THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Eleventh Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Eleventh Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Ilene Knable Gotts

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Martin Roach

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-15-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2018 Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE CLASS ACTIONS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE HEALTHCARE LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

THE TRADEMARKS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN CEDERQUIST KB

AFFLECK GREENE MCMURTRY LLP

AGUILAR CASTILLO LOVE, SRL

ANGARA ABELLO CONCEPCION REGALA & CRUZ LAW OFFICES (ACCRALAW)

BIRD & BIRD

CMS REICH-ROHRWIG HAINZ RECHTSANWÄLTE GMBH

COMPASS LEXECON

CYRIL AMARCHAND MANGALDAS

ERDEM & ERDEM LAW OFFICE

HOUTHOFF

KING & WOOD MALLESONS

LÓPEZ MELIH & ESTRADA

M FIRON & CO

MARVAL, O'FARRELL & MAIRAL

MINTERELLISONRUDDWATTS

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU STOICA & ASOCIAȚII

RUCELLAI & RAFFAELLI

SLAUGHTER AND MAY

SRS ADVOGADOS

URÍA MENÉNDEZ ABOGADOS, SLP

WACHTELL, LIPTON, ROSEN & KATZ

WEBB HENDERSON

WILLKIE FARR & GALLAGHER LLP

WILSON SONSINI GOODRICH & ROSATI

CONTENTS

PREFACE vii
Ilene Knable Gotts

Chapter 1 EU OVERVIEW 1
William Turtle and Camilla Sanger

Chapter 2 ESTIMATING CARTEL DAMAGES IN THE EUROPEAN UNION 15
Enrique Andreu, Jorge Padilla, Nadine Watson and Elena Zoido

Chapter 3 ARGENTINA 22
Miguel del Pino and Santiago del Rio

Chapter 4 AUSTRALIA 33
Tom Bridges

Chapter 5 AUSTRIA 41
Bernt Elsner, Dieter Zandler and Molly Kos

Chapter 6 BRAZIL 51
Cristianne Saccab Zarzur

Chapter 7 CANADA 59
W Michael G Osborne, Michael Binetti, David Vaillancourt and Fiona Campbell

Chapter 8 CHINA 77
Susan Ning, Kate Peng and Sibo Gao

Chapter 9 ENGLAND AND WALES 89
Peter Willis and Jonathan Speed

Chapter 10 FRANCE 100
Thomas Oster

Chapter 11 GERMANY 109
Susanne Zuehlke

Chapter 12 GUATEMALA 122
Juan Carlos Castillo Chacón and Natalia Callejas Aquino

Chapter 13 INDIA 127
Vandana Shroff and Rahul Goel

Chapter 14 ISRAEL 138
Eytan Epstein, Mazor Matzkevich and Shani Galant-Frankfurt

Chapter 15 ITALY 165
Enrico Adriano Raffaelli

Chapter 16 MEXICO 176
Juan Pablo Estrada-Michel and Monica Mishy Flisser

Chapter 17 NETHERLANDS 184
Rick Cornelissen, Naomi Dempsey, Albert Knigge, Paul Sluijter and Weyer VerLoren van Themaat

Chapter 18 NEW ZEALAND 207
Oliver Meech and Alisaundre van Ammers

Chapter 19 PHILIPPINES 218
Patricia-Ann T Prodigalidad and Christopher Louie D Ocampo

Chapter 20 PORTUGAL 237
Gonçalo Anastácio and Catarina Anastácio

Chapter 21 ROMANIA 250
Mihaela Ion, Laura Ambrozie and Vanessa Nistor

Chapter 22 SOUTH AFRICA 261
Candice Upfold

Chapter 23 SPAIN 277
Alfonso Gutiérrez and Tomás Arranz

Chapter 24 SWEDEN....290
Elsa Arbrandt and Fredrik Lindblom

Chapter 25 TURKEY....299
H Ercüment Erdem and Mert Karamustafaoğlu

Chapter 26 UNITED STATES....310
Chul Pak and Daniel P Weick

Appendix 1 ABOUT THE AUTHORS....329
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....351

PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government is undertaking a comprehensive review and is now considering the implementation of significant changes

to its private enforcement law. The most significant developments, however, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a 'preferred' jurisdiction for commencing private competition claims. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the 'public interest'.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia

and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly fora – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Germany and Sweden). Some jurisdictions, such as Hungary, seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the

overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of 'unjust enrichment' law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view

it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
February 2018

Chapter 7

CANADA

W Michael G Osborne, Michael Binetti, David Vaillancourt and Fiona Campbell[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

i Worldwide class gets green light

The Court of Appeal for Ontario permitted claims by 'absent foreign claimants' to proceed in *Airia Brands Inc v. Air Canada*,[2] opening the door to worldwide classes in price fixing class actions. The 2017 *Airia* case concerns allegations of price fixing in the market for air cargo services into and out of Canada. Class counsel sought to certify a global class consisting of anyone purchasing such services regardless of where such purchasers were domiciled or any direct presence-based connections to Canada.

The defendants brought a preliminary motion challenging the Court's jurisdiction over 'absent foreign claimants' – those proposed class members that were outside of Canada and had no presence in Canada. At first instance, a judge of the Superior Court of Justice granted the motion, finding that Ontario courts did not have jurisdiction over absent foreign claimants because the territorial limits in the Constitution prohibit the Court from assuming jurisdiction over absent foreign claimants who do not have a Canadian presence or do not consent to the jurisdiction of the Court.

The Court of Appeal overturned this lower court decision, holding that the motions judge had erred by disregarding the traditional test for the assumption of jurisdiction: the real and substantial connection test. In the case of absent foreign plaintiffs, an Ontario Court will assume jurisdiction where:

a there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;

b there are common issues between the claims of the representative plaintiff and absent foreign claimants; and

c the procedural safeguards of adequacy of representation, adequacy of notice and the right to opt out are provided, thereby serving to enhance the real and substantial connection between absent foreign claimants and Ontario.[3]

On the facts of *Airia*, the Court of Appeal found that the Ontario Court did have jurisdiction, and also rejected an argument that Ontario was *forum non conveniens*.

1 W Michael G Osborne, Michael Binetti and David Vaillancourt are partners and Fiona Campbell is an associate at Affleck Greene McMurtry LLP.

2 2017 ONCA 792.

3 2017 ONCA 792 at paragraph 107.

ii Class counsel cannot discover Bureau investigator

The Supreme Court of Canada has held that the Crown, including the Competition Bureau and its investigators, is immune from examinations for discovery in litigation in which it is not a party.

Canada (Attorney General) v. Thouin[4] involved a price fixing class action against oil companies and retailers. The plaintiffs consisted of purchasers of gasoline in Quebec, who alleged the defendants conspired to fix gasoline prices. The Bureau had conducted a prior investigation into gasoline price fixing that yielded over 220,000 private communications.

The plaintiffs moved for an order permitting them to examine the Bureau's chief investigator, and requiring the Attorney General of Canada, as the Bureau's legal representative, to produce all documents in the Bureau's investigation file. The Attorney General argued that the Crown had immunity from discovery under the Crown Liability and Proceedings Act (CLPA) because it was not a party to the litigation.

The Quebec Superior Court granted permission to examine the chief investigator and ordered production of the investigation documents, and the Court of Appeal affirmed. The Court of Appeal reasoned that Section 27 of the CLPA, which provides that 'the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings', did not contain clear language expressly limiting Section 27 to proceedings against the Crown. According to the Court of Appeal, Section 27 therefore lifted the Crown's immunity even in litigation in which the Crown was not a party.

The Supreme Court had to decide whether a court may require a Bureau investigator to be examined for discovery under a province's rules of civil procedure in litigation in which none of the Crown, Bureau or chief investigator is a party. Historically, the Crown's immunity exempted it from discovery in civil litigation, even in litigation in which it was a party. According to Section 17 of the Interpretation Act, the Crown continues to have immunity unless the immunity is clearly lifted. The question, then, was whether Section 27 of the CLPA lifted the Crown's immunity in cases in which it was not a party.

The Supreme Court held that provincial discovery rules do not apply to the Crown in proceedings in which it is not a party. The Supreme Court explained that the CLPA does not reflect a clear intention by Parliament to lift the Crown's immunity from discovery in litigation in which it is not a party. The Bureau's chief investigator could therefore rely on the Crown's discovery immunity to refuse to submit to an examination for discovery.

The practical result of the *Thouin* decision is that it blocks parties from examining the Competition Bureau for discovery in price fixing class actions.

Following the *Thouin* decision, the Bureau released a position statement on requests for information from private litigants explaining that it will not voluntarily provide information to private litigants, and it will oppose subpoenas for production of information if disclosure might interfere with an ongoing investigation.[5]

iii The uncertainty of umbrella purchasers

Umbrella purchasers are purchasers that did not buy the price-fixed product from an alleged conspirator, either directly or indirectly (that is, as part of a vertical distribution chain); they bought it from firms that are not part of the conspiracy or through distribution

4 2017 SCC 46.

5 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html.

chains descending from those firms. Class counsel typically argue that umbrella purchasers have a claim against conspirators because the alleged conspiracy created an umbrella of *supra*-competitive prices, enabling non-cartel members to raise prices, causing their customers to pay an overcharge. Canadian courts have not taken a unified approach to the claims of umbrella purchasers, and there is divergent authority in Ontario and British Columbia.

In 2017, the Ontario Divisional Court held in *Shah v. LG Chem Ltd*[6] that umbrella purchasers do not have a cause of action under Section 36 of the Competition Act, and further that no claims (including common law claims) by umbrella purchasers should be permitted to proceed. The Divisional Court held that umbrella purchaser claims would open defendants up to indeterminate liability for the pricing decisions of non-defendant manufacturers over which the defendants have no control. The spectre of indeterminate liability is contrary to the common law principles governing recovery for pure economic loss.

The holding in *Shah* was reiterated by the Ontario Divisional Court in *Fanshawe College of Applied Arts and Technology v. Hitachi Ltd*.[7]

Again in 2017, in *Godfrey v. Sony Corporation*,[8] the British Columbia Court of Appeal permitted umbrella purchaser claims to proceed. The Court rejected the reasoning in *Shah*, holding that if a conspirator impacts the market dynamics, causing non-conspirators to raise prices and overpayments to be made by umbrella purchasers, then the conspirators should not be permitted to shield themselves behind the doctrine of indeterminate liability for losses consequentially caused by their conduct.

Given the divergent authority on umbrella purchasers, the final determination of this issue may rest with the Supreme Court of Canada.

iv Have gown, will travel

In its 2016 decision in *Endean v. British Columbia*,[9] the Supreme Court of Canada (SCC or Supreme Court) ruled that superior court judges can sit outside their home provinces. This decision will facilitate the management of national class actions, including private antitrust class actions.

The issue arose in connection with a national settlement in a class action related to tainted blood that was approved in 1999. Class counsel wanted to extend the time for filing claims for benefits from the settlement funds, which required that superior courts supervising the settlement in three provinces, British Columbia, Ontario and Quebec, hear the motion and agree on the outcome for the decision to take effect. Class counsel proposed that the three judges should hear the motion sitting together in one location. The attorneys general from each of the three provinces opposed this, however, claiming that superior court judges cannot sit outside their home province. Ultimately, the Ontario Court of Appeal held that judges can sit outside Ontario, but that there must be a videolink back to Ontario. The British Columbia Court of Appeal disagreed, citing pre-Confederation common law principles of territoriality.

The Supreme Court held that the broad, general power to manage class proceedings found in the Class Proceedings Act in both Ontario and British Columbia gave the courts the authority to sit outside of their home provinces. The common law does not prevent this, nor

6 2017 ONSC 2586.

7 2017 ONSC 2791.

8 2017 BCCA 302.

9 2016 SCC 42.

does the Constitution or any statute, the Court added. While there is a 'deep-seated sense' in the common law that courts conduct their business within their geographical boundaries, the type of hearing at issue did not engage concerns relating to extra-provincial exercise of a judge's coercive power, since the hearing was on a paper record.

Superior court judges also have an inherent jurisdiction to sit outside their home provinces, the Court added, unless there is a statutory limitation prohibiting this.

v Application of discoverability as applied to Competition Act claims under review

Civil claims under Section 36 of the Competition Act are subject to a two-year limitation period running from the later of the last day on which the conduct was engaged in or the day on which any criminal proceedings relating thereto were finally disposed of. The limitation period provided in the Competition Act makes no reference to the common law principle of 'discoverability' – a delaying mechanism which provides that a limitation period does not begin to run until the material facts of a claim have been discovered or ought to have been discovered. Although the better interpretation of the Act is that discoverability should not apply, courts have recently taken the opposite view.

The Court of Appeal for Ontario, in the 2016 decision of *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp*,[10] held that the principle of discoverability does apply to claims under Section 36 of the Competition Act. The Court of Appeal held that as a general interpretive principle, statutory limitation periods that run from the accrual of a cause of action are subject to the principle of discoverability, while statutory limitation periods that run from a fixed event unrelated to the injured party's knowledge are not subject to the principle. The Court of Appeal held that the 'conduct' referenced in Section 36 is the conduct that gives rise to the right to damages under Section 36, therefore the triggering event for the limitations period is related to the actual accrual of the cause of action. As a result, the Court held, the discoverability principle applies. The British Columbia Court of Appeal agreed with this holding in *Godfrey v. Sony Corporation*.[11]

The 'conduct' in Section 36 is conduct of the defendants, which is arguably 'unrelated to the injured party's knowledge'. The reasoning of the Court of Appeal is difficult to square with the general statement of law that discoverability does not apply in such circumstances. There is an application for leave to appeal to the Supreme Court of Canada in *Godfrey*, so the Supreme Court of Canada may provide further guidance on the issue.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Like most competition regimes, Canada's Competition Act[12] deals with three broad areas: coordinated conduct among competitors, unilateral conduct by firms with market power and mergers. Somewhat unusually, the Competition Act also deals with a variety of marketing practices, such as false advertising.

The Competition Act applies a mix of criminal and civil (administrative) approaches to the areas it covers, as well as both public and private remedies.

10 2016 ONCA 621.

11 2017 BCCA 302.

12 RSC 1985, c C-34.

Private actions for damages are only available for breaches of the Competition Act's criminal provisions. The key criminal provisions are conspiracies to fix prices, allocate markets or reduce output,[13] bid rigging[14] and false advertising.[15]

Importantly, unilateral conduct by firms with market power, such as abuse of dominance,[16] exclusive dealing,[17] tied selling[18] and refusal to deal,[19] are not subject to criminal sanction. In fact, they are not even prohibited unless they cause a substantial lessening or prevention of harm, in which case the Competition Tribunal can prohibit the conduct. Agreements between competitors that are not hard-core cartels and price maintenance are subject to the same treatment.

Section 36 of the Competition Act creates a civil cause of action for damage caused by breaches of the criminal provisions of the Competition Act.[20] To succeed, the plaintiff must prove that the defendant committed a criminal offence under the Competition Act, and that he or she suffered damage caused by the criminal offence. The standard of proof is on a balance of probabilities.

A conviction is, in the absence of proof to the contrary, sufficient to prove that the defendant committed the offence.[21] The plaintiff must show actual damage, and that the damage was caused by the offence.[22]

Section 36 itself specifies two remedies: damages and costs. The amount of damages is limited to the actual loss suffered by the plaintiff, plus the costs of investigation and of the proceeding.

Actions under Section 36 are subject to a two-year limitation period that commences on the last day on which the offence was engaged in,[23] or from the day on which criminal proceedings were finally disposed of.[24] Whether discoverability applies to extend this

13 Section 45.

14 Section 47.

15 Section 52.

16 Section 79.

17 Section 77.

18 Section 77.

19 Section 75.

20 Section 36 is also available to recover damages caused by violations of orders made under the Competition Act by the Competition Tribunal or a court. Indirect purchaser class actions under this branch are unlikely. Section 36 provides in part as follows:

Recovery of damages

36. (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

21 Moreover, rules against collateral attacks on the result of proceedings that are concluded would likely bar any attempt by a person convicted of a criminal offence under the Competition Act to establish that no offence was, in fact, committed.

22 *Chadha v. Bayer Inc*, [2001] OJ No. 1844 (Div Ct) at paragraph 69.

23 *Eli Lily and Company v. Apotex Inc*, 2009 FC 991, at paragraph 728.

24 Section 36(4). There is currently a debate in the jurisprudence over whether discoverability applies to this limitation period. The better view is that it does not, because the limitation period commences based on

limitation period is an issue currently before the courts. Both the Ontario Court of Appeal[25] and the British Columbia Court of Appeal[26] have ruled that it can; however, leave to appeal has been sought from the Supreme Court.

Both direct and indirect purchasers can sue and recover damages for price fixing.[27]

Section 36 actions can be brought in the superior courts of any province, as well as the Federal Court of Canada.[28] They can be structured as class actions under the class proceedings statutes or rules in most Canadian provinces, as well as the Federal Court. In Ontario, for example, the Class Proceedings Act, 1992 (CPA)[29] provides for certification of class actions, and several other provinces have similar legislation.[30] Plaintiffs typically start at least three class actions for each case: one in Quebec, for a class of consumers and small businesses; one in British Columbia, for British Columbia consumers and businesses; and a national class in Ontario covering Ontario and the rest of the country.[31]

---

events that are not dependent on the knowledge of the plaintiff. The SCC stated the general rule in *Peixeiro v. Haberman*, [1997] 3 SCR 549 and *Ryan v. Moore*, 2005 SCC 38. Several decisions have applied this principle to find that the discoverability requirement does not apply: *Garford Pty Ltd v. Dywidag Systems International, Canada, Ltd*, 2010 FC 996 at paragraphs 31–33; *Fairview Donut Inc v. The TDL Group Corp*, 2012 ONSC 1252, at paragraph 646; *Les Laboratoires Servier v. Apotex Inc*, 2008 FC 825 at paragraph 488. See also *Watson*, where the Court applied the two-year limitation period without any consideration of discoverability. Other decisions have left the matter open. Only one decision has found that discoverability applies: *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp*, 2015 ONSC 2046.

25 2016 ONCA 621.

26 2017 BCCA 302.

27 *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57.

28 Section 36(3) grants jurisdiction to the Federal Court of Canada to hear Section 36 actions. The superior courts in each province are courts of inherent jurisdiction. They hear virtually all civil and important criminal matters, whether they are local, interprovincial or even international, and whether they involve provincial or federal law. The Federal Court of Canada has only limited statutory jurisdiction, mainly involving federal statutes, income tax, immigration and the like. It does not have jurisdiction over common law claims between private parties. The only significant private law jurisdiction of the Federal Court is over intellectual property, admiralty law, and actions under Section 36 of the Competition Act. Because the Federal Court does not have jurisdiction over the common law claims typically associated with Section 36 private actions, such claims are only rarely advanced in the Federal Court.

29 SO 1992, c 6.

30 The following provinces have class proceedings legislation similar to Ontario's: British Columbia (Class Proceedings Act, RSBC 1996, c 50), Alberta (Class Proceedings Act, SA 2003, c C-16.5), Saskatchewan (Class Actions Act, S.S. 2001, c C-12.01), Manitoba (Class Proceedings Act, CCSM c C130), Quebec (Code of Civil Procedure, RSQ, c C-25, Book IX), New Brunswick (Class Proceedings Act, RSNB 2011, c 125), Nova Scotia (Class Proceedings Act, SNS 2007, c 28), and Newfoundland and Labrador (Class Actions Act, SNL 2001, c C-18). The Federal Court rules allow class actions within the court's limited jurisdiction. In *Western Canadian Shopping Centres v. Bennett Jones Verchere*, [2001] 2 SCR 534, the Supreme Court ruled that a class action could be brought even in the absence of class action legislation. Although Quebec was the first province to enact class action legislation, in 1978, its legislation limits the plaintiff classes to individuals and small corporations or associations (fewer than 50 employees).

31 Ontario has been the jurisdiction of choice for national class actions because it has an opt-out regime for national classes, whereas British Columbia requires out-of-province members to opt in. Manitoba may become the forum of choice for plaintiffs in national class actions because its legislation adopts an opt-out regime for national classes, and, unlike Ontario's, prohibits awards of costs at any stage of a class proceeding: CCSM c C-130, Section 37(1). Alberta, Saskatchewan and Newfoundland and Labrador have adopted an opt-in regime.

Ontario's class action legislation is similar to (and indeed, modelled on) Rule 23 of the US Federal Rules of Civil Procedure. In contrast to Rule 23's requirement that the common issues predominate over individual issues, however, the CPA sets a lower threshold, requiring that a class proceeding be 'the preferable procedure for the resolution of the common issues'.[32] The court considers the proposed class action in light of the three goals of class actions: judicial economy, access to justice and behaviour modification. The importance of the common issues in relation to the claim as a whole is a factor in this analysis.[33] If resolution of the common issues would not significantly advance the litigation, and individual trials for each class member would be required, the action will not be certified.[34]

III EXTRATERRITORIALITY

Price-fixing class actions potentially raise two different jurisdictional issues. The first is whether the court has jurisdiction over the claim. Courts have generally held that if an international price-fixing conspiracy has caused losses in Canada, Canadian courts have jurisdiction.[35]

---

32 CPA Section 5 contains the test for certification. It reads in part as follows:

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c 6, s 5 (1).

The test in Manitoba (Section 4), Alberta (Section 5), Saskatchewan (Section 6) and Newfoundland & Labrador (Section 5) is almost identical to CPA Section 5, except that these three statutes add 'whether or not the common issue predominates over issues affecting only individual prospective class members' (or similar) after the equivalent of CPA Section 5(1)(c). The impact of this additional language has yet to be considered judicially, but it is unlikely to have much effect on the test. The British Columbia Class Proceedings Act expressly makes whether the common issues predominate over individual issues a factor in determining whether a class proceeding would be preferable (Section 4(2)(a)). The test in Quebec has the lowest threshold of all: there is no preferable procedure or predominance requirement; it is enough that there are common issues: Code of Civil Procedure, Article 1003(a). In one case, Quebec certified a case rejected by Ontario: contrast *MacLeod v. Viacom Entertainment Canada Inc* (2003), 28 CPC (5th) 160 (SCJ) with *Yadid v. Blockbuster Canada Co* [2003] JQ No. 2278 (SC).

33 *Hollick v. The City of Toronto* [2001] 3 SCR 158. See also *Western Canadian Shopping Centres v. Bennett Jones Verchere* [2001] 2 SCR 534, *Rumley v. British Columbia* [2001] 3 SCR 184.

34 *Mouhteros v. DeVry Canada Inc* (1998), 41 O.R. (3d) 63 at 73 (Gen Div); *Bywater v. Toronto Transit Commission* (1998) 27 CPC (4th) 172 at 181–82 (Ont Gen Div).

35 *Vitapharm Canada Ltd v. F. Hoffmann-La Roche Ltd* [2002] OJ No. 298 (SCJ); *Sun-Rype Products Limited v. Archer Daniels Midland Company*, 2013 SCC 58 at paragraph 46; *Fairhurst v. Anglo American PLC*, 2012 BCCA 257; but see *Bouchard v. Ventes de véhicules Mitsubishi du Canada Inc*, 2008 QCCS 6033, where the Quebec Superior Court held that an overcharge suffered in Quebec as a result of price fixing is a pure

Courts in most Canadian provinces will take jurisdiction over matters that have a 'real and substantial connection' with that province. The party asserting that the court should assume jurisdiction has the burden of identifying the connecting factors that link the subject matter of the action to the jurisdiction. Certain connecting factors are considered presumptive: that is, if they exist, the court will have jurisdiction.[36] These presumptive factors are:

a the defendant is domiciled or resident in the province;

b the defendant carries on business in the province;

c the tort was committed in the province; and

d a contract connected with the dispute was made in the province.

However, these factors are merely presumptive, and do not preclude an action against a foreign defendant that never had any business presence in the jurisdiction if the defendant allegedly participated in a conspiracy that impacted the jurisdiction, a British Columbia court recently confirmed.[37]

Because of the presumptive factors, and the court's consideration of the impact of the conduct, it is generally difficult for defendants to be successful on a jurisdictional challenge. However, in an April 2015 decision, two defendants successfully had a price-fixing claim dismissed against them for lack of jurisdiction. The judge found insufficient evidence showing a connection to Ontario, including insufficient evidence that the defendants did business in Ontario or were parties to the conspiracy, or that the product at issue would have made its way through the normal channels of trade to Ontario.[38]

Quebec has codified a similar set of connecting factors that allow its courts to assume jurisdiction.[39]

With respect to the class members, the Court of Appeal for Ontario has held that Ontario courts have extraterritorial jurisdiction over absent foreign class members when:

a there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;

b there are common issues between the claims of the representative plaintiff and absent foreign claimants; and

c the procedural safeguards of adequacy of representation, adequacy of notice and the right to opt out are provided, thereby serving to enhance the real and substantial connection between absent foreign claimants and Ontario.[40]

The second jurisdictional issue goes to the criminal offence under the Competition Act that serves as the basis for the claim. The offence of conspiracy under Section 45 is complete as soon as a prohibited agreement is reached. Implementation of the agreement is not one of

---

economic loss that is not damage suffered in Quebec for purposes of Article 3148(3) CCQ. In addition, in *Shah v. LG Chem, Ltd*, 2015 ONSC 2628, the fact that damage was suffered in Ontario was insufficient to establish jurisdiction where the plaintiffs failed to show a 'good arguable case' that the defendant was a party to that conspiracy.

36 *Club Resorts Ltd v. Van Breda*, 2012 SCC 17. This rule applies in Canada's common law provinces and territories.

37 *Ewart v. Nippon Yusen Kabushiki Kaisha*, 2016 BCSC 2179.

38 2015 ONSC 2628.

39 Civil Code of Quebec, CQLR c C-1991, Article 3148.

40 2017 ONCA 792 at paragraph 107.

the elements of the offence; nor are the effects of the agreement on competition. Where a price-fixing conspiracy is entered into outside Canada, it is at least arguable that the offence took place outside Canada, and thus outside of the reach of Canada's criminal law jurisdiction, which is territorial in nature.[41] The presence of Section 47 of the Competition Act, which makes it an absolute liability offence for Canadian subsidiaries to implement conspiracies entered into by their foreign parents, reinforces this argument. Against this, Canadian courts now take an expansive approach to criminal jurisdiction.[42] The question of whether a price-fixing conspiracy entered into outside Canada by foreign entities is an offence in Canada under Section 45 has yet to be determined.

Parties wishing to contest jurisdiction are required to bring their jurisdiction motions promptly, as their participation in any further steps in the proceeding (such as responding to the certification motion) will constitute attornment.[43]

Because class actions have a preclusive effect against potential plaintiffs, the question of whether a court validly assumes jurisdiction over the entire plaintiff class also arises. It is well established that a class in, say, Ontario, can include plaintiffs from other Canadian provinces, even on an opt-out basis. Ontario's Class Proceedings Act expressly allows this, and other Canadian provinces will enforce any judgment arising out of the Ontario proceedings. Where a plaintiff class is proposed that includes members from outside Canada, the question becomes more difficult. While classes that include foreign members have been certified, the Ontario Superior Court has recently suggested that foreigners cannot be included unless they opt in.[44]

IV STANDING

i Standing with respect to criminal practices or breach of orders

Canada has an expansive concept of standing in private actions for damages in instances where there is an alleged violation of the criminal provisions of the Competition Act or breach of an order of the Tribunal or other court made under the Act. Section 36 of the Competition Act provides that 'any person' who has suffered loss or damage as a result of such conduct may commence a private action to seek redress.

The SCC has recently made clear that indirect purchasers have standing to sue and seek damages in price-fixing cases, subject to the caveat that indirect purchasers must be able to prove that they have actually suffered loss or damage as a result of the complained-about conduct.[45] A class member cannot recover merely based on the fact that there has been a price-fixing conspiracy, and that somewhere down the distribution chain the class member purchased a good that contained the price-fixed component.[46] Proof of loss is required for each member of the class. This is typically done by way of expert economic evidence, as discussed below.

41 Criminal Code, RSC 1985 c C-46, Section 6(2) provides that no one shall be convicted of an offence outside Canada.

42 *R v. Karigar*, 2013 ONSC 5199.

43 *Momentous.ca Corp v. Canadian American Assn of Professional Baseball Ltd*, 2010 ONCA 722, [2010] OJ No. 4595 at paragraph 34.

44 *Airia Brands Inc v. Air Canada*, 2015 ONSC 5332.

45 *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57, at paragraph 131.

46 Ibid.

ii Standing with respect to non-criminal restrictive trade practices

Canada has a very limited scope for the private enforcement of non-criminal restrictive trade practices. Private party prosecution of such trade practices is limited to instances of refusal to deal (Section 75 of the Competition Act), price maintenance (Section 76 of the Act), and exclusive dealing, tied selling and market restriction (collectively Section 77 of the Act). To commence a private prosecution before the Competition Tribunal, a party must first obtain leave of the Tribunal, which pursuant to Section 103.1 of the Competition Act will only be granted where the Tribunal has reason to believe that the party is directly and substantially affected in its business by the trade practice in question.

Leave to commence a private prosecution under Section 103.1 is rarely sought and even more rarely granted.

V THE PROCESS OF DISCOVERY

In Canadian class actions, the discovery process occurs after the class action has been certified. The certification motion is procedural in nature, and there is no thorough probing of the merits at the certification hearing and no right to pre-certification discovery.

The discovery process occurs in two stages. The first stage is documentary discovery, wherein parties must disclose and produce all non-privileged relevant documents that are in their power, possession and control. 'Documents' is very broadly defined, and includes all relevant electronic data. As a general principle, the obligation to produce documents is tempered by the principle of proportionality, which is directed by the size and complexity of the case at hand. Since price-fixing class actions are typically factually complex with plaintiffs seeking a large quantum of damages, documentary production is usually extensive.

Recently, in *Imperial Oil v. Jacques*,[47] the SCC held that plaintiffs in a price-fixing class action were permitted to obtain as part of the production process wiretap evidence obtained by the Competition Bureau in the course of the Bureau's criminal price-fixing investigation. This decision will make it easier for plaintiffs to obtain information disclosed to a criminal defendant in the Crown brief in follow-on price-fixing class actions. However, plaintiffs do not have carte blanche to obtain production of the entire investigatory file of the Bureau, and the Bureau has stated that it will oppose such requests.[48]

A British Columbia court held that information provided to the Bureau by third parties uninvolved in the litigation was protected from disclosure in a civil action by way of public interest privilege.[49]

Oral discovery follows the production of documents. In some jurisdictions, such as Ontario, a party is limited to having to produce one representative to be discovered, who must take steps to inform him or herself about matters within the collective corporate knowledge in advance of being examined. Even with such preparation, there are generally questions at discovery that go beyond the knowledge of the corporate representative, necessitating the need for the examinee to give undertakings to seek information and documentation from

47 2014 SCC 66.

48 *Canada (Attorney General) v. Thouin*, 2017 SCC 46: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html.

49 *Pro-Sys Consultants Ltd v. Microsoft Corp*, 2016 BCSC 97.

other sources within the corporation. Other Canadian jurisdictions, such as Alberta, have a more expansive right of discovery covering multiple corporate representatives, which is more in line with the American deposition process.

Oral discovery of non-parties is typically available only with leave of the court. Members of the Competition Bureau investigatory team are not obligated to attend discoveries in follow-on civil litigation to answer questions about criminal investigations under the Competition Act.[50]

The process of discovery is similar for matters before the Competition Tribunal. Parties in proceedings before the Tribunal are required to make documentary production and participate in oral discovery.[51]

VI USE OF EXPERTS

The use of experts is commonplace in Canadian competition proceedings, both in class actions in the civil courts and in reviewable matters before the Competition Tribunal. The most common types of experts put forward in competition proceedings are expert economists and industry-specific experts.

In class actions, experts are used at the certification stage, and would also be used at trial (all price-fixing class actions in Canada to date have settled prior to trial). On the certification motion, the plaintiff bears the burden of demonstrating some basis in fact to show that all members of the class have suffered harm as a result of the alleged criminal conduct.[52] This is typically done by way of economic modelling and proposed methodologies by an expert economist.

On the certification motion, the plaintiff's expert does not need to actually quantify the overcharge paid by indirect purchasers: the quantification of the overcharge is done at trial with a full evidentiary record. Rather, on certification the expert must present a methodology that establishes that the overcharge has been passed down through the distribution chain to the indirect purchaser level.[53] On the certification motion, the expert's methodology must only offer a realistic prospect of establishing loss on a class-wide basis.

Defendants on a certification motion have a high hurdle in refuting a plaintiff expert's methodology, and will only succeed if they are able to show that the plaintiff expert's methodology is implausible. The SCC has held that on the certification motion, it is not the role of the certification judge to resolve conflicts between experts, which makes it difficult (although not impossible) for defendants to succeed in an 'economist versus economist' battle at certification.[54]

One strategy employed by defendants in responding to a certification motion is to put forward evidence from an industry expert to demonstrate that, contrary to the theoretical approach of the plaintiff's economic expert, based on how the industry actually works (including the mechanics of the distribution chain) any overcharge would not have been uniformly or consistently passed on through various points of the distribution chain, or would not have made it to the ultimate end purchaser of a price-fixed good. The strategy here

50 *Canada (Attorney General) v. Thouin*, 2017 SCC 46.

51 Competition Tribunal Rules, SOR/2008-141, Sections 60–64.

52 *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57, at paragraph 114.

53 Ibid. at paragraph 115.

54 Ibid. at paragraph 126.

(as well as with an economics expert) is to demonstrate that there are complexities in pass-on that the plaintiff expert has not, and indeed cannot, consider or capture such that the class would include those who have suffered no harm.

In proceedings before the Competition Tribunal, complex economic evidence is tendered by both sides geared at demonstrating the effect on competition (or lack thereof) concerning the reviewable practice at issue in a given proceeding. The Tribunal itself is also empowered to appoint independent experts to assist it regarding 'any question of fact or opinion relevant to an issue in a proceeding'.[55]

VII CLASS ACTIONS

In Canada, class action legislation has been enacted by all provinces except Prince Edward Island, although not in the territories.[56] In 2002, the Federal Court also created specific class proceeding provisions; however, this was not done through independent legislation, but rather through the amendment of the Federal Court Rules.

i Requirements for certification

While there are some differences in the precise language used in the class action legislation enacted in the various jurisdictions, generally speaking a class action will be certified if the following criteria are met:

a the pleadings disclose a cause of action;
b there is an identifiable class of two or more persons;
c the claims of the class members raise common issues;
d a class proceeding is the preferable procedure for the resolution of the common issues; and
e there is a representative plaintiff who can fairly and adequately represent the interests of the class, and a workable plan for advancing the proceeding.

In Quebec, which is a civil law jurisdiction, there are two primary distinctions: a numerosity requirement and no specific requirement that the proposed class action meet the preferable procedure test.

ii Notice

Notice to class members is an important component of the class proceeding process. Because individual class members are not active participants in the conduct of the action, notice provides the only real mechanism to inform class members of decisions made by the court in respect of major steps in the litigation. Notice is typically provided through publication in national media, industry magazines, distribution to industry associations, direct mailings to persons involved in the industry and on class counsel websites. The extent and types of notice will vary depending on the nature, scope and value of the claims. While not an exhaustive list, notice is given in the context of certification and settlement, and in respect of the claims process.

55 Competition Tribunal Rules, SOR/2008-141, Section 80.

56 Class actions are permitted to proceed in jurisdictions without class action legislation under local rules of court.

Notice of certification is particularly important in jurisdictions that have an 'opt-in' process. In these jurisdictions, class members who fall within the defined class of persons have to take steps to become part of the action. This is distinct from 'opt-out' jurisdictions where, once a class has been certified, any member of the defined class is presumed to be part of the proceeding unless they takes steps to 'opt out' of the proceeding.

When one or more defendants in an action settle with the plaintiff, a notice of settlement will be published in advance of the settlement approval hearing to permit people to consider the settlement and allow a class member to object to the settlement. Objectors may make submissions in writing or at the hearing. While objectors may make submissions, they do not gain party status with accompanying rights of appeal. Settlements must be approved by the court, which must satisfy itself that the settlement is fair, reasonable and in the best interests of the class.

iii Settlements in class proceedings

Settlements before trial are the norm in competition class actions. Settlements are negotiated between the parties, often using settlements of related proceedings in the United States as benchmarks for settlement quantum. Where the settlement amount owed to each individual class member is quite small, distribution of the settlement funds may be made *cy-près* to organisations such as charities.

Unlike the United States, there is no procedure similar to a multi-district litigation process. The effect of this is that where class actions are commenced in various provinces (often with plaintiff counsel working cooperatively in the different jurisdictions), settlements must be approved in each jurisdiction. There is a growing trend to conduct these hearings via video conference with the different jurisdictions participating at the same time. In these circumstances, each judge sits within his or her own jurisdiction, with all participants linked by video (or telephone) conference. In its 2016 decision in *Endean v. British Columbia*,[57] the Supreme Court of Canada ruled that superior court judges can sit outside their home provinces. This decision will facilitate the management of national class actions, including private antitrust class actions.

VIII CALCULATING DAMAGES

Section 36 of the Competition Act provides for the recovery of damages, by individuals or companies, incurred as the result of a violation of the Act's criminal provisions.[58] The damage recovery permitted by Section 36 is compensatory in nature only; class members must have suffered actual loss or harm as a result of the alleged breach of the Act by the defendant. This means that it is not sufficient for the private defendant to simply point to anticompetitive conduct that did not affect it. It also permits the plaintiff to recover the costs of any investigation into the matter.

Plaintiffs' claims for damages under Section 36 of the Competition Act are often accompanied by claims grounded in tort based on breaches of the Act. These claims permit, in principle, the recovery of punitive damages as well as damages through restitutionary principles. The ability of plaintiffs to rely on these avenues of recovery has been called into

57 2016 SCC 42.

58 Part VI, Sections 45–62.

question. In *Watson*, the British Columbia Supreme Court held that the Competition Act is a complete code that was intended by Parliament to provide exhaustively the remedies available to plaintiffs for breaches of the Competition Act.[59] However, the British Columbia Court of Appeal held that while claims in restitution (such as waiver of tort) are not available for breaches of the Competition Act, claims for unlawful means conspiracy or unlawful interference with economic relations (now simply called 'unlawful means') are available, and Section 36 was not intended to replace the tort.[60]

To date, none of the contested actions based on Section 36 has made it to trial. Consequently, there are no decisions providing judicial guidance on the appropriate methodology for damages calculations or other damages-related issues. Most judicial commentary in respect of damages has been in the context of class certification and settlements.

The most common approach used for damages calculations is based on an analysis of the difference in price between the alleged cartel pricing and a 'competitive' price that would have been in play but for the cartel. That price differential is used to estimate the amount of the 'overcharge'. Typically, expert evidence, including regression analysis (or, in the case of an expert's report at certification, regression modelling), is relied upon to estimate the quantum of overcharge as well as to address pass-through (or pass-on) issues.

IX PASS-ON DEFENCES

The SCC, in 2013, heard a trilogy[61] of cases that addressed, among other things, the availability of indirect purchasers to maintain a cause of gain against alleged cartel members particularly given that the pass-on defence had earlier been rejected by the Supreme Court.[62] Until the trilogy, lower courts had generally avoided dealing with the problems associated with indirect purchaser claims. The Court held that the rejection of the defensive use of pass-on did not entail, as a necessary corollary, the rejection of the offensive use of pass-on. Both direct and indirect purchasers can make a claim and, unlike in the United States, for example, such claims can be joined in one action.

X FOLLOW-ON LITIGATION

The Competition Act creates a statutory cause of action for anyone who has suffered loss as a result of a criminal breach of the Act.[63] Damages under this provision are limited to actual damages suffered, plus costs.

The Competition Act provides that proof of a criminal conviction can be used as proof of the offence in a subsequent private action.[64] While a plaintiff can obtain evidence disclosed

59 *Watson v. Bank of America Corporation*, 2014 BCSC 532.

60 2015 BCCA 362.

61 *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Limited v. Archer Daniels Midland Company*, 2013 SCC 58; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

62 See *British Columbia v. Canadian Forest Products Ltd*, [2004] 2 SCR 74 and *Kingstreet Investments v. New Brunswick (Department of Finance)*, 2007 SCC1.

63 Section 36(1).

64 Section 36(2).

to a criminal accused as part of a crown brief during the discovery process, a plaintiff will not have access to the Bureau's investigatory file and does not have the ability to summons members of the Bureau for oral discovery.[65]

When there is no prior criminal conviction, a plaintiff can still bring a civil claim against the defendant, but must prove all elements of the case on a civil standard (i.e., on a balance of probabilities). Plaintiffs typically also plead various ancillary common law and equitable causes of action in bringing private actions under the Competition Act. Since these other causes of action are not available in the Federal Court, private actions are almost always commenced in provincial superior courts.

Private actions are commonly structured as a class action under provincial class proceedings statutes. Private actions can be structured as class actions in any of Canada's 14 legal jurisdictions (10 provinces, three territories and the Federal Court), although each jurisdiction has its own particular rules.

Some of the Competition Act's civil provisions, notably refusal to deal, tied selling, exclusive dealing and market restriction, allow for private enforcement by affected firms; however, before commencing an application, the injured party must obtain leave (permission) from the Competition Tribunal. One of the requirements for obtaining leave is a certification by the Commissioner of Competition that the matter is not the subject of an inquiry or application by the Commissioner to the Tribunal.

There is no right of private action under the abuse of dominance, anticompetitive agreements or merger provisions of the Competition Act.

XI PRIVILEGES

i Solicitor–client privilege

Solicitor–client privilege protects communications between solicitor and client that are made in confidence for the purpose of giving or receiving legal advice. This privilege belongs to the client and is a permanent right; it survives the retainer and even past the client's death. Communications with in-house counsel containing legal advice or for the purpose of obtaining legal advice are subject to solicitor–client privilege so long as the communications are made in the context of performing the function of legal counsel to the company. This privilege does not apply when the communications are made while in-house counsel is acting in some other non-legal capacity.

ii Litigation privilege

Litigation privilege applies to work product and communications that are made specifically in contemplation of existing or anticipated litigation. Litigation privilege also applies to communications with third parties where the dominant purpose of the communication is to assist with existing or anticipated litigation. This privilege, and the protections flowing therefrom, ends with the resolution of the action.

65 *Imperial Oil v. Jacques*, 2014 SCC 66; *Canada (Attorney General) v. Thouin*, 2017 SCC 46.

iii Settlement privilege

Settlement privilege attaches to communications between parties made on a 'without prejudice' basis that relate to settlement or were made for the purpose of attempting to resolve the dispute. In these circumstances, the communications will be protected from disclosure to the court by settlement privilege, subject to certain exceptions.[66]

iv Case-by-case privilege: the Wigmore test

Communications or documents that do not fall within one of the class privileges discussed above can be nonetheless subject to privilege if the party claiming privilege can demonstrate that the communication or document should remain confidential based on four criteria, known as the Wigmore test:

a the communications must originate in a confidence that they will not be disclosed;

b this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

c the relation must be one which in the opinion of the community ought to be sedulously fostered; and

d the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[67]

The onus is on the party seeking to prevent disclosure to demonstrate on a balance of probabilities that each criterion has been met.

XII SETTLEMENT PROCEDURES

Settlements are actively encouraged by Canadian courts, and many jurisdictions have mandatory mediation requirements in their civil procedure rules. Most class actions commenced to date have not proceeded to trial and are settled before and after class certification. Moreover, due to the multi-jurisdictional nature of class actions in Canada, we are seeing an increased frequency in the use of global settlement agreements, which serve to resolve the actions in each of the jurisdictions by way of one settlement agreement.

Settlements of class actions require court approval (with some exceptions).[68] With respect to class actions, the settlement process usually occurs in two stages: certification as against a party for the purpose of settlement and notice to class members regarding the settlement hearing, and approval of the settlement agreement itself. Objectors, including non-settling defendants and class members, can make submissions at each stage, and can voice their concerns about the fairness or reasonableness of the agreement or to ensure that certain protections are included within the order to appropriately protect their interests.

There is generally close judicial scrutiny of class action settlement agreements in Canada, and Canadian courts have not hesitated to refuse to provide their approval if they

66 For example, if there is a dispute about the existence, interpretation or enforceability of a settlement agreement, the privilege will not apply, and the relevant documents, including settlement communications, will be producible before the court.

67 *Slavutych v. Baker* [1976] 1 SCR 254.

68 In Ontario and Quebec, prior court approval, even prior to certification, is required for a proposed class action to be settled or discontinued. The same is true for actions commenced in Federal Court. In the other statutory jurisdictions, court approval is required only after certification has been granted.

deem the agreement to be unfair.[69] While provincial legislation does not specify criteria for approving a settlement, the test at common law is whether the settlement is 'fair, reasonable and in the interests of all those affected by it'.[70]

In determining whether to approve a class action settlement, the court will consider a number of criteria, including:

a the likelihood of recovery or success if the case were litigated;
b the amount and nature of discovery or investigation;
c the terms and conditions of the settlement;
d recommendations of counsel;
e future expense and likely duration of litigation;
f recommendations of neutral parties or experts;
g the number and nature of objections from class members;
h the presence of good-faith bargaining; and
i the absence of collusion.[71]

XIII ARBITRATION

So long as all litigants consent – or at least those who are willing to have their portions of a litigated case determined – parties may submit a matter to a private arbitrator or panel of arbitrators.

Submitting a matter to arbitration would afford litigants the latitude to select the arbitrator or arbitrators, maintain confidentiality, and tailor evidentiary and procedural rules, although not all of these options are mandatory or provided for at law. The key, however, is that the process must be a voluntary one. Most provincial consumer protection statutes forbid terms in 'consumer contracts' that require disputes to be submitted to arbitration.

A note about class actions: a private antitrust claim has never been submitted to or attempted to be submitted to arbitration. Much as would be the case with class settlements, the courts would have to approve any request to submit a matter to arbitration as being in the interests of the class members. Instead of arbitration, lawyers have been engaging mediators in an attempt to resolve class actions during the early stages, such as before a class certification motion or prior to certification, but before further substantive steps are undertaken, such as discovery.

XIV INDEMNIFICATION AND CONTRIBUTION

Generally, rules of court, or the Rules of Civil Procedure in Canadian provinces that govern the administration of justice, specifically permit claims for cross and third-party claims for contribution and indemnity. Limitation statutes sometimes prevent such claims from being advanced after the expiry of the applicable limitation period, such as two years, but parties

69 For example, the Ontario Superior Court recently refused to approve a settlement agreement between Quiznos franchisees, the defendant franchisors and food supplier, Good Food Service Inc, finding that the scope of the release was too broad given the nominal amount of damages.

70 *Dabbs v. Sun Life Assurance Co of Canada*, [1998] OJ No. 1598 (Gen Div) at paragraph 9.

71 *Dabbs* at paragraph 13, and see also *Haney v. Iron Works Ltd v. Manufacturers Life Insurance Co* (1998), 169 DLR (4th) 565 (BCSC) at paragraph 23.

are usually permitted to extend, or toll, limitation periods by agreement. Tolling a limitation period in Quebec, to the extent that such a notion is permissible under Quebec's Civil Code, is not so straightforward.

In the case of private antitrust cases, plaintiffs' counsel have argued that civil defendants should not be permitted to make claims for contribution and indemnity. While no court has specifically dealt with this issue, and despite the provisions specifically permitting such claims in the various rules of court, the argument for denying contribution and indemnity is premised on the fact that where conduct complained of is covered by the criminal provisions of the Competition Act, and because in the criminal context defendants are not permitted to claim contribution and indemnity among themselves, then the same rule should apply in civil courts. Differing burdens of proof between civil and criminal acts will have to be considered by the courts if this issue is decided, along with the fact that private competition claims also allege various common law torts, such as the tort of civil conspiracy, which obviously does not rise to the level of criminal conduct in and of itself.

Further complicating the issue is that defendants who settle competition class actions usually, as part of their settlement, require and obtain an order from the court barring any future proceedings against them, including any cross-claims or claims for contribution and indemnity. The trade-off that is usually satisfactory to the courts is that the plaintiffs will be precluded from seeking from any non-settling defendants the proportionate share of the settling defendants' liability. If the non-settling defendants are precluded by way of a court order from seeking contribution and indemnity, the logic holds, then they should not be burdened with the liability of the settling defendants.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Despite the growing numbers of private antitrust class actions in Canada, none of them have proceeded to a trial on the merits. Many Canadian competition class actions are commenced in tandem with or very closely related to other global or United States-based antitrust matters. Very few cases proceed before the Competition Tribunal. Many lawyers in Canada expect the Competition Bureau to take a more aggressive stance on enforcement of the Competition Act given amendments which have now been in effect for over eight years that deem certain conduct – conspiracy for example – a *per se* criminal offence with the follow-on effect of more private antitrust actions.

Appendix 1

ABOUT THE AUTHORS

W MICHAEL G OSBORNE

Affleck Greene McMurtry LLP

Michael Osborne leads Affleck Greene McMurtry LLP's competition law group. He also practises commercial litigation, international arbitration and anti-corruption law.

Michael regularly represents clients targeted by Competition Bureau cartel and other investigations, as well as defendants in class actions. He has also acted as trial and appellate counsel before all levels of court, the Competition Tribunal, and domestic and international arbitral tribunals.

Michael was called to the Bar in 1998 after completing his articles as a law clerk to the late Justice John Sopinka of the SCC. He received his LLB from Dalhousie University in 1996, his MA from the University of Toronto in 1991 and his BA from the University of Saskatchewan in 1988.

Michael is an active member of several legal associations. He writes and speaks frequently on competition law and commercial litigation topics.

MICHAEL BINETTI

Affleck Greene McMurtry LLP

Michael Binetti is a litigator with a focus on competition law, commercial litigation and administrative law. A partner of Affleck Greene McMurtry LLP, he appears regularly in all levels of court in Ontario.

Michael represents clients who are targeted by the Competition Bureau and defends multinational corporations in Canadian class actions, often as part of larger, multi-jurisdictional class actions.

Michael was called to the Bar in Ontario in 2006 after articling with Affleck Greene McMurtry LLP. He graduated with a JD from the French common law Section of the University of Ottawa, Canada. He obtained an honours bachelor of arts from Glendon College of York University in Toronto and was a visiting student at the Institut d'Études Politiques de Rennes in France.

DAVID VAILLANCOURT

Affleck Greene McMurtry LLP

David Vaillancourt is a partner of Affleck Greene McMurtry LLP and a member of the firm's competition group. David represents clients who are targeted by the Competition Bureau as well as in multi-jurisdictional class actions. He has acted as trial and appellate counsel before all levels of provincial court, the Competition Tribunal and the Federal Court of Appeal.

FIONA CAMPBELL

Affleck Greene McMurtry LLP

Fiona Campbell is a member of the firm's competition group and represents clients who are targeted by the Competition Bureau as well as in multi-jurisdictional class actions.

AFFLECK GREENE McMURTRY LLP

365 Bay Street, Suite 200
Toronto, Ontario
M5H 2V1
Canada
Tel: +1 416 360 2800
Fax: +1 416 360 5960
www.agmlawyers.com

ISBN 978-1-912228-15-7