GCR Know-how

Know-How - Private Litigation 2015 - Canada Questionnaire

1. What is your country's primary competition authority?

The Competition Bureau ("the Bureau") is Canada's primary competition authority. The Bureau is an independent agency within the federal Department of Industry ("Industry Canada"). The Bureau is headed by the Commissioner of Competition ("the Commissioner"), who is appointed by the federal Cabinet.

2. Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The Bureau is responsible for administering and enforcing Canada's competition legislation, the Competition Act, R.S.C., 1985, c. C-34 ("the Act"). The Act includes both criminal offences and "reviewable practices" (ie, non-criminal civil matters). The Bureau is responsible for investigating alleged violations of the Act, both criminal and civil. To that end, the Bureau has considerable investigatory powers at its disposal, including the ability to obtain judicially authorised orders to conduct search and seizures (dawn raids), compel the production of documents and responses to interrogatories under oath, examine witnesses under oath, and intercept communications by electronic means (wiretaps).

The Bureau may commence civil proceedings under the Act before a specialised administrative body known as the Competition Tribunal ("the Tribunal"). However, responsibility for conducting criminal prosecutions under the Act resides with the federal Public Prosecutions Service of Canada ("the PPSC"). The Bureau's role in this regard is to refer matters to the PPSC when the Bureau believes the cases warrant criminal prosecution. The decision to prosecute, however, is that of the PPSC.

3. Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Follow-on private actions with respect to criminal offences under the Act (see A11 below) may proceed parallel to investigations and prosecutions. It is not mandatory for plaintiffs to wait for criminal proceedings to be completed to commence an action. That said, there are certain evidentiary benefits available to civil plaintiffs where defendants have already been convicted of a criminal offence under the Act (see A5 below).

4. Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

The ability to do so is very limited. If a party is charged with a violation of the Act's criminal provisions, that party can bring a motion to stay any related civil proceedings pending the

resolution of the criminal proceedings. In order to have the civil proceedings stayed on this basis, the party must show that it would suffer prejudice if it were required to continue the civil case while the criminal proceedings are pending.

5. Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

The court "record of proceedings" from a criminal prosecution under the Act may be used in a follow-on civil action as prima facie proof that the defendant in the civil action committed the offence in question. Furthermore, any evidence proffered in the criminal proceedings as to the effect of the defendant's conduct may be used as evidence of the same in any follow-on private action. Decisions of foreign enforcers and sector-specific regulators are not of any probative value.

6. Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

Immunity/leniency applicants do not receive any special or beneficial treatment in follow-on private antitrust actions, eg, in terms of a reduction in the damages that can be claimed or awarded.

7. Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

Bureau investigations are generally conducted confidentially and in private, subject to the general exception that the Bureau may disclose the information if necessary for the "administration or enforcement" of the Act, eg, in order to obtain an investigatory order or as evidence in a prosecution. The Bureau also specifically accords confidential and privileged treatment to information that it receives from immunity/leniency applicants. In that regard, the Bureau's policy is that it will not disclose information received from immunity/leniency applicants to private plaintiffs in the absence of a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking additional protective court orders. The Bureau will also typically resist efforts by plaintiffs to gain access to its internal work product, such as notes of interviews, assessments of evidence, etc. Plaintiffs will have greater success in obtaining information and documents directly from defendants and/or from the "record of proceedings" of court prosecutions, as described above (A5).

In the recent decision in Imperial Oil v. Jacques, 2014 SCC 66, the Supreme Court of Canada held that plaintiffs can obtain court-ordered access to wiretap evidence gathered by the Bureau during the course of their investigations. Such disclosure was ordered pursuant to article 402 of the Quebec Civil Code of Procedure, which empowers a judge to order the disclosure of documents that are in the possession of a third party if those documents relate to

the issues between the parties to the proceeding. The decision in Imperial Oil has the potential to be applied in other Canadian provinces whose rules of civil procedure provide for the production of documents from third parties, including Ontario and British Columbia.

8. Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

As noted in A7 above, the policy of the Bureau and the PPSC is that information provided by immunity/leniency applicants will not be disclosed to private plaintiffs absent a court order.

9. Is information submitted in a cartel settlement protected from disclosure?

The position of the Bureau/PPSC is that information submitted as part of cartel settlement discussions is confidential and also protected by "settlement privilege" and will not be disclosed except in limited circumstances as described above, eg, if necessary to pursue an investigation or prosecution. Settlement privilege does not, however, apply to prohibit the disclosure to private litigants of factual information provided to the Crown in circumstances where the person providing the information does so with the knowledge that the Crown may potentially rely on some or all of that information for the purposes of a criminal prosecution (see R v Nestle Canada Inc, 2015 ONSC 810).

Even in those cases where disclosure is sought from the Bureau, however, the Bureau will attempt to protect the information insofar as is possible. For example, where the Bureau applies for a court order authorising the use of investigatory powers, it will also apply to seal confidential information presented to the court so that this information is not available on the public court file.

10. How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

The Bureau does not typically disclose to plaintiffs information submitted by third parties as part of Bureau investigations unless ordered to do so by a court. As noted, Bureau investigations are conducted in private and are subject to confidentiality protections. The Bureau will also typically treat third party information as subject to "public interest" privilege. Private communications intercepted as part of a Bureau investigation are not, however, subject to the confidentiality protections of s 29 of the Competition Act and any limit on their disclosure to private litigants will be subject to the court's discretion (see *Imperial Oil v Jacques*, 2014 SCC 66).

11. On what grounds does a private antitrust cause of action arise?

Section 36 of the Act permits any person who has suffered loss or damages as a result of (i) conduct that is contrary to any of the Act's criminal provisions, or (ii) the failure to comply with an order issued under the Act, to commence a civil action to recover damages from the person or persons who engaged in that conduct.

Although the right to claim damages under the Act was introduced in 1976, it is only with the recent enactment of class action legislation in Canada that plaintiffs have regularly begun to utilise this provision.

Section 36 claims are most commonly brought in respect of alleged criminal conspiracies, particularly price-fixing conspiracies or bid-rigging offences. Claims relating to breaches of the Act's misleading advertising offence are also possible and are becoming more common.

It is important to emphasise that the section 36 right of action does not extend to breaches of the Act's civil reviewable practice provisions. As discussed below (see A60), there is a separate process for certain of these practices whereby private applicants may apply to the Tribunal for relief.

It is also important to note that the section 36 cause of action is supplementary to any common law causes of action which may apply in the circumstances. These include common law claims under the doctrine of unreasonable restraint of trade, the tort of conspiracy, and economic torts such as the tort of unlawful interference in contractual relationships or unlawful interference in economic interests. Private claimants may rely on a breach of section 36 of the Act as the underlying unlawful act for purposes of pleading the tort of unlawful means conspiracy and unlawful means tort, as well as underlying claims in restitution and waiver of tort to the extent those claims are derived from the tort of unlawful means conspiracy. Private claimants cannot, however, make a claim in restitution for a simple breach of the Competition Act (ie to the extent a claim in restitution derives from a breach of the Act and nothing else, the sole route to recovery is a claim under section 36) (see Watson v Bank of America Corporation, 2015 BCCA 362).

It is also important to note that the section 36 cause of action is supplementary to any common law causes of action which may apply in the circumstances. These include common law claims under the doctrine of unreasonable restraint of trade, the tort of conspiracy, and economic torts such as the tort of unlawful interference in contractual relationships or unlawful interference in economic interests. It is common practice to include common law causes of action together with claims under section 36 of the Act because doing so offers benefits in terms of the scope of damages that can be sought, limitation periods and the ability to obtain injunctive relief. These topics are discussed below.

12. What forms of monetary relief may private claimants seek?

A party suing under section 36 of the Act is entitled to claim "an amount equal to the loss or damage proved to have been suffered". General and special damages may be sought, but punitive damages are not available.

Section 36 also permits plaintiffs to claim "any additional amount that the court may allow not exceeding the full cost to (the plaintiff) of any investigation in connection with the matter and of proceedings under (section 36)." The investigation costs claimed must be supported by evidence, and must distinguish between the actual investigation costs and the plaintiff's personal time and expense as a private litigant (which is not recoverable). The costs of

investigation are over and above the usual costs available if a civil plaintiff is successful in its claim.

See A11. If common law or equitable claims are derived from an underlying breach of the Competition Act, then a successful plaintiff may be entitled to monetary relief that may exceed the amounts available under the Act.

13. What forms of non-monetary relief may private claimants seek?

Section 36 does not expressly provide for injunctive relief. On the other hand, neither does it preclude the court from granting such relief. This has led to different judicial views on the availability of injunctive relief to section 36 plaintiffs. Some courts have held that injunctive relief is not available under section 36 because it is not expressly provided for in the Act. Other courts have granted interim injunctions on the basis of the inherent jurisdiction of provincial courts to grant such relief where an applicant establishes that (i) there is a serious issue to be tried, (ii) irreparable harm would be caused to the applicant if relief is not granted, and (iii) the balance of convenience favours the granting of the order. The uncertainty surrounding the availability of injunctive relief under section 36 is another reason why section 36 claims will often be combined with common law claims that permit injunctive relief.

14. Who has standing to bring claims?

See question 11.

15. In what fora can private antitrust claims be brought in your country?

Claims under section 36 of the Act may be brought in any “court of competent jurisdiction”. For these purposes, “court of competition jurisdiction” includes the Federal Court of Canada in addition to the provincial courts. One potentially significant disadvantage to bringing a claim in the Federal Court is that this statutory court does not have jurisdiction to consider common law claims that are commonly brought in conjunction with section 36 claims. For that reason, section 36 claims are commonly brought in the provincial courts. The information provided herein will therefore focus on claims brought in the provincial courts generally, and on claims brought in the Ontario Superior Court of Justice in particular.

16. What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

See question 15.

Typically, dealing with proceedings in multiple provinces is only an issue for class action proceedings. Where class proceedings are commenced in multiple provinces, counsel may agree to pursue the claims nationally or continue the litigation only on behalf of plaintiffs in a certain province. There is no established rule in Canada for resolving the conflict when there are multiple provincial class actions purporting to represent a national class.

17. Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

Claims cannot be brought under foreign law. The basis for any claim is a violation of the Act's criminal offences or violation of an order issued under the Act.

18. Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

Civil actions in Canada, including private competition actions, are generally commenced by the issuance of an originating process and the payment of a nominal filing fee. In Ontario, the customary originating process is called a "Statement of Claim" (and the title of this document varies among Canadian jurisdictions). However, where there is insufficient time to prepare a Statement of Claim, an action may be commenced by the issuing of an abbreviated originating process referred to in Ontario as a "Notice of Action". Where an action is commenced by way of Notice of Action, a Statement of Claim must be filed within 30 days.

The Statement of Claim (or Notice of Action and Statement of Claim) must be served personally (or served by an alternative to personal service provided for by the applicable rules of court) upon the defendant(s).

Generally, a defendant is required to bring a motion in order to obtain security for costs, and the circumstances in which security for costs may be awarded vary according to the applicable rules of court.

19. What is the limitation period for private antitrust claims?

Claims based on criminal conduct under part VI of the Act must be commenced within two years of the day on which the impugned conduct was engaged in, or within two years of the day on which criminal proceedings were finally disposed of, whichever is later. Claims based on the contravention of an order issued under the Act must be brought within two years of the day on which the order was contravened, or within two years of the day on which criminal proceedings related to infringement of the order were finally disposed of, whichever is later.

Several cases have considered whether the common law discoverability rule applies to section 36 actions. The discoverability rule operates to extend a limitation period where a party could not reasonably have known about the existence of an event. Recent decisions have held that the discoverability rule likely does not apply to section 36 claims because the limitation period is explicitly linked by legislation to a fixed event that is not related to the injured party's knowledge or the basis of the cause of action.

A unique aspect of the section 36 limitation period is that it is tied not only to the date on which the conduct was engaged in but also the date on which criminal proceedings are finally completed. This means that parties can be exposed to the risk of civil litigation for an extended period of time, because it often takes several years or more before criminal proceedings are disposed of in Canada.

The applicable limitation period(s) for the various common law claims that are often brought in conjunction with section 36 claims are governed and determined by the applicable federal or provincial limitations statute.

20. Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

The general position in Canada is that limitation periods form a part of a jurisdiction's substantive law. In Ontario, the expiry of a limitation period is a complete bar to a plaintiff's claim, subject only to a few limited exceptions.

21. When does the limitation period start to run?

See question 19.

22. What, if anything, can suspend the running of the limitation period?

See question 19. Additionally, in class proceedings commenced in some Canadian jurisdictions, including in Ontario, the commencement of proceedings operates to suspend the applicable limitation period for class members. The limitation period will resume running upon the occurrence of one of a number of specified events, including: a class member opts out of the proceeding; an amendment that has the effect of excluding the member from the class is made to the certification order; the class is decertified; the class proceeding is dismissed without an adjudication on the merits; the class proceeding is abandoned or discontinued with approval from the court; or the class proceeding is settled.

23. What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

A plaintiff is generally required to plead a concise statement of the material facts on which the plaintiff relies for its claim, but not the evidence by which those facts are to be proved. The degree of particularity required when pleading the relevant material facts varies with the cause(s) of action pled.

24. What must plaintiffs show for the court to grant interim relief?

See question 13.

25. What options does the defendant have in responding to the claims and seeking early resolution of the case (eg, answer, counterclaim, motion to dismiss, summary judgment)?

Once served with an originating process, a defendant to a civil action in Canada generally has several options available to it. The following are some options available to a defendant to respond to an action commenced in the common law provinces:

- Statement of Defence – A defendant must respond to the allegations set out in the plaintiff 's Statement of Claim (unless the defendant does not intend to dispute the

plaintiff 's allegations). All allegations not denied in a party's Statement of Defence are deemed to be admitted, unless the defendant pleads lack of knowledge with respect to a particular fact. If a defendant intends to rely on facts other than those set out in the Statement of Claim, it must plead its own version of the facts.

- Notice of Intent to Defend – In circumstances where a defendant requires additional time for delivery of its Statement of Defence, it may choose to deliver a Notice of Intent to Defend, which serves to briefly extend the deadline for issuing and serving a Statement of Defence.
- Counterclaim – If the applicable facts provide for such a claim, a defendant may bring its own claim as against the plaintiff.
- Cross-claim – If the applicable facts provide for such a claim, one or more of a group of multiple defendants to a proceeding may file a claim against another defendant.
- Third-Party Claim – If the applicable facts provide for such a claim, a defendant can assert a claim against persons who are not yet parties to the lawsuit if that claim is related to the issues that have arisen or could arise between the plaintiff and defendant(s) to the existing action.

Examples of some of the substantive motions that a defendant can bring seeking early resolution of part or all of the plaintiff 's claims include a motion to strike, a motion for stay of proceedings, a motion to dismiss or a motion for summary judgment.

Examples of some of the procedural motions that a defendant can bring seeking early resolution of part or all of the plaintiff 's claim include default proceedings, a motion for dismissal for delay or a motion for dismissal as a result of non-compliance with the applicable rules of court.

26. What types of disclosure/discovery are available *(eg, documentary, depositions, interrogatories, admissions)*? Describe any limitations.

The form and content of documentary disclosure and oral and documentary discovery can vary slightly between Canadian jurisdictions depending on variations in the applicable rules of court.

In actions commenced in the Ontario Superior Court (and generally in the other provincial courts), parties are entitled to disclosure of all documents relevant to the matters in issue (wherein the scope of relevance is defined by the pleadings). Parties are further entitled to production of all relevant, non-privileged documents in the possession, control or power of another party to the action. While documentary discovery from non-parties is available in certain limited circumstances, non-parties are not required to make general disclosure of the documents in their possession, control or power.

Parties are also entitled to conduct examinations for discovery in respect of information relevant to any matter in issue in the action. Such examinations may be oral or by way of written questions and answers, but not both except with leave of the court. In practice, examination by written questions is rare. Parties have a right to examine any party adverse in

interest and may examine non-parties (other than expert witnesses) with leave of the court where there is reason to believe the non-party has information relevant to the matters at issue in the action.

Discovery is only available after pleadings have closed (ie, there is generally no provision for pre-certification discovery as is available in some other jurisdictions).

27. How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

Canadian courts have not to date recognised a general privilege that extends to confidential communications or documents beyond the accepted categories of privilege (e.g. solicitor-client privilege, litigation privilege, without prejudice communications and Crown privilege).

The "deemed undertaking rule" serves as some protection for confidential information. This rule provides that "all parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained", unless leave to do so has been obtained. So, for example, the rule would operate to preclude Party A from disclosing documents received from Party B to any person who is not a party to the litigation. (Ontario Rules of Civil Procedure, RRO 1990, Reg. 194, Rule 30.1.01(3)).

Where a party is of the view that the protection of the deemed undertaking rule is insufficient, that party may apply to the court for a sealing order. Generally, Canadian courts operate on the "open courts" principal and sealing orders are exceptional. However, where a party's documents contain confidential information and the evidence demonstrates that a party's commercial interests could be harmed if that information were to become public, the Ontario Superior Courts have discretion to order that disclosure and/or production of documents be denied to the public and, in extreme cases, to an opposing party but allowed to his or her solicitors and/or to experts (the latter known as a "counsel's eyes only" sealing order).

28. What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

In Canadian law, solicitor–client privilege is closely guarded. The privilege protects against the voluntary or compelled disclosure of solicitor-client communications and/or materials directly related to the seeking, formulating or giving of legal advice or legal assistance. Three things must be present in order to establish solicitor-client privilege: (i) a communication, whether written or oral, between the lawyer and client, that is (ii) for the purpose of seeking or giving legal advice and which (iii) the parties intended to be confidential. It is of note that while the communication between a solicitor and client itself may be privileged, any facts that are disclosed in the communication are generally not privileged and are disclosable.

Canadian law also recognises several other types of privilege:

- **Litigation privilege** exists in order to create what is referred to as a "zone of privacy" in relation to pending or reasonably anticipated litigation. Documents or communications will fall within the scope of this privilege where such documents or communications were created for the dominant purpose of preparing for existing or reasonably anticipated litigation. This privilege is not restricted to communications between solicitor and client, but may also extend to communications between a solicitor and third parties. Litigation privilege ends when the litigation or related litigation comes to an end.
- **Common interest privilege** is not a separate category of privilege per se, but rather depends on the existence of an underlying privilege and provides a basis upon which otherwise privileged documents or communications can be shared with third parties without effecting waiver of the privilege in question. Examples of this type of "privilege" in Canadian law include transactional privilege (which protects information shared among parties to a commercial transaction) and joint defence privilege (which allows parties who have a common interest in litigation to share strategy, including legal advice).
- **Settlement/without prejudice communication privilege** protects from disclosure documents or communications created for, or communicated in the course of, settlement negotiations.
- **Crown privilege/public interest immunity** is a specialised form of privilege that can be asserted by government officials in order to avoid the disclosure of documents if the disclosure of such documents would cause harm to the public interest.
- **Case-by-case privilege** may apply in circumstances where none of the recognised categories of privilege applies to a particular document or communication. There are four conditions that must be met before privilege is extended to any document or communication on this basis:
    1. The communications must originate in a confidence that they will not be disclosed.
    2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
    3. The relation must be one that in the opinion of the community ought to be sedulously fostered.
    4. The injury that would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

29. Describe the trial process.

Very generally speaking, the trial of an action in the Canadian common law provinces (ie, excluding Quebec) proceeds as follows:

1. Filing and service of originating process (Statement of Claim/Notice of Action)
2. Filing and service of Statement of Defence
3. Discovery
4. Preliminary motions (which are common during discovery but which can occur at any stage of the proceedings up to and including during trial)
5. Setting action down for trial

6. Pre-trial conference/mediation
7. Trial - A civil trial may proceed before a judge alone, or a judge and jury (upon the request of a party to the action). Jury trials are only available in competition cases in limited circumstances and are rare. The vast majority of trials are heard by a judge alone. The following are the conventional steps in a trial in the Ontario Superior Courts:

   a) Opening statements

   b) Presentation of evidence by plaintiff (direct examination(s), followed by cross-examination(s) by defendant)

   c) Possible motion for judgment by defendant

   d) Presentation of evidence by defendant (direct examination(s), followed by cross-examination(s) by plaintiff)

   e) Reply evidence by plaintiff

   f) Closing arguments

30. How is evidence given or admitted at trial?

Evidence at trial is generally admitted by way of oral testimony and by entering documents or objects as exhibits. The admissibility of such evidence is a legal question to be determined by the judge on a case-by-case basis. To be admissible, the evidence must be relevant and authentic.

31. Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Parties often retain consulting and/or testifying experts. The fields of expertise of these experts varies with the nature of the allegations in question; for example, economic experts are often retained to assist parties with matters such as analysing market data and estimating damages. In class action litigation involving allegations of price fixing in particular, the parties to putative class action proceedings often retain economic experts at the certification stage of the proceedings to analyse whether damages are capable of being quantified on a class-wide basis. Experts are also used at trial, including: industry experts; experts to assist in proving or disproving liability; and experts on damage calculations. Each party is able to choose their own expert(s), and Canadian courts do not appoint experts except in very limited circumstances.

32. What must private claimants prove to obtain a final judgment in their favour?

Generally, a private claimant in a competition action is required to prove (i) wrongdoing, (ii) liability, (iii) that it has suffered damages as a result of the defendants' conduct, and (iv) the amount of any such damages alleged to have been suffered. In some cases, claimants seek

restitution of profits illegally retained by the defendants, in which case the claimant is required to prove the amount of the loss suffered.

Claims made under section 36 of the Act require that plaintiffs prove (i) all of the elements of the relevant substantive offence(s) or non-compliance with an order, and (ii) that they have suffered damages as a result of the conduct proven in (i). Each element of the applicable cause(s) of action (and of the applicable defences) is required to be proven on a balance of probabilities by way of admissible evidence.

33. Are there any defences unique to private antitrust litigation (eg, Noerr-Pennington *defence*, *passing-on defence*)? If so, which party bears the burden of proving these defences?

- Passing-on Defence — The Supreme Court of Canada rejected the passing-on defence in its entirety in its trilogy of decisions in Pro-Sys Consultants Ltd v Microsoft Corporation, 2013 SCC 57 ("Pro-Sys"); Sun-Rype Products Ltd v Archer Daniels Midland Co., 2013 SCC 58 ("Sun-Rype"); and Infineon Technologies AG v Option consommateurs, 2013 SCC 59 ("Infineon").
- Regulated Conduct Defence ("RCD") – The RCD is a common law doctrine that operates as a defence to conduct prohibited under the Act in circumstances where the conduct complained of is authorised by valid federal or provincial legislation. The party seeking to rely on the RCD has the burden of proving the defence

34. How long do private antitrust cases usually last (not counting appeals)?

Private competition litigation is complicated and can be high risk (particularly when the action in question is a class proceeding). Some cases are settled relatively quickly and take only one to two years from filing to completion, while others are vigorously contested, involve numerous motions and multiple appeals and can take up to 10 years or more to conclude. The amount of time required to resolve a private competition dispute varies greatly depending on the facts of the case and the relevant legal framework applicable at the time the case is commenced, and as such there is no standard amount of time that a private antitrust case "usually" lasts.

35. Who is the decision-maker at trial?

In private competition litigation, the decision-maker is a judge sitting alone. A judge and jury is very rare.

36. What is the evidentiary burden on plaintiffs to quantify the damages?

Damages must be proven to the Canadian civil standard of a "balance of probabilities", meaning that the facts at issue are more likely to have occurred than not.

37. How are damages calculated?

A party suing under section 36 of the Act is entitled to claim "an amount equal to the loss or damage proved to have been suffered". For claims made under this section and for common law claims brought in competition actions, plaintiffs are entitled to the actual damages proven to have been suffered (Canadian law does not provide for treble damages).

A party may also bring a claim for restitution and seek to recover the amount of the defendants' alleged illegal profits as opposed to damages actually suffered by that party.

In addition to a damages claim or a claim for restitution, plaintiffs can also claim an award of punitive damages (in connection with any common law claims) if the conduct of the defendant is found to be particularly egregious (although punitive damages are meant to punish, not to compensate, and it is rare for a punitive award in Canada to exceed $1 million).

38. Does your country recognise joint and several liabilities for private antitrust claims?

The general rule in Canada is that joint defendants are held jointly and severally liable for each other.

39. Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

It is still an open issue in Canadian law whether defendants have a right of contribution and indemnity from one another in the context of competition claims, and whether the law will make a clear distinction between contribution and indemnity in competition cases.

40. Can prevailing parties recover attorneys' fees and court costs? How are costs calculated?

The rules of court applicable to awards of costs against unsuccessful parties to private civil disputes vary as between the Canadian provinces. In Ontario, "the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine who and to what extent costs shall be paid" (*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1)). While section 131(1) establishes a broad discretion as to costs, the developed practice focuses primarily on successes in the litigation as the factor governing most cost orders.

Ontario courts have the ability to specify one of two scales of costs on which the quantum of recoverable costs may be assessed:

1. **Partial indemnity or "party-and-party" –** costs assessed on this scale give the party in whose favour the relevant order or ruling was made partial compensation for that party's expenses incurred in connection with specified portions of the litigation.
2. **Substantial indemnity costs or "solicitor-and-client"** – costs assessed on this scale give the party in whose favour the relevant order or ruling was made more complete compensation for that party's expenses incurred in connection with specified portions of the litigation.

Further, section 36 permits plaintiffs to claim "any additional amount that the court may allow not exceeding the full cost to [the plaintiff] of any investigation in connection with the matter and of proceedings under [section 36]." The investigation costs claimed must be supported by evidence, and must distinguish between the actual investigation costs and the plaintiff's personal time and expense as a private litigant (which is not recoverable). The costs of investigation are over and above the usual costs available if a civil plaintiff is successful in its claim.

41. Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

Yes. Success is not the sole determining factor. Offers to settle are relevant. For example, if a plaintiff is ultimately successful in the action, but the amount of compensation awarded is less than an offer to settle previously made by the defendant, the plaintiff's ability to recover costs will be affected. Also, the following factors can be relevant:

- the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- the amount claimed and the amount recovered in the proceeding;
- the apportionment of liability;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- whether any step in the proceeding was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution;
- a party's denial of or refusal to admit anything that should have been admitted;
- whether it is appropriate to award any costs or more than one set of costs where a party, commenced separate proceedings for claims that should have been made in one proceeding, or in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
- any other matter relevant to the question of costs.

42. May attorneys act for claimants on a conditional fee basis? How are contingency fees calculated?

The ability to charge clients on a contingency fee basis has only recently been permitted in Canadian law. Presently, some form of contingency fee arrangement is now permitted by statute, rule, case law or as a matter of practice in all Canadian jurisdictions.

In calculating the amount of a contingency fee, the fee is required to be based on the quantum of damages awarded and any applicable interest, and must exclude any amounts awarded (or otherwise agreed upon) for costs and disbursements. Contingency fees are required to be court approved in class proceedings.

43. Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

In Ontario, third party funding agreements are not categorically illegal. While a relatively new phenomenon in Canadian litigation, plaintiff-side class counsel are increasingly entering into such arrangements to mitigate against the risk of sizeable adverse cost awards. For example, third party litigation funders may agree to indemnify the plaintiff for any costs awards in exchange for a percentage of the amount recovered upon completion of the case.

Plaintiffs are required to promptly disclose the existence of a third party funding agreement to the court, and the agreement will not come into force absent court approval. The court must be satisfied, inter alia, that the agreement: (i) will not compromise the solicitor-client relationship or the lawyer's professional judgment; (ii) will not diminish the representative plaintiff's rights to instruct and control the litigation; (iii) is necessary to provide access to justice; and (iv) is fair and reasonable to the class.

There is no ability for plaintiffs to sell their private competition claims to third parties to the authors' knowledge.

44. May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Such insurance is not available in Canada to the authors' knowledge.

45. Is there a right to appeal or is permission required?

In the context of private competition litigation, appeals may be directed to various levels of provincial appeal courts. The applicable appellate body and the ability to appeal (ie, as of right or with leave of the court) will vary depending on, inter alia, whether the decision being appealed from is interlocutory or finally disposes of the rights of the parties in the action. Generally, appeals from interlocutory orders require leave whereas appeals from final orders may be appealed as of right.

46. Who hears appeals? Is further appeal possible?

See question 45.

Decisions of the highest provincial appeal courts may be further appealed to the Supreme Court of Canada with leave of that Court. Leave of the Supreme Court of Canada is, however, rarely granted.

47. What are the grounds for appeal against a decision of a private enforcement action?

The grounds for appeal from a final decision of a judge of the Ontario Superior Court in a private enforcement action will vary depending on the nature of the decision rendered, but parties are able to appeal liability and/or damages. Generally speaking, grounds of appeal are:

exceeding jurisdiction, error of law, error of fact or error of mixed fact and law. When the finding appealed from is one of pure fact, a heightened level of deference will be afforded to the decision of the court below. Where the finding appealed from is a question of pure law, significantly less deference will be afforded to the decision of the court below. The level of deference to be afforded to the court below on a question of mixed fact and law falls somewhere in between that afforded to a question of pure fact and a question of pure law.

48. Does your country have a collective, representative or class action process in private antitrust cases?

Yes. Such a process exists in each Canadian jurisdiction.

49. Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Generally speaking, any person who has a cause of action and who meets the legal standard of being an appropriate representative plaintiff may bring a class proceeding on behalf of a group of people with the same or similar claims. In order to qualify as an appropriate representative plaintiff, a person must meet the following criteria set out in section 5(1)(e) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("the CPA"):

- the person must fairly and adequately represent the interests of the class;
- the person must produce a plan for the proceeding that sets out a workable method of advancing the litigation on behalf of the class and of notifying class members of the proceeding; and
- the person must not have, on the common issues for the class, an interest in conflict with the interests of the other class members.

In the common law provinces, consumer associations and trade or professional associations are entitled to bring class proceedings only if the association itself has a cause of action against the defendant or defendants and otherwise meets the test to qualify as an appropriate representative plaintiff. Such associations are commonly representative plaintiffs in Quebec, where the law is distinct on this issue.

50. What is the standard for establishing a class or group?

In order to certify a competition class proceeding, a putative representative plaintiff must satisfy the same five-part certification test applied to other types of class proceedings. Generally speaking, the putative representative plaintiff must establish that:

- the pleadings disclose a cause of action;
- there is an identifiable class of two or more persons (and who falls into the class must be capable of being determined objectively);
- the claims of the class members raise common issues;
- a class proceeding is the preferable procedure for resolving the claims; and
- there is an appropriate representative plaintiff.

- To satisfy the certification criteria, the putative representative plaintiff some basis in fact for each of the foregoing requirements (other than that there is a cause of action, which is to be assessed on a pleadings standard absent expert evidence). Certification is purely procedural in nature; on a certification motion, the question is not whether the claims are likely to succeed on the merits, but instead whether the claims can appropriately be prosecuted as a class proceeding.

One of the main issues of contention between plaintiffs and defendants at the certification stage of competition class actions in Canada was historically the question of whether indirect purchasers have a cause of action. In its 2013 trilogy of decisions respecting competition class actions (see A33), the Supreme Court of Canada held that indirect purchasers do in fact have a cause of action against a party who has effected an overcharge at the top of a distribution chain, where that overcharge has allegedly resulted in injury to the indirect purchasers as a result of the overcharge being "passed on" to them through the chain of distribution.

51. Are there any other threshold criteria that have to be met?

No.

52. How are damages or settlements distributed?

Plaintiffs propose a distribution plan which must be approved by the court. Class members are generally required to complete and submit a claims form as well as required supporting documentation to plaintiffs' counsel, or to a separate claims administrator retained by plaintiffs' counsel, in order to recover compensation. The quantum of any one class member's claim is generally equal to the loss or damage proven to have been suffered by that class member unless there are insufficient funds to cover all class members' claims, in which case the distribution is on a pro-rata basis.

In competition class actions in particular, it is often difficult, if not impossible, for class members to individually prove their losses, or for plaintiffs' counsel to identify and/or notify every member of the class due to complexities associated with, inter alia, multi-level distribution chains. For this reason, *cy-près* (ie, charitable) distributions are common.

53. Describe the process for settling these claims, including how damages or settlement amounts are apportioned.

Parties can settle at any point in time during the course of the proceedings. Plaintiffs and defendants will enter into a written settlement agreement that must be approved by the relevant court.

Although there is some flexibility in the process generally, once the parties have executed the settlement agreement, the plaintiff is required to bring motions for: (i) certification of the class for purposes of settlement; (ii) approval of the form and manner of dissemination of notice to class members that a prospective settlement has been reached and that the class has been certified for settlement purposes; and (iii) an order setting out the opt-out period and process.

Subsequently, the motion to approve the settlement is heard. At this motion, the court must review the terms of the settlement and determine whether that settlement is fair and reasonable to the members of the class. At the settlement approval motion (or shortly thereafter), the court will also be asked to approve a method for distributing the settlement funds to settlement class members.

Once the settlement has been approved, settlement funds will be distributed in the manner approved by the court.

54. Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

There is no mechanism for collective settlement in the absence of a claim being made.

55. Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

The Bureau has no statutory authority to impose mandatory redress schemes. At one point, the Bureau's immunity program stated that the Bureau might condition a recommendation of immunity on the applicant providing restitution to victims of its conduct. However, that is no longer the case and the Bureau's view is that restitution for victims of criminal conduct under the Act is better dealt with through the civil litigation process. The payment of restitution to victims may also be a relevant mitigating factor for a court to consider on sentencing (where such restitution has been paid).

56. Are private antitrust disputes arbitrable under the laws of your country?

Yes, if the parties agree to arbitrate rather than proceed in the court system. Arbitration of private competition disputes is rare, although mediation of such disputes does occur frequently.

57. Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

Generally, yes, unless precluded by statute or some other agreement to the contrary.

58. Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

Courts can recommend mediation and in some limited circumstances can mandate it. Whether the court is involved in the mediation, or the mediation is conducted by an independent third party, is usually decided by the parties.

In addition, pre-trial conferences are mandatory in many actions and, unless the court orders otherwise, the parties (and not just their counsel) are required to participate in the pre-trial

conference. Parties are required, with the assistance of the pre-trial judge, to consider the possibility of settlement of any or all of the issues in the litigation at the pre-trial conference.

59. Describe any notable attempts by policymakers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

The right to pursue private antitrust actions in Canada is well established and well known. As described above, the relevant statutory provision contains several elements to facilitate the pursuit of such claims, most notably various evidentiary presumptions.

60. Give details of any notable features of your country's private antitrust enforcement regime not covered above.

In addition to the statutory right to bring follow-on civil litigation in respect of criminal offences under the Act, there is a limited right for private parties to initiate applications before the Tribunal with respect to the Act's civil reviewable practices.

Specifically, private parties may seek leave from the Tribunal to bring applications with respect to the following reviewable practices in Part VIII of the Act: refusal to deal (section 75), price maintenance (section 76), and exclusive dealing/tied selling/market restriction (section 77).

The right to bring private applications was introduced in 2002 with respect to the refusal to deal and exclusive dealing/tied selling/market restriction provisions and in 2009 for the price maintenance provision. The decision to enact a private application process for civil reviewable practices in 2002 was preceded by a vigorous debate, pro and con. Proponents argued that introducing a private application process would enhance enforcement of the Act's reviewable practices provisions by leading to more cases and further development of the law. Opponents countered that a new private application process would only "open the floodgates" to a wave of frivolous litigation.

Although the government at the time ultimately decided to introduce a private application process, concerns about the "floodgates" argument led to the adoption of several important limitations on this right. These include restricting the number of reviewable practices to which the right applies (and notably excluding the abuse of dominance and merger review provisions); requiring applicants to obtain leave from the Tribunal as a preliminary step; and precluding applicants from claiming damages as a form of relief.

Whether because of these restrictions or otherwise, the private application process under the Act has seen only moderate use by parties. Since the process was introduced in 2002, there have been only 22 applications for leave to bring private applications. Of these, only seven applications were granted leave to proceed by the Tribunal, and only three of these seven actually resulted in a hearing at the Tribunal. Significantly, no private applicant has yet been successful at the Tribunal.

Partner profiles

Mark Katz

Mark Katz is a partner in the Competition & Foreign Investment Review, Retail and China practices at Davies. He has advised domestic and international clients on a wide variety of competition law matters, such as mergers and acquisitions, criminal cartel investigations, joint ventures, abuse of dominance, distribution and pricing practices, misleading advertising and compliance.

Mark has appeared at every level of court in relation to competition matters, including the Supreme Court of Canada, and has acted as counsel on several leading cases before the Competition Tribunal, including the first abuse of dominance and merger cases heard by that body. He also provides advice with respect to the application of the Investment Canada Act.

Mark has authored a wide variety of articles and conference papers on competition law matters and contributed to a number of texts and treatises in the area, as well as authoring and presenting policy briefs for clients on a variety of domestic and international competition-related matters. Mark is most recently co-author of The Competition Law Guide for Trade Associations in Canada. Mark is also a member of the editorial board for Competition Law Insight and a regular contributor to the Kluwer Competition Blog.

Mark is very active in the American Bar Association and Canadian Bar Association, including serving currently as a vice-chair of the sports and trade association committee of the ABA section of antitrust law and the immediate past co-chair of the international antitrust law committee of the ABA section of international.

Contact:

mkatz@dwpv.com

Chantelle Spagnola

Chantelle Spagnola is an associate in the Litigation practice at Davies. She is developing a diverse civil and complex commercial litigation practice focusing on corporate and commercial disputes, class action defence, competition litigation, securities litigation and intellectual property matters. A significant portion of Chantelle's practice involves defending national and cross-border class actions.

Chantelle has authored a number of articles and other publications relating to competition law matters and has contributed to texts on the subject of competition litigation.

Chantelle has worked on litigation proceedings before the Ontario Superior Court of Justice, the British Columbia Supreme Court, the Saskatchewan Court of Queen's Bench, the Supreme Court of Canada, the Ontario Securities Commission and the Canadian Competition Bureau.

cspagnola@dwpv.com

GCR Know-how

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