Supreme Court of Canada Issues Landmark Competition Class Action Decision in Godfrey Appeals

September 20, 2019

Today, the Supreme Court of Canada issued a landmark competition class action decision in *Toshiba Corporation, et al v Neil Godfrey* and *Pioneer Corporation, et al v Neil Godfrey*.[1]

The court's decision has been eagerly anticipated by the Canadian competition bar and litigants as the issues raised by the appeals have recently been heavily litigated in the lower courts (in some cases with contradictory results in different provinces). It marked the first opportunity the court has taken to hear a competition law class action case involving certification issues in the common law provinces since issuing a trilogy of competition class action decisions in 2013 (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*;[2] *Sun-Rype Products Ltd. v. Archer Daniel Midland Company*;[3] and *Infineon Technologies AG v. Option consommateurs*[4]).

In its judgment this morning, the Court (Côté J dissenting in part) affirmed the certification of a class action alleging a global price fixing involving optical disk drives (ODD) and products containing such devices on behalf of all persons in British Columbia who purchased any such products during a six-year period from 2004 to 2010. The proposed class consisted of both direct and indirect purchasers, as well as purchasers of ODD and ODD products that were not manufactured or supplied by the defendants (Umbrella Purchasers).

In its reasons, the court decided several issues that have been at the forefront of contested certification decisions in Canadian competition class actions, namely:

1. The statutory right of action for damages in section 36 of the *Competition Act* does not bar common law or equitable claims

The court held that the cause of action in section 36 of the *Competition Act* is not the exclusive civil remedy for breaches of the criminal provisions in Part VI of the *Competition Act*. The court also affirmed that a breach of the criminal conspiracy

provision in section 45 of the *Competition Act* can satisfy the "unlawful means" element of the tort of civil conspiracy.

2. Umbrella Purchasers have a cause of action under the *Competition Act*

The court held that the so-called Umbrella Purchasers have standing to sue for damages under section 36 of the *Competition Act*.[5] The court supported its conclusion based on the text of section 36(1), which provides a cause of action to "any person who has suffered loss or damage as a result of" a breach of a provision in Part VI of the *Competition* Act and on the purpose of the *Competition Act* which, as set out in section 1.1, is to "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices". It also expressly rejected the contention that permitting Umbrella Purchaser claims risks exposing defendants to indeterminate liability:

umbrella effects are "not just a known and foreseeable consequence of what the defendants are doing, it's an intended consequence". The point is that the results of Toshiba's alleged anti-competitive behaviour are not indeterminate. Intended results are not indeterminate, but pre-determined. I therefore agree with the Court of Appeal that there is "no reason why defendants who intend to inflict damage on umbrella purchasers should be exonerated from liability on the basis that they exercised no control over their liability" (para 73) [emphasis in original; citations omitted].

3. The limitation period for the statutory right of action for damages in section 36 of the *Competition Act* is subject to the discoverability principle

The court held that the discoverability rule applies to extend the limitation period in section 36(4)(a)(i) of the *Competition Act* (which provides that no action may be brought under section 36(1)(a) after two years from a day *on which conduct contrary to Part VI* occurred), "such that it begins to run only when the material facts on which [the plaintiff's] claim is based were discovered by him or ought to have been discovered by him by the exercise of reasonable diligence" (para 50).

In reaching this conclusion, the court expressly rejected the position that the time to sue runs independent of actual or constructive knowledge by plaintiffs of the alleged anti-competitive conduct, reasoning *inter alia* that:

It would therefore be absurd, and would render the cause of action granted by s. 36(1)(a) almost meaningless, to state that Parliament did not intend for discoverability to apply, such that the plaintiff's right of action would expire prior to his or her acquiring knowledge of the anti-competitive behaviour. I agree with the Court of Appeal that "it cannot be said that Parliament intended to accord such little weight to the interests of injured plaintiffs in the context of alleged conspiracies so as to exclude the availability of the discoverability rule ins. 36(4)" (para 46) [citations omitted].

The court also found that it is not "plain and obvious" that the doctrine of fraudulent concealment, which has the effect of suspending limitation periods to prevent them "from being used 'as an instrument of injustice' […] [w]here the defendant fraudulently conceals the existence of a cause of action" (para 52), could not delay the running of the limitation period in the case before it.

4. At the certification stage, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish that loss reached one or more purchasers – that is, claimants at the "purchaser *level*"

The court held that "in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level" (para 102). In other words, a proposed price fixing class action may be certified despite the fact that "that [the] plaintiff's expert's methodology [is not] capable either of showing loss to *each and every class member*, or of distinguishing between those class members who suffered loss from those who did not" (para 92) [emphasis in the original].

At the same time, however, the court confirmed that

in order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has actually suffered a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the Competition Act). Therefore, ultimately, to use the aggregate damages provisions, the trial judge must be satisfied, following the common issues trial, either that all class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have (para 118) [emphasis in original].

As the court elaborated, "while it was sufficient *for the purposes of certifying loss as a* common issue for [the plaintiff's expert's] methodology to show merely that loss reached the indirect purchaser level, whether this methodology is sufficient *for the purposes of establishing* [the defendant's] liability to *all* class members will depend on the findings of the trial judge" (para 119) [emphasis in original].

[1] 2019 SCC 42.

[2] 2013 SCC 57.

[3] 2013 SCC 58.

[4] 2013 SCC 59.

[5] The court explained the theory of harm underpinning umbrella purchaser claims as being that "the defendants' anti-competitive cartel activity creates an 'umbrella' of supra-competitive prices, causing non-cartel manufacturers to raise their prices" (para 58).

By

Davit Akman, Carolyn Wong, Joshua Abaki, Moshe Grunfeld

Expertise

Disputes, Class Actions, International Trade & Investment

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749