

GCR

GLOBAL COMPETITION REVIEW

A photograph of the Golden Gate Bridge in San Francisco, California, viewed from the water. The bridge's iconic orange-red towers and suspension cables are prominent against a clear sky. The foreground shows the dark, rocky shoreline with waves crashing against the rocks, creating white foam. The water is a deep blue-grey color.

THE FRONT LINE

CARTEL BUSTING IN SAN FRANCISCO

Certification of antitrust class actions in Canada: is the bar lowering?

Two Canadian courts have recently certified class actions alleging global price-fixing conspiracies, write **Linda Plumpton, Omar Wakil** and **Sandeep Joshi** of Torys LLP. The decisions are significant because they depart in key respects from the leading decision of the Ontario Court of Appeal in this area. Read together, they suggest that the bar for certification of antitrust class actions in Canada may be lowering

In Canada, proposed class actions arising from alleged price-fixing conspiracies have typically failed to satisfy the statutory requirements for class action certification. In the leading decision, *Chadha v Bayer Inc.*, the Ontario Court of Appeal determined that proof of loss or harm is an essential element of liability. For a class action to be certified, the plaintiff therefore must establish that there is a workable methodology to establish the fact of loss on a class-wide basis. The admission of statistical evidence and aggregate assessments of damages could not assist because they are only available once actual liability to members of the class has been established. In *Chadha*, the Court of Appeal declined to certify the proposed class action on the basis that the plaintiffs had failed to establish the existence of a workable methodology for determining that the actual loss caused by the alleged price-fixing in that case was “passed on” to indirect purchasers through a lengthy and complex distribution chain.

Irving Paper

In *Irving Paper Limited v Atofina Chemicals Inc.*, the first of the two new decisions, a lower court in Ontario certified a class action that alleged a price-fixing conspiracy in the market for hydrogen peroxide. In doing so, the court relied on precedents established in non-price-fixing cases and applied a less rigorous standard than that prescribed by the Court of Appeal in *Chadha*. The court’s decision departs from *Chadha* in several respects.

The court determined that plaintiffs need only establish potential liability (that is, that the defendant acted unlawfully) on a class-wide basis, rather than actual liability (that is, that each member of the class actually suffered a loss), in order to engage and utilise the statistical sampling and aggregate assessment of damages provisions in the Ontario class action legislation.

In considering whether the plaintiffs had demonstrated that there was a workable

methodology to establish proof of loss on a class-wide basis, the court concluded that it was ill-equipped to resolve competing expert opinions and found that it only needed to be satisfied that a methodology may exist to establish proof of loss on a class-wide basis.

In analysing the requirement that a class action be the preferable procedure for the resolution of the claims asserted, the court suggested that there is a positive onus on defendants to identify an alternative procedure to a class proceeding, and that defendants are not in a position to argue that “no litigation” is preferable to a class proceeding.

Last, the class certified by the court included both direct and indirect purchasers. The court was not persuaded that the problem created by the “passing on” of a loss along a chain of distribution signalled an irresolvable conflict between direct and indirect purchasers.

Pro-Sys

In *Pro-Sys Consultants Ltd v Infineon Technologies AG*, the British Columbia Court of Appeal reversed the decision of a lower court in British Columbia and certified a class action alleging a price-fixing conspiracy in the market for dynamic random access memory (DRAM). The British Columbia Court of Appeal also adopted an approach to the certification of price-fixing conspiracies that departs from the analysis of the Ontario Court of Appeal in *Chadha* in certain key respects.

Although none of the defendants had been charged under the price-fixing provisions of the Canadian Competition Act, the Court of Appeal held that the “admissions inherent in the guilty pleas and the plea agreements” in the related US criminal proceedings, if proven, would establish liability, leaving the only issues left to be determined in the case to be those related to the assessment of the monetary relief payable by the defendants.

The Court of Appeal determined that expert opinion evidence adduced at a certification hearing should not be subjected to the same “rigorous” scrutiny that is required at a trial. At the certification stage, the plaintiff only needs to show a “credible and plausible” methodology for establishing class-wide harm – a standard described as a “low threshold”.

The Court of Appeal disagreed with the lower court’s finding that there would need to be individual inquiries in order to determine whether the basic elements of liability to members of the class have been met, and that these individual issues would overwhelm the remaining common issues. The court held that, since damages do not need to be proven on an individual basis, a class action is the preferable procedure for the resolution of the claims being asserted.

The Court of Appeal considered the potential conflict between direct and indirect participants in a chain of distribution to be a “minor issue” on the basis that all class members share a common interest in establishing the defendants’ wrongful conduct and in establishing the aggregate amount of the defendants’ unlawful gain.

Conclusion

The decisions discussed above appear to lower the evidentiary threshold that must be met by plaintiffs at the certification stage in price-fixing class actions. Coupled with the recently enacted amendments to the conspiracy provisions of the Competition Act that remove the requirement for plaintiffs to establish that a cartel “unduly lessened competition”, these decisions will likely lead to an increase in the number of price-fixing class actions certified in Canada. Unless overturned on appeal, this should lead to more litigation on the merits of these claims. At a minimum, plaintiffs will have increased leverage in settlement negotiations, particularly in cases arising from multi-jurisdictional price-fixing investigations. ■