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Private Competition Litigation in Canada

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I. INTRODUCTION

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 note 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.

II. PRIVATE RIGHTS OF ACTION IN CANADA

A person who has suffered loss or damage as a result of anticompetitive 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.

A. Statutory Right of Action for Damages

The *Competition Act*² (the "Act") is the principal competition statute in Canada.³ 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 result of (i) conduct that is

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² R.S.C. 1985, c. C-34.

³ There are a variety of other federal and provincial statutes aimed at preventing anticompetitive practices in the marketplace. The federal statutes relate to the packing, labeling, 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 that proscribe certain unfair business or trade practices and specifically authorize private actions for damages and other relief in respect of such practices.

contrary to one (or more) of the *criminal* provisions in Part VI of the Act⁴ or (ii) the failure of any person to comply with an order of the Competition Tribunal⁵ 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.⁶ 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").⁷ In contrast to the United States, treble (or multiple) damages are not available.

Also, again in contrast to the United States, 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 in conduct 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 offenses 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 offense 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

⁴ 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.

⁵ 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.

⁶ 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]

⁷ 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.

implemented, would have unduly prevented or lessened competition. 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 anticompetitive practices that are reviewable by the federal Competition Tribunal, but not subject to prosecution in the criminal courts of Canada.⁸ 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.⁹ However, as discussed in the next section, there is a limited right for private parties to bring applications to the Tribunal with respect to certain of these matters.

B. Private Applications

The Act permits private parties to bring applications for relief in respect of certain civil "reviewable practices": refusal to deal, exclusive dealing, tied selling, and market restrictions.¹⁰

The right to bring private applications with respect to the above reviewable practices is limited in that:

- 1) Applicants must first obtain leave from the Competition Tribunal to bring proceedings;
- 2) Applications cannot be brought in respect of matters that are the subject of an inquiry by the Bureau or that had been the subject of an inquiry but were settled;
- 3) Applications must be brought within one year after the practice that is the subject of the application has ceased; and

⁸ 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.

⁹ In *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.* 2010 BCSC 1030, the British Columbia Supreme Court recently confirmed that an allegation of abuse of dominance cannot form the basis of a common law tort claim, such as unlawful interference with economic interests, because such conduct is not "unlawful" until found by the Competition Tribunal to violate the Act. Novus had argued that recent amendments to the Act, which now permit the Competition Tribunal to impose significant financial penalties for abuse of dominance, meant that Parliament had changed the fundamental character of such conduct into something unlawful in and of itself. However, the Court disagreed, holding that the introduction of financial penalties as a potential remedy did not change the fact that the "unlawfulness" of a party's conduct under the abuse of dominance provisions remains subject to a finding by the Tribunal. As the Court pointed out, the Competition Tribunal cannot impose financial penalties unless it decides there has been an abuse and that a remedy of this nature is required. Indeed, the Tribunal is free to decide not to issue a remedial order even if it decides that an abuse of dominance has been established.

¹⁰ *Competition Act*, section 103.1. Notable exceptions to this right are the abuse of dominance and merger provisions. Only the Commissioner of Competition can bring applications with respect to these matters.

- 4) Applicants are not entitled to seek damages but are limited to the same remedies that would have been available to the Commissioner of Competition (*i.e.*, largely injunctive relief).

At the time that the right to bring private applications was incorporated into the Act in 2002, there was some concern that the result would be to "open the floodgates" to such proceedings. However, the impact of the private application process has been decidedly limited. Since 2002, there have been 20 applications for leave to commence private proceedings before the Competition Tribunal. Only six of these leave applications were granted. Of these six successful leave applications, only two actually proceeded to a full hearing and both applications were ultimately dismissed by the Competition Tribunal.

C. Common Law and Equitable Causes of Action

Outside of the Act, private litigants may seek redress for anticompetitive 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.

III. RECENT DEVELOPMENTS IN CLASS ACTIONS IN CANADA

A. Overview

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 anticompetitive 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 anticompetitive 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 either by competition authorities in Canada or elsewhere.

B. The Irving Paper and Pro-Sys Decisions

Recent decisions by Canadian courts may spur and heighten the trend towards more antitrust class actions.

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.*¹¹ 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 that included indirect purchasers. In *Irving Paper Limited v. Atofina Chemicals Inc. et al.*,¹² 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*,¹³ 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*.

The defendants in both *Irving Paper* and *Pro-Sys* sought leave to appeal these decisions to certify. Both applications for leave to appeal were denied.

¹¹ *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 color 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.”

¹² *Irving Paper Limited v. Atofina Chemicals Inc. et al.*, [2009] O.J. No. 4021 (S.C.J.) (Q.L.).

¹³ *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.).

In *Irving Paper*, the Ontario Divisional Court denied leave to appeal on the basis that there was no good reason to doubt the correctness of the certification judge's decision.¹⁴ The Divisional Court rejected the defendant's argument that a certification judge is obliged to determine whether the plaintiff's methodology for proving class-wide loss accords with sound principles of economics. Instead, the Divisional Court held that a certification judge only needs to be satisfied that there is "some basis in fact to find that proof of aggregate damages on a class-wide basis is a common issue."

In *Pro-Sys*, the Supreme Court of Canada denied the defendant's leave to appeal the B.C. Court of Appeal's decision to approve certification.¹⁵ As is the Court's custom, reasons for denying leave to appeal were not provided. As such, denial of leave to appeal cannot necessarily be taken as approval of the B.C. Court of Appeal's reasoning. That said, the denial of leave to appeal means that the B.C. Court of Appeal's decision remains undisturbed as the first and only decision of a senior Canadian appellate court approving a contested certification order granted in respect of antitrust claims asserted by or on behalf of indirect purchasers.

C. Implications

The long-term impact of *Irving Paper* and *Pro-Sys* remains to be seen but could potentially be dramatic. Much will depend on how broadly or narrowly certification motion judges interpret and apply these decisions. At a minimum, these decisions put class action law in Ontario and British Columbia out of step with U.S. federal law that generally bars indirect purchasers from asserting claims of this nature.

¹⁴ See *Irving Paper Limited v. Atofina Chemicals Inc. et al.*, 2010 ONSC 2705 (Div. Ct.).

¹⁵ See *Infinion Technologies AG v. Pro-Sys Consultants Ltd.*, [2010] S.C.C.A. No. 32 (Q.L.).