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Class Actions: The Supreme Court of Canada addresses the issue of indirect purchasers and the jurisdiction of the Quebec courts over contracts formed at a distance

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On October 31, 2013, the Supreme Court rendered three judgments with respect to class actions at the authorization or certification stage, one from the Province of Quebec[1] and the other two from the Province of British Columbia.[2]

In all three cases, the facts raised issues with respect to the price fixing of consumer products in contravention of the *Competition Act*,[3] notably through a conspiracy. The class representatives sought to institute class actions against the persons or companies allegedly responsible for the price fixing, which raised the price of these products, on behalf of members of the class of persons who directly or indirectly purchased the products. Among other things, the three actions alleged the civil fault of the defendant companies.

In the *Infineon Technologies* case ('*Infineon*'), the manufacturers of dynamic random-access memory microchips ("DRAM"), which allow information to be electronically stored and rapidly retrieved for use in a wide range of electronic devices, were alleged to have taken part in an international conspiracy to fix the price of the product, resulting in an increase in the purchase price. In the *Pro-Sys Consultants Ltd*. case ('*Pro-Sys*'), Microsoft was alleged to have engaged in unlawful conduct by overcharging for its operating systems and applications software. And in the *Sun-Rype Products Ltd*. case ('*Sun-Rype*'), manufacturers of food products allegedly engaged in an illegal conspiracy to fix the price of high fructose corn syrup used in various food products, including, for example, soft drinks.

The three decisions raised the issue as to whether indirect purchasers of the products, hence, customers who did not purchase the product directly from the alleged overchargers, but who purchased it indirectly from a party further down the chain of distribution, could institute proceedings directly against the person alleged to have fixed the price. The Court's reasons in answer to this question were rendered in the *Pro-Sys* matter and applied in the other two cases. In so doing, the Supreme Court resolved a judicial controversy over the rights and recourses of indirect purchasers in similar circumstances.

In *Sun-Rype*, the Court dealt with the question as to whether a class of persons consisting both of purchasers who acquired the product directly from the party allegedly responsible for the price fixing,

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and of indirect purchasers, constituted an identifiable class.

Finally, in *Infineon*, the Court dealt with the issue of the jurisdiction of the Quebec courts to authorize the bringing of a class action in the context where a product was purchased on the Internet or "online" from a company which manufactures and conducts business outside the province, such as a distance contract.

Indirect Purchasers' Right of Action: The *Pro-Sys* Case

In reasons delivered by Justice Rothstein, the Court concluded that indirect purchasers could bring an action to recover losses which they suffered in purchasing a product whose price had allegedly been increased illegally. Justice Rothstein dismissed the argument pursuant to which only direct purchasers, who may have subsequently transferred the additional costs to subsequent purchasers, had a right of action. The risk of multiple recovery and the complexities of the evidence which the representatives of the class would have to adduce did not constitute sufficient reasons to stand in the way of allowing indirect purchasers to make their case against those responsible for the price fixing. Moreover, according to Justice Rothstein, the deterrence function of the *Competition Act* was not impaired by the actions of indirect purchasers.

The Supreme Court of Canada therefore distinguished its position from that of the Supreme Court of the United States,[4] which concluded that indirect purchasers had no cause of action against those responsible for the price fixing. According to Justice Rothstein, the refusal by a number of state level courts to follow the federal precedent, and the more recent doctrinal discussions in support of authorizing the right of action of indirect purchasers against the perpetrator of the illegal price fixing, favors the position of allowing the indirect purchasers' right of action.

After reviewing the criteria for certification, the Supreme Court concluded that they had all been met, and therefore granted the certification of the action as a class proceeding.

Direct and Indirect Purchasers as Class Members: The *Sun-Rype* Case

In a judgment for the majority, Justice Rothstein[5] concluded that a class made up of indirect and direct purchasers met the requirement for an identifiable class. Although certain members of the class might not have been able to prove a direct individual loss, the proposed class did not give rise to sufficient difficulties that would have warranted dismissing the action.

However, in this case, the Court concluded that the criteria for certification had not been met. Based on the evidence, it was impossible for indirect purchasers to prove they had purchased a product containing high fructose corn syrup, and it was therefore impossible to prove they had suffered a loss. The Court found that there was therefore no factual basis to determine the class membership of indirect purchasers. According to Justice Rothstein, the Appellants had not met the relatively low evidentiary burden to adduce evidence to establish some basis in fact that at least two class members could be identified.

In the dissenting opinion written by Justice Karakatsanis and concurred in by Justice Cromwell, Justice Karakatsanis came to the conclusion that the facts as alleged provided a sufficient evidentiary basis to reach a finding that there was "an identifiable class of two or more persons".

According to the dissent, evidentiary difficulties should not stand in the way of certification.

Jurisdiction of the Quebec Courts: The *Infineon* Case

In *Infineon*, the Petitioner, *Option consommateurs*, sought authorization to institute a class action against the manufacturers of DRAM chips used in various electronic devices, including personal

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computers. The designated class representative purchased her computer online by credit card from a company operating exclusively outside Quebec and which had no place of business in Quebec. *Option consommateurs* alleged that the price-fixing conspiracy artificially inflated prices of DRAM and products containing DRAM sold in Quebec. The manufacturers argued that the Quebec courts lacked jurisdiction because the contract was formed outside Quebec and none of the alleged faults, including the conspiracy, was committed in Quebec.

The Supreme Court acknowledged that the challenge to Quebec's jurisdiction could properly be raised and dealt with at the outset of a proceeding for the authorization of a class action. Even if a Quebec court concludes that it has jurisdiction, the issue may still be raised again at a later stage of the proceeding because the judgment rendered at this stage is only an interlocutory decision.

Relying on article 3148 of the *Civil Code of Quebec*, Justices LeBel and Wagner, in an unanimous decision by the Court, concluded that the Quebec courts had jurisdiction. According to them, the alleged economic damage suffered by the purchasers of the products consisted of a higher price resulting from the conspiracy and constituted a sufficient connection with the Province of Quebec to ground jurisdiction. In other words, since the pecuniary loss was suffered in Quebec, this gave the Quebec courts jurisdiction. Moreover, the contract at issue was a "distance contract", as defined by the *Consumer Protection Act*,[6] which provides that it is deemed to be entered into at the address of the consumer, which, in this case, was in Quebec.

Finally, Justices LeBel and Wagner concluded that the criteria for the authorization of a class action set out in article 1003 of the *Code of Civil Procedure* ('C.C.P.') had been met. They reiterated that, at this preliminary procedural stage, the criteria for the authorization of a class action must be interpreted and applied broadly, and that the burden is one of demonstration and not of proof. The Court noted that, in Quebec, the burden at the authorization stage is less onerous than at the certification stage in other Canadian jurisdictions. Thus, the Court highlighted that, in other Canadian jurisdictions, indirect purchasers would have to show that their claim has a sufficient basis in fact, and would have to produce expert testimony demonstrating an aggregate loss. To impose such a burden would be inconsistent with the requirements of article 1003 C.C.P. The class action was therefore authorized.

Conclusion

These three judgments will certainly facilitate the authorization of class actions by direct and indirect purchasers. Moreover, consumers who purchase products over the Internet from the comfort of their homes may have a right of action against the persons that are alleged to have increased the prices. In the context of purchases in Quebec, where the economic damages are suffered in Quebec, consumers, and the associations who represent them, will in all likelihood resort to launching class action proceedings in Quebec, even where the vendor or manufacturer is located outside Quebec.

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1 *Infineon Technologies AG* v. *Option consommateurs*, 2013 SCC 59.

2 *Pro-Sys Consultants Ltd.* v. *Microsoft Corporation*, 2013 SCC 57 and *Sun-Rype Products Ltd*. v. *Archer Daniels Midland Company*, 2013 SCC 58.

3 R.S.C., 1985, c. C-34.

4 *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

5 With Chief Justice McLachlin and Justices LeBel, Fish, Abella, Moldaver and Wagner.

6 R.S.Q., c. P-40.1.

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