

The Antitrust Review of the Americas

2010

Published by Global Competition Review
in association with
McMillan LLP

GCR
GLOBAL COMPETITION REVIEW

Canada: Private Antitrust Litigation

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Private antitrust litigation in Canada focuses mainly on two distinct kinds of alleged misconduct and takes place in two very different venues.

Criminal behaviour, including cartels and misleading advertising offences, triggers traditional civil litigation before the courts (usually by way of class action). Certain non-criminal reviewable trade practices, such as refusals to deal, may trigger private administrative proceedings before the Canadian Competition Tribunal (the Tribunal). In either case there is a series of potent but very different remedies available.

What follows is a review of both of these routes to private antitrust enforcement in Canada, together with an indication of some of the key differences between private Canadian and US cartel litigation.

Civil litigation – criminal conduct

The private right of action

The Canadian Competition Act (the Act)¹ governs competition issues arising from commercial activity throughout Canada. Section 36 provides a private right of action in respect of the criminal offences under the Act. A person may sue anyone who commits a criminal offence under the Act (or who fails to comply with a Tribunal or court order made under the Act). The plaintiff is entitled to recover its actual loss or damage flowing from the offence – Canada does not have a treble damage regime. The plaintiff may also recover its full cost of investigation and legal proceedings. Any such action must be brought within two years of a day on which the conduct was engaged in or the day on which any related criminal proceedings were disposed of, whichever is later.

The criminal offence provisions are found in part VI of the Act. The Canadian government overhauled this part in March 2009. The amendments repealed the price discrimination, promotional allowances, predatory pricing and price maintenance provisions. The most important amendment, from a private enforcement perspective, was made to section 45 dealing with conspiracy. Previously, section 45 required that the conspiracy prevent or unduly lessen competition. This requirement has been removed, creating a *per se* offence. Now any agreement between competitors to fix prices or allocate markets violates the conspiracy provisions regardless of the conspiracy's impact on competition.

Evidence of misconduct

There need not be a prior conviction for a plaintiff to bring a private action under section 36 alleging an offence under part VI of the Act. However, from a practical perspective, most private actions arise either after or in anticipation of a conviction. This is because section 36(2) of the Act provides that the judicial record relating to a conviction under part VI is proof that the convicted person engaged in conduct contrary to part VI in the absence of any evidence to the contrary. This provision applies whether the conviction was the result of a negotiated plea or a contested trial. In fact, it has been many years since a Canadian cartel conviction was the product of a trial rather than a negotiated agreement. Accordingly, the judicial record in a criminal proceeding usually consists only of the indict-

ment, an agreed statement of facts, the plea and the finding of guilty and imposition of sentence. Accused who are negotiating guilty pleas know that the agreed statement will become the centrepiece in any follow-on civil litigation, and much of the criminal negotiation centres on the form and content of that statement.

In the past few years class counsel have become more aggressive in starting private competition law cases earlier to pre-empt competing suits. It is now common to see Canadian class actions commenced before there is a plea in Canada and, with increasing frequency, contemporaneous with the initiation of a cartel investigation in the US or (exceptionally) Europe. These cases routinely recite US guilty pleas or, if none, then Canadian or US grants of amnesty (usually disclosed in securities filings) as 'evidence' of anti-competitive activity.

Alternative causes of action

Most plaintiffs in cartel matters rely not only on section 36 of the Act but also on common law conspiracy and a variety of economic torts. The tort claims are unlikely to expand the bases of liability. However, depending on the jurisdiction, they may carry longer limitation periods. They may also support requests for relief such as interlocutory injunctions, punitive damages or equitable disgorgement that are not available under section 36 of the Act.²

International cartels

Canadian cartel litigation rarely involves purely domestic conspiracies. Instead, Canadian litigation has focused on North American or global conspiracies affecting Canada as well as other jurisdictions. This reflects both the larger scale of international cartels (and therefore greater potential recoveries for plaintiffs and their counsel) and the fact that Canadian plaintiffs can coattail on the parallel US criminal and civil proceedings that often occur prior to those in Canada.

International cartels affecting Canada are usually entered into abroad and merely implemented in Canada. This usually raises jurisdictional questions: can a foreign conspirator be brought before the Canadian courts? Such questions, however, arise principally with respect to criminal prosecutions. Canadian courts have determined (in the context of the vitamins litigation) that they have personal jurisdiction over foreign defendants who are alleged to have entered into foreign conspiracies affecting Canadian commerce.³

Class actions – general

Almost all Canadian competition law litigation in recent years has been conducted by way of class actions. Large purchasers have occasionally sued cartel participants in traditional litigation, and direct purchasers were few enough to sue as a group (rather than a class) in respect of the graphite electrodes cartel. But class proceedings have really been the order of the day.

Most Canadian provinces now have formal class action procedural rules. Even those that do not are entitled to handle class actions on an *ad hoc* basis following general guidelines from the Supreme Court of Canada that roughly mimic the formal rules in place in other provinces.⁴

Outside Quebec, the test for certifying a proposed class proceeding is more or less the same. It generally requires the plaintiff to satisfy five criteria:

- the pleadings disclose a cause of action;
- there is an identifiable class of two or more people;
- the claims of the class members raise common issues;
- a class proceeding would be the preferable procedure for resolving the common issues; and
- the representative plaintiff would fairly and adequately represent the class, has produced a workable plan of proceeding and has no interests in conflict with other class members on the common issues.⁵

Unlike US Federal Rule 23, the certification test in most Canadian provinces does not include a formal predominance requirement under which common issues must predominate over individual issues if the class is to be certified.⁶ Nevertheless, the preferability element of the usual certification test has been held to include a requirement that the resolution of the common issues will ‘significantly advance the action’.⁷ Accordingly, outside Quebec, it is not enough for the plaintiff merely to establish the existence of some common issues.⁸

Although the need for extensive evidence on certification motions was originally doubted by a number of courts, the Supreme Court of Canada has now confirmed that evidence is required on each of the elements of the certification test except disclosure of a cause of action.⁹ It has now become common for the parties, and in particular the defendants, to amass large records consisting of lay and expert industrial and economic evidence on the motion.

There have been a number of Canadian cartel class actions certified on consent for settlement purposes. While each of the five criteria for certification must be satisfied even for settlement, the courts do not require satisfaction to the same standard as in contested proceedings. The courts are mainly concerned with whether the settlement is fair and adequate to the class and whether there is an appropriate plan for distributing the settlement proceeds. The courts essentially assume for the purposes of the settlement that there is a cause of action, a common issue and that a class proceeding is preferable – preferability in this context has more to do with making and implementing a settlement on behalf of a class than anything else. Certification for settlement has no precedential effect. Canadian courts have dismissed certification motions contested by some defendants even after certifying the same class action for settlement purposes in respect of other defendants.¹⁰

Competition law class actions

Until recently there was a dearth of jurisprudence on class action certification. Prior to 2008 only two competition law cases outside Quebec had reached the contested certification stage. Certification was ultimately denied in both instances.¹¹ Since then there have been a number of decisions, most of which denied motions to certify and most of which are currently under appeal.

A number of practical and substantive issues arise with respect to proposed cartel class actions in Canada.

The key feature of Canadian cartel class actions, and the most important difference between Canadian and US class action law lies in the courts’ rejection of the US *Illinois Brick* doctrine as a universal response to indirect purchaser claims.¹²

In *Chadha v Bayer*, the Ontario courts refused to certify an indirect purchaser case involving a proposed class of homeowners who alleged price-fixing of iron oxide pigments allegedly used to colour the bricks in their houses. The courts held, in part, that a class pro-

ceeding would not be preferable because the plaintiffs had failed to demonstrate any common basis for tracing the alleged overcharge from the manufacturers, through a welter of distribution chains, and into the purchase price paid for their houses.

This approach is consistent with the concerns expressed by the US Supreme Court in *Illinois Brick*. However, the Ontario courts refused to adopt the doctrinaire US approach by making a blanket ruling that consumer cases were incapable of being certified or that indirect purchasers had no status to sue. To the contrary, the courts expressly stated that end consumer or indirect purchaser classes are capable of being certified on appropriate evidence.

As important as what this decision says is what it implies. First, it is open to indirect purchasers to prove that harm from cartel behaviour was passed on to them by direct purchasers. Second, as a corollary, direct purchasers are not deemed to bear all of the price-fixing harm. And finally, if plaintiffs at different stages of the distribution chain can debate the degree of pass-on, so can defendants. Unlike in the US, therefore, defendants have a pass-on defence to raise in direct purchaser litigation.

As a result of *Chadha* most Canadian cartel class actions now consist of neither direct nor indirect purchaser classes but rather a combination of both. Plaintiffs’ counsel have proposed ‘universal’ classes consisting of every possible plaintiff, from the initial direct purchasers to the last end consumers. Their theory is that if all direct and indirect purchasers are included, then all of the harm must have been suffered somewhere in the class.

The decision in *Pro-Sys Consultants Ltd v Infineon Technologies* demonstrates that global class definitions were not the panacea that plaintiffs’ counsels were hoping for. This action sought to recover damages arising from the alleged DRAM price-fixing cartel. The proposed class included those who brought DRAM directly from the manufacturers as well as those who bought DRAM or products containing DRAM indirectly.

The court said that certification should be denied to classes that include indirect purchaser classes where the plaintiff is unable to propose a viable class-wide method of establishing harm and thus liability. The court stated that, even though the questions surrounding the alleged conspiracy may be easy to answer in a cartel class action, this does not displace the significance of determining whether there is a class-wide method capable of establishing pass-through to all of the market participants caught by the proposed class definition. Indeed the court held that this is the core of the inquiry in a pass-through case. The appeal for *Pro-Sys* was heard this February 2009 and the decision is expected later this year.

A second practical result of defining global classes that include direct and indirect purchasers is that there has been very little opt out experience in Canada. Unlike in the US, a direct purchaser who opts out of a Canadian class settlement to pursue individual litigation will be met with a pass-on defence and an allegation that it suffered little or no harm. There are no treble damages in Canada to offset this risk. Accordingly, the only direct purchasers to pursue individual litigation thus far have done so before class settlements have been reached, typically in an effort to either make an earlier recovery or profit from business factors in Canada or elsewhere that may give it unique bargaining leverage.

At a procedural level, another key (and frustrating) difference between Canada and the US is the lack of any formal coordination among different courts handling proposed class actions by different counsel respecting the same cartel. The senior superior courts that typically handle cartel class actions are provincial, not federal. There is no Canadian equivalent to the US MDL system. Where overlapping claims or classes in different provinces cannot be resolved or

coordinated informally by negotiations among competing class counsel and the various defendants, cumbersome and inadequate motions invoking forum conveniens or similar doctrine must be taken. There is as yet little guidance from the courts on how these issues will be resolved, although proceedings currently pending in a number of cases may shed some light.

More typically, class proceedings are started in a number of provinces at the same time by counsel working with one another on a coordinated basis. These counsel usually identify one jurisdiction as the 'lead' jurisdiction in which certification and, potentially, the merits will be litigated.

Cross-border litigation

Many Canadian cartel cases are 'copycat' cases derived from earlier ongoing US litigation. US class counsel often assist Canadian counsel in formulating the case and reviewing the facts. Canadian courts have acknowledged these arrangements by approving counsel fees that expressly include fees payable to US counsel.

The cross-border nature of much Canadian antitrust litigation has raised a number of issues. The first involves cross-border discovery. US cases are usually well into the pre-certification or even merits discovery when parallel Canadian class actions are commenced. US courts have now begun granting intervenor orders in favour of proposed Canadian classes so that Canadian class counsel can be included within US protective orders for the purposes of obtaining the documents and reviewing the transcripts generated in the US discovery process. Accordingly, Canadian class counsel are starting to get extensive discovery in the US before they have sought certification or have any discovery rights in Canada.

Another issue arising from cross-border antitrust litigation stems from US class action settlements on behalf of classes that include Canadians. Such settlements raise the question of whether those settlements bar Canadians from bringing their own litigation in Canada if they do not expressly opt out.

In the *Auction House* conspiracy litigation, a settlement was reached in New York on behalf of classes that included non-US purchasers, including Canadians. There was, at that time, an existing Canadian auction house class action. Canadian class counsel worked with US class counsel, satisfied themselves that the US settlement was in the best interest of Canadian class members and, ultimately, had the Canadian class action dismissed so that Canadians could participate in the US deal. However, in the *McDonald's* contest litigation (not an antitrust case), Canadian class counsel resisted an effort by the defendants to dismiss a proposed Canadian case on the basis that the Canadian class was subsumed within a North American class on behalf of which a settlement had been approved in the US. The Canadian courts refused to dismiss the Canadian case, initially on the basis of inadequate notice in Canada of the US settlement. However, the courts left open the distinct possibility that a US settlement might bind unwitting Canadian class members and undercut, or terminate, Canadian class proceedings.¹³

Recent certification jurisprudence demonstrates that it is not easy for plaintiffs to achieve certification for competition claims. Plaintiffs' counsel now know, as a result of *Pro-Sys*, that the mere existence of a conspiracy and use of global classes is not sufficient to make a class action the preferable procedure. They will have to show that the fact of harm to class members is provable on a class-wide basis. If these decisions are upheld on appeal this might lead to a decline in class actions in Canada.

Administrative proceedings – reviewable trade practices

Reviewable practices

Part VIII of the Act includes provisions dealing with trade practices that are reviewable by the Tribunal. These include abuse of dominant position, exclusive dealing and tied selling and refusal to deal. The recent amendments have added a new civil provision that will allow the commissioner of competition to challenge agreements and arrangements between competitors.

The Tribunal's remedies are largely behavioural – directing a person found to have engaged in a reviewable practice to take or stop taking certain steps. The Tribunal may also order a person to pay an administrative monetary penalty (AMP), a thinly disguised fine, in certain circumstances. The recent amendments now allow the Tribunal to impose an AMP of up to C\$10 million (up to C\$15 million for repeat offenders) for abuse of dominance.

Private access to the Tribunal

Until 2002, only the commissioner of competition could initiate a proceeding before the Tribunal to consider an alleged reviewable practice. However, amendments to the Act have granted a limited right to any aggrieved person to initiate Tribunal proceedings.¹⁴ Any person may now apply to the Tribunal for leave to make an application to the Tribunal for a finding that another person is improperly refusing to deal or is engaged in exclusive dealing or tied selling. Private parties are not currently entitled to seek leave to initiate an abuse of dominance proceeding. Only prospective behavioural remedies are available in private proceedings – neither penalties nor damages may be awarded.

Process

There are several hurdles a private applicant must overcome before being granted leave to commence an application. First, the Tribunal may not consider applications respecting matters that are currently the subject of an inquiry by the commissioner or that were the subject of an inquiry discontinued because of a settlement involving the commissioner or, finally, that are subsumed in an application already submitted by the commissioner to the Tribunal. However, other matters, including those regarding which the commissioner has discontinued an inquiry other than by way of settlement, are available for consideration. The Tribunal is expressly forbidden from drawing any inferences, one way or the other, from the fact that the commissioner has (or has not) taken any particular step in respect of the matter.

The other preliminary hurdle that a private applicant must overcome involves the test for leave. The Tribunal has been given a gate-keeping function. Leave is only to be granted if the Tribunal has reason to believe that the applicant is 'directly and substantially affected in the applicant's business' by impugned conduct constituting one of the kinds of reviewable practice amenable to private applications.

There have been a number of leave applications filed since the Act was amended to introduce private access. Some have been granted, but most have been rejected. The jurisprudence remains somewhat mixed in terms of the application of the leave test. However, it is arguable that an applicant must not only demonstrate substantial impact but also provide reasonable grounds for the Tribunal to believe that each of the elements required to be proven to establish the alleged reviewable conduct is capable of being demonstrated. To date only five applications have been granted leave. Of these only two have been heard on the merits and both were subsequently dismissed by the Tribunal.

Notes

- 1 RSC 1985, cC-34, as amended.
- 2 Whether these remedies will, in fact, be granted in cartel cases has not yet been determined by Canadian courts. For example, it is unlikely that punitive damages would be awarded against a defendant that has already been convicted and sanctioned criminally.
- 3 *Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd* (2002), 20 CPC (5th) 351 (Ont SCJ).
- 4 See *Western Canadian Shopping Centers Inc v Bennett Jones Vechere* (2001), 201 DLR (4th) 385 (SCC).
- 5 This iteration of the criteria is from Ontario's Class Proceedings Act, 1992, SO 1992 c6, s5(1).
- 6 But see British Columbia's Class Proceedings Act, s4 (2)(a).
- 7 *Hollick v Toronto (City)*, 2001 SCC 68 at para 32.
- 8 The Quebec class action regime is quite different from that in the other provinces. The test for 'authorising' a class action does not include an overt preferability requirement, the procedural steps on an authorisation motion are truncated, and class membership is restricted to individuals and companies with fewer than 50 employees.
- 9 *Hollick v Toronto (City)*, supra.
- 10 *Gariepy v Shell Oil Co, et al* (2002), 26 CPC (5th) 358 (Ont SCJ).
- 11 See *Price v Panasonic Canada Inc*, [2000 OJ No. 3123] (SCJ) and *Chadha et al v Bayer Inc et al* (1999), 45 OR (3rd) 29 (SCJ); rev'd (2001), 54 OR (3rd) 920 (Div Ct); aff'd (2003), 63 OR (3rd) 22 (CA); leave to appeal dismissed (2003), 65 OR (3rd) xvii (SCC).
- 12 *Illinois Brick v Illinois*, 431 US 720 (1977); see also *Hanover Shoe Inc v United Shoe Machinery Corp*, 392 US 481 1968).
- 13 *Currie v McDonald's Restaurants of Canada Ltd* (2005), 74 OR (3d) 321 (CA).
- 14 See, generally, section 103.1 of the Act.

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Founded in 1903, McMillan provides a full range of business legal services and advice to corporate and financial services clients in Canada and abroad.

The McMillan competition group is recognised nationally and internationally as one of Canada's pre-eminent competition law practices. It advises domestic and international clients on all aspect of Canadian competition law, with an emphasis on complex mergers, cartels and abuse of dominance cases.

The group advises merging businesses and affected parties on all aspects of domestic mergers, and coordinates merger clearances around the world. The group also handles both civil and criminal Competition Bureau investigations and prosecutions as well as private actions before the Competition Tribunal. Group members have been involved in most high-profile Canadian antitrust class actions. And for more than 30 years, McMillan has also played a leading role in shaping the development of competition law and policy in Canada.

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David Kent is a partner in the litigation and competition groups of McMillan LLP and chairs the firm's class action practice.

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