

**NEW DEVELOPMENTS IN
PRIVATE ANTI-TRUST ENFORCEMENT IN CANADA**

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INTRODUCTION

In common with other jurisdictions, private enforcement of Canada's competition law, the federal *Competition Act*,² has been on a course of expansion over the last decade. Since 1985, section 36 of the *Act* has enabled private parties to bring a civil action for losses and damages suffered as a result of a breach of the criminal provisions of the *Act*, including conspiracy, bid-rigging, illegal trade practices, and price maintenance. For many years, the right to sue remained generally in abeyance, as parties tended to avoid litigation to solve the issues that arise out of cartel activity. However, the recent availability of class proceedings has generated a significant increase in the number of cases initiated. Pursuant to legislation within the last decade or so in Ontario, British Columbia and Quebec, claims may now be brought on a class basis in these and other provinces.³ Class action authority has been in place for just over a decade, but to date, no competition case has ever proceeded past the certification stage.

There have been several important developments in private antitrust actions, and several important points of differentiation between private antitrust enforcement in Canada and the corresponding United States practice. The most direct Canadian developments have come from Canadian decisions such as *Chadha v. Bayer Inc.*,⁴ *Gariepy v. Shell Oil Co.*⁵ and *Culhane v. ATP Aero Training Products Inc.*⁶ From these cases it is possible to identify six key points of Canadian practice that differ from the United States. They include (1) the availability of recovery for indirect purchasers, (2) potential liability of representative plaintiffs for the costs of the defence, (3) a risk of joint and several liability for defendants, but coupled with a right to contribution and indemnity, (4) the availability of single, not treble or other forms of punitive damages in Canada, (5) the very limited incidence of jury trials and (6) the "preponderance" requirement for class certification.

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² R.S., 1985, c. C-34 (the "*Act*").

³ See Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c.6, British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c.50 and Quebec's *An Act Respecting the Class Action*, R.S.Q. R-12. Additional provinces have recently enacted class action legislation, including Alberta, Saskatchewan, Manitoba and Newfoundland. The Federal Court has also enacted a class action regime, but the Federal Court is a statutory court with extremely limited jurisdiction, and the relevance of this jurisdiction to private competition claims remains to be seen. The Supreme Court of Canada also created a common law right to sue on a class basis in the absence of formal class proceeding legislation in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

⁴ (2003), 63 O.R. (3d) 22 (Ont. C.A.) [hereinafter *Chadha*].

⁵ (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.) [hereinafter *Gariepy*].

⁶ (2004) 238 D.L.R. (4th) 112 (Fed. Ct.) [hereinafter *Culhane*].

Secondly, there has been a recent expansion of private enforcement of Canada's competition laws as a result of statutory change. The *Act* has recently been amended to confer on private parties the right, with leave of the Competition Tribunal, to seek remedies in their own right in relation to certain civil reviewable practices.⁷ The practices for which there is a right of private access to the Tribunal are refusals to deal, exclusive dealing, tied selling and market restriction. These remedies currently do not include claims for damages, which is now specifically excluded by section 77(3.1) of the *Act*, but proposals for amending the *Act* would authorise claims for damages. Private access to the Tribunal was authorised as recently as 2002, but there have already been a number of applications for leave to initiate proceedings, and some criteria for access have begun to be settled. From both these perspectives, private antitrust enforcement is becoming a very active and important aspect of competition law in Canada.

Finally, there have been some implications for Canadian private antitrust enforcement that flow from developments in the United States, including in particular the decision in *F. Hoffman-La Roche Ltd. et al. v. Empagran*⁸ and *Kruman v. Christies International PLC*.⁹

A. CANADIAN DEVELOPMENTS IN CLASS ACTION AND CIVIL LITIGATION

1. The Impact of *Chadha v. Bayer Inc.*

(i) The Decision

Chadha was the first civil class action to reach the certification stage in a competition case under section 36 of the *Act*. *Chadha* involved a claim alleging price fixing in the market for iron oxide, a pigment used in the manufacture of bricks. The class consisted of homebuyers, not the brick manufacturers or other direct purchasers of the product. The plaintiffs claimed that the illegal conduct by the suppliers increased the costs of construction and the ultimate purchase price of their homes. In essence, on the facts before it the Court refused to certify the indirect class of purchasers, on the grounds that issues of liability, including proof of loss, could not be established on a class-wide basis. But *Chadha* has produced several important legal outcomes in Canadian civil antitrust enforcement, including changes to the trend of commencing class actions following a guilty plea or conviction, and opening up class actions to indirect purchasers.

⁷ Section 103.1 of the *Act*. This private access to the Tribunal covers only refusal to deal (s. 75), exclusive dealing, tied selling and market restriction (s. 77), but to date, do not authorise private recourse to the Tribunal for an abuse of dominant position (ss. 78-79). These provisions were previously enforceable only by public proceedings initiated and pursued by the Commissioner of Competition. Note that proposals to amend the *Act* are currently under consideration that would extend the private right of action to s. 79 (abuse of dominance) and provide a remedy in damages for private litigants.

⁸ 124 S.Ct. 2359 (2004) [hereinafter *Empagran*].

⁹ 284 F.3d 384 (2nd Cir. 2002) [hereinafter *Kruman*].

(ii) Commencement of Civil Actions in the Absence of Criminal Enforcement

Canadian civil antitrust actions have typically been commenced following a guilty plea or a conviction by an accused. Under subsection 36(2) of the *Act*, a conviction for an offence is, in the absence of evidence to the contrary, proof of liability. However, section 36 also authorises a cause of action in respect of “conduct contrary to Part VI [the criminal provisions] of the *Act*”. Recently, the commencement of private actions independent of criminal prosecutions have become more common, even though plaintiffs lack the benefit of the legal and factual liability presumptions resulting from convictions.¹⁰

This is in part a result of the lead taken in *Chadha*. There, the Competition Bureau initiated an investigation into price fixing allegations in the iron oxide pigment market, but the investigation was closed without further proceedings. But the *Chadha* civil class action proceedings were commenced nonetheless, on the basis that the *conduct* of the parties to the alleged agreement was contrary to section 36 of the *Act*. The action was disposed of on a motion for certification and the Court in *Chadha* did not therefore have to decide what the plaintiffs had to do to prove the actual commission of an offence, or the standard of proof they had to meet. The decision nevertheless has far-reaching implications for the commencement of class actions.

The approach taken by the plaintiffs in *Chadha*, of commencing a private action without a guilty plea or a conviction, might increase the prospect of future civil actions in Canada, leaving to the plaintiffs the difficult task of establishing liability for an offence under the *Act*. The incidence of such cases in the United States, where civil antitrust claims are not uncommon in the absence of a conviction,¹¹ suggests that *Chadha* will not be the only case to be brought in such circumstances.

(iii) Indirect Purchasers

The issue of whether indirect purchasers have a right to sue was litigated for the first time in Canada in *Chadha*. The United States Supreme Court in *Illinois Brick v. Illinois*¹² and *Hanover Shoe, Inc. v. United Machinery Corp.*¹³ effectively precluded class action claims by indirect purchasers on the basis of difficulties of proof and class administration. Critics consider the decisions dogmatic and inflexible.¹⁴ It is arguable that, in cases where direct purchasers have passed on the price increase to downstream users of a product, direct plaintiffs receive a

¹⁰ A. Neil Campbell, D. Kent, D.M. Low & J.W. Rowley, “Canada” in *Cartel Regulation 2003: Getting the Deal Through* (London: Global Competition Review, 2002) at 33.

¹¹ See e.g. the settlements in the United States civil antitrust class actions involving High Fructose Corn Syrup, with settlements by ADM of \$400 million, Cargill Inc. and American Maize Products of \$24 million, and Staley Manufacturing Company of \$100 million, all for an alleged cartel in which there was no prosecution anywhere. *Global Competition Review*, 6 August 2004. In the United States, however, plaintiffs need only establish the fact of a *per se* anticompetitive agreement, whereas in Canada, proof of the economic consequences of the most hard-core cartel conduct must also be proven.

¹² 431 U.S. 720 (1977) [hereinafter *Illinois Brick*].

¹³ 392 U.S. 481 (1968) [hereinafter *Hanover*].

¹⁴ D. Kent, “*Indirect Purchaser Price Fixing Claims - A Canadian Approach*” (2003) 2 B.L.I. 78 [hereinafter *Indirect Purchaser Price Fixing Claims*].

windfall, in the event of success, while those who in fact absorbed the adverse economic consequences of the illegal conduct get no redress. Subsequent to these decisions, several U. S. states enacted legislation to permit class actions by indirect purchasers.¹⁵ Critics of this solution argue that the legislation is chaotic, unadministrable, and may, in turn, legitimize double recovery.¹⁶

In its result, the disposition of *Chadha* by the Ontario Court of Appeal is facially similar to *Illinois Brick*. The Ontario Court refused to certify the particular indirect purchaser class in *Chadha*, but it took an arguably more nuanced and principled approach than in the American precedents, and left open the possibility of certification for indirect purchasers in future cases on different facts.¹⁷ The Court of Appeal held that proof of loss could not be a common issue on the facts of *Chadha*. It found that the plaintiffs adduced no evidence to show that the alleged harm was passed to end users, or, equally important, how that issue could be proven on a class-wide basis. The Court found that the plaintiffs' economic expert assumed, without analysis, that harm from the alleged anticompetitive conduct had been passed on to end-purchasers. The absence of evidence as to the analytical method to prove the existence of harm *on a common basis* was fatal to the plaintiffs' argument that liability was a common issue for the class.¹⁸ The Court consequently determined that a class proceeding would not be the preferable procedure for the resolution of these issues, given the limited common issues and the individual inquiries that would be required to determine whether and to what extent individual class members suffered any harm.

Although the Court refused to certify the particular class of indirect purchasers in *Chadha*, it did not close the door to certification of indirect purchaser classes in other cases. It expressly did not rule out the possibility that the evidentiary flaw in *Chadha* could be overcome in other cases, unlike the analysis in *Illinois Brick*. There is no doubt that indirect purchasers will have a high threshold to meet in order to establish that harm was suffered on a common basis. However, evolving practice indicates that class action lawyers are now beginning to construct classes composed of both direct and indirect purchasers, seeking a global award and, in essence, asking the Court to rely on class counsel to distribute the damages. Time and litigation will tell whether the Courts will sanction this gambit.

2. The Impact of *Gariepy v. Shell Oil Co.*

(i) The Decision

In *Gariepy*, the Court ordered the unsuccessful representative plaintiffs to pay costs to the defendants, in one of the largest awards ever made in a Canadian class action. The plaintiffs claimed that Shell and Hoechst Celanese Canada had supplied a defective type of resin to manufacturers of potable water systems. The Court found that the claim lacked the requisite

¹⁵ *Indirect Purchaser Price Fixing Claims, supra*, at 178.

¹⁶ *Ibid.*

¹⁷ *Indirect Purchaser Price Fixing Claims, supra*, at 178.

¹⁸ *Chadha, supra*, at 41.

degree of commonality and refused to certify the class. Moreover, costs totalling \$175,000 were awarded to the successful defendants.¹⁹ *Gariepy* arguably contributes to a better balance between claimants and defendants in Canadian class proceedings (at least by comparison with the practice in the United States) by creating an economic hazard for plaintiffs and, more realistically, class counsel.

(ii) Costs Awards in Class Actions

Canada's traditional approach to litigation, like that of the English courts, has been to foster settlement and discourage frivolous proceedings, in part by allocating the economic risk of conducting litigation between the successful and unsuccessful parties. In non-class proceedings, the courts may exercise discretion regarding an award of costs, but almost invariably, costs will follow the outcome: the loser will pay the winner's legal costs.²⁰ In Canadian class actions, costs also normally operate on a "loser-pays" basis. The effect of this is that the unsuccessful party, even at an interlocutory stage of a proceeding, will ordinarily be required to pay the legal costs of the successful party (typically calculated on a partial indemnity scale).²¹

In some Canadian provinces, class actions are excluded by statute from the risk of cost awards against the unsuccessful litigant, on the theory that exposure to costs may deter plaintiffs of modest means from bringing proceedings that have merit.²² That policy also, of course, affects the incentives to sue in cases with less plausibility. It may in fact encourage class claims in such cases, subjecting class defendants to the very significant costs of unwarranted litigation and the potential consequence that defendants will settle to avoid the risks of litigation, despite having a good defence. It also ignores the practical reality that the representative plaintiff will generally run no actual financial costs exposure, as the financial risks of litigation are actually underwritten by the class counsel. Simplistically, the effect of the "no-costs" policy might be described as giving class claimants a "free shot" at certification of the claim.

Gariepy tends to neutralize these concerns, at least in Ontario where the majority of Canadian class actions tend to occur. The threat of high costs awards may inject some prudence into the initiation of class action proceedings. Class counsel now have to be willing not only to accept the risk of wasted time and lost disbursements, but they also run the risk of having to pay a significant portion of the legal defence costs, if the claim is unsuccessful.²³ This may ultimately prove to be a significant disincentive to class counsel taking on weak cases simply for

¹⁹ In another case, *Pearson v. Inco Ltd.* (2002), O.J. No. 3532, aff'd (2004), 44 C.P.C. (5th) 276 (Ont. S.C.J.), costs of over \$184,000 were awarded against four representative plaintiffs.

²⁰ For example, see Rule 57 of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and Rule 57 of British Columbia's *Supreme Court Civil Rules*, R.R.B.C. 2004, Reg. 201.

²¹ D. Kent & H. Clarke "Class Actions Canadian Style" *Corporate Counsel* (February 2003) at A4 [hereinafter *Class Actions Canadian Style*].

²² For example, see *Class Proceedings Act*, R.S.B.C. 1996, c.50, which bars an award of costs, other than in exceptional circumstances.

²³ *Class Actions Canadian Style*, *supra*.

the purpose of exploring settlement.²⁴ On the other hand, class counsel are in a position to enter into arrangements with representative plaintiffs that will shelter the named class members from exposure to costs in the event of failure of apparently meritorious litigation. *Gariepy* therefore carries potentially significant implications for the development of Canadian class action practice, if it discourages the development of frivolous class actions and maintains the economic balance that encourages both the initiation and the settlement of reasonable claims.

3. The Impact of *Culhane v. ATP Aero Training Products Inc.*

(i) The Decision

Culhane is a case involving an individual civil claim for alleged predatory pricing under section 52 of the *Act*. The plaintiff alleged that the defendant's marketing strategy of offering free on-line products to increase sales of other products was contrary to the predatory pricing provisions of the *Act*. The plaintiff claimed that the defendant's free products reduced sales of the plaintiff's competing publications, an allegation that might have chilled the common marketing practice of "loss leaders".

The court refused to grant an injunction to restrain the defendant from providing free on-line products, and found that the plaintiff's claim for damages must fail. The court held that although the defendant's on-line product was previously offered for a fee, and the plaintiff continued to offer its comparable product for a fee, there was no substantial lessening of competition or loss or damage to a competitor under the *Act*.²⁵ The decision does not deal very adequately with proof of the requisite economic impact of alleged predatory pricing and it says little about the necessary intent that must be shown to substantiate such a claim. Nonetheless, the outcome will be a comfort to Canadian retailers, on the issue of their ability to advertise on a "loss leader" basis, and more broadly, it does confirm the application of general principles of proof to a civil case under the *Act*.

The *Culhane* action was initiated subsequent to *Chadha*, under section 36 of the *Act*, once again despite the fact that there had been no prior criminal prosecution for predatory pricing. And despite the inadequacy of some of its reasoning, *Culhane* does have important implications for the standard of proof necessary to establish civil liability, in the absence of a guilty plea or conviction.

(ii) The Standard of Proof

A predatory pricing offence under the *Act* must be proven beyond a reasonable doubt before a criminal conviction may be registered. In contrast, a plaintiff in a private civil action must normally prove its case on the balance of probabilities. The Court in *Culhane* affirmed these principles, in a proceeding brought under section 36 of the *Act*. It held that, although the substantive predatory pricing offence must be proven beyond a reasonable doubt, a

²⁴ *Class Actions Canadian Style, supra.*

²⁵ Note that the plaintiff submitted an application for leave to appeal on April 28, 2004.

civil plaintiff need only establish a breach of the predatory pricing provisions of the *Act* on a balance of probabilities, the civil standard of proof, for the action to succeed.

This disparity between these evidentiary standards has important implications for private antitrust enforcement. The burden of proving civilly that a business engaged in predatory pricing – or any other criminal offence under the *Act* – may be considered sufficiently low to provide a plaintiff with incentive to sue. Clearly, the increased incentive for an affected competitor or consumer to sue in the absence of a guilty plea or conviction, and the resulting costs of defending an action, may be high enough to encourage compliance. But as indicated, it may become a generator of unmeritorious actions and inhibit business activity in grey areas of the law. On the other hand, proof of the substantive elements of most cartel offences, including price fixing and customer or market allocation, requires the plaintiffs to establish the economic effect of the misconduct in a market, a matter of very considerable difficulty. While the court in *Culhane* did not make a finding of civil liability on a balance of probabilities, it will be interesting to see whether future plaintiffs can successfully recover damages without a criminal conviction.

4. Other Features of Canadian Civil Competition Litigation

In addition to these developments in civil enforcement under section 36 of the *Act*, there are several other competition class action developments in Canada that are considerably different from the apparent United States incentives for plaintiffs to litigate and the corresponding pressures on defendants to settle. One is the risk of joint and several liability, which, like United States practice, implies that each co-conspirator may be held liable for the entirety of any damage award. Unlike the United States practice, the normal Canadian rule authorises contribution and indemnity between those held jointly liable.²⁶ A single defendant accordingly may seek the pro-rata amount for which its co-conspirators should have paid. While that may be of limited utility, in the case of co-defendants that are bankrupt or have no assets in the jurisdiction, it does create an environment in which a single defendant is not automatically confronted with the risk of total liability for the conduct of all co-conspirators.

Another feature of Canadian antitrust class action litigation that is distinct from the United States is the award of single, not treble damages. In Canada, only actual, proven damages are available under section 36 of the *Act*, along with the actual costs of investigation of the matter. The result is that Canadian plaintiffs do not anticipate the putative rich penal payouts that United States litigants seek in antitrust class action litigation. The policy approach in Canada is recovery of loss or damage by those who have suffered the loss, not a concept of instigating private parties to litigate civilly, with the incentive of punitive damages, to supplement public antitrust enforcement.

This difference in the quantity of damage awards is amplified by the availability of jury trials in the United States. The threat of elevated damages from frequent jury trials in the United States is simply not present in Canada. Jury trials are not a common feature of Canadian

²⁶ See e.g.: *Negligence Act*, R.S.O. 1990, c. N.1, s. 1; *Contributory Negligence Act*, R.S.A. 2000, c. C-27, s. 2(2); *Negligence Act*, R.S.B.C. 1996, c. 333, s. 2; *Contributory Negligence Act*, R.S.S. 1978, c. C-31, s. 10.

civil antitrust litigation, although they are not prohibited by law in the class proceedings context.²⁷ Accordingly, the perception that jury trials may inject upward pressure on damage awards, with the consequential risk of tilting defendants towards unwarranted settlements, does not exist in this jurisdiction.

A final aspect of Canadian class action litigation that is distinct from the United States practice is the apparent lack of a “preponderance” requirement for certification analogous to the U.S. Federal Court Rule 23. A class will be certified in Canada if (i) there is an identifiable class of 2 or more people, (ii) the class members’ claims raise common issues, (iii) a class proceeding is the preferable procedure for resolving the issues, and (iv) there is an appropriate representative party.²⁸ Initially, Canadian courts indicated that the existence of any common issues would be enough to certify a class; however, this has changed recently. In 2001, the Supreme Court of Canada ruled that a class action would only be a preferable procedure if the resolution of the common issues is capable of moving the class action forward *significantly*.²⁹ So, although “preponderance” is not required, Canadian classes will only be certified if the common issues are extensive or weighty enough that determining them on a class basis would be more efficient, economical or effective.³⁰

B. CANADIAN STATUTORY DEVELOPMENTS IN ANTITRUST ENFORCEMENT

1. Private Access to the Competitions Tribunal

The *Act* was amended in 2002 to extend a private right of action in relation to certain civil reviewable practices, with leave of the Competition Tribunal. The amendments conferred on private parties the right to seek remedies in their own right for refusal to deal, tied selling, market restriction and exclusive dealing.³¹ Previously, these matters were only amenable to action by the Commissioner of Competition, and the exclusive remedial jurisdiction of the Competition Tribunal was restricted to non-monetary relief, primarily, the prohibition of the relevant anti-competitive practice. It is notable that these practices were not illegal as such, but were only determined to be improper after a decision to that effect was obtained from the Tribunal. In essence, that system of Tribunal review had the effect of promoting business initiative, subject to the safety valve of proceedings by a public authority to preclude the practice, when the line of competitive legitimacy is crossed. An effect of the amendments has been to put the litigation initiative into the hands of the parties who are ostensibly affected by the practice, a posture that relieves the pressure on the resources of the Competition Bureau and that permits private parties affected by a competitive practice to challenge the practice directly.

²⁷ M.A. Eizenga et al., *Class Actions Law and Practice* (Markham: Butterworths, 1999) at 8.8.

²⁸ *Federal Rules of Civil Procedure* (2003).

²⁹ *Hollick v. Metropolitan Toronto (Municipality)* (2001), 13 C.P.C. (5th) 1 (S.C.C.).

³⁰ *Class Actions Canadian Style*, *supra*.

³¹ Section 103.1 of the *Act*. Private parties do not currently have a right to seek a remedy from the Tribunal in relation to either merger or abuse of dominance matters, but consultations are underway on possible amendments to the Act that would extend private access to the Tribunal for abuse cases, though not mergers.

Parties seeking a remedy for reviewable practices that are alleged to be anticompetitive must obtain leave from the Tribunal to commence an action. The leave proceedings must be supported by affidavit evidence that demonstrates that the applicant's business is directly and substantially affected by the practice that can be subject to an order of the Competition Tribunal. The substantive criteria to be established on the allegations of anticompetitive conduct are those set out in the relevant provisions of the *Act*, so that, for example, an allegation of an anticompetitive refusal to deal must cover all the elements that are prescribed by section 75 of the *Act*. The applicant must also give notice of the application to the Commissioner of Competition, who in turn must certify to the Tribunal whether or not the gist of the application is the subject of an inquiry by the Commissioner or has previously been settled between the Commissioner and the party concerned. If so, the application for leave must be discontinued.³² The leave requirement is designed to provide some degree of protection against strategic litigation by competitors and to provide defendants with the opportunity to demonstrate that the allegations are without merit and should not proceed.

However, the up-front screening process is not foolproof, as a hedge against frivolous or otherwise inappropriate proceedings. Defendants are only given 15 days to respond to an application for leave, which provides minimal time for preparation of responsive material and argument and for conducting any cross-examinations on the affidavits of the applicant. In practice, of course, cross-examinations rarely occur at this stage. Moreover, oral arguments are seldom made at the leave application stage, and decisions on leave applications are typically decided on the basis of a written record. Furthermore, the threshold for leave to bring an application is not particularly demanding. The test is that the Tribunal may grant leave if it has *reason to believe that the applicant is directly and substantially affected* in its business by any practice referred to in one of those sections that can be subject to an order under the *Act*.³³ There must be sufficient credible evidence to give rise to a *bona fide* belief that the applicant *may* have been affected in its business by a reviewable practice, and that the practice in question could be subject to an order.³⁴ But the Tribunal measures the evidence on a scale that is lower than the balance of probabilities, and the Tribunal is not required to have reason to believe that there is an adverse effect on competition in a market at this stage.³⁵ That issue is left for the merits stage, if leave is granted, even though it would appear that the competitive effect of the conduct in a market, which would presumably require expert economic evidence, could be an important screening issue at the leave stage. Nonetheless, and perhaps because it would be such a complex issue of proof, this aspect of the case is not open for review at the initial leave stage of the proceedings. Private parties will therefore not find it particularly onerous to meet the statutory standard for leave in cases where they are aggrieved by the reviewable practice. In the matters to

³² Subsection 103.1(2) - (4) This approach accords primacy to the public enforcement mechanisms of the Act, although it is clearly open to the Commissioner to terminate a pending inquiry and leave the issue for determination by the private parties.

³³ Section 103.1(7) of the *Act*.

³⁴ *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41 (CT-2002/005) at para. 14.

³⁵ *Barcode Systems Inc v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1 (CT-2003/008) at para. 8, 13.

date where leave of the Competition Tribunal has been sought, leave has been granted in 4 of the 5 cases where a decision has been rendered so far.³⁶

The cases to date where leave has been sought involve the following claims: (i) allegations against the Speaker of the Canadian House of Commons regarding a refusal to provide the complainant newspaper with access to the Parliamentary Press Gallery;³⁷ (ii) a refusal to supply barcode scanners to the complainant corporation or to accept the complainant corporation as a customer on the usual trade terms;³⁸ (iii) a refusal by the manufacturer of certain chairs to deal with the complainant furniture retailer on the usual trade terms,³⁹ (iv) a refusal of specific pharmaceutical manufacturers to supply product to retail stores which engaged in internet based cross-border sales of pharmaceutical products;⁴⁰ and (v) the refusal of a Harley Davidson distributor to supply certain dealerships with product.⁴¹ Although leave has been granted in a number of these cases, none have proceeded to the stage where a hearing on the merits has occurred or a decision on the merits has been rendered, and consequently, the substantive conditions for an order of the Tribunal have not received any judicial consideration.

To date, private remedies under the reviewable practices amendments to the *Act* have not opened the floodgates to a significant increase in Tribunal proceedings, despite the low threshold for obtaining leave to proceed. There is little to indicate that matters have been undertaken by private litigants which might, in the past, have warranted the allocation of public resources by the Competition Bureau to investigate or litigate. However, further amendments to the existing reviewable practices regime may be in the offing. Currently, private reviewable practice proceedings are not available to support private challenges to mergers or to allege an abuse of dominant position. Moreover, and perhaps more significant to the relative paucity of private proceedings in the Tribunal, damages are not available for private reviewable causes of action. However, the Industry Committee of the Canadian House of Commons has issued a

³⁶Leave of the Competition Tribunal has been sought in 9 cases to date. Leave was granted in 4 of the 5 cases in which the Competition Tribunal has reached a decision, although 2 of those decisions are currently under appeal. The other 4 matters are pending.

³⁷ *National Capital News v. The Honourable Peter Milliken, M.P.* (CT-2002/005): application for leave pursuant to section 75 filed on July 29, 2002; leave denied on December 13, 2002.

³⁸ *Barcode Systems Inc v. Symbol Technologies Canada ULC* (CT-2003/008): application for leave pursuant to section 75 filed on November 4, 2003; leave granted on January 15, 2004; a notice of appeal has been filed with the Federal Court of Appeal, Docket A-39-04 on January 26, 2004.

³⁹ *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Limited* (CT-2003/009): application for leave pursuant to section 75 filed on November 26, 2003; leave granted on February 5, 2004; a notice of appeal has been filed with the Federal Court of Appeal, Docket A-115-04 on March 3, 2004.

⁴⁰ *Mrs. O's Pharmacy Inc. v. Pfizer Canada Inc.* (CT-2004/003): application for leave pursuant to section 75 filed on May 13, 2004; decision not yet rendered. *Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc./Novartis Canada Inc.* (CT-2004/004): application for leave pursuant to section 75 filed on May 13, 2004; decision not yet rendered. *1177057 Ontario Inc. c.o.b. as Broadview Pharmacy v. Wyeth Canada Inc.* (CT-2004/005): application for leave pursuant to section 75 filed on May 13, 2004; decision not yet rendered. *1177057 Ontario Inc. c.o.b. as Broadview Pharmacy v. Pfizer Canada Inc.* (CT-2004/006): application for leave pursuant to section 75 filed on June 14, 2004; decision not yet rendered.

⁴¹ *Robinson Motorcycle Limited v. Freed Deely Imports Ltd.* (CT-2004/007): application for leave pursuant to section 75 filed on June 18, 2004; leave granted on July 19, 2004. *Quinlan's of Huntsville Inc. v. Freed Deely Imports Ltd.* (CT-2004/009): application for leave pursuant to section 75 filed on July 7, 2004; leave granted on August 4, 2004.

report that calls for further expansion of the regime of private access, to authorise private actions for abuse of dominant position and to provide for damages as a remedy for all private reviewable causes of action. The report also calls for exemptions for small businesses from the regular loser-pays costs rules, so as to not discourage small businesses from seeking remedies from the court, and for administrative monetary penalties for reviewable practices. These proposals would offer considerable incentive to parties to initiate such proceedings and would mark an important departure from the previous tradition of public enforcement of Canadian competition law. There is a good deal of controversy about the proposed amendment package, with virtually unanimous criticism by all parties which have submitted comments on the consultation material that has been made available by the government. With respect to the proposals that promote further private enforcement of the Act, it appears that Canadian policy-makers support increased incentives to litigate, increased protections for those who seek a remedy, and a significantly enhanced role for private parties in the overall enforcement of Canada's regime of competition law. Whether or not the recently elected Government will pursue the proposals to expand Canada's regime of private enforcement of civil reviewable matters appears to be a matter of conjecture. If diversion of enforcement responsibility away from public authorities is the policy objective, it may be a plausible approach, in an era of public financial and administrative retrenchment. But if, as seems equally plausible, it is founded on a philosophical acceptance of the concept of the "private attorney general," generating supplemental competition enforcement by creating private incentives to litigate, the initiative would represent a significant departure from Canadian legal tradition and the history of competition enforcement in Canada.

C. U.S. DEVELOPMENTS IN CLASS ACTION LITIGATION

1. The Canadian Impact of *Empagran*

(i) The Decision

The recent decision of the United States Supreme Court in *F. Hoffman-La Roche Ltd. et al. v. Empagran*⁴² will almost certainly have an important, practical impact for Canadian private enforcement of competition laws. *Empagran* was a class action brought in the United States courts by foreign vitamin purchasers who claimed that United States vitamin producers and their foreign affiliates engaged in a global pricing conspiracy to fix the price of bulk vitamins. The cartel members pled guilty to United States criminal charges,⁴³ and purchasers in Australia, Ecuador, Panama and Ukraine later filed a class action there. The class alleged that, as foreign purchasers of vitamins sold by foreign corporations for delivery outside of the United States, they paid artificially inflated prices as a result of the conspiracy.

The key issue decided was whether the 1982 *Foreign Trade Antitrust Improvements Act* (FTAIA) permitted foreign plaintiffs who purchased overseas to bring private antitrust suits in United States courts under the *Sherman Act*. The FTAIA prohibits private antitrust suits for foreign commerce entirely outside of the United States, unless the claimant can show that (i) the alleged harmful conduct had a direct, substantial and reasonably foreseeable

⁴² 124 S.Ct. 2359 (2004), *supra*, note 8.

⁴³ As well as in Canada, Australia and the EU.

effect on United States commerce, and (ii) the effect on United States commerce gave rise to “a” claim under the *Sherman Act*. The Court ultimately held that the FTAIA does not give United States courts jurisdiction over claims based on injuries in foreign markets, if those injuries are independent of harm to purchasers in the United States. The Court left open the possibility of plaintiffs injured in foreign markets bringing private antitrust claims in circumstances where the foreign harm was interrelated with and dependent on the operation of the cartel in the United States. This decision appears to limit the extraterritorial reach of United States civil antitrust enforcement, in Canada and elsewhere.

(ii) Restricted Reach of United States Antitrust Laws

The *Empagran* decision limits the litigation options of non-United States purchasers of cartelised products that wish to pursue private antitrust remedies. Purchasers in foreign markets cannot sue in the United States courts for damages from a cartel that also harmed United States purchasers, unless the United States harm was directly connected to the damages to the foreign plaintiffs. Where the foreign injury is not independent of the United States harm, and where the domestic effects of the anticompetitive conduct are linked to the foreign harm, it may still be open for foreign purchasers to sue in the United States. That issue is now under consideration on remand from the United States Supreme Court, and its precise implications have yet to unfold.⁴⁴

These factors will likely influence some of the recent tendencies in Canadian private antitrust enforcement. First, Canadian enterprises that do business with parties outside the United States will not necessarily be drawn into United States antitrust claims through a “foreign class” action, as might have been the impact of lower court decisions in *Empagran*, *Kruman* and other cases. They will continue, of course, to be exposed for sales into the United States. Second, Canadian claimants suing Canadian defendants over wholly Canadian transactions will have difficulty invoking the advantages and incentives to sue that are inherent in United States law, unless they are able to substantiate a direct connection between the Canadian conduct and United States cartel activity. The balance that seems to be evolving in Canadian class action practice will likely remain in equilibrium, as a result.

Third, public, penal anti-cartel enforcement in Canada and elsewhere, together with international cooperation in antitrust enforcement will not be jeopardized. If the Court in *Empagran* had ruled the other way, the increased exposure to treble damages in the United States would have changed the economic incentives to cooperate with the Competition Bureau under its Immunity Bulletin.⁴⁵ Exposure to the threat of treble damages could be perceived to have offset the benefit of immunity from criminal prosecution and penalties that companies would obtain from invoking Canada’s Immunity Policy and its counterparts in other jurisdictions. The

⁴⁴ See *Empagran*, *supra* at 19. There have been numerous comments on the *Empagran* decision. See, e.g., Wilmer Cutler Pickering Hale and Dorr LLP, *F. Hoffman-La Roche Ltd. v. Empagran: Supreme Court Restricts Extraterritorial Reach of United States Antitrust Laws* (June 2004) [unpublished], archived online at <<http://www.wilmerhale.com>>; S. Rubin “United States Antitrust Reach Shortened” *National Post* (30 June, 2004) FP11 [hereinafter *United States Antitrust Reach Shortened*].

⁴⁵ For details on Canada’s immunity program under the *Act*, see the Competition Bureau website: <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01990e.html>>

Supreme Court acknowledged the concerns of Canada and other jurisdictions about the perceived risk to public enforcement that *Empagran* generated. The Court accepted that the exposure of foreign buyers and foreign sellers in foreign transactions to the particular features of United States antitrust law could be seen to have an adverse impact on public enforcement activities by non-United States competition regulatory bodies.

However, it is still possible that Canadian and other non-U.S. purchasers who purchased outside the United States will seek to litigate their claims there, if they can establish that their injuries are linked to the effects on United States markets. There will likely be a heavy burden of proof to demonstrate to a United States court that the offshore harm was directly connected to the United States market, but it seems a high probability that such a case will be advanced. In fact the *Empagran* Court remanded the case for an assessment of whether such facts could be established in that case.

There was a distinct prospect of global forum shopping, in cases where there was no direct connection between the plaintiff's claim and United States commerce, if the *Empagran* Court had chosen not to limit the extraterritorial reach of United States antitrust laws. Of course, the systemic costs of such litigation would have been borne by US taxpayers, while the benefits, apart from the legal fees of the class and defence lawyers in the United States, would have flowed to the foreign plaintiffs. Canadian and other non-United States purchasers of cartelised products could have bypassed the Canadian and other local courts, to bring their claims in the United States. Canadian defendants would have been subject to United States jury trials, on a punitive basis of recovery, for Canadian damage to Canadian plaintiffs.

This could have significantly shifted private antitrust enforcement from other jurisdictions to the United States.⁴⁶ An actual example of this might be found in *London Regional Art Museums v. Sotheby's Holdings Inc., et al.*⁴⁷ The plaintiffs initiated a class action in Ontario against the international fine art auction houses, for auctions that occurred outside the United States, arising out of the Christies/Sotheby's price fixing agreement. Previously, a foreign "purchaser" class action, *Kruman v. Christies International PLC*⁴⁸ had been initiated in the United States in connection with the claims of the foreign participants in non-U.S. auctions. A "global" settlement of the *Kruman* action in the United States effectively redressed the claims of any potential Canadian class members, and the Canadian class action was terminated without any consideration of the potential merits of the claim under Canadian law.⁴⁹ It is highly likely, had *Empagran* been decided at the time,⁵⁰ that the *Kruman* claim would not have produced a global settlement and the application of the plaintiffs' Canadian claim would have had to be determined in the various jurisdictions where relevant auctions occurred. Clearly, at the time, the pressure to settle globally was enhanced by the premise, subsequently rejected in *Empagran*, that

⁴⁶ *United States Antitrust Reach Shortened*, *supra*.

⁴⁷ Ontario Superior Court of Justice Court File No. 38497CP

⁴⁸ 284 F.3d 384 (2nd Cir. 2002), *supra*, note 9.

⁴⁹ The author. D.M. Low, was counsel to Christies International PLC and Christies Canada Inc.

⁵⁰ Or if a pending application for certiorari to overrule the decision of the 2nd Circuit Court of Appeals in *Kruman* had proceeded.

the US Courts were competent to resolve the foreign parties' claims, using principles of redress that applied in domestic U.S. cases.

CONCLUSION

It is clear there have been very significant developments in Canadian law as it relates to private enforcement activities for antitrust conduct. The area of law is still in its infancy, but Canadian lawyers who generally act for private claimants have developed close connections with their U.S. counterparts in the plaintiffs' Bar there. It is to be expected that there will be a continuing expansion of claims for private competition redress in Canada.