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The turning of the tide?

Price-fixing class actions in the Canadian courts

by **Michael Osborne**

Class action defence counsel in Canada have long complained that the courts certify price-fixing class actions too easily.

The bar for certification is deliberately set relatively low. Courts cannot strike dodgy pleadings unless it is "plain and obvious" the case cannot succeed, and plaintiffs are required to show only "some basis in fact" to support the proposed common issues. But the courts have lowered the bar still further by declining to engage with the evidence at certification. For example, they ignore any challenges to expert evidence in order to avoid a "battle of the experts" at the certification stage. This approach makes it possible to certify a ham sandwich in Canada,[1] as some wags have put it.

There are signs that the tide may be turning in favour of a more balanced, less plaintiff-friendly, approach to certification in Canada, however. Several recent decisions illustrate this.

"Certifying a ham sandwich"

Canadian law permits those who suffer loss caused by price fixing to recover damages, through both a statutory tort, in section 36 of the Competition Act, and the common law tort of unlawful means conspiracy. Provincial class action statutes permit these claims to be advanced as class actions.

The difficulty that price-fixing class actions present is proof of loss. While class action statutes allow damages to be calculated on an aggregate basis, this can only be done once liability is established. The causes of action available to plaintiffs require proof of loss before liability is established. As a result, aggregate damages cannot be used to determine whether class members suffered a loss for purposes of establishing liability.

To make matters more complicated, most Canadian class members are so-called indirect purchasers. A direct purchaser is someone who bought a product from a participant in a price-fixing conspiracy. An indirect purchaser is someone who bought the product from a direct purchaser, another indirect purchaser, or who bought a different product, one containing the product whose price was fixed.

Indirect purchasers are entitled to recover any loss they suffered, the Supreme Court of Canada held in 2013 in the indirect purchaser trilogy. Proving that they suffered a loss is another matter, however. For an indirect purchaser to suffer a loss, every purchaser above that indirect purchaser in the distribution chain must have passed on at least part of the price increase imposed by the conspiracy (known as the "overcharge").

In the lead decision in the trilogy, *Pro-Sys Consultants Ltd v Microsoft Corporation*,[2] the Supreme Court held that loss can be certified as a common issue if the plaintiffs can show that they have a methodology capable of establishing that the loss reached the indirect purchaser level.

But the court also reaffirmed the cardinal principle that aggregate damages can only be used once liability has been established; they cannot be used to establish liability. Indeed, in a companion decision, *Sun-Rype Products Ltd v Archer Daniels Midland Company*,[3] the court expressly rejected the proposition that people who did not suffer loss could be permitted to recover in a price-fixing class action.

The lower courts seized on this "level" approach to loss, but they ignored the Supreme Court's direction that aggregate damages methodologies cannot be used to establish liability, and in fact did just that.

It took another Supreme Court decision to correct this error. In its 2019 decision in *Pioneer Corp v Godfrey*,[4] the court affirmed that loss could be certified as a common issue if plaintiffs can provide a methodology to show that the loss reached indirect purchasers, but also emphasised that this is not enough to establish liability. Rather, before aggregate damages methodologies can be used, the plaintiffs must either show at trial that all class members suffered a loss, or which of them did, and which did not.

Towards a more balanced approach

The implications of *Godfrey* are now working their way through the courts.

The hydra: *Kett v Mitsubishi Materials Corporation*

In December 2020, a British Columbia judge refused to certify a class action[5] that included every Japanese car

sold in Canada during a 16-year class period, finding that it would be so unmanageable as to be a hydra, a monster from Greek mythology that grows new heads every time one is chopped off.

In 2018, Mitsubishi Materials Corporation discovered that some auto parts made by some of its affiliates deviated from customer specifications. MMC and its affiliates worked with their customers to verify that these parts were safe. No safety concerns were raised by customers.

Despite this, the plaintiffs argued that Canadian consumers suffered a loss because the parts were worth less than car manufacturers paid for them, and that this loss was passed on to consumers through the various distribution chains for cars.

Thus although *Kett* was not a price-fixing class action, the theory of harm asserted by the plaintiffs exactly matched the theory of harm suffered by indirect purchasers in price-fixing class actions.

Justice Branch held that liability could not be determined on a class-wide basis because some cars do not contain non-conforming parts. As a result, the analysis would have to be conducted on a shipment by shipment basis at best, and likely would come close to a vehicle by vehicle evaluation involving millions of vehicles. Branch J distinguished *Godfrey* by observing that in that case "there was at least some hope on the part of the plaintiffs at the outset that there would in fact be a single finding in favour of the entire class", a finding that was not possible in the case before him. Rather, there would be separate answers to separate questions, and the proceeding would become a "monster of complexity and cost" – a "hydra".

Lack of clarity and precision: *David v Loblaw*

In October 2021, an Ontario judge certified a class action[6] alleging that several bakeries and supermarket chains fixed the price for packaged bread for 16 years. Several of the plaintiffs' claims were not certified, however.

The court refused to certify claims against parent companies of several of the alleged conspirators. The plaintiffs had failed to particularise their allegations against these parent companies. They had not pleaded the conspiracy with "clarity and precision" or described the "overt acts that are alleged to have been done by each of the conspirators". Instead, they "lumped" the parents in with the subsidiaries, simply because of the parent-subsidiary relationship. Accordingly, these claims did not meet the requirement of disclosing a cause of action.

The court also refused to certify the claims that purchasers of fresh bread overpaid because the conspiracy inflated the price of packaged bread. The plaintiffs' theory was a variation on what is known as an "umbrella claim". An umbrella claim is brought by those who buy a product from firms that did not participate in an alleged conspiracy. The theory is that non-conspirators will follow the price increases imposed by the conspirators; a rising tide lifts all boats. Here, differences between fresh and packaged bread meant they did not compete with each other and were in different product markets. The plaintiff had no way of showing that a conspiracy to fix prices for packaged bread would also raise prices for fresh bread; he merely speculated that it would. The plaintiff argued that as the conspiracy pushed up the price of packaged bread, consumers switched to fresh bread, which is more expensive. The court characterised this as a Marie Antoinette argument, pointing out that increased prices for packaged bread could drive consumers to non-competing products like cake, muffins, crackers, matzah, and even vegetables.

The court also refused to certify umbrella claims for consumers who bought packaged bread baked by non-defendants. The plaintiffs' assurances that they did not intend to lead evidence about the thousands of independently-owned bakeries did not satisfy the court; rather, the pricing by those bakeries was part of the plaintiffs' claim. This claim was not certifiable because it was not possible to effectively gather and adduce evidence to prove it.

Conclusory legal statements: *Jensen v Samsung Electronics Co Ltd*

Next, in November 2021, the Federal Court refused to certify a class action[7] alleging that three manufacturers of dynamic random access memory chips (DRAM) conspired to limit global supply and raise prices for DRAM from 2016 to 2018. The court held that the pleadings did not disclose a cause of action because they were "not anchored in material facts", but instead were "speculative and boil down to bald assertions". The plaintiffs "fell well short of providing the minimum evidentiary basis required to support the existence of the alleged conspiracy". The conspiracy alleged by the plaintiffs was different from the usual conspiracy case; their core allegation was that the defendants suppressed the supply of DRAM in order to increase its price, as opposed to directly conspiring to fix prices for DRAM.

The court emphasised that a conspiracy claim under the Competition Act must provide "material facts and full particulars" of the alleged agreement and any overt acts, "described with clarity and precision", in furtherance of the conspiracy. The plaintiffs did not do this; they pleaded "conclusory legal statements that paraphrase the language" of the statute. What particulars the plaintiffs did provide were mere speculation. For example, they provided a list of meetings of industry associations, and speculated that the conspiracy occurred at those meetings.

The proposed common issues also failed the "some basis in fact" test. This test requires a two-step approach, the court held: the plaintiff must show some basis in fact, first, for the existence of the proposed common issues, and second, that the issues are common. The plaintiffs had argued that they only had to show the second of

these steps, that is, that the issues are common, but not that they exist. They objected that requiring them to show the existence of the issues infused the certification process with an inquiry into the merits. The court disagreed, holding that a "a proposed common issue that is not underpinned by some evidentiary foundation supporting a conclusion that two or more class members share an issue that exists in fact is not an issue worthy of certification". The court reasoned that a "non-existent or fictitious issue has no more basis or justification because it happens to be common to a group of plaintiffs". Thus a proposed common issue alleging a wrongful act requires some evidence of the wrongful act.

The DRAM plaintiffs did not meet this test; they failed to show some basis in fact for their conspiracy allegations. The plaintiffs relied on news articles reporting on an investigation by Chinese competition authorities. There were no documents from the authorities themselves, no indication of any findings made by the authorities, nor any evidence that the conduct investigated by Chinese authorities could be an offence under Canada's Competition Act. There was no evidence of any investigation by US or Canadian competition authorities.

The plaintiffs also relied on expert evidence about the structure of the market for DRAM; but that evidence, as the expert himself admitted, could not support an inference that there was a conspiracy. The same was true of evidence of price increases for DRAM: absent evidence of coordinated behaviour, price increases alone do not provide some basis in fact for the existence of a conspiracy. There was no evidence of concerted price increases, nor of meetings or communications between the defendants.

The fact that some defendants were involved in a price-fixing conspiracy some 15 years earlier (the first DRAM case) did not provide some basis in fact for believing that they are involved in one now. Nor did pleadings from a US class action.

New legal theory: *Williams v Audible Inc*

In May 2022, The British Columbia Supreme Court refused to certify a claim[8] alleging that an exclusivity clause in a distribution agreement between audiobook publisher Audible and Apple breached the Competition Act's criminal conspiracy provision. That provision prohibits agreements between competitors to fix prices, allocate markets, or restrict output. The plaintiff seems to have characterised the exclusivity clause as a form of market allocation agreement. The defendants argued that it was primarily a vertical agreement, not a horizontal one.

However, Audible competes with Apple in addition to supplying it with audiobooks, making the agreement a "dual distribution" agreement, the court noted. Because it can be difficult to characterise dual distribution agreements, the court found that the claim was not bound to fail, and refused to dismiss it.

The court went on to refuse to certify the claim because the methodology for assessment of damages proposed by the plaintiff's expert relied on two assumptions that the plaintiff had since abandoned. The plaintiff had revised his theory of the case shortly before the certification motion, and again during the hearing of the motion. The plaintiff then proposed adjourning the certification motion so that the plaintiff could lead new evidence. This would be unfair to the defendants, the court held.

Outside the scope of conspiracy provisions: *Mohr v National Hockey League*

Finally, in August 2022, the Federal Court of Appeal[9] affirmed a Federal Court decision striking a proposed class action alleging that a number of hockey leagues conspired to limit players' opportunities to negotiate and play with teams in the National Hockey League, the American Hockey League, and the East Coast Hockey League. Mohr argued that this conspiracy breached the Competition Act's general conspiracy provision (section 45) and a provision targeting conspiracies in professional sports (section 48).

Section 48 is expressly limited to intra-league conspiracies, that is, conspiracies between teams in the same league; it does not apply to conspiracies between leagues, both courts held. Because the claim alleged an inter-league conspiracy, not an intra-league one, section 48 could not apply.

Nor could section 45 apply. Section 45 is limited to so-called "sell-side" conspiracies, that is, conspiracies between sellers or producers of a product. It does not apply to "buy-side" conspiracies, that is, conspiracies between purchasers of a product. The claim alleged a conspiracy between the leagues as purchasers of the services of hockey players – a buy-side conspiracy.

The British Columbia Supreme Court had earlier reached the same conclusion in *Latifi v The TDL Group*, a proposed class action alleging that a no-poach clause in a doughnut chain's franchise agreements breached section 45. The court followed the Federal Court's decision in *Mohr*, in holding that section 45 does not apply to buy-side conspiracies and struck the claim.

What is notable about *Mohr* (and *Latifi* for that matter) is the courts' willingness to strike pleadings at such an early stage of the action based on an interpretation of the statute. Mohr had urged that the court could not find that his claim had no chance of success because no court had ever considered the scope of section 48, and there was only limited consideration of the application of section 45 to buy-side conspiracies.

While courts should not make "definitive legal pronouncements on the meaning of legislation" on a motion to strike "where there are competing, credible interpretations", "a cause of action is not presumptively 'reasonable' simply because it has no antecedence in jurisprudence", the Federal Court of Appeal noted. Here, the court reached the conclusion that sections 48 and 45 could

not apply by reasoning from the plain words of the statute. There were no competing, credible interpretations.

Similarly, courts "must be careful not to inhibit the development of the law by applying too strict an approach to motions to strike". But motions to strike also serve an important gatekeeping function; they "are essential to effective and fair litigation and prevent unnecessary effort and expense being devoted to cases that have no reasonable prospect of success". The Federal Court of Appeal noted two reasons why "this is particularly true in the context of class actions". First, "plaintiffs may have fundraised to cover their expenses"; and second, plaintiffs "are relieved from paying costs when they are unsuccessful on interlocutory matters along the way". The first of these suggests that it would be unfair to plaintiffs to fundraise to spend money on an unmeritorious claim; the second, that it would be unfair to defendants to force them to spend money they cannot recover defending an unmeritorious claim.

Has the tide turned?

There has long been a tension between the theoretical purpose of certification and its practical impact. Certification is, in theory, merely a procedural step in an action. It is not meant to be the determining step in a case.

In practice however, it is just that. Denial of certification effectively ends the case. But so does granting certification, because once the claim is certified, a defendant is "practically compelled to pay a settlement to the plaintiff", as the Supreme Court recognised in *Atlantic Lottery Corp Inc v Babstock*.[10]

The decisions discussed above suggest that the Canadian courts are now more willing to take a somewhat harder look at pleadings and evidence at the certification stage.

But an appeal is pending in *Jensen* and *Audible*, and a very recent British Columbia Supreme Court decision arguably applies the ham sandwich approach to certification. In that case, *Cheung v NHK Spring Co*,[11] the court simply ignored (once again) the Supreme Court of Canada's instruction that aggregate damages evidence cannot be used to establish liability, and that before aggregate damages can be assessed, the plaintiffs must either prove that all class members suffered harm, or which of them suffered harm. Instead, the court held that loss on a class-wide basis, as proof of liability, could be established using a regression analysis. Regressions are one of the tools used to assess damages on an aggregate basis. They yield an aggregate number, effectively an average. They do not answer the question whether any particular class member suffered harm.

Thus, it remains to be seen whether or not the tide really has turned.

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Endnotes

1. "Stothers-Kwak, Patrick, "Certifying a ham sandwich: The Supreme Court further lowers the class authorization bar in *Vivendi*", the court.ca, https://www.thecourt.ca/certifying-a-ham-sandwich-the-supreme-court-further-lowers-the-class-authorization-bar-in-vivendi/.
2. *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, https://www.canlii.org/en/ca/scc/doc/2013/2013scc57/2013scc57.html.
3. *Sun-Rype Products Ltd v Archer Daniels Midland Co*, 2013 SCC 58, https://www.canlii.org/en/ca/scc/doc/2013/2013scc58/2013scc58.html.
4. *Pioneer Corp v Godfrey*, 2019 SCC 42, https://www.canlii.org/en/ca/scc/doc/2019/2019scc42/2019scc42.html.
5. *Kett v Mitsubishi Materials Corporation*, 2020 BCSC 1879, https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1879/2020bcsc1879.html.
6. *David v Loblaw*, 2021 ONSC 7331, https://www.canlii.org/en/on/onsc/doc/2021/2021onsc7331/2021onsc7331.html.
7. *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185, 2021 FC 1185, https://www.canlii.org/en/ca/fct/doc/2021/2021fc1185/2021fc1185.html.
8. *Williams v Audible Inc*, 2022 BCSC 834, https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc834/2022bcsc834.html.
9. *Mohr v National Hockey League*, 2022 FCA 145, https://www.canlii.org/en/ca/fca/doc/2022/2022fca145/2022fca145.html.
10. *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19. https://www.canlii.org/en/ca/scc/doc/2020/2020scc19/2020scc19.html.
11. *Cheung v NHK Spring Co Ltd*, 2022 BCSC 1738, https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc1738/2022bcsc1738.html.