009, and the B.C. Court of Appeal certified a consolidated class of direct and indirect purchasers in the hydroponics case in 2009, and the B.C. Court of Appeal concluded that indirect purchasers of Micros software products have no cause of action for damages under the antrust Act.

In other words, in the first two decisions, the Supreme Court of Canada had granted certification in both cases, and the appeals of both cases followed that any claim by an indirect purchaser that was premised on the allegations of an – competitive conduct, and the courts have certified classes consisting of both direct and indirect purchasers, oen within the same consolidated class. In many instances, these class actions have been brought on the heels of a global price-fixing investigation – namely, in circumstances where specialized plainff firms in Canada have initiated class proceedings in Canada in conjunction with parallel class proceedings in the United States. For example, the Ontario Superior Court certified a purchaser class action in the DRAM case in 2009, and the B.C. Court of Appeal certified a consolidated class of direct and indirect purchasers in the hydroponics case in 2009, and the B.C. Court of Appeal concluded that indirect purchasers of Micros software products have no cause of action for damages under the antrust Act.

The Court of Appeal allowed the appeal from certification in both cases – largely on the reasoning that the plainffs sought to represent a class of indirect purchasers of Micros software products. At first instance, the plainffs had initiated a number of vertical and other an – competitive claims against Micros and others. In light of the Supreme Court’s reasoning in these decisions, the courts have certified claims in respect of both vertical and horizontal an – competitive conduct, and the courts have certified classes consisting of both direct and indirect purchasers, oen within the same consolidated class. In many instances, these class actions have been brought on the heels of a global price-fixing investigation – namely, in circumstances where specialized plainff firms in Canada have initiated class proceedings in Canada in conjunction with parallel class proceedings in the United States. For example, the Ontario Superior Court certified a purchaser class action in the DRAM case in 2009, and the B.C. Court of Appeal certified a consolidated class of direct and indirect purchasers in the hydroponics case in 2009, and the B.C. Court of Appeal concluded that indirect purchasers of Micros software products have no cause of action for damages under the antrust Act.

In short, if upheld, these two decisions may have a significant impact in antrust class actions in Canada, and as a result, the law in Canada has arguably fallen in line with the federal antrust laws in the U.S. as reflected by the U.S. Supreme Court’s book-end rulings in

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In the first case, the B.C. Court of Appeal found that the courts had erred in the first instance by certifying a class that included indirect purchasers in both cases. More specifically, in

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Purchaser Class Actions and Adopts the Rule that Indirect Purchasers Have No Cause of Action for Damages under the Antrust Act.

In the second case, the B.C. Court of Appeal set aside certification, and remanded proceedings for further consideration. In

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