

CANADA / JUDGMENT

Pro-Sys Consultants Ltd. v. Microsoft Corporation

2016 BCSC 1781

COURT

Supreme Court of British Columbia

DECIDED

28 September 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 1781 Pro-Sys Consultants Ltd. v. Microsoft Corporation IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2016 BCSC 1781 Date: 20160928 Docket: L043175 Registry: Vancouver Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50 Between: Pro-Sys Consultants Ltd. Neil Godfrey Plaintiffs And Microsoft Corporation Microsoft Canada Co./Microsoft Canada Cie Defendants Before: The Honourable Mr. Justice Myers Corrected Reasons: These reasons were corrected at para. 23 on October 12, 2016. Reasons for Judgment: Microsoft's Application re: Security Patch and Innovation Issues Counsel for the Plaintiffs: Reidar Mogerman Counsel for the Defendants: D. Geoffrey Cowper, Q.C., James M. Sullivan, Mathew Good Place and Date of Hearing: Vancouver, B.C. September 23-24, 2016 Place and Date of Judgment: Vancouver, B.C. September 28, 2016 I. The Application

- [1] In this certified class action, the plaintiffs allege that Microsoft engaged in anti-competitive conduct violating the Competition Act, R.S.C. 1985, c. C-34, and the common law.
- [2] In an attempt to try the case efficiently, the parties agreed that evidence from other proceedings could - subject to certain terms - be relied upon. Those proceedings include specified class actions in the United States, a United States Department of Justice regulatory proceeding and a similar proceeding in the Europe Community. I approved a trial management order providing for this and an unusual method of trying the case. I described parts of the order in detail in previous decisions: 2016 BCSC 378 and 2016 BCSC 1713. Briefly, the order provides for parties to submit their evidence in a written "memorial" of fact and law. An oral hearing for cross-examinations will be scheduled after the memorials have been filed. The hope is that this procedure will greatly reduce the time from a trial that would otherwise take up to 18 months.
- [3] The order provides that the trial will commence on the filing of the plaintiffs' memorial. That is now filed.

- [4] In this application, Microsoft says that the plaintiffs' memorial includes evidence, argument and expert reports relating to claims that were never pleaded or certified. It seeks to strike the portions of the memorials and the expert reports dealing with those issues. To be specific Microsoft applies for the following orders:
1. A declaration that the Plaintiffs' "security patch" and "failure to thrive" claims are not pleaded or certified.
 2. Judgment dismissing the Plaintiffs' "security patch" and "failure to thrive" claims.
 3. A declaration that all evidence and submissions based on the Plaintiffs' "security patch" and "failure to thrive" theories are struck from the Plaintiffs' Memorial and annexes, as set out at Schedule "A" to this application, and that the Plaintiffs are barred from making further submissions or leading evidence on the basis of these theories.
 4. An order striking the expert reports of Darren Benning and Richard Smith, and excluding them as witnesses at trial.
 5. An order striking the following portions of the expert reports of Jeffrey Mackie Mason, Frederik Warren-Boulton and Joseph E. Stiglitz, delivered June 30, 2016, as set out at Schedule "B" to this application.
 6. An order that the Plaintiffs re-file a redacted Memorial and expert affidavits redacting or otherwise removing the material struck under paras. 2 to 4 of this order.
- [5] On September 24, I gave my rulings on the application. These are my reasons for the rulings, which are simpler to set out after I go through the reasons, rather than at the outset. II. The claims and assertions involved in the application
- [6] As advanced in the plaintiffs' memorial, the claim relating to security patches is this: Microsoft's goal was to exclude Netscape and other cross-platform rivals. To achieve this, Microsoft tied software developers to Microsoft Windows by including a programming feature - ActiveX - in Internet Explorer. ActiveX was vulnerable to security attacks resulting in Microsoft having to issue multiple security patches, which users had to install on their PCs. In a competitive environment, Microsoft would not have offered this feature in Explorer and consumers therefore would have spent less time installing patches. The plaintiffs claim damages for the time that class members had to spend on installing the patches. This is no small claim: the plaintiffs' experts calculate the damages for British Columbia class members at \$97 million, and Canada-wide at \$718 million.
- [7] The essence of what Microsoft calls the plaintiffs' failure to thrive claim (I prefer to refer to it as the stifling of innovation allegations) is that Microsoft's wrongful anti-competitive acts are said to have denied consumers the benefit of software innovation that would have occurred in a more competitive marketplace. Unlike the security patch claim, no damages are sought for the stifling of innovation allegations. Rather, the plaintiffs say they are factual allegations to address the effect of Microsoft's anti-competitive conduct, which is germane to other

elements of their claim. III. Was the security patch claim pleaded or CERTIFIED?

[8] In answering this question, I will start with the current statement of claim, which is the fifth amended version. (I directed that the pleading not be converted to a notice of civil claim when the Rules changed.) Paragraphs 8-13 set out the general nature of the alleged anti-competitive acts undertaken by Microsoft. Paragraphs 12-13 state:

12. Microsoft's unlawful conduct, in combination and agreement with and furthered by Microsoft Canada, certain IAPs, ISVs, OEMs (including Budgetron, Dell, Gateway, Hewlett Packard, Acer, Lenovo, Toshiba, Sony, LG Electronics, Panasonic, Fujitsu/Fujitsu Siemens, Averatec, and IBM), and Intel, constitutes wrongful and anti-competitive acts that were calculated to produce, and have produced, pernicious monopolies that virtually annihilated competition such that Microsoft is able to and is charging and receiving artificially inflated supra-competitive prices for Microsoft Operating Systems and Microsoft Applications Software that it otherwise would not have been paid in competitive markets unfettered by the effects of its unlawful conduct. Manufacturers and sellers of PCs and distributors of Microsoft products, because of the competitive nature of the distribution channels through which Microsoft Operating Systems and Microsoft Applications Software reaches end users, have passed through these supra-competitive prices to Canadian consumers, including to the plaintiffs and the other Class Members.

13. As a direct consequence of the defendants' unlawful conduct, the plaintiffs and all other Class Members paid and continue to pay higher prices for Microsoft Operating Systems and Microsoft Applications Software than they otherwise would have paid in the absence of the defendants' conduct. As a result they have suffered damages.

[9] The relief claimed is:

- a) an Order pursuant to the Act certifying this action as a class proceeding and appointing it as representative of the Class;
- b) damages, including punitive damages, for tortious interference with economic interests or relations in such sum as the Court finds appropriate;
- c) damages, including punitive damages, for conspiracy to injure and/or unlawful means conspiracy in such sum as the Court finds appropriate;
- d) damages including the full cost of investigation as per section 36, Competition Act, R.S.C. 1985, c. C-34;
- e) a declaration that Microsoft and Microsoft Canada have been unjustly enriched at the expense of the plaintiffs and the other Class Members by their receipt of the Overcharge;
- f) a declaration that Microsoft and Microsoft Canada account for and make restitution to the plaintiffs and the other Class Members in an amount equal to the Overcharge;
- g) judgment in an amount equal to the Overcharge;

- h) an Order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- i) pre-judgment and post-judgment interest;
- j) the costs of administering the plan of distribution of the recovery in this action in such sum as the Court finds appropriate; and
- k) such further and other relief as this Court deems just.

[10] As is apparent from the above, the statement of claim did not mention the security patch issue and the monetary remedy sought was specifically directed at price overcharges.

[11] In my reasons certifying the action, I described this case as:

[3] ... an indirect purchaser competition class action. Pro-Sys alleges that Microsoft committed various anti-competitive wrongs enabling it to charge higher prices for a number of its products. The proposed class members are indirect purchasers who acquired their Microsoft software from re-sellers who, in turn, either purchased the software directly from Microsoft, or indirectly from other re-sellers. (Although Microsoft licenses its software, for ease of reference I will refer to the transactions as purchases of a product.) I then described one of the major issues for certification:

[6] Because the class members did not purchase their software directly from Microsoft, they will be required to show at trial that wrongful price overcharges were paid by the direct (i.e. first-level) customers to Microsoft and that these charges were passed on through every level of the various distribution channels (referred to as "pass-through"), resulting in the class members paying more for the software than they would have paid in the absence of the wrongful conduct. In other words, the plaintiffs must show that the alleged increased charges to the direct customers were not absorbed by any subsequent level in the distribution channel.

[7] At trial, Pro-Sys proposes to demonstrate the initial overcharges and the pass-through with economic and econometric analyses.

[8] This leads to the major issue in this certification motion: whether Pro-Sys' proposed methodology will be able to show the initial overcharges and the pass-through to the proposed class members. The ability of Pro-Sys to demonstrate economic harm on a class-wide basis is germane to at least three of the requirements for certification: whether there is an identifiable class; whether there is a common issue; and whether a class proceeding is the preferable procedure for determining the claims.

[12] At the certification hearing the plaintiffs submitted affidavits from experts attesting as to how the overcharge and pass-on could be calculated. No mention was made of a claim relating to the security patches and no expert evidence was submitted showing how damages for that could be calculated.

- [13] The case proceeded on that basis up the appeal chain. Lowry J.A. for the majority in the Court of Appeal (2011 BCCA 186) characterised the case as:
- [76] In this action, the representative plaintiffs allege on behalf of the proposed class that, as a consequence of the defendants' unlawful conduct, in combination and agreement with computer manufacturers and others, the defendants defeated all competition and have charged more for their operating systems and application software licensed for, and installed on, personal and laptop computers since the 1980s than they otherwise could have done. The allegation is that, as the purchasers of computers for their own use, the members of the proposed class ultimately bore the entire overcharge that was paid to the defendants; it was passed on to them through the distribution channels.
- [14] Similarly, the Supreme Court of Canada (2013 SCC 57) stated: 15 In this appeal, the parties have introduced numerous issues. The one occupying the largest portion of the factums and the oral argument was the question of whether indirect purchasers have the right to bring an action to recover losses that were passed on to them. Some sources have treated this issue as one of standing. I think it more appropriate to treat it as a threshold issue to be determined before moving into the specific causes of action alleged in the certification application. 16 As I have described above, indirect purchasers are consumers who have not purchased a product directly from the alleged overcharger, but who have purchased it either from one of the overcharger's direct purchasers, or from some other intermediary in the chain of distribution. The issue is whether indirect purchasers have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured them indirectly as the result of the overcharge being "passed on" down the chain to them. I am attaching the issues certified by the Supreme Court of Canada as set out in Schedule B to its order.
- [15] The long form notice to the class stated: Nature of the Class Actions The plaintiffs allege that Microsoft and Microsoft Canada have unlawfully created monopolies and used those monopolies to charge Class Members artificially inflated prices for Microsoft Operating Systems and Microsoft Applications Software. Specifically, the plaintiffs seek damages in the amount of the price inflation, or alternatively restitution. The short form notice was similarly drafted.
- [16] The plaintiffs argued that having pleaded the wrongs, such as the breach of ss. 45 and 52 of the Competition Act, the claim for the security patches is a matter merely of damages and did not have to be pleaded or certified separately. Rather, the issue is whether the amount of damages attributable to the installation of the security patches can be determined on an aggregate basis and if so, in what amount. It is therefore encompassed in the certified issues.
- [17] That is untenable. I will put to the side for the moment that this is a class action. The purpose of an originating pleading is to give a defendant notice of a plaintiff's case. The plaintiff must plead its case with sufficient particularity to achieve that end. It did not do so

here. Add to this the class action certification process and the argument becomes even more attenuated. The security patch claim raises issues that ought to have been addressed; for example, whether the damages claimed are recognisable in law, whether they can be assessed in the aggregate or are capable of being proved. As shown above, this element of the claim did not raise its head in any level of court. The case proceeded as one dealing only with overcharges and their recovery as a remedy.

- [18] The plaintiffs also argue that the security patch claim was incorporated by the references in the statement of claim to the Iowa consumer class action, findings made in the U.S. Department of Justice claim and the European Union proceeding. I do not agree. Each of those actions was broad and sweeping; a general reference to them cannot bring in a claim component that was not specifically pleaded.
- [19] I conclude that the security patch claim was never pleaded or certified. It ought to have been. IV. The Stifling of Innovation Allegations
- [20] I do not use the word "claim" here because, as I said above, there is no monetary claim being advanced.
- [21] On behalf of the plaintiffs, Mr. Mogerman says that the facts and expert opinion regarding the effect of Microsoft's alleged conduct on innovation in the industry is part of the factual narrative. It is also necessary to assess the effect of Microsoft's conduct for the purposes of the claim under s. 45 of the Competition Act. Given that explanation, Microsoft was content to not press its application to have the portions struck from the memorial. I reach the same conclusion in any event.
- [22] Similarly, it appears to me - and I do not think Microsoft argues otherwise - that the portions of the expert reports dealing with that ought not to be struck. V. Conclusion
- [23] The security patch claim was never pleaded or certified. It should not be included in the memorial. Because the memorial is a complex electronic record, I will leave it to the parties to deal with the mechanics and timing of this or whether I simply ignore the relevant passages. The report of Darren Benning deals only with this issue and is, therefore, struck. The parts of the report of Mr. Smith that relate specifically to the calculation of damages resulting from users installing security patches should be struck. The parts of the report that deal only with the necessity to install the patches or their history can remain. Counsel may work that out and if there remains a dispute they can bring the matter before me. If the plaintiffs wish to advance a claim for the security patch installations they will have to bring an application to amend the statement of claim and certification order. I make no comment on that.
- [24] The factual allegations and asserted conclusions regarding the stifling of innovation may remain in the memorial and expert reports. "E.M. MYERS, J." Schedule B from Supreme Court of Canada order - certified issues

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/17/2016BCSC1781cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/pro-sys-consultants-ltd-v-microsoft-corporation-2016-bcsc-1781>

Prepared on 28 October 2026 · Esheria