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## Green Light for Class Action Suits by Consumers

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In a highly-anticipated and extremely significant pair of decisions for businesses and consumers alike, the Supreme Court of Canada ("SCC") ruled on Thursday (October 31, 2013) that the ultimate consumers at the end of a supply chain can effectively leap-frog the supply chain by having direct legal recourse in a class action against a manufacturer who illegally overcharged for the product supplied.

The SCC handed down simultaneous decisions in two appeals from the British Columbia Court of Appeal, namely *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 (as well as a related decision from Quebec).

Until these decisions, Canadian law did not support a cause of action by indirect purchasers against manufacturers or suppliers one or more times removed up the supply chain. While these cases have received attention for changing that law, they are significant for a number of reasons and to a number of classes of persons.

The SCC expressly declined to follow U.S. Supreme Court jurisprudence that does not allow for claims by indirect purchasers unless specifically provided for by legislation. Although common law at the federal level in the U.S. operates to bar indirect purchaser class actions, thirty-five states have provided for direct and indirect purchaser action through "repealer statutes" or judicial decisions.

Some of the effects of these decisions will be:

- To increase the likelihood that consumers will band together to pursue claims against manufacturers and suppliers; and
- To reinvigorate causes of action available under the *Competition Act* or related to such claims (such as economic tort claims).

But the rulings in these cases are not just important to competition and class action law or to manufacturers and consumers.

The SCC clarified that the so-called "passing on" defence should be rejected across restitutionary claims. Previously that defence had only been rejected definitively in relation to claims for reimbursement of taxes paid pursuant to *ultra vires* legislation.



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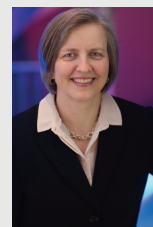
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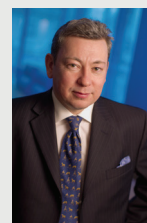
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By agreeing that the unjust enrichment claims in favour of indirect purchasers should not fail at the certification stage, the SCC opened the door to future claims where the relationship between the plaintiff and defendant and the requisite enrichment and corresponding detriment is more attenuated and less obviously direct. Accordingly, these rulings will encourage plaintiffs in their increasingly enthusiastic pursuit of restitutionary claims and remedies in commercial and consumer litigation.

Equally important are some of the issues the SCC left unresolved for another day, including:

- Whether Canadian law should continue to recognize two categories of conspiracy (predominant purpose conspiracy and unlawful means conspiracy);
- What the proper approach is to the “unlawful means” component of both the unlawful means class of conspiracy and the tort of intentional interference with economic interests should be;
- Whether waiver of tort is indeed a stand-alone cause of action that relieves plaintiffs of proving all the elements of given torts to recover; and
- How jurisdictional issues in terms of conspiracies potentially carried out in part outside Canada will be resolved.

## The issue

The issue at stake in both appeals was whether indirect purchasers had a certifiable class action proceeding disclosing a cause of action as required by s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The British Columbia Supreme Court certified the action on this basis, but the British Columbia Court of Appeal (“BCCA”) set that decision aside, stating that as a matter of law, indirect purchaser actions were not available in Canada and therefore that the claim did not disclose a cause of action.

The BCCA followed the SCC’s prior ruling in *Kingstreet Investments Ltd. v. New Brunswick* (Department of Finance), 2007 SCC 1, which definitively rejected the use of passing on as a defence. This defence is typically advanced by an overcharger on the ground that the alleged overcharge was passed to others lower down the supply chain and therefore the intermediaries suffered no loss. Were the defence not available in Canada, the overcharger at the top of the chain would be exposed to multiple, duplicate claims from direct and indirect purchasers, possibly leading to double or multiple recovery of damages.

The SCC reaffirmed *Kingstreet* and broadened its application beyond the *ultra vires* tax context. It expressly rejected the proposition that because passing on was not available as a defence to the overcharger, indirect purchasers should be foreclosed from claiming losses passed on to them, i.e., the offensive use of passing on. It considered and rejected a number of arguments in coming to that conclusion.

**Double or multiple recovery:** The SCC agreed with the dissenting opinion of Donald J.A. of the BCCA, dissenting in *Sun-Rype*, that “the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided” and found there was no evidence adduced that the B.C. courts could not preclude double or multiple recovery.

**Remoteness and Complexity:** The SCC held that indirect purchaser actions should not be barred solely because of the likely complexity associated with proof of damages. Indirect purchasers willingly assume this burden and the court will decide whether it has been discharged on a case-by-case basis.

**Deterrence:** The SCC rejected the proposition that allowing indirect purchaser actions would frustrate enforcement and deterrence objectives of competition law.



**Doctrinal commentary:** The SCC noted that there is a significant body of academic authority in favour of allowing indirect purchaser actions in order to best achieve the objectives of competition law.

Having considered the threshold question of whether offensive passing on may be used to bring an action, the next question for the SCC was whether there was a cause of action.

In relation to the statutory claim, this question turned on the wording of section 36 (1) of the *Competition Act*, R.S.C. 1985, c.C-34, which provides that "any person" who has suffered loss or damage contrary to Part VI of the Act may sue for and recover that loss or damage. The respondents in the cases argued that the benefit of this provision was unavailable to the indirect purchasers, largely based on their fundamental position that passed on losses are not recognized at law, and therefore section 36 was not intended to provide a right of action to indirect purchasers. For the reasons given above, this argument was rejected.

In *Pro-Sys Consultants*, the SCC also found that it was not plain and obvious that the following claims could not succeed:

- The claim in tort for predominant purpose conspiracy
- The claim in tort for intentional interference with economic interests
- The claim for unjust enrichment
- The claim for waiver of tort

We will have to wait for a suitable case to reach the SCC for it to engage on a number of interesting tort and restitution law questions, including the scope of the tort of conspiracy in Canadian law; whether waiver of tort is a distinct cause of action; and when an indirect relationship between plaintiff and defendant will support an unjust enrichment claim.

The Court did signal that it would be addressing the unlawful means requirement of the tort of conspiracy and intentional interference in a case in a judgment currently on reserve (*Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*).

## Remaining certification requirements

The *Class Proceedings Act* requires that the claims of class members raise common issues as a matter of central importance. The SCC held that in order to establish commonality, evidence that the acts alleged actually occurred is not required. The factual evidence required at this stage is to establish whether these questions are common to all the class members. The SCC said that if and when material differences emerge, the trial judge can deal with them when the time comes.

Expert methodology to establish some basis in fact for the commonality requirement must be sufficiently credible or plausible, offering a realistic prospect of establishing loss on a class-wide basis. That methodology "cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question."

The SCC's rulings strengthen the "basis in fact" requirement on certification that the Court first blessed in *Hollick v. Toronto (City)*, 2001 SCC 68, and therefore will be referred to by defendants on certification applications in cases involving many other substantive law areas. The SCC ruled that the ultimate decision as to whether the aggregate damages provision of the *Class Proceeding Act* should be available is one that should be left to the common issues trial judge.

In *Pro-Sys Consultants*, the SCC declined to interfere with the application judge's finding that a class action was the preferable procedure.



In the *Sun-Rype* case, unlike in *Pro-Sys Consultants*, the SCC refused to certify the indirect purchasers as an identifiable class. In that case, there was no basis in evidence to link at least two of the indirect purchasers to the purchase of the product during the class period. The claimants in that case ended up winning the battle but losing the war – the remaining claim brought by direct purchasers was also struck as it was based on a claim of constructive trust which the SCC found had no chance of success.

## Implications

These decisions are likely to have major ramifications in competition law and class action procedure in Canada, but also more broadly in terms of plaintiffs pursuing restitutionary claims and remedies.

From a competition law perspective, allowing indirect purchasers to bring claims will significantly increase the field of potential plaintiffs, both generally and in class proceedings. As a result, we can expect more private claims under the *Competition Act*, and more claims based on related economic torts, many of which will likely be brought as class proceedings.

In addition, the rejection of the U.S. jurisprudence, which negated indirect purchaser claims unless expressly permitted by legislation, may lead U.S. claimants to seek redress under Canadian law should they be able to tie themselves to Canada from a jurisdictional point of view. Again, this raises the potential for an increasing number of competition and class action claims in Canada.

The decisions makes plain that the aggregate damages provisions of the class proceedings legislation cannot be used to establish liability, but rather only to allow for the possibility that damages assessed in the aggregate can be a common issue for the class. The SCC followed Ontario rather than B.C. appellate authority on this point. This result will assist defendants in price-fixing class action cases throughout Canada as well as in those cases involving other areas of the substantive law.

The SCC remarked that increased complexity should not be a policy bar to indirect purchaser claims because, in part, it is up to the plaintiff to meet that burden. The Court did not remark on the increased burden on defendants who need to defend these types of claims. It seems likely that class action counsel on the plaintiff's side will see this increased complexity and burden as another lever to use in attempting to settle competition class actions. Defendants facing these claims will need to consider the increased cost and risk associated indirect purchaser claims in considering how to respond to a class proceeding of this type.

Finally, the confirmation that the passing on defence is not available in relation to any restitutionary claim and the SCC's refusal, at the certification stage, to strike out an unjust enrichment claim where the relationship between the enriched party and deprived party was indirect, should encourage plaintiffs' counsel to look to the law of restitution in consumer and commercial cases.

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