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The eBooks Case: A Canadian Perspective

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"As a result of this alleged conspiracy, we believe that consumers paid millions of dollars more for some of the most popular titles. We allege that executives at the highest levels of these companies—concerned that e-book sellers had reduced prices—worked together to eliminate competition among stores selling e-books, ultimately increasing prices for consumers."

(Attorney General Eric Holder, April 11, 2012)

"This was competition on the merits, with Apple providing a superior reading platform on a beautiful 10 inch iPad screen, with color, multi-media, and fixed display, and access to millions of future iPad purchasers. This is classic procompetitive behavior that should be celebrated, not condemned through litigation."

(Apple Answer, May 22, 2012)

"Absent any direct evidence of conspiracy, the Government's Complaint is necessarily based entirely on the little circumstantial evidence it was able to locate during its extensive investigation, on which it piles innuendo on top of innuendo, stretches facts and implies actions that did not occur and which Macmillan denies unequivocally. For the record, Macmillan did not conspire with other publishers in New York City restaurants."

(Macmillan Answer, May 29, 2012)

I. INTRODUCTION

Before the U.S. Department of Justice ("DOJ") filed its claim in the eBooks case earlier this year, Canadian class action plaintiffs commenced their own proceedings in the provinces of British Columbia, Ontario, and Quebec.[2]

As in the United States, the Canadian actions are challenging the agency eBook distribution model adopted by Apple and five of the world's largest book publishers.[3] Specifically,

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[2] See *Natalee Blagden v. Apple Inc., et al.*, Statement of Claim, Court File No. 6664-12CP (Ont. Sup. Ct.); *Antoine Pontbriand v. Apple Corporation, et al.*, Motion for Authorization to Institute a Class Action, Court File No. 500-06-000595-120 (Que. Sup. Ct.); *Wayne Van Tassel v. Apple Inc. et al.*, Notice of Civil Claim, Court File No. S-122529 (B.C.S.C.). Interestingly, the Canadian Competition Bureau (the "Bureau") has not announced its own investigation of the matter in Canada. As noted below, Bureau enforcement is not a necessary precondition for the commencement of competition civil actions in Canada, although the fact of guilty pleas or convictions can be of assistance to plaintiffs in proving their cases.

[3] The five publishers are Hachette, HarperCollins, Macmillan, Penguin, and Simon & Shuster. Three of these publishers, Hachette, HarperCollins, and Simon & Schuster, have already settled the claims brought against them by the U.S. DOJ.

the Canadian plaintiffs allege that Apple and the defendant publishers violated Canada's price-fixing offense under section 45 of the *Competition Act* (the "Act"). The publishers allegedly committed the offense by collectively agreeing to discontinue their former wholesale distribution models, under which publishers sold eBooks at wholesale prices to distributors who in turn set retail prices, for a new agency model under which publishers set prices with distributors receiving sales commissions.[4]

The Canadian plaintiffs also allege that the publisher defendants illegally agreed not to set eBook prices below Apple's iBookstore prices (a "most-favored-nation" provision). Finally, the plaintiffs plead a variety of non-statutory grounds for recovery, including certain common law torts (e.g., unlawful interference with economic relations) and—in Québec—claims under the *Civil Code of Québec*.[5]

As in the United States, the key substantive issue in Canada will be whether the conduct of Apple and the defendant publishers constitutes an illegal conspiracy. In addition, the case raises some uniquely Canadian issues relating to jurisdiction and certification and the interpretation of Canada's conspiracy offense.

Before addressing these various questions, we provide a brief summary of the competition class action regime in Canada for background purposes.

II. PRIVATE RIGHTS OF ACTION IN CANADA

A person who has suffered loss or damage as a result of anticompetitive conduct in Canada may, depending on the nature of the offending conduct, pursue damages under statutory or common law causes of action.

A. Statutory Rights of Action

The statutory right of action for damages is found in section 36 of the Act. Pursuant to this provision, any person may sue for damages if she/he has suffered loss or harm as result of (i) conduct that is contrary to one (or more) of the criminal provisions in Part VI of the Act, such as the conspiracy offense in section 45;[6] or (ii) the failure of any person to comply with an order of the Competition Tribunal or a court made the Act.[7]

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[4] The Canadian plaintiffs also argue that this new arrangement violates section 46 of the Act, which makes it a criminal offense for Canadian subsidiaries of non-Canadian companies to implement "foreign" cartels in Canada. The offense applies even if the officers and directors of the Canadian subsidiary did not know that they were facilitating criminal conduct in Canada.

[5] As discussed below, plaintiffs in Canada commonly base their claims on both statutory (i.e., *Competition Act*) and common law causes of action.

[6] Notably, the Act does not provide a private right to sue for damages in respect of the various non-criminal anticompetitive practices in the Act, such as abuse of dominance (section 79), refusal to deal (section 75), price maintenance (section 76), tied selling (section 77), mergers (section 92), and agreements that prevent or lessen competition substantially (section 90.1). In some cases, however, it is possible for private parties to bring "private access" applications to the Competition Tribunal in respect of non-criminal matters. However, damages are not available as a remedy.

[7] 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.

A successful plaintiff in a section 36 action may recover single damages equal to "an amount equal to the loss or damage proved to have been suffered" (sometimes referred to as "special damages"). In contrast to the United States, treble (or multiple) damages are not available. In addition to damages, a successful plaintiff in a section 36 action 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 of competition litigation relative to ordinary civil actions, and is intended to provide an incentive for private competition enforcement (much like treble damages).[8]

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, or (b) the day on which any criminal proceedings relating to (i) the conduct or (ii) the order were finally disposed of. As such, the right to bring a section 36 action arises even if the Bureau has not commenced an investigation or brought a successful prosecution under the relevant offense.[9]

Most private actions brought to date have involved alleged conspiracies contrary to section 45 of the Act. Section 36 actions by competitors for misleading representations have also become more 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. However, very few section 36 actions have been heard on the merits and almost none have resulted in a final judgment for damages.

B. Common Law and Equitable Causes of Action

Apart from the Act, private litigants may seek redress for anticompetitive conduct pursuant to various common law torts (e.g., civil conspiracy and unlawful interference with economic interests) and equitable causes of action (e.g., unjust enrichment). Plaintiffs in Canada typically assert these non-statutory causes of action in their claims, in addition to claims under section 36 of the Act, as the plaintiffs have done in the eBooks matter. There are various reasons for doing this, including more favorable limitation periods than under the Act, the ability to sue for injunctive relief, and the ability to claim broader remedies such as punitive damages.

[8] A recent Alberta Court of Queen's Bench decision has circumscribed the ability of plaintiffs to recover solicitor-client costs and established factors to assess investigation costs: *321665 Alberta Ltd. v. ExxonMobil Canada Ltd.*, 2012 ABQB 76 (Alta. Q.B.).

[9] That said, the Act does provide plaintiffs with an important advantage where defendants have previously been found guilty of the offense or of breaching a Competition Tribunal order. In those circumstances, plaintiffs are entitled to rely on the "record of proceedings" of that prosecution as proof that an offense was committed (or an order breached) and for evidence of the effect of that conduct on the plaintiffs.

C. 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 anticompetitive conduct have become an increasingly important vehicle for the pursuit of private competition claims in Canada.

Relevant provincial class action legislation generally requires plaintiffs to establish the following in order to be certified to proceed: that there exists an identifiable class of plaintiffs with common issues, that a class proceeding is the preferable procedure for resolving the issues, and that a plaintiff fairly and adequately represents the proposed class.

To date, Canadian competition class actions have tended to involve allegations of price-fixing or other alleged conspiracies (cartel conduct). Competition class actions have also been initiated in connection with misleading advertising 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 Canada or abroad,]. Further, they 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.

Finally, while competition class actions have become more common in Canada in recent years, a number of issues remain unsettled. These include the procedure for the carriage of multiple actions, the ability of indirect purchasers to commence proceedings, and the ability of Canadian courts to assert jurisdiction over foreign defendants.

III. THE eBOOKS CASE IN CANADA

A. Threshold Issues: Jurisdiction and Certification

As noted, fully litigated competition civil actions are still rare in Canada, including class actions. To the extent that litigation has occurred in the class action context, most of it has revolved under the threshold issue of whether or not the class should be certified to proceed and, specifically, whether "indirect purchasers" claims are permissible.

The ability of indirect purchasers to commence price-fixing class actions in Canada is currently unsettled, with conflicting provincial appellate decisions in British Columbia, Ontario, and Quebec. The issue is now scheduled to be heard by the Supreme Court of Canada in the fall of 2012.[10] Depending on how and when the Court decides the "indirect purchaser" issue, the

[10] The Court granted leave to appeal from two concurrent decisions of the British Columbia Court of Appeal in which classes of indirect purchasers were denied certification on the grounds that indirect purchaser claims are unlawful in Canada as a matter of law (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186 and *Sun-*

publisher defendants could argue that certification in Canada should be denied on the grounds that the plaintiffs purchased their eBooks indirectly, i.e., through distributors such as Amazon and Apple rather than from the publishers themselves. The plaintiffs' claims anticipate this argument, as they go to some effort to characterize the eBook sales as direct sales between publishers and consumers, with publishers retaining title and physical possession of the eBooks.

The Canadian plaintiffs also claim that damages are capable of being assessed on an aggregate basis calculated as the difference (i.e., overcharge) between eBook prices in the presence and absence of the alleged agreement. This approach avoids the necessity of making individual damages arguments at the certification stage and is another strategy to counter indirect purchaser related arguments by defendants.

Another defense that can be raised in Canada in the context of "foreign" cartels is that the courts lack jurisdiction over extra-territorial defendants. The Supreme Court of Canada recently pronounced on the substantive aspect of this question in a trilogy of decisions considering the ability of Canadian courts to assert substantive jurisdiction in civil claims involving foreign defendants.

The basic test is that Canadian courts can assume jurisdiction where there is a "real and substantial connection" between the matter at issue and Canada. In its trilogy of decisions, the Supreme Court of Canada clarified that, in establishing whether such a connection exists, a court should consider if: (i) the defendant is domiciled or resident in the province, (ii) the defendant carries on business in the province, (iii) the tort was committed in the province, and (iv) a contract connected with the dispute was made in the province. The Court also held that, even where substantive jurisdiction is established, the claim should proceed subject to a court's discretion to stay the proceedings on the basis of *forum non conveniens*.

As a general observation, it is difficult to succeed in contesting competition cases on jurisdictional grounds unless the defendant has no business presence in Canada at all. Even then, the real issue is often that of establishing "personal" jurisdiction over the defendant rather than "substantive" jurisdiction. Given that the majority of the defendants in the eBooks case carry on business in Canada, the chances of successfully contesting certification on jurisdictional grounds appear remote.[11]

B. Substantive Issues

The key issue in Canada—as in the United States—is whether the agency agreements between the publishers and Apple involved any illegal coordination at all.

As noted, the plaintiffs in Canada principally rely upon section 45 of the Act, which is analogous to section 1 of the U.S. *Sherman Act*.

Section 45 makes it a *per se* criminal offense for competitors (or potential competitors) to enter into agreements to: (i) fix, maintain, increase, or control the price for the supply of a

Rype Products Ltd. v. Archer Daniels Midland Company, 2011 BCCA 187). In contrast, courts in Ontario and Quebec have taken the opposite position and granted certification to indirect purchasers in various cases.

[11] Canadian subsidiaries of all of the defendants have been named in the Canadian plaintiffs' pleadings, with the exception of Macmillan.

product; (ii) allocate sales, territories, customers, or markets for the production or supply of a product; or (iii) fix, maintain, control, prevent, lessen, or eliminate the production or supply of a product.

In the United States, the defendants have argued vigorously that the agency agreements are the product of a series of separately negotiated bilateral agreements that did not involve any form of illegal horizontal collusion. They also dispute allegations that circumstantial evidence of meetings and information exchanges support the existence of illegal agreements. The defendants argue that the occasional meetings between publishers were only for social purposes or to discuss market trends or legitimate joint ventures, and that the similarity among the agency agreements can be explained by Apple's desire for uniform supplier agreements.

Proof of the existence of an "agreement" will obviously be a key issue in Canada as well. In Canada, as in the United States, information exchanges between competitors are not in and of themselves illegal. However, they can form the basis for concluding that an illegal agreement was reached, circumstantial evidence being commonly relied upon for that purpose in civil proceedings under section 36 (and in criminal prosecutions as well).

Another issue that has been raised by the U.S. proceedings is whether the shift by the publishers from a wholesale to an agency model was illegal simply because the new model **could** adversely affect pricing for eBooks, even if there were no express agreements between the publishers (and Apple) to "fix" these prices. In other words, is an arrangement illegal if it does not literally fix prices, but nonetheless has the effect of increasing prices.

This could be an issue in Canada as well, now that liability under section 45 requires that conduct fit within defined categories, i.e., in this case, that there be an agreement to "fix, maintain, increase, or control the price for the supply of [a] product." There is no case law on point yet, but it is interesting to note the Bureau's approach to the issue in its enforcement guidelines on section 45 (the "Competitor Collaboration Guidelines"). In the discussion of price-fixing agreements in these Guidelines, the Bureau takes the very broad view that section 45 prohibits any arrangements between competitors to fix or increase the prices paid by customers (or a component of price, such as a surcharge or credit terms). According to the Bureau, this can include agreements to "fix prices at a predetermined level, to eliminate or reduce discounts, to increase prices, to reduce the rate or amount by which prices are lowered, to eliminate or reduce promotional allowances and to eliminate or reduce price concessions or other price related advantages provided to customers."

The Bureau also notes that price-fixing can be accomplished in many ways, and need not establish an actual price for the relevant product; rather, prohibited price-fixing agreements could involve agreements between competitors to use a common price list in their negotiations with customers, to apply specific price differentials between grades of products, to apply a pricing formula or scale, or not to sell products below cost.

Of note, however, the Bureau also states that it does consider arrangements between competitors to fall under section 45 "solely on the basis that they have the effect of increasing prices charged by competitors." For example, the Bureau would not proceed against an agreement among competitors to implement certain measures designed to protect the

environment or implement a new industry standard simply because this may increase the costs of producing a product and ultimately result in an increase in price to consumers.

While the Bureau's Competitor Collaboration Guidelines are not binding on the courts, one can see the defendants in the e-books case potentially relying on a similar line of thinking to assert that their distribution arrangements cannot be condemned solely on the basis that an ancillary effect may be to raise prices, when these arrangements otherwise have benign or even beneficial effects.

In addition to the above, however, other specifically Canadian issues could arise, owing to the particular nature of the conspiracy offense in Canada, both in its current and recently repealed versions.

The current version of section 45 was enacted in March 2009 and came into force in March 2010. Importantly, the previous version of section 45 (i) did not limit the offense to horizontal agreements between competitors/potential competitors, or to the three categories of conduct specified above, and (ii) incorporated a "market effects" test that required proof (beyond a reasonable doubt) that the impugned agreement prevented or lessened competition "unduly" or resulted in an "unreasonable" enhancement in price. It is generally agreed that, by eliminating proof of market impact as a condition precedent to criminal liability, the new section 45 also arguably lowers the bar for civil recovery by private litigants under section 36.

Given the time frames involved, certain of the Canadian plaintiffs are purporting to rely on both the pre- and post-amendment versions of section 45. This could ultimately require these plaintiffs to prove that the pre-March 2010 conduct in question resulted in an "undue" lessening or prevention of competition, or an "unreasonable" enhancement of prices, in order to recover. Although the plaintiffs would not be required to meet the criminal burden of proof in this regard, given the civil nature of the proceeding, there is no doubt that having to prove market impact would significantly complicate their ability to prevail in any contested proceeding. For example, Apple and the publisher defendants would no doubt argue that the arrangements had a pro-competitive effect by facilitating Apple's entry and accelerating innovation and increased competition and output.[12]

At the same time, one of the difficult issues facing plaintiffs with respect to post-amendment conduct will be how to characterize Apple as a "competitor" of the publishers, given that new section 45 only applies to agreements between competitors (or potential competitors). While there are historical precedents in Canada for parties being convicted for participating in cartels organized by upstream or downstream parties, these cases were decided under the old version of section 45, which was not limited to prohibiting anticompetitive agreements among "competitors."

[12] Although the assumption is that market impact considerations will not be relevant for civil litigation under the current version of section 45, this is not yet settled since there have not been any decided cases. For example, it is possible that a court might consider the effect of the agreements in this case, including any pro-competitive justifications, in deciding whether they qualify as *per* se prohibited price-fixing agreements under section 45 to begin with.

IV. CONCLUSION

Although the key legal battles in the eBooks case will no doubt be fought in the United States, the litigation raises interesting issues for Canada as well. In particular, to the extent that the case actually proceeds to litigation, it could raise—and decide—important issues relating to the interpretation of the new *per se* conspiracy offense under the Act.