

# The privatisation of Canadian competition law enforcement

The shift towards greater use of private enforcement in competition matters in respect of both criminal offences and reviewable practices looks set to continue in Canada. **A Neil Campbell** and **J William Rowley QC** of McMillan Binch, Toronto, explain the why and the how

The Competition Bureau's virtual monopoly over enforcement of the Canadian Competition Act is declining rapidly. Class action litigation has become routine in cartel cases and the enactment of Bill C-23 in July has created private rights of action for vertical distribution practices. A new round of legislative reforms is almost certain to reinforce the expansion of private competition litigation.

## Class actions

After a lethargic judicial and legislative history, various Canadian provinces including Ontario, Quebec and British Columbia established class action regimes in the 1990s. Similar rules can be expected in the remaining provinces and the Federal Court. In the interim, the Supreme Court of Canada has held that such actions may be pursued under more general rules of civil procedure even in provinces that have not enacted a customised legal framework.

The legal profession is responding entrepreneurially. An energetic and effective plaintiff class action bar has arisen and is now bringing cases in a wide range of areas including on behalf of customers injured by competition law violations.

A private right of action was introduced for the criminal provisions of the Act (conspiracy, bid-rigging, price maintenance, price discrimination, predatory pricing, misleading advertising, etc) over a quarter century ago. It languished for a decade and a half because of the then non-litigious business environment and a cloud of legal uncertainty. However, with the Supreme Court's confirmation of its constitutionality in 1989 and the introduction of class actions, private sheriffs are embracing this enforcement mechanism.

Guilty pleas under the Competition Act in several international cartel cases (eg citric acid, sorbates, vitamins, etc) provided a basis for large class actions on behalf of both direct and indirect purchasers. The ability of indirect purchasers to obtain certification in respect of

passed-on price increases is under appeal. However, one creative plaintiffs' firm has side-stepped the potential barrier by initiating cases to recover aggregate damages on behalf of a class consisting of all direct and indirect purchasers (with the overall pool then being divided between groups at different trade levels). Judicial approval has been obtained for settlements structured on this basis, although the inherent conflict of interest between differently-situated members of such a class has not been challenged.

In addition to 'follow-on' cases after guilty pleas, class and other private actions are becoming more common in matters which the competition authorities have not prosecuted. Recent cases demonstrate a willingness to pursue private recovery of damages even where plaintiffs do not benefit from the legal and factual presumptions on liability issues that result from a conviction. While some of the inducements to private litigation in the US (eg treble damages, frequent jury trials and the lack of loser-pay cost rules) are absent in Canada, this has not prevented a significant flow of cases coming forward. Moreover, the Supreme Court's ruling in *Whiten v Pilot Insurance* earlier this year is likely to encourage plaintiffs in cartel cases to seek large punitive damage awards.

## Private litigation of distribution practices

Amendments which came into force in July 2002 have expanded private rights of action to four non-criminal "reviewable practices": refusal to deal, tied selling, "market restriction" (eg exclusive territories) and exclusive dealing. These provisions were introduced in 1976 as part of an impressive economic modernisation of Canada's competition legislation. They established a relatively non-interventionist approach to vertical non-price restraints, with remedial orders available from the Competition Tribunal on application by the Commissioner of

Competition in the rare cases where these ordinary commercial activities result in anti-competitive effects.

Despite a very respectable track record of reviewable practices enforcement, the Commissioner's role as a 'gatekeeper' was opened up for debate in the latter half of the 1990s. The Bureau suggested that private rights of action could help to overcome resource shortages and help build up much needed case law. An assortment of other stakeholders supported 'private access' for philosophical reasons and to increase the Bureau's accountability.

But support for these proposals was far from unanimous. A wide cross-section of the business community opposed the extension of private actions to commonplace distribution practices. They pointed out that need and benefits had not been demonstrated, and that these provisions were particularly susceptible to unmeritorious 'strategic litigation' by competitors or customers that would negatively impact the Canadian economy.

A study commissioned from Deloitte and Touche found that the average cost to defend a reviewable practice case before Canada's Competition Tribunal was C\$5.5 million (in 1998). If only 5 per cent of the non-merger complaints that the Bureau weeded out as unmeritorious under the old regime were brought forward as private cases, and assuming costs were discounted by 50 per cent for settled or abandoned cases, the estimated litigation costs for defendants alone would be in the range of C\$75 million per year. To this would have to be added plaintiff, intervenor (Bureau and/or third party) and Tribunal costs. If as many as 15 per cent of the unmeritorious complaints which are brought to the Bureau proceeded as private cases, the annual costs to the Canadian economy are estimated to approach C\$300 million.

Market participants have a variety of incentives to initiate, or threaten, competition litigation even when it is

unmeritorious. Indeed, it may be overtly anti-competitive. As former US Assistant Attorney General Donald Baker has observed, "it is well-known that litigation can be used for nefarious competitive or other purposes—in order to raise a rival's costs, deter entry, preserve the status quo for its own sake, penalise a competitive innovation or simply to enhance a party's bargaining position."

Commissioner von Finkenstein conditioned his support for new private rights of action on the inclusion of safeguards to minimise the risks of strategic litigation. While many business community stakeholders felt that the safeguards were not rigorous enough, the new regime involves a combination of conventional and novel elements to discourage strategic litigation (see sidebar). Jurisdictions that are considering the expansion of private competition litigation, particularly for vertical restraints and other types of conduct covered by monopolisation laws, may find it interesting to study Canada's new model.

The requirement to obtain prior leave to commence an action is particularly interesting. It is designed to provide defendants with an opportunity to demonstrate that a case is unmeritorious and should not go forward. In practice, capable counsel will usually be able to develop pleadings and supporting materials that allege the elements necessary to obtain leave (as well as to survive an early motion to dismiss or summary judgement motion). However, the requirement that leave applications be supported by sworn affidavit material should discipline the process somewhat. Unfortunately, the defendant is only guaranteed 15 days to respond, which provides minimal time for cross-examining on such affidavits as well as completing its own affidavit material and submissions. How the Tribunal adapts its procedures to administer this up-front screening process will determine its effectiveness in preventing strategic litigation.

One substantive area which cried out for safeguarding was the absence of a competitive effects test in the reviewable practice of refusal to deal. As historically structured, the provision was a potential lightning rod for competitor-protection litigation, but this has been tempered by responsible Bureau enforcement decisions. Several private action proponents recognised the risks of strategic litigation that would arise from opening up access to this provision. Nevertheless, the government

chose to proceed with an "adverse effect on competition" standard that is unlikely to check inappropriate litigation, rather than the "substantial lessening of competition" test that applies to almost all other reviewable practices.

### Future evolution

Before the ink was dry on the amendments which introduced private actions for distribution practices, the Industry Committee of the Canadian House of Commons issued a sweeping report which calls for further expansion of competition litigation. Fuelled by a perception that small businesses want legal avenues to challenge the competitive activities of larger rivals, the Committee urged that private actions be extended to abuse of dominant position and that damages be added as a remedy for all private reviewable practice causes of action. In the name of "fairness", the Committee added that small businesses should be exempted from the regular loser-pay cost rules to ensure they not be discouraged from seeking their day in court. The Committee also felt it would be desirable to add substantial "administrative monetary penalties" to the reviewable practices (although it is unclear whether these could be sought by private plaintiffs or only the Commissioner). Such penalties would effectively eviscerate a remedial structure that has worked well for a quarter century by turning reviewable practices into statutory offences. At the very least, further changes must be regarded as premature when there has been no experience with the current amendments.

The Committee also endorsed proposals by the Competition Bureau and others to redesign Canada's conspiracy law. The new concept is a 'per se' offence for hard-core cartel activity, with strategic alliances and other less clear-cut competitor agreements or collaborations being shifted into a new 'rule of reason' reviewable practice. Unfortunately, while one may know hard-core cartel conduct when one sees it, developing a legislative provision that does not have the potential to overreach will be difficult. Many members of the competition bar and the business community are concerned that there will be an unacceptable legal over-exposure under a criminal law which provides for massive fines as well as imprisonment for individuals. Less noticed but also of concern is that an overbroad definition of conspiracy

without any competitive effects test would expand opportunities for private strategic litigation directly or through class actions.

Against this backdrop, those with an interest in sound competition policy development will need to prepare for another intense round of Competition Act amendments over the coming year. While the exact outcome is difficult to predict, the shift towards greater use of private enforcement in respect of both criminal offences and reviewable practices is likely to continue. ●

### Safeguards against strategic litigation

- Private reviewable practice actions are only available for specified vertical distribution restraints, not mergers or abuse of dominant position.
- To commence an action, plaintiffs must obtain leave from the Competition Tribunal by providing sufficient information under oath to demonstrate that they are directly and substantially affected in their business by a practice that could be subject to an order of the Tribunal.
- 'Double jeopardy' rules preclude private suits when the Bureau is continuing to investigate a complaint or has litigated or settled a matter (but not in situations where an investigation has been discontinued without enforcement action).
- Summary disposition procedures have been introduced to allow unmeritorious claims or defences to be dealt with at any time during a proceeding.
- Only the prohibition or other remedial orders currently available to the Commissioner can be obtained by a private plaintiff (reviewable practices are not violations or offences, and hence penalties and damages are not available).
- The Tribunal is empowered to make cost awards using standard Canadian principles (generally loser pay).