Watch For Antitrust Developments North Of The Border

By **Mohsen Seddigh** (November 5, 2018)

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On Dec. 11, 2018, the Supreme Court of Canada will hear Godfrey v. Sony Corporation, an appeal that could be one of the most important antitrust cases to ever come before the court.

The Supreme Court faces some major issues in Godfrey. I discuss one of them here: Do the so-called "umbrella purchasers" — i.e., purchasers of products that were not manufactured or supplied by the price-fixing cartel defendants[1] — have a right of action against cartel firms under Canada's Competition Act?[2]

The plaintiffs allege that the defendant companies conspired to raise the prices of optical disc drives and products containing such drives. The proposed class consists of both direct and indirect purchasers, as well as umbrella purchasers. The defendants argue, however, that umbrella purchasers do not have a cause of action.

While Godfrey is an appeal from a certification decision by the courts in British Columbia, antitrust law is federally regulated in Canada. The Supreme Court's decision will impact antitrust litigation across the country. It will also determine the viability of some future Canadian antitrust class actions. Therefore, the outcome is of interest to both plaintiff and defense lawyers in the bar. Given that many antitrust class actions are litigated concurrently in the United States and Canada,[3] the case will also be of interest to the antitrust bar and defendants in the U.S.

The Debate

Defendants have typically offered several reasons why umbrella purchasers should not have a cause of action. One of those reasons found some traction at an appellate level in Canada: i.e., the argument that the recognition of a cause of action for umbrella purchasers could lead to indeterminate liability. This is also the central issue before the Supreme Court of Canada in Godfrey. The defendants argue that the prospect of cascading liability requires that umbrella purchasers be denied the right to sue. Only those with a proximate relationship to the cartel firms should be able to sue, because the pricing decisions of third parties belong to those third parties. This reality breaks the chain of causation and makes it unfair and unwise to subject the cartel firms to liability.

The plaintiffs' response is that unlike in the United States, concerns of indeterminate liability are less compelling in Canada for some intertwined reasons. First, no treble damages are available under Canadian antitrust law. The concern driving American cases such as Mid-West Paper Products Co. v. Continental Group Inc.,[4] is that treble damage recoveries would amount to "permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition." The concern does not apply to Canadian antitrust recoveries.

Furthermore, the restrictions inherent in Canadian intentional torts and statutory offenses, such as price-fixing conspiracy, limit recovery. The Competition Act restricts recovery to loss or damage that the plaintiff is able to prove she suffered "as a result of" the conspiracy.[5] As such, Canadian plaintiffs can at best recover their actual damages if they succeed at

establishing causation. That causation analysis arises only once the plaintiffs have proven the two elements of the mens rea and actus reus of the criminal offence of conspiracy to fix prices.

In sum, while actions by umbrella purchasers may result in large judgments or settlements, they cannot result in indeterminate liability. The Court of Appeal for Ontario has dismissed the indeterminate liability concerns along the same lines, stating: "Certain activities, like conspiring to fix prices for batteries that are in high demand for contemporary society, may well come with significant liability. Although the addition of umbrella claimants would add additional exposure, that exposure would be in relation to specific products and limited by a defined class and a defined class period. It would not be limitless exposure."[6]

The American Divide and the Canadian Unity on Umbrella Purchasers

The jurisprudence in the United States is divided as to whether umbrella purchasers have a right of action. The Fifth and Seventh Circuits have held that umbrella purchasers can sue cartel firms.[7] The Second and Third Circuits, however, have denied umbrella purchasers a cause of action on the basis of concerns about exposing cartel firms to indeterminate liability.[8] For a brief period of time, Canadian jurisprudence experienced a similar divide among the appellate courts. [9] The split ended, however, after Ontario's Court of Appeal, recently held that umbrella purchasers have a cause of action.[10]

The Supreme Court of Canada will have the final word when it hears Godfrey. In deciding the case, the court may look to the antitrust jurisprudence in the United States given the similarities in the antitrust law of the two countries and the well-developed case law in the U.S. However, the court generally forges its own path, particularly in light of the circuit split on this question. The last time the Supreme Court of Canada decided an antitrust class action case was in Pro-Sys Consultants Ltd. v. Microsoft Corporation.[11] In that case, the court departed from the U.S. Supreme Court precedent in Illinois Brick Co. v. Illinois,[12] and held that indirect purchasers have a right of action against cartels. This time around, the court will have the opportunity to decide if umbrella purchasers have a cause of action.

Repercussions for Antitrust Class Actions

The Supreme Court's decision in this case will impact not only the immediate interests of umbrella purchasers in the Godfrey case but Canadian antitrust litigation at large.

For example, the availability to umbrella purchasers of a right to sue can impact the obtainability of aggregate damages in some cases where the price-fixed market is that of a product that is hard to trace in the market or is one that becomes a component of a more complex consumer product. The reason is that the class definition should make it possible to recognize class members by reference to objective criteria.[13] The ability to identify class members is essential to certification.[14] Without the inclusion of umbrella purchasers in the class definition, a class action could face challenges where it is impossible to ascertain whether a person purchased a product that emanated from the conspirators or the nonconspirators. A given class action's ability to capture the entire market — including both umbrella purchasers and those who purchased directly and indirectly from the cartel firms — can resolve that issue in situations where aggregate damages are viable.

Therefore, the Godfrey case will decide issues that will reach beyond the immediate parties and could have wide-ranging impact on antitrust claims.

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Disclosure: Mohsen Seddigh is co-counsel for a public interest intervener in the Godfrey appeal before the Supreme Court of Canada.

[1] Roman Inderst et al summarize the essence of umbrella pricing effects in the antitrust context as follows:

> Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a substitution away from the cartels' products toward substitute products produced by cartel outsiders. As we discuss in this article, the increased demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market…

Roman Inderst, Frank P. Maier-Rigaud & Ulrich Schwalbe, "Umbrella Effects" (2014) 10:3 J. Competition L. & Econ. 739 at 740

[2] R.S.C., 1985, c. C-34

[3] Some examples of this concurrent litigation within the US/Canadian market are: In Re Foreign Exchange Benchmark Rates Antitrust Litigation, No. 1:13-cv-07789-LGS; In Re: Commodity Exchange, Inc., Gold Futures And Options Trading Litigation, No. 14-MD-2548 (VEC); In Re: Automotive Parts Antitrust Litigation, Master File No. 12-md-02311.

[4] 596 F.2d 573, 580-87 (3d Cir.1979)

[5] Section 36.

[6] Shah v. LG Chem Ltd, 2018 ONCA 819 at para. 60

[7] In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1171 n. 24 (5th Cir.1979) and U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir.2003)

[8] Mid-West Paper Prods. Co. v. Cont'l Grp. Inc., 596 F.2d 573, 580-87 (3d Cir.1979); Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir.1971); Gelboim v Bank of America Corp., 823 F.3d 759, 778 (2d Cir. 2016)

[9] Godfrey v. Sony Corporation, 2017 BCCA 302; Panasonic Corporation c. Option consommateurs, 2017 QCCA 1442; Fanshawe College v. Hitachi, Ltd. et al., 2016 ONSC 5118; Shah v. LG Chem, Ltd., 2015 ONSC 6148; Shah v. LG Chem, Ltd., 2017 ONSC 2586 (Div. Ct.)

[10] Shah v. LG Chem Ltd., 2018 ONCA 819

[11] [2013] 3 SCR 477

[12] 431 U.S. 720 (1977)

[13] Hollick v. Toronto (City), [2001] 3 SCR 158

[14] Sun-Rype Products Ltd. v. Archer Daniels Midland Company, [2013] 3 SCR 545