

Private Antitrust Litigation

in 27 jurisdictions worldwide

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Canada

David Kent, Martin Low QC, Eric Vallières and Jonathan Hood

McMillan LLP

Legislation and jurisdiction

- 1** How would you summarise the development of private antitrust litigation?

Changes in procedural rules have given rise to a dramatic increase in private antitrust litigation in Canada since the mid-1990s.

The first change was the introduction of modern class action regimes in the various Canadian jurisdictions, coupled with a more permissive approach to contingency fees, which have led to a wide range of private antitrust class actions being launched across the country. The majority of these cases deal with North American or global cartels and follow on from US or European investigations and litigation.

The second notable procedural change was the more recent amendment to the Canadian Competition Act (the Act) that now permits claimants to have direct access to the Competition Tribunal (the Tribunal) in certain situations (see question 3).

- 2** Are private antitrust actions mandated by statute? If not, on what basis are they possible?

As described more fully below, private antitrust actions are expressly contemplated in Canada by the Act.

In common law provinces, an antitrust action may also be based on the tort of conspiracy and a variety of economic torts as well as on restitutionary theories. Such claims do not expand the basis of liability beyond the statutory cause of action created by the Act. However, depending on the province where the claim is brought, relying on a common law cause of action may result in a longer limitation period than that which is available under the Act. Relying on a common law or equitable cause of action may also support requests for relief such as interlocutory injunctions, disgorgement or other equitable relief that are not available under the Act.

In Quebec, an antitrust action may also be based on the general rules of civil liability (article 1457 of the Civil Code), and the same remarks as noted above would apply (time limitation in Quebec is typically three years).

- 3** If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The Act governs competition issues arising from commercial activity throughout Canada. The Act provides two different venues for pursuing private actions depending on the type of alleged misconduct.

Section 36 allows private actions where the defendant has committed a criminal offence under the Act. Section 36 also allows actions where the defendant fails to comply with an order of the Tribunal. The Federal Court of Canada and the provincial superior courts are courts of competent jurisdiction for the purposes of bringing an action under section 36 of the Act.

Pursuant to the recent amendments, section 103.1 of the Act now

gives private parties a limited right to initiate proceedings before the Tribunal if they are affected by certain restrictive trade practices. Any person may apply to the Tribunal for leave to make an application for a finding that another person is improperly refusing to deal or is engaged in exclusive dealing or tied selling.

- 4** In what types of antitrust matters are private actions available?

Private antitrust actions are available where the defendant has engaged in conduct that would be a criminal offence under the Act. The criminal offence provisions are found in part VI of the Act. The Canadian government overhauled part VI in March 2009. The amendments narrowed the range of criminal behaviour under the Act by repealing the price discrimination, promotional allowances, predatory pricing and price maintenance provisions. Conspiracy, bid-rigging, deceptive telemarketing, misleading advertising and pyramid sales remain criminal offences in part VI.

The most important amendments, from a private enforcement perspective, are the changes 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. We expect to see an increase in private antitrust actions because the creation of a per se offence makes proving cartel conduct easier for potential plaintiffs.

Section 46 of the Act deals with foreign-directed conspiracies: it is an offence for any corporation that carries on business in Canada to implement a policy of a corporation or person outside of Canada that would violate the conspiracy provisions of the Act.

- 5** What nexus with the jurisdiction is required to found a private action?

Canadian courts have determined that they have jurisdiction over foreign defendants who are alleged to have entered into a foreign conspiracy directed at the Canadian market that caused loss or damage to Canadian claimants. In general, courts will take jurisdiction over a private antitrust action if the court finds that there is a real and substantial connection between the alleged misconduct and the jurisdiction. Canadian courts apply relatively generous rules of service of civil process on parties outside Canada.

- 6** Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals including those from other jurisdictions. In practice, defendants in most private cartel actions are corporations rather than individuals. As indicated above, Canadian courts will assume personal jurisdiction if a foreign corporation or individual is alleged to have committed an offence abroad that affects Canada.

- 7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

It is possible to bring private actions simultaneously in more than one province. Sometimes this involves class actions on behalf of similar or overlapping classes. At this time there is no formal way to coordinate actions among the provinces. As a result, where litigation by overlapping classes in different provinces cannot be coordinated informally by competing counsel and the various defendants, cumbersome and inadequate motions invoking *forum non conveniens* or similar doctrines must be brought.

Private action procedure

- 8 May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties. Third-party litigation funding is still in its infancy in Canada. Law societies are monitoring third-party litigation funding but no steps have been taken to regulate it.

Contingency fees are available throughout Canada. Contingency fees are the preferred method of compensation for plaintiffs' counsel in class actions. The legislation in several jurisdictions requires plaintiff class action fees to be approved by the court. Counsel must demonstrate that the fees charged are reasonable.

- 9 Are jury trials available?

The ordinary rules of civil procedure apply to private antitrust actions. In all Canadian provinces other than Quebec, a party can require issues of fact and damages to be assessed by a jury. Typically, to request a jury the party must serve a jury notice on the opposing party before the close of pleadings. The opposing party may bring a motion to strike out the jury notice. The most common ground for striking out a jury notice is that the case is inherently complex. Unlike the US, jury trials in civil actions in Canada are not a common method for adjudicating private actions, and competition or antitrust class litigation will rarely involve a jury.

No juries are available for matters heard by the Tribunal or by the courts of the province of Quebec.

- 10 What pre-trial discovery procedures are available?

Documentary and oral discovery are available in all jurisdictions with some differences as to procedure.

In the common law provinces and before the Federal Court, the parties have an obligation to produce all relevant documents relating to the matters at issue. The definition of 'documents' is wide and includes all relevant data and information in electronic format. After each party has delivered their documents, oral discoveries begin. Each party is entitled to examine every party adverse in interest to it once.

The person being examined is required to answer every question that is relevant to the matter in dispute. The party conducting the examination is entitled to read in portions of the discovery transcript of the adverse parties as evidence at trial.

In Quebec, the parties are required to produce only the documents on which they intend to rely at trial. During the examination process that follows they may be requested to provide additional documents specified by the other parties.

- 11 What evidence is admissible?

The rules of evidence apply to private competition litigation and dictate what evidence is admissible. Generally, parties are entitled

to provide whatever factual or expert opinion evidence they think is necessary to prove their case. Evidence is primarily entered orally with the opposing party given broad rights to cross-examine. Most rules of evidence deal with admissibility of evidence and try to prevent access to potentially misleading information. Most corporate records will be admissible.

- 12 What evidence is protected by legal privilege?

Legal privilege falls into two general categories: solicitor-client privilege and litigation privilege. Solicitor-client privilege applies to all communications between a lawyer and client that were made for the purpose of giving or receiving legal advice and that were made in confidence. Advice from in-house counsel is privileged provided that the advice meets the three requirements of legal privilege described above. In other words, if in-house counsel is providing legal advice in confidence then that advice will be privileged. In-house counsel communications providing business advice are not privileged.

Litigation privilege applies to communications of a non-confidential nature between counsel and third parties and even includes material of a non-communicative nature provided that the communications or material was created specifically in contemplation of litigation.

- 13 Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions are available where there has been a criminal conviction in respect of the same matter. However, there need not be a prior criminal conviction for a plaintiff to bring a private antitrust action: a plaintiff may bring an action for loss or damage as a result of 'any conduct that is contrary to any [criminal] provision' of the Act, whether or not there has been a conviction. From a practical perspective, many private actions arise after a conviction, because the conviction serves as *prima facie* proof of the illegal conduct, for the purpose of establishing civil liability. Increasingly, however, class actions are being brought prior to conviction, but after disclosure of an investigation.

- 14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

Subsection 36(2) of the Act provides that the judicial record relating to a criminal conviction under the Act is proof that the convicted person engaged in the criminal conduct, in the absence of evidence to the contrary. This provision applies whether the conviction was the result of a negotiated plea bargain 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 relating to a cartel conviction usually consists only of the indictment, an agreed statement of facts or admissions, and the plea, record of conviction and imposition of sentence. Leniency applicants are not protected from follow-on litigation.

- 15 What is the applicable standard of proof for claimants and defendants?

The standard of proof in any civil action, including private antitrust litigation, is on the balance of probabilities. The Supreme Court of Canada recently held that there is only one standard of proof, the balance of probabilities, even in an action based on an alleged breach of a criminal provision. The plaintiff bears the burden of proving all of the essential elements of the case. The defendant bears the burden of proving the elements of any affirmative defence on a balance of probabilities.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is no typical timetable for class and non-class proceedings. The provincial courts and Federal Court have rules that set out pro forma deadlines for each step in a proceeding. However, in complex proceedings such as antitrust actions it is common for the parties to agree to extend the deadlines or for the deadlines to be extended by the courts. There is typically less flexibility in proceedings before the Tribunal, where the parties may be given little latitude to depart from the strict timelines set out in the statute and rules.

In common law provinces, class actions cannot proceed unless and until the court has granted a motion certifying the class. The provincial legislation contains time limits within which a certification motion must be brought. However, as in regular actions, it is common for this deadline to be extended by the court. Certification motions are not usually commenced until at least six months after a case is commenced, and usually take at least 10 additional months to be resolved.

In Quebec, the launching of a class action must first be authorised by the superior court. Once the court has authorised the action (this process normally takes several months), the plaintiff has three more months to institute the class action itself. Thereafter pro forma deadlines apply, but are typically extended.

Proceedings can only be accelerated in exceptional circumstances. A party seeking to expedite a proceeding must satisfy the relevant court that the matter is too urgent to be conducted according to the usual timelines.

17 What are the relevant limitation periods?

Section 36(4) of the Act sets out the limitation period for actions brought under section 36. No action can be brought after two years from the later of the day on which the conduct was engaged in or the day on which any criminal proceedings relating to the matter were finally disposed of. With the delays that are common in disposing of a prosecution, the two-year period for initiating an action may in fact become quite extended.

Depending on the jurisdiction, the limitation period may be different if the action is based on a common law tort or other cause of action. A common period is two years from the time when the plaintiff knew or ought to have known of the offending conduct. The applicable limitation period for Quebec is generally three years.

18 What appeals are available? Is appeal available on the facts or on the law?

There is an automatic right of appeal in all civil actions, including antitrust actions, to the relevant provincial or federal court of appeal. Appeals from an appellate court can be made to the Supreme Court of Canada, but only if leave to appeal is granted. Appeals are available on both the facts and the law although the standard of review for each is different.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings, known in Canada as class proceedings, are available in respect of private antitrust litigation.

20 Are collective proceedings mandated by legislation?

Most Canadian provinces now have formal class action procedural legislation. 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.

21 If collective proceedings are allowed, is there a certification process? What is the test?

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 pleading must disclose a cause of action;
- there is an identifiable class of two or more people;
- the claims of the class members must 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 does not have interests in conflict with other class members on the common issues.

Quebec's rules for authorisation are somewhat different. There is no formal 'preferability' requirement, and only individuals and organisations with 50 employees or fewer may be members of Quebec classes.

22 Have courts certified collective proceedings in antitrust matters?

In the common law provinces, fewer than 10 competition law cases have been the subject of a contested certification decision. Only two of these were cartel cases, neither of which was certified. The first of these reached the highest appellate court in Ontario before leave to appeal to the Supreme Court of Canada was denied. In the more recent *DRAM* case, class certification (authorisation, in Quebec) was denied in both British Columbia and Quebec. The case is currently being appealed in both jurisdictions, and the appeal has been argued and a decision is pending in the British Columbia Court of Appeal.

The other common law jurisdiction cases involved allegations of vertical, rather than horizontal, misconduct. Of these, one resale price maintenance case was partly certified and another was certified on appeal in a decision that is being further appealed.

Several motions for authorisation to institute a class action in a competition case have been launched in Quebec recently. The two decisions rendered thus far have denied authorisation. The first was upheld on appeal, while the *DRAM* appeal is pending.

The courts in Quebec and other provinces have certified or authorised numerous antitrust class actions, on consent, to facilitate settlements. Examples include cartel cases involving vitamins, liner-board, lysine and a variety of rubber chemicals.

23 Are 'indirect claims' permissible in collective and single party proceedings?

Canadian courts have expressly stated that end consumer or indirect purchaser classes have standing and are capable of being certified on appropriate evidence. Therefore, it is possible for indirect purchasers to bring a claim provided they can prove that the harm was passed onto them. No indirect purchaser case has been certified in Canada. Indirect claims are permissible in single party proceedings.

24 Can plaintiffs opt out or opt in?

Opt outs are permitted in Canada. Once a class is certified, the prospective class members must be notified of the existence of the proceeding and informed of their right to opt out and the process for doing so. Some provinces require non-residents to opt in before they can become class members.

25 Do collective settlements require judicial authorisation?

All class settlements require judicial authorisation. The courts are mainly concerned with whether the settlement is fair and adequate

Update and trends

There are two hot topics in the law of private antitrust litigation: the effect of the recent amendments to the Act on private antitrust litigation; and the recent jurisprudence on competition class action certifications.

The Act amendments replaced the former cartel provisions with a *per se* criminal offence. Prosecutors no longer need to show a substantial lessening of competition to prove an offence under the Act. In addition, read literally, the new provisions catch a variety of competitor agreements that do not constitute hard-core cartel conduct. Although the Competition Bureau has decided not to prosecute agreements that are not hard-core cartels as a matter of prosecutorial discretion, this decision is not binding on the courts and will not stop potential litigants from bringing such claims. As a result, it is expected that prosecutions and the inevitable follow-on class actions will increase.

The past few years have also seen a dramatic increase in the jurisprudence on certification of cartel class actions. Plaintiffs have not succeeded in getting any of these cases certified. Plaintiffs' counsel were hoping to use global classes to address the indirect purchaser problem that prevented previous cases from certification. While courts have not explicitly rejected global classes, they have emphasised that in order to succeed in certification a plaintiff must show that the fact of harm to all members of the class must be capable of proof on a class-wide basis. A number of these cases are currently under appeal. If any of these appeals is successful it will have a significant impact on certification jurisprudence and almost certainly lead to a significant increase in the number of class actions commenced.

to the class and whether there is an appropriate plan for distributing the settlement proceeds.

- 26** If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

It is common for antitrust class actions in Canada to be commenced in one jurisdiction on behalf of residents of other jurisdictions as well. Sometimes, these actions propose national classes including all Canadians. There has not yet been a definitive ruling as to whether the courts of one jurisdiction are entitled to resolve an action on behalf of a national class and thereby bind residents of other jurisdictions. In practice, many of these cases have settled, and out-of-province class members have been deemed by the approving courts to have released their claims, without any detailed comment as to the effectiveness of these releases.

It is also common for class counsel in different jurisdictions to commence coordinated actions in their respective jurisdictions that, when taken together, constitute a 'virtual' national class. However, there is no Canadian equivalent to the US MDL system and no organised means of consolidating actions commenced in different jurisdictions.

- 27** Has a plaintiffs' collective-proceeding bar developed?

A plaintiffs' class-proceeding bar has developed across the country. This bar is relatively small and, with respect to private antitrust litigation, currently involves only a small number of firms. These firms litigate either on a national basis or have developed relationships with firms in other jurisdictions so that they can coordinate national litigation.

Remedies

- 28** What forms of compensation are available and on what basis are they allowed?

Section 36 of the Act states that an individual who has suffered damage is entitled to recover an amount equal to the loss or damage proved to be suffered by him. This provision also allows the plaintiff to recover the full cost of investigating and bringing the action as well as pre- and post-judgment interest (see below). Damages are also available if the action is based on a common law cause of action or on the principles of civil liability (in Quebec).

Only actual (single) damages, and not multiple damages, are awarded in Canada.

Some plaintiffs have also made restitutionary and constructive trust claims in antitrust actions. The availability of such relief in this context has not been resolved in Canada.

In cases before the Tribunal only prospective behavioural remedies are available in private proceedings; neither penalties nor damages may be awarded.

- 29** What other forms of remedy are available?

Interlocutory injunctions and interim remedies are not available in actions brought under section 36 of the Act. However, interlocutory injunctions and interim remedies may be available if the claim is brought under the common law tort of conspiracy or pursuant to the principles of civil liability (in Quebec).

In cases brought before the Tribunal the only available remedy is behavioural on either an interim or permanent basis. For example, the Tribunal can order a supplier to accept a customer in refusal to deal cases or prohibit a business from engaging in a practice the Tribunal finds is an abuse of dominance.

- 30** Are punitive or exemplary damages available?

This issue has not been addressed in the context of antitrust litigation. Punitive or exemplary damages are available in Canada but they are only awarded in extraordinary circumstances and in relatively modest amounts.

- 31** Is there provision for interest on damages awards?

Both pre- and post-judgment interest are available on damages awards in most jurisdictions. The rate of interest is set by the relevant legislation. Plaintiffs are typically entitled to pre-judgment interest from the date of the cause of action until the order disposing of the case. Thereafter, post-judgment interest accrues on the amount of the judgment.

- 32** Are the fines imposed by competition authorities taken into account when settling damages?

Fines are not a factor when determining damages in a private antitrust action. A successful plaintiff is entitled to be compensated for its losses. Fines are not a relevant factor in determining the plaintiff's losses. However, the imposition of a fine may reduce or eliminate the likelihood of punitive damages.

- 33** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Each party to a litigation must initially bear its own legal costs. However, courts will typically award costs to the successful party at the end of the litigation. The common law courts will look at a number of factors such as settlement offers, the importance of the

issue being litigated and behaviour of the parties when considering the quantum of the costs award. In a normal case the successful party can expect to recover between one-third and one-half of its actual costs. In Quebec, costs awards are nominal. The Tribunal also has complete discretion to award costs for cases brought before it. In class actions, however, most provinces and the Federal Court have rules that provide that no party shall pay the other's costs except in extraordinary circumstances.

34 Is liability imposed on a joint and several basis?

Canadian courts have not considered whether liability can be imposed on a joint or several basis in the context of a private antitrust action. However, it is common for two parties who are responsible for committing a tort (or a civil fault) to be held jointly and severally liable for the damage caused by them ('solidarily' in Quebec).

35 Is there a possibility for contribution and indemnity among defendants?

Canadian courts have not yet ruled on whether normal common law or statutory rules regarding contribution and indemnity among defendants will apply to members of an antitrust cartel. Contribution and indemnity agreements are generally permissible as among defendants in Canada, and there is no reason to believe that they would not be available to defendants in a private antitrust action.

In Quebec, when defendants are held 'solidarily' liable they are each liable towards the aggrieved party for the entire loss. They may, however, have recourses as between themselves to apportion their liability.

36 Is the 'passing-on' defence allowed?

While this issue has not been dealt with directly by the courts, we believe that defendants can raise a pass on defence in direct purchaser litigation. This is the natural consequence of the fact that indirect purchasers have standing to sue. The Canadian courts have expressly noted the difficulty in conducting a passing-on analysis to determine if indirect purchasers are harmed in refusing to certify various cartel

and other proposed antitrust class actions, citing the US jurisprudence that disallowed the passing-on defence but declining to adopt that outcome. However, in a non-antitrust restitution case, the Supreme Court of Canada cast doubt on the legitimacy of passing-on defences and it is unclear how that view will affect antitrust cases.

37 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

The Competition Act contains a number of defences to the various criminal provisions. For example, section 45 of the Act (conspiracy provisions) permits businesses to enter an arrangement that relates only to:

- exchange of statistics;
- defining product standards;
- exchange of credit information;
- the definition of terminology used in a trade, industry or profession;
- cooperation in research and development;
- restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;
- the sizes or shapes of the containers in which an article is packaged; and
- measures to protect the environment.

The scope of these defences is, however, narrow because the Act states that they do not apply if the conspiracy, combination, agreement or arrangement lessens competition in respect of price, quantity or quality of the product, markets or customers, or channels or methods of distribution.

38 Is alternative dispute resolution available?

Alternative means of dispute resolution are available in Canada, including mediation and arbitration. Alternative dispute resolution is not commonly used in private antitrust actions, but in principle there is no reason why the parties could not consent to arbitration or mediation.

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