The Private Competition Enforcement Review

Eighth Edition

Editor
Ilene Knable Gotts

Law Business Research

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This article was first published in
The Private Competition Enforcement Review - Edition 8
(published in August 2015 – editor Ilene Knable Gotts)

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Law Business Research Ltd

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

www.TheLawReviews.co.uk

ISBN 978-1-909830-64-6

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

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ACKNOWLEDGEMENTS

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

AFFLECK GREENE McMURTRY LLP

ANGARA ABELLO CONCEPCION REGALA & CRUZ LAW OFFICES (ACCRALAW)

ARAQUEREYNA

CASTRÉN & SNELLMAN ATTORNEYS LTD

CLIFFORD CHANCE

CONSUMERS EMPOWERMENT ORGANISATION OF NIGERIA (CEON)

DANAILOV, DRENSKI, NEDELCHEV AND CO/LEX LOCUS LAW OFFICES

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EDITOR'S 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 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. Brazil provided another, albeit more limited, example: Brazil 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 last 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., Lithuania, Romania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, 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 pending in many jurisdictions throughout the world to provide a greater role for private enforcement and courts beginning to act in such cases. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. In other jurisdictions, the transformation has been more rapid. In Korea, for example, 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 the past few years, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect-purchaser claims (e.g., Korea). Moreover, we are at a critical turning point in the EU: by 2016, EU Member States are required to implement the EU's directive on private enforcement into their national laws. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights. Indeed, private enforcement developments in some jurisdictions have supplanted the EU's initiatives. The English and German courts, for instance, are emerging as major venues for private enforcement actions. 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 also taken steps to facilitate collective action/class action legislation. 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.

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, for example, 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 jurisdictions 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 as 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 the 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 is gross negligence or wilful conduct. Only Australia seems to be 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. 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 have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 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; limited recognition of privilege in Germany; 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 to 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 all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

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Wachtell, Lipton, Rosen & Katz
New York
August 2015

Chapter 8

CANADA

W Michael G Osborne, Michael Binetti, Michelle E Booth,
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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

i Parasitic causes of action under review

Plaintiffs in class actions based on violations of the Competition Act typically plead a number of common law and equitable causes of action in addition to a claim based on the statutory cause of action provided for in Section 36 of the Competition Act. They do so because these causes of action hold out the potential for greater recovery than Section 36. For example, Section 36 requires that the plaintiffs prove loss. Waiver of tort, however, potentially does not require any showing of loss at all. Similarly, Section 36 is expressly limited to damages that can be proven, thus ruling out punitive damages. Common law and equitable claims are not so limited.

The causes of action typically pleaded are unlawful interference with economic relations, tort of conspiracy, and waiver of tort. They are parasitic because all (except for one branch of the tort of conspiracy) depend on a showing of a breach of the Competition Act as a necessary unlawful element.

Recently, courts have begun to question whether these common law and equitable claims should be allowed at all. The Competition Act itself provides for a cause of action for breaches of some of its provisions, and other remedies for beaches of other provisions. The question naturally arises therefore: is the recovery provided for in the Competition Act a complete code, such that these other causes of action are not needed, and not permissible?

1 W Michael G Osborne and Michael Binetti are partners and Michelle E Booth, David Vaillancourt and Fiona Campbell are associates at Affleck Greene McMurtry LLP.

In *Wakelam v. Wyeth Consumer Healthcare*,[2] the British Columbia Court of Appeal held that Parliament intended the Competition Act to be a complete code, thus excluding remedies apart from those provided in the Act.

Following this decision, the BC Supreme Court struck claims of unlawful conspiracy, unlawful interference with economic interests, and constructive trust in *Watson v. Bank of America Corp*,[3] but certified a class action against Visa and MasterCard, major Canadian banks, and other financial institutions, alleging that the credit card interchange fees and rules breach the Competition Act. Claims based on breaches of the criminal price maintenance provisions were statute-barred, since these provisions were repealed more than two years before the action was launched, the court held.

However, less than four months later, another BC Supreme Court judge refused to strike similar claims in a case alleging that Microsoft conspired with various computer manufacturers to gain a monopoly over PC operating systems.[4] The judge said that *Wakelam* conflicted with the recent SCC decision on the tort of unlawful interference with economic relations in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*,[5] because that case referred to an earlier case holding that a breach of a predecessor to the Competition Act could support the tort of conspiracy. A third BC judge took the same view in *Fairhurst v. Anglo American PLC*,[6] and certified a class action alleging that De Beers and diamond companies conspired to fix prices for diamonds.

The issue is now before the BC Court of Appeal in *Watson*.

ii Class action plaintiffs can obtain wiretap evidence

Class-action plaintiffs can obtain disclosure of wiretap evidence obtained by the Competition Bureau, the Supreme Court of Canada held in *Imperial Oil v Jacques*.[7] The plaintiffs were seeking production from the Competition Bureau of wiretap intercepts it obtained in the course of its investigation into retail gasoline price fixing in Quebec. These intercepts were a critical piece of evidence in a trial of three accused. They demonstrated that the conspirators used a telephone tree to disseminate information about price increases.

The Supreme Court rejected two bases advanced by the defendants for protecting the wiretaps from disclosure. First, provisions in the Competition Act protecting the confidentiality of information obtained by the Commissioner did not apply to wiretap evidence. Second, while the wiretap provisions of the Criminal Code protect the confidentiality of the wiretaps, they contain an exemption for their use in court proceedings that applied here.

2 2014 BCCA 36.

3 2014 BCSC 532.

4 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2014 BCSC 1280.

5 2014 SCC 12.

6 2014 BCSC 2270.

7 2014 SCC 66.

The court held that privacy concerns can be addressed through conditions imposed by the court on disclosure, as well as the duty of confidentiality imposed on parties by discovery rules.

The practical effect of this decision will be to make it easier for plaintiffs to obtain evidence of price fixing, and thus easier for them to prove their case.

iii Class action plaintiffs cannot rely on foreign findings of fact

In the *Microsoft* case (mentioned above), the plaintiffs attempted to rely on findings of fact made by US courts in a monopolisation case brought by the US Department of Justice against Microsoft in 1998 challenging Microsoft's competitive response to the Netscape internet browser, as well as findings by the European Commission in essentially the same case. The class action plaintiffs argued that Microsoft should not be allowed to relitigate the same findings in Canada. They wanted Microsoft to be bound by the multiple findings of fact underlying the legal conclusions drawn in the US and the EU.

The BC Supreme Court held that the findings in these cases could not bind Microsoft.[8]

Factual findings are not made in a vacuum, the BC Supreme Court noted; they are made based on the underlying legal regimes, which, in the case of competition law, are considerably different in the US and the EU than in Canada.

There were also differences between the cases. Neither the US nor the EU cases involved an attempt by consumers to recover an overcharge. The dates differed as well: the US decision was released in 1999, and the EU decision, in 2004. The proposed BC class covers the period from 1994 to the present day. Finally, both the US and EU cases involved fairness issues. The judge in the US was criticised by the court of appeal for exhibiting an appearance of bias. The EU case was essentially administrative in nature: Microsoft was not entitled to discovery, to cross-examine witnesses, or to compel witnesses to attend.

iv Other developments

Canadian courts certified a number of class actions alleging breaches of the Competition Act:

a An Ontario action alleging that Dow Chemical Company and its Canadian affiliate face participated in a conspiracy to fix prices for polyether polyol.[9]

b An Ontario action alleging that Telus and Bell failed to disclose that they rounded time up to the nearest minute when billing for mobile telephone calls.[10]

c A BC action alleging that HSBC's mortgage arm and Household Trust Company did not disclose that part of the title insurance premiums paid to First Canadian Title were for legal fees, thus breaching the Competition Act's misleading advertising provisions, as well as various provincial consumer protection laws.[11]

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8 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2014 BCSC 1281.

9 *Crosslink v. BASF Canada*, 2014 ONSC 1682.

10 *Wellman and Corless v. TELUS and Bell*, 2014 ONSC 3318.

11 *Sandhu v. HSBC Finance Mortgages Inc.*, 2014 BCSC 2041.

In another case, however, there was no *prima facie* evidence that Coca Cola misled consumers into purchasing Vitaminwater by misrepresenting its sugar content and health benefits, a Quebec court held in refusing to authorise the class action.[12]

Courts approved settlements in a number of other class actions:

a Honda agreed to cash payments of C$100–C$200 plus cash rebates of C$500–C$1,000 to those who owned or leased a Honda Civic Hybrid between 2003 and 2009 to settle a class action alleging that its hybrid models did not achieve the fuel economy that Honda had claimed.[13]

b The Ontario DRAM price-fixing class proceeding continued to wind up with the addition of four more court-approved settlements: Infineon Technologies AG, Mitsubishi Electronic Corporation, Toshiba Corporation, and Winbond Electronics Corporation, increasing the pot to C$79.5 million (up from C$61.5 million in 2013).[14]

c A group of aftermarket filter makers agreed to pay C$350,000 to resolve allegations that they fixed prices for aftermarket oil and air filters for cars and trucks.[15]

In one case, however, the court refused to approve the settlement. The Ontario Superior Court refused to approve a settlement agreement between Quiznos franchisees, the defendant franchisors and food supplier, Gordon Food Service, Inc, finding the scope of the release was too broad given the nominal amount of damages.[16]

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Like most competition regimes, Canada's Competition Act[17] 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.

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

Private actions for damages are only available for breaches of the Act's criminal provisions. The key criminal provisions are conspiracies to fix prices, allocate markets, or reduce output,[18] bid rigging[19] and false advertising.[20]

12 *Wilkinson c. Coca-Cola Ltd.*, 2014 QCCS 2631.

13 *Courtemanche v. Honda Motor Co. Ltd.*, 2014 QCCS 5478.

14 *Eidoo v. Infineon Technologies AG*, 2014 ONSC 6082.

15 *Urlin Rent-A-Car Ltd. v. Champion Laboratories*, 2014 ONSC 577.

16 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812.

17 RSC 1985, c C-34.

18 Section 45.

19 Section 47.

20 Section 52.

Importantly, unilateral conduct by firms with market power, such as abuse of a dominant position,[21] exclusive dealing,[22] tied selling[23] and refusal to deal,[24] are not subject to criminal sanctions. In fact, they are not even prohibited unless they cause a substantial lessening or prevention of competition, 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 damages caused by breaches of the criminal provisions of the Competition Act.[25] To succeed, the plaintiff must prove that the defendant committed a criminal offence under the 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.[26] The plaintiff must show actual damages, and that these damages were caused by the offence.[27]

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 begins to run from the last day on which the offence was engaged in,[28] or from the day on which criminal proceedings were finally disposed of.[29]

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21 Section 79.

22 Section 77.

23 Section 77.

24 Section 75.

25 Section 36 is also available to recover damages caused by violations of orders made under the 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.

26 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 Act to establish that no offence was, in fact, committed.

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

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

29 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

Both direct and indirect purchasers can sue and recover damages for price fixing.[30]

Section 36 actions can be brought in the superior courts of any province, as well as the Federal Court of Canada.[31] 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)[32] provides for certification of class actions, and several other provinces have similar legislation.[33] Plaintiffs typically start at least three class actions for each case: one in Quebec, for a class of consumers

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period starts to run based on events that are not dependent on the knowledge of the plaintiff. The general rule was stated by the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 SCR 549 and *Ryan v. Moore*, 2005 SCC 38. Several decisions have applied this principle to find that discoverability 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 v. Bank of America Corporation*, 2014 BCSC 532, where the two-year limitation period was applied 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.

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

31 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.

32 SO 1992, c 6.

33 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 (*The Class Actions Act*, SS 2001, c C-12.01), Manitoba (*The 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).

and small businesses; one in British Columbia, for BC consumers and businesses; and a national class in Ontario covering Ontario and the rest of the country.[34]

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'.[35] 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

34 Ontario has been the jurisdiction of choice for national class actions because it has an opt-out regime for national classes, whereas BC 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.

35 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).

is a factor in this analysis.[36] 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.[37]

III EXTRATERRITORIALITY

For a Canadian court to have jurisdiction over a dispute, there needs to be a connecting factor between the jurisdiction and the subject matter of the dispute such that there is a 'real and substantial connection' between the two.[38] In order to meet the real and substantial connection test, the party asserting that the court should assume jurisdiction has the burden of identifying the presumptive connecting factors that link the subject matter of the action to the jurisdiction.[39] In the context of private actions alleging anti-competitive conduct, it is not necessary that the conspiracy conduct take place in Canada.[40] A court will assume jurisdiction against a foreign defendant only where the plaintiff establishes a good arguable case for assuming jurisdiction. The burden on the plaintiff to so establish is not high. To date, defendants have enjoyed very limited success in challenging jurisdiction.[41]

Even in circumstances where jurisdiction is established, the court may still decline to exercise its jurisdiction. A defendant may raise the doctrine of *forum non conveniens*. In this circumstance, the defendant has the burden to demonstrate that there is clearly a more appropriate forum and in light of the characteristics of that forum, it would be more fair and efficient to choose that alternate forum.

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 Act or breach of an order of the Tribunal or other court made under the Act. Section 36 of the Act

36 *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.

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

38 *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

39 Ibid.

40 It is important to note that Section 46 of the Act addresses implementation of foreign directives. The effect of this provision is that if a price-fixing conspiracy is arranged outside of Canada but is implemented in Canada (even through the setting of prices by the foreign corporation for prices in Canada), then that entity in Canada can be held liable whether or not those in Canada were aware of the price-fixing conspiracy.

41 For a recent decision in which a defendant was successful see *Shaw v. LG Chem, Ltd.*, 2015 ONSC 2628.

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 Supreme Court of Canada 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.[42] 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.[43] Proof of loss is required for each member of the class. This is typically done by way of expert economic evidence, as discussed below.

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 Act), price maintenance (Section 76 of the Act), and exclusive dealing, tied selling, and market restriction (collectively Section 77 of the Act). In order 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 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 of the Act 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; it 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*,[44] the Supreme Court of Canada 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

42 *Supra* footnote 30 at paragraph 131.

43 Ibid.

44 2014 SCC 66.

Bureau's criminal price-fixing investigation. This decision will make it easier for plaintiffs to obtain evidence in follow-on price-fixing class actions.

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 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.

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.[45]

VI 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.[46] 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.[47] 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 Supreme Court of Canada has held that on the certification motion, it is not the role of the certification judge to resolve conflicts

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

46 *Supra* footnote 30 at paragraph 114.

47 Ibid. at paragraph 115.

between experts, which makes it difficult (although not impossible) for defendants to succeed in an 'economist versus economist' battle at certification.[48]

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 (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 in order to assist it regarding 'any question of fact or opinion relevant to an issue in a proceeding.'[49]

VII CLASS ACTIONS

In Canada, class action legislation has been enacted by all provinces except Prince Edward Island, though not in the territories.[50] 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: (1) a numerosity requirement, and (2) no specific requirement that the proposed class action meet the preferable procedure test.

48 Ibid. at paragraph 126.

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

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

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, settlement, and in respect of the claims process.

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, satisfying 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.

VIII CALCULATING DAMAGES

Section 36 of the Act provides for the recovery of damages, by individuals or companies, incurred as the result of a violation of the Act's criminal provisions.[51] The damage recovery permitted by this section is compensatory in nature only; class members must

51 Part VI, Sections 45–62.

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 anti-competitive conduct that did not affect it. This section also permits the plaintiff to recover the costs of any investigation into the matter.

Plaintiffs' claims for damages under Section 36 of the 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 question. In *Watson*, the British Columbia Supreme Court held that the Act is a complete code which was intended by Parliament to provide exhaustively the remedies available to plaintiffs for breaches of the Act.[52] The British Columbia Court of Appeal, in December 2014, heard an appeal in *Watson*. The panel has not yet released its reasons. Whatever decision is arrived at, it will be persuasive, but not binding, on other Canadian jurisdictions.

To date, none of the contested actions based on Section 36 have 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 Supreme Court of Canada, in 2013, heard a trilogy[53] of cases that addressed, among other things, the availability of indirect purchasers to maintain a cause of again against alleged cartel members particularly given that the pass-on defence had earlier been rejected by the Supreme Court.[54] 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.

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

53 *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.

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

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.[55] 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.[56] Moreover, the Supreme Court of Canada recently ruled that evidence from a Bureau's criminal investigation must be disclosed to plaintiffs in a parallel class action.[57]

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 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 Act.

XI PRIVILEGES

i Solicitor and client privilege

Solicitor and 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

55 Section 36(1).

56 Section 36(2).

57 *Imperial Oil v. Jacques*, 2014 SCC 66: Specifically, the court ruled that wiretap evidence from the Bureau's criminal price-fixing investigation of gas stations in Quebec must be disclosed to civil plaintiffs in a parallel class action.

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.

iii Settlement privilege

Settlement privilege attaches to communications between the 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.[58]

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.[59]

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

58 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.

59 *Slavutych v. Baker,* [1976] 1 SCR 254.

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).[60] With respect to class actions, the settlement process usually occurs in two stages: (1) certification as against a party for the purpose of settlement and notice to class members regarding the settlement hearing, and (2) approval of the settlement agreement itself. Objectors, including non-settling defendants and class members can make submissions at each stage, and 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 deem the agreement to be unfair.[61] 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'.[62]

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.[63]

60 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.

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

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

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

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(s), 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 Rules of Civil Procedure in Canadian provinces that govern the administration of justice, specifically permit 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 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 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 issues is that defendants who settle competition class action 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, 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 that have now been in effect for over five 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

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