



PRIVATE COMPETITION LITIGATION IN CANADA

Private competition litigation, particularly class action litigation, is an area of growing importance in Canada. In recent years, private actions have played an increasingly prominent role in the enforcement of competition law in Canada. The Canadian regime incorporates many elements of U.S. private antitrust litigation, while preserving a number of Canadian aspects intended to guard against abuses of the system, such as awarding compensatory damages only and not treble damages. The Canadian system may provide some useful lessons for those jurisdictions contemplating a move towards increased private litigation.

This article is intended to provide a brief overview of private competition litigation in Canada, as well as to highlight recent and potentially significant statutory and jurisprudential developments which could further increase the importance of private competition litigation in this country.

PRIVATE COMPETITION LITIGATION IN CANADA

George N. Addy, Kent E. Thomson, Adam F. Fanaki,
Davit D. Akman and Jessica Norman*

PRIVATE RIGHTS OF ACTION IN CANADA

A person who has suffered loss or damage as a result of anti-competitive conduct may, depending on the nature of the offending conduct, be able to pursue statutory, common law (e.g., tort and contract) or equitable causes of action and remedies.

STATUTORY RIGHTS OF ACTION

The *Competition Act*¹ (the "Act") is the principal competition statute in Canada.² The Act is a federal statute governing most business conduct in Canada, and is administered and enforced by the Competition Bureau, an independent government agency headed by the Commissioner of Competition.

The statutory right of action for damages under the Act is found in section 36. Pursuant to that provision, any person who has suffered loss or damage as a result of (i) conduct that is contrary to one (or more) of the *criminal* provisions in Part VI of the Act³ or (ii) the failure of any person to comply with an order of the Competition Tribunal⁴ or a court made pursuant to the Act, may sue for and recover damages from the person who breached the criminal provision or the order in question.⁵ A successful plaintiff in a section 36 action may only recover single damages equal to "an amount equal to the loss or damage proved to have been suffered" (sometimes referred to as "special damages").⁶ In contrast to the United States, treble (or multiple) damages are not available. Also, again in contrast to the U.S., the general rule in Canada as to costs in civil litigation (including section 36 actions) is that the successful party (whether the plaintiff or the defendant) is entitled to its costs of the proceeding (*i.e.*, legal fees and disbursements plus applicable taxes).

Ordinarily, cost recovery is limited to (at most) one third to one half of the actual legal costs incurred by the successful party. However, the courts generally possess broad discretion in fixing the quantum and scale of costs and where, for example, a party has engaged in criminal misconduct, in conduct which tended to lengthen unnecessarily the duration of the proceeding or that was improper, vexatious or unnecessary, higher awards may be made.

The Act's criminal prohibitions are found in Part VI, titled "Offences in Relation to Competition". Conspiracy (section 45), bid rigging (section 47) and misleading representations (section 52), among others, are criminal offences under Part VI. The largest number of private actions brought to date have involved alleged conspiracies contrary to section 45. Section 36 actions by competitors for misleading representations have also been common, highlighted by a recent spate of actions in the wireless phone services industry, with competitors suing one another in various jurisdictions across Canada and successfully obtaining interim injunctive relief in respect of allegedly misleading comparative promotional campaigns.

To date, very few section 36 actions have been heard on the merits and almost none have resulted in a final judgment for damages.

Recent amendments to the Act have significantly altered the conspiracy provision in section 45 making it a *per se* criminal offence for competitors to enter into agreements to, among other things, fix prices, allocate markets and control or lessen supply. Gone is the historical requirement in the predecessor provision of proving that the conspiratorial agreement, if implemented, would have prevented or lessened competition unduly. These changes have potentially important implications for the statutory right of action. By eliminating proof of market impact as a condition precedent to criminal liability, the new section 45 arguably lowers the bar for civil recovery by private litigants under section 36. The amendments also repealed certain criminal provisions, including those proscribing predatory pricing, disproportionate promotional sales allowances and price discrimination.

Price maintenance was also decriminalized and is now a "reviewable practice" (as discussed below) pursuant to section 76 of the Act. By reducing the categories of conduct proscribed by Part VI of the Act, the amendments have narrowed the circumstances in which private parties may rely on section 36 to sue for damages.

Notably, the Act does not provide a private right of action for various anti-competitive practices that are reviewable by the federal Competition Tribunal, but not subject to prosecution in the criminal courts of Canada.⁷ For example, there is no private right of action with respect to abuse of dominance (section 79), refusal to deal (section 75), price maintenance (section 76), tied selling (section 77), mergers (section 92) or agreements that prevent or lessen competition substantially (section 90.1). Nor can a reviewable practice found a civil action at common law unless the alleged conduct in question independently satisfies all of the required elements of one or more common law causes of action.

COMMON LAW AND EQUITABLE CAUSES OF ACTION

Outside of the Act, private litigants may seek redress for anti-competitive conduct pursuant to various common law (e.g., civil conspiracy and unlawful interference with economic interests) and equitable causes of action (e.g., unjust enrichment). For a variety of practical and legal reasons (which are beyond the scope of this note), plaintiffs typically assert both statutory and non-statutory causes of action.

CLASS ACTIONS IN CANADA

Collective actions, in the form of class proceedings and representative actions, brought on behalf of all persons who have suffered loss or damage as a result of anti-competitive conduct, have become an increasingly important vehicle for the pursuit of private competition claims in this country.

To date, Canadian competition class actions have tended to involve allegations of price-fixing or other alleged cartel conduct. Competition class actions have

also been initiated, however, in connection with misleading advertising and (prior to the amendments discussed above) price maintenance claims.

Historically, Canadian class actions (particularly those alleging conspiracy) were commonly of a "follow-on" nature; class proceedings were typically initiated in response to an announcement that the Bureau and, in some cases, foreign competition authorities were investigating possible anti-competitive conduct in this country or abroad, and did not proceed in earnest until the successful conclusion of such investigations, either by way of a guilty plea or conviction. Of late, however, there has been a discernible trend away from such deferred follow-on class actions, with plaintiffs' lawyers bringing and aggressively pursuing class proceedings in the absence of convictions or guilty pleas and, in some cases, even where the matter in question has never been investigated by competition authorities in Canada or elsewhere.

Recent class actions decisions issued by Canadian courts may spur and heighten this trend. Until last year, virtually no competition class actions had been certified on a contested basis in Canada. Indeed, Canadian courts had repeatedly refused to certify indirect purchaser, price-fixing class actions. The seminal case in Canada on indirect purchaser class actions is the decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.*⁸ Certification was denied on appeal in *Chadha* (and in subsequent indirect purchaser cases) on the ground that plaintiffs had failed to adduce sufficient evidence to support a methodology for establishing or calculating harm on a class-wide basis, with the result that individual trials would be necessary to determine whether pass-through of alleged overcharges had occurred (and therefore to establish liability). In these circumstances, the Court of Appeal held that a class action was not the preferable procedure for resolving the claims asserted, and that the action should not have been certified as a class proceeding.

On September 28, 2009, however, a motions court judge at the trial level of the Ontario Superior Court of Justice issued the first decision by a Canadian court in a contested case certifying a price-fixing class action on

behalf of a class which includes indirect purchasers. In *Irving Paper Limited v. Atofina Chemicals Inc. et al.*,⁹ the Court certified under the Ontario *Class Proceedings Act, 1992* a class action on behalf of all persons in Canada who purchased hydrogen peroxide, products *containing* hydrogen peroxide or products *using* hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005. Contrary to *Chadha*, the Ontario Court in *Irving Paper* concluded that "rigorous scrutiny" of conflicting expert opinions as to the existence of a means of proving class-wide harm was not necessary at the certification stage. Rather, according to the certification judge, plaintiffs need only satisfy a certification motion judge that a methodology *may* exist for the calculation of damages, and therefore *attempts* to postulate a plausible methodology which *in theory* might be able address class-wide loss are sufficient.

A month and a half later, on November 12, 2009, in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,¹⁰ the British Columbia Court of Appeal certified under the British Columbia *Class Proceedings Act* a class action on behalf of a class of direct and indirect purchasers of semiconductor memory chips (known as dynamic random access memory (or "DRAM")), overruling a lower court decision denying certification. The decision in *Pro-Sys* represents the first decision by a Canadian appellate court certifying an indirect purchaser, price-fixing class action on a contested basis. The Court of Appeal's decision in *Pro-Sys* (like *Irving Paper*) constitutes a radical departure from *Chadha*.

An appeal of the certification decision in *Irving Paper* was heard in January of this year, and the appellate court's decision is under reserve. The Defendants in *Pro-Sys* have applied for leave to appeal to the Supreme Court of Canada. In view of the sharp conflict between *Pro-Sys* (and *Irving Paper*) and the Ontario Court of Appeal's decision in *Chadha*, among other decisions, the Supreme Court of Canada may well grant leave to appeal in the latter case.

If left undisturbed on appeal, *Irving Paper* and *Pro-Sys* signal a potentially significant lowering of the bar to class certification in at least two Canadian jurisdictions and, potentially, across Canada in respect of price-fixing claims asserted by or on behalf of indirect purchasers.

At a minimum, if not reversed, these decisions will put class action law in Ontario and British Columbia out of step with U.S. federal law which bars indirect purchasers from asserting claims of this nature.

For further information with respect to Davies' Litigation and Competition and Foreign Investment Groups please visit our website at dwpv.com.

* About the Authors: George Addy is a partner in the Competition & Foreign Investment Review Group at Davies. Kent Thomson, Adam Fanaki and Davit Akman are partners in the Litigation and the Competition & Foreign Investment Review Groups. Jessica Norman is an associate in the firm's Litigation Group.

- 1 R.S.C. 1985, c. C-34.
- 2 There are a variety of other federal and provincial statutes aimed at preventing anti-competitive practices in the marketplace. The federal statutes relate to the packing, labelling, sale, importation, advertisement and/or marking of certain products: see *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38; *Textile Labelling Act*, R.S.C. 1985, c. T-10; and *Precious Metals Marking Act*, R.S.C. 1985, c. P-19. However, none of these three statutes, which are exclusively criminal in nature, contains a statutory private right of action. There are also a variety of provincial consumer protection statutes which proscribe certain unfair business or trade practices and specifically authorize private actions for damages and other relief in respect of such practices.
- 3 A prior criminal conviction is not a condition precedent to the commencement of a statutory claim, nor is the existence of an on-going prosecution of the (intended or named) defendant a bar to the initiation or continuation of such a claim.
- 4 The Tribunal is a specialized quasi-judicial body with exclusive jurisdiction over the Act's non-criminal provisions, with the exception of misleading representations and other deceptive marketing practices under Part VII.1 of the Act, in respect of which it shares concurrent jurisdiction with the courts.
- 5 The limitation period for a section 36 action is two years from *the later of* (a) a day on which (i) the alleged criminal conduct, contrary to Part VI of the Act, was engaged in or (ii) the order of the Tribunal or the court was allegedly contravened (section 36(4)(a)) or (b) the day on which any criminal proceedings relating to (i) the conduct or (ii) the order were finally *disposed of* (section 36(4)(b)). [emphasis added]
- 6 In addition to damages, a successful plaintiff in an action

pursuant to section 36 of the Act may, in the court's discretion, recover up to the full costs of the proceedings and of any related investigation of the alleged misconduct (e.g., surveys, market analyses and economic studies). This is to be contrasted with the costs regime applicable to ordinary civil proceedings where, as a general rule, investigative costs are not recoverable and a successful party is typically only able to recover (at most) between one third and one half of its costs of bringing the action. The scope of recoverable costs recognizes the significant expense (relative to ordinary civil actions) of competition litigation and is intended to provide an incentive (much like treble damages) for private competition enforcement.

- 7 However, an alleged violation of an order made by the Tribunal (under Part VII.1 or Part VIII of the Act) or by a court (under Part VII.1) in respect of a reviewable practice *can* found an action pursuant to section 36.
- 8 On appeal in the Ontario Divisional Court, Ontario Court of Appeal and Supreme Court of Canada, Bayer Inc. was represented by our firm, led by Kent Thomson, working together with another firm in Toronto. *Chadha v. Bayer Inc.* (2003), 223 D.L.R. (4th) 158 (Ont. C.A.), aff'g (2001), 200 D.L.R. (4th) 309 (Ont. Div. Ct.), rev'g (1999), 45 O.R. (3d) 29 (S.C.J.), leave to appeal to S.C.C. denied [2003] S.C.C.A. No. 106. The *Chadha* case involved a proposed class action on behalf of an estimated 1.1 million indirect purchasers alleging that the defendant manufacturers had, *inter alia*, conspired contrary to section 45 of the Canadian *Competition Act* to fix the price of iron oxide pigments - additives used to colour concrete bricks and paving stones used in home construction - over an approximately six-year period. In concluding that the proposed class action should not have been certified at first instance, the Court of Appeal found, among other things, that the certification motion judge had erred in certifying liability as a common issue. Noting the "many problems of proof facing the [plaintiffs] with respect to the pass-on issue, including the number of parties in the chain of distribution and the 'multitude of variables' which would affect the end-purchase price of a building", the appellate court found that the plaintiffs had not shown that there was a generally applicable, class-wide "method [that] could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result".
- 9 *Irving Paper Limited v. Atofina Chemicals Inc. et al.*, [2009] O.J. No. 4021 (S.C.J.) (Q.L.).
- 10 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2009] B.C.J. No. 2239 (C.A.) (Q.L.), rev'g [2008] B.C.J. No. 831 (S.C.) (Q.L.).

TORONTO

DAVIES WARD PHILLIPS & VINEBERG LLP
1 FIRST CANADIAN PLACE 44TH FLOOR
TORONTO ON CANADA M5X 1B1

TELEPHONE: 416.863.0900

FAX: 416.863.0871

MONTRÉAL

DAVIES WARD PHILLIPS & VINEBERG LLP
1501 MCGILL COLLEGE AVENUE 26TH FLOOR
MONTRÉAL QC CANADA H3A 3N9

TELEPHONE: 514.841.6400

FAX: 514.841.6499

NEW YORK

DAVIES WARD PHILLIPS & VINEBERG LLP
625 MADISON AVENUE 12TH FLOOR
NEW YORK NY U.S.A. 10022

TELEPHONE: 212.588.5500

FAX: 212.308.0132