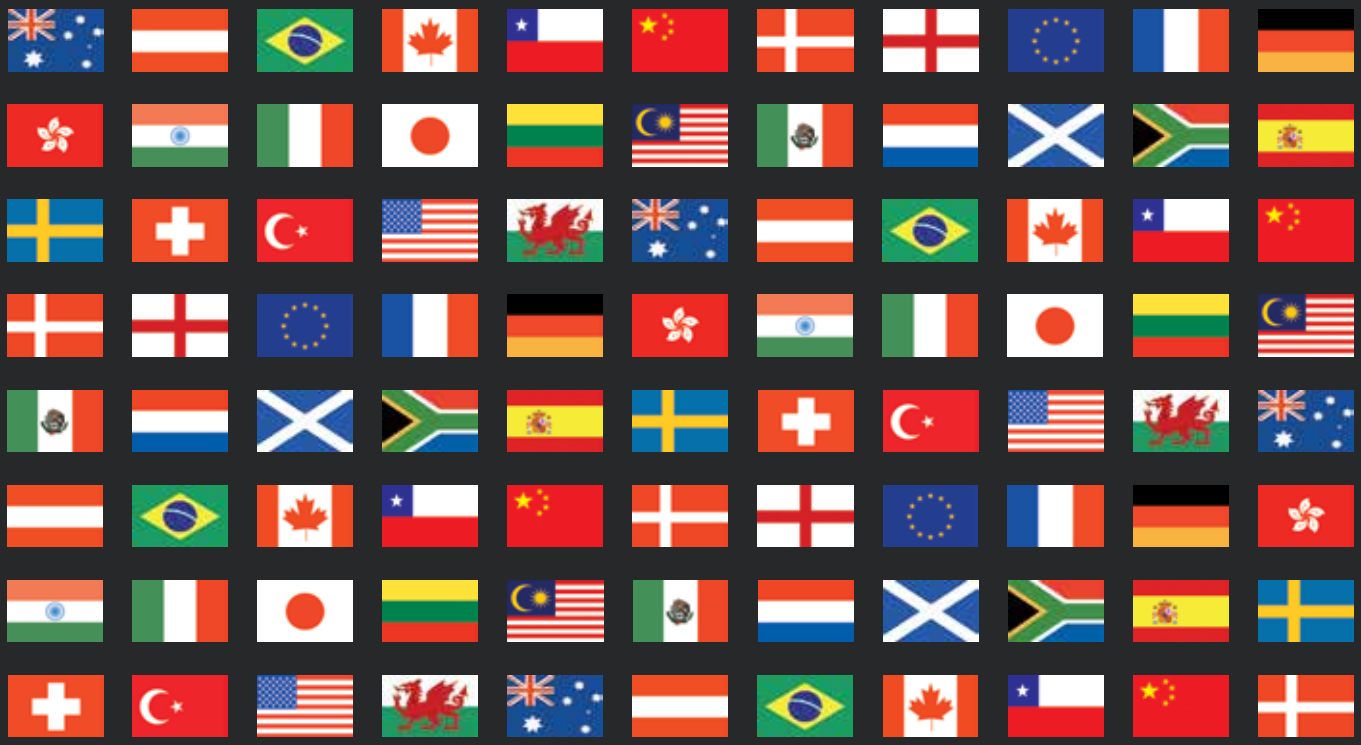
Private Antitrust Litigation

Contributing editor
Samantha Mobley



2016

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Private Antitrust Litigation 2016

Contributing editor

Samantha Mobley

Baker & McKenzie LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2003
Thirteenth edition
ISSN 1742-2280

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Plaintiff overview 5
Robert Kaplan and Elana Katcher
Kaplan Fox & Kilsheimer LLP

Antitrust in US health care 9
Richard Feinstein and Nicholas Widnell
Boies, Schiller & Flexner LLP

The EU Damages Actions Directive 12
Thomas Funke
Osborne Clarke

Australia 16
Ross Zaurrini and Elizabeth Sarofim
Ashurst Australia

Austria 22
Stephan Polster
Dorda Brugger Jordis

Brazil 26
Bruno Oliveira Maggi and Lucas Siqueira Bentes
SMM Sociedade de Advogados

Canada 31
David Kent, Éric Vallières, Joan Young and Lisa Parliament
McMillan LLP

Chile 36
Javier Velozo and Ximena Rojas
Aninat Schwencke & Cía

China 40
Ding Liang and Fang Yunze
Beijing DeHeng Law Offices

Denmark 46
Henrik Peytz, Thomas Mygind and Katrine Lapp
Nielsen Nørager Law Firm LLP

England & Wales 51
Elizabeth Morony and Ben Jasper
Clifford Chance LLP

France 71
Jacques Buhart, Lionel Lesur and Louise-Astrid Aberg
McDermott Will & Emery

Germany 78
Alexander Rinne
Milbank, Tweed, Hadley & McCloy LLP

Hong Kong 83
Clara Ingen-Housz, Gavin Lewis and Anna Mitchell
Linklaters

India 87
Alok Dhir and Sachin Gupta
Dhir & Dhir Associates

Italy 92
Mario Siragusa, Marco D'Ostuni and Cesare Rizza
Cleary Gottlieb Steen & Hamilton LLP

Japan 100
Hideto Ishida and Takeshi Suzuki
Anderson Mōri & Tomotsune

Lithuania 104
Ramūnas Audzevičius and Vytautas Saladis
Motieka & Audzevičius

Malaysia 109
Lim Koon Huan
Skrine

Mexico 113
Agustín R Elizondo, Arturo Corona and Ronald Prat
Avah Legal

Netherlands 117
Ruben Elkerbout, Gerben Smit and Jan Erik Janssen
Stek

Scotland 122
Catriona Munro and Jennifer Marshall
Maclay Murray & Spens LLP

South Africa 129
Mark Garden and Kevin Minofu
ENSafrica

Spain 137
Juan Jiménez-Laiglesia, Alfonso Ois, Raúl Partido and Samuel Rivero
DLA Piper Spain SL

Sweden 143
Tommy Pettersson, Stefan Perván Lindeborg, Sarah Hoskins and Mårten Andersson
Mannheimer Swartling

Switzerland 147
Daniel Emch, Anna-Antonina Gottret and Lorenz Hadorn
Kellerhals Attorneys at Law

Turkey 152
Bahadır Balkı, Sinem Uğur and Sera Erzene Yıldız
ACTECON Competition & Regulation Consultancy

United States 157
James A Keyte, Paul Eckles, Karen Hoffman Lent, Tiffany Rider and Anjali B Patel
Skadden, Arps, Slate, Meagher & Flom LLP

Canada

David Kent, Éric Vallières, Joan Young and Lisa Parliament
McMillan LLP

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Changes in procedural rules have given rise to a dramatic increase in private antitrust litigation in Canada since the mid-1990s.

The first change was the introduction of modern class action regimes in the various Canadian jurisdictions, coupled with a more permissive approach to contingency fees and, more recently, third-party funding, which have led to a wide range of private antitrust class actions being launched across the country. The majority of these cases deal with North American or global cartels and follow on from US or European investigations and litigation.

The second notable procedural change was the more recent amendment to the Canadian Competition Act (the Act) that now permits claimants to have direct access to the Competition Tribunal (the Tribunal) in certain situations (see question 3).

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

As described more fully below, private antitrust actions are expressly contemplated in Canada by the Act.

In common law provinces, an antitrust action may also be based on the tort of conspiracy and a variety of economic torts, as well as on restitutionary theories. Depending on the province where the claim is brought, relying on a common law cause of action may result in a longer limitation period than that which is available under the Act. Relying on a common law or equitable cause of action may also support requests for relief such as interlocutory injunctions, disgorgement or other equitable relief that is not available under the Act.

In Quebec, an antitrust action may also be based on the general rules of civil liability (article 1457 of the Civil Code), and the same remarks as noted above would apply (the time limitation in Quebec is typically three years).

The Supreme Court of Canada held in late 2013 that indirect purchasers may bring claims.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The Act governs competition issues arising from commercial activity throughout Canada. The Act provides two different venues for pursuing private actions, depending on the type of alleged misconduct.

Section 36 allows private actions in civil courts where the defendant has committed a criminal offence under the Act. Section 36 also allows actions where the defendant fails to comply with an order of the Tribunal. The Federal Court of Canada and the provincial superior courts are courts of competent jurisdiction for the purposes of bringing an action under section 36 of the Act.

Section 103.1 of the Act also gives private parties a limited right to initiate proceedings before the Tribunal if they are affected by certain restrictive trade practices. Any person may apply to the Tribunal for leave to make an application for a finding that another person is improperly refusing to deal or is engaged in exclusive dealing or tied selling. However, the Tribunal cannot award damages in these circumstances.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

Private antitrust actions are available where the defendant has engaged in conduct that would be a criminal offence under the Act. No prior finding of misconduct is required. The criminal offence provisions are found in Part VI of the Act. The Canadian government overhauled Part VI in March 2009. The amendments narrowed the range of criminal behaviour under the Act by repealing the price discrimination, promotional allowances, predatory pricing and price maintenance provisions. Conspiracy, bid rigging, deceptive telemarketing, misleading advertising and pyramid sales remain criminal offences in Part VI.

The most important amendments, from a private enforcement perspective, are the changes to section 45 dealing with conspiracy. Previously, section 45 required that the conspiracy prevent or unduly lessen competition. This requirement has been removed, creating a per se offence. Now any agreement between competitors to fix prices or allocate markets violates the conspiracy provisions regardless of the conspiracy's impact on competition. We expect to see an increase in private antitrust actions because the creation of a per se offence makes proving cartel conduct easier for potential plaintiffs.

Section 46 of the Act deals with foreign-directed conspiracies: it is an offence for any corporation that carries on business in Canada to implement a policy of a corporation or person outside of Canada that would violate the conspiracy provisions of the Act.

Private antitrust actions are also available in other (non-criminal) matters if a defendant fails to comply with an order of the Tribunal.

Finally, as noted in question 2, antitrust actions may be available based on civil conspiracy or other common law, equitable or civil law theories.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

Canadian courts in the common law provinces (ie, outside Quebec) have determined that they have jurisdiction over foreign defendants who are alleged to have entered into a foreign conspiracy directed at the Canadian market that caused loss or damage to Canadian claimants. In general, these courts will take jurisdiction over a private antitrust action if the court finds that there is a real and substantial connection between the alleged misconduct and the jurisdiction. Canadian courts apply relatively generous rules of service of civil process on parties outside Canada.

Until recently, courts in Quebec had taken a narrower approach to jurisdiction and had refused to assert jurisdiction over foreign defendants with no establishment in the province where no harm was suffered in the province other than a mere pecuniary loss. However, this stance was reversed in a recent decision of the Supreme Court of Canada in which the court adopted a more expansive approach to jurisdiction and to the definition of 'harm'.

Parties can influence the jurisdiction in which a claim will be heard both formally and informally. At a formal level, defendants can attack the jurisdiction of a Canadian court either on the basis of jurisdiction simplicitor (lack of personal jurisdiction) or forum non conveniens (a discretionary refusal to exercise jurisdiction in favour of another more preferable jurisdiction). At an informal level defendants and plaintiffs can sometimes

negotiate venue, both within Canada and (less commonly) as between Canada and another country.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against both corporations and individuals including those from other jurisdictions. In practice, defendants in most private cartel actions are corporations, although individuals have also been sued, usually for tactical reasons. As indicated above, Canadian courts may in some circumstances assume personal jurisdiction if a foreign corporation or individual is alleged to have committed an offence abroad that affects Canada.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties. Third-party litigation funding is still in its infancy in Canada. Law societies are monitoring third-party litigation funding but no steps have been taken to regulate it.

Contingency fees are available throughout Canada. Contingency fees are the preferred method of compensation for plaintiffs' counsel in class actions. The legislation in several jurisdictions requires plaintiff class action fees to be approved by the court. Counsel must demonstrate that the fees charged are reasonable.

Certain provinces also have publicly run funds which are designed to provide financial support to class action claimants.

8 Are jury trials available?

The ordinary rules of civil procedure apply to private antitrust actions. In all Canadian provinces other than Quebec, a party can require issues of fact and damages to be assessed by a jury. Typically, to request a jury the party must serve a jury notice on the opposing party before the close of pleadings or shortly after the notice of trial is issued. The opposing party may bring a motion to strike out the jury notice. The most common ground for striking out a jury notice is that the case is inherently complex. Unlike the US, jury trials in civil actions in Canada are not a common method for adjudicating private actions, and competition or antitrust class litigation will rarely involve a jury.

No juries are available for matters heard by the Tribunal or by the courts of the province of Quebec.

9 What pretrial discovery procedures are available?

Documentary and oral discovery are available in all jurisdictions, with some differences as to procedure.

In the common law provinces and before the Federal Court, the parties have an obligation to produce all documents relevant to the matters at issue. The definition of 'documents' is wide and includes all relevant data and information in electronic format. However, Canadian courts have increasingly applied the concept of proportionality to discovery disputes, and formal rules requiring proportionality in discovery have been adopted in several Canadian provinces.

After each party has delivered its documents, oral discoveries begin. Each party is entitled to examine one representative of every party adverse in interest to it.

The person being examined is required to answer every question that is relevant to the matter in dispute. The party conducting the examination is entitled to read in portions of the discovery transcript of the adverse parties as evidence at trial.

In Quebec, the parties are required to produce only the documents on which they intend to rely at trial. During the examination process that follows they may be requested by the other parties to provide additional relevant documents.

Third-party oral discovery is available on an exceptional basis. Courts are reluctant to require non-parties to be subjected to oral discovery, and do so only where the plaintiff can demonstrate unusual prejudice. Third-party documentary discovery is more frequently ordered.

10 What evidence is admissible?

The rules of evidence apply to private competition litigation and dictate what evidence is admissible. Generally, parties are entitled to provide whatever factual or expert opinion evidence they think is necessary to prove their case. Evidence is primarily entered orally, with the opposing party given broad rights to cross-examine. Most rules of evidence deal with admissibility of evidence and try to prevent access to potentially misleading information. Most corporate records will be admissible.

11 What evidence is protected by legal privilege?

Legal privilege falls into two main categories: solicitor–client privilege and litigation privilege. Solicitor–client privilege applies to all communications between a lawyer and client that were made for the purpose of giving or receiving legal advice and that were made in confidence. Advice from in-house counsel is privileged provided that the advice meets the three requirements of legal privilege described above. In other words, if in-house counsel is providing legal advice in confidence, then that advice will be privileged. In-house counsel communications providing business advice are not privileged.

Litigation privilege applies to communications of a non-confidential nature between counsel and third parties and even includes material of a non-communicative nature, provided that the communication or material was created specifically in contemplation of litigation. Litigation privilege ends when the litigation ends, while solicitor–client privilege survives the termination of litigation.

Trade secrets are not privileged. However, it may be possible to get a protective or sealing order that limits the degree to which the secrets, if otherwise producible, may be accessed or disseminated by the opposite party or at trial.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions are available where there has been a criminal conviction in respect of the same matter. However, there need not be a prior criminal conviction for a plaintiff to bring a private antitrust action: a plaintiff may bring an action for loss or damage as a result of 'any conduct that is contrary to any [relevant] provision' of the Act, whether or not there has been a conviction. From a practical perspective, many private actions arise after a conviction, because the conviction serves as prima facie proof of the illegal conduct for the purpose of establishing civil liability. Increasingly, however, class actions are being brought prior to conviction, but after disclosure of an investigation.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Subsection 36(2) of the Act provides that the judicial record relating to a criminal conviction under the Act is proof that the convicted person engaged in the criminal conduct, in the absence of evidence to the contrary. This provision applies whether the conviction was the result of a negotiated plea bargain or a contested trial. Amnesty and leniency applicants are not protected from follow-on litigation.

The Competition Bureau will not routinely disclose documents obtained during their investigations, although they may be compelled to disclose some materials on motion by private plaintiffs. Some documents prepared for the purposes of amnesty or leniency discussions may be privileged, but certain aspects of a proffer may be disclosable.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The rules of civil procedure provide the grounds whereby a defendant can petition the court for a stay of proceedings. While there are some differences in the rules between provinces, generally a defendant can ask the court to stay an action on the following four grounds: (i) the court has no jurisdiction over the subject matter; (ii) the plaintiff does not have legal capacity; (iii) the action is frivolous or an abuse of process; or (iv) another proceeding is pending in another jurisdiction between the same parties in respect of the same subject matter. In Canada this last ground is the most common reason for a defendant to seek a stay in a competition class action. Multiple actions on behalf of national classes for the same competition case are often commenced by counsel in different provinces. Because there is no Canadian equivalent to the US multi-district litigation (MDL) system and no organised means of consolidating actions commenced in different provinces, if the parties cannot agree, the defendants will seek to have the action stayed in all but one of the provinces.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The standard of proof in any civil action, including private antitrust litigation, is on the balance of probabilities. The Supreme Court of Canada recently held that the balance of probabilities is the only standard of proof, even in an action based on an alleged breach of a criminal provision. The plaintiff bears the burden of proving all of the essential elements of the case. The defendant bears the burden of proving the elements of any affirmative defence on a balance of probabilities. As noted in response to question 13 above, subsection 36(2) of the Act provides that the judicial record relating to a criminal conviction under the Act is proof that the convicted person engaged in the criminal conduct, in the absence of evidence to the contrary. There are no presumptions as to the likelihood or extent to which a cartel affected a market. Passing on is not available as a defence, but an indirect purchaser must prove passing on in order to establish damages.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

There is no typical timetable for class and non-class proceedings. The provincial courts and Federal Court have rules that set out pro forma deadlines for each step in a proceeding. However, in complex proceedings such as antitrust actions it is common for the parties to agree to extend the deadlines or for the deadlines to be extended by the courts. There is typically less flexibility in proceedings before the Tribunal, where the parties may be given little latitude to depart from the strict timelines set out in the statute and rules.

In common law provinces, class actions cannot proceed unless and until the court has granted a motion certifying the class. The provincial legislation contains time limits within which a certification motion must be brought. However, as in regular actions, it is common for this deadline to be extended by the court. Certification motions are not usually commenced until at least six months after a case is commenced, and usually take at least 10 additional months to be resolved.

In Quebec, the launching of a class action must first be authorised by the superior court. Once the court has authorised the action (this process normally takes several months), the plaintiff has three more months to institute the class action itself. Thereafter pro forma deadlines apply, but are typically extended.

Proceedings can only be accelerated in exceptional circumstances. A party seeking to expedite a proceeding must satisfy the relevant court that the matter is too urgent to be conducted according to the usual timelines.

17 What are the relevant limitation periods?

Section 36(4) of the Act sets out the limitation period for actions brought under section 36. No action can be brought after two years from the later of the day on which the conduct was engaged in or the day on which any criminal proceedings relating to the matter were finally disposed of. With the delays that are common in disposing of a prosecution, the two-year period for initiating an action may in fact become quite extended.

Depending on the jurisdiction, the limitation period may be different if the action is based on a common law tort or other cause of action. These limitation periods vary by province. The provincial periods are generally subject to a 'discoverability' requirement that delays the start of the period until the plaintiff knew or ought to have known of the main facts giving rise to the cause of action.

18 What appeals are available? Is appeal available on the facts or on the law?

There is an automatic right of appeal from final decisions in all civil actions, including antitrust actions, to the relevant provincial or federal court of appeal. Appeals from an appellate court can be made to the Supreme Court of Canada, but only if leave to appeal is granted. Appeals are available on both the facts and the law, although the standard of review for each is different. The dismissal of a certification motion (or, in Quebec, a motion for authorisation) is a final decision and can be appealed. A decision granting certification or authorisation is interlocutory – depending on the jurisdiction, defendants are either entitled to appeal (eg, British Columbia), entitled to seek leave to appeal (eg, Ontario) or not entitled to appeal at all (eg, Quebec).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings, known in Canada as class proceedings, are available in respect of private antitrust litigation.

20 Are collective proceedings mandated by legislation?

All Canadian jurisdictions but one now have formal class action procedural legislation.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Outside Quebec, the test for certifying a proposed class proceeding is more or less the same. It generally requires the plaintiff to satisfy five criteria:

- the pleading must disclose a cause of action;
- there is an identifiable class of two or more people;
- the claims of the class members must raise common issues;
- a class proceeding would be the preferable procedure for resolving the common issues; and
- the representative plaintiff would fairly and adequately represent the class, has produced a workable plan of proceeding and does not have interests in conflict with other class members on the common issues.

Quebec's rules for authorisation are somewhat different. There is no formal 'preferability' requirement, expert evidence is rarely permitted, and only individuals and organisations with 50 employees or fewer may be members of Quebec classes.

22 Have courts certified collective proceedings in antitrust matters?

In the common law provinces, after a long period with only a few contested certification motions in competition law cases, all of which failed, many antitrust cases have now been certified. The courts in Quebec and other provinces have also certified or authorised numerous antitrust class actions, on consent, to facilitate settlements.

23 Can plaintiffs opt out or opt in?

Opt outs are permitted in Canada. When a class is certified, the prospective class members must be notified of the existence of the proceeding and informed of their right to opt out and the process for doing so. Some provinces require non-residents to opt in before they can become class members.

24 Do collective settlements require judicial authorisation?

All class settlements require judicial authorisation. The courts are mainly concerned with whether the settlement is fair and adequate to the class and whether there is an appropriate plan for distributing the settlement proceeds.

Update and trends

While too soon to be definitive, there may be an emerging development with respect to the treatment of expert evidence presented on motions to certify class proceedings. Until late 2013, the trend was for certification courts to treat plaintiffs' expert evidence with great deference – courts were reluctant to examine it closely, and forbidden to weigh it against contrary evidence from defence experts. In 2013, however, the Supreme Court of Canada held that certification must be a 'meaningful screening device', and that experts' proposed methodologies must be 'sufficiently credible or plausible', demonstrate a 'realistic prospect' of proof on a class-wide basis and be 'grounded in the facts of the case' and not be 'purely theoretical or hypothetical'.

Since then, some certification and appellate courts have refused to certify proposed classes that relied on theories of generic harm without expert evidence and that asserted unsustainable common approaches to harm in cases alleging defects across a variety of distinguishable products. An impending appellate decision in the proposed credit card conspiracy class action will shed light on how these new requirements will be applied in an antitrust setting.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

It is common for antitrust class actions in Canada to be commenced in one jurisdiction on behalf of residents of other jurisdictions as well. Sometimes these actions propose national classes including all Canadians. There has not yet been a definitive ruling as to whether the courts of one jurisdiction are entitled to resolve an action on behalf of a national class and thereby bind residents of other jurisdictions. In practice, many of these cases have settled, and out-of-province class members have been deemed by the approving courts to have released their claims, without any detailed comment as to the effectiveness of these releases.

It is also common for class counsel in different jurisdictions to commence coordinated actions in their respective jurisdictions that, when taken together, constitute a 'virtual' national class. However, there is no Canadian equivalent of the US MDL system and no organised means of consolidating actions commenced in different jurisdictions.

26 Has a plaintiffs' collective-proceeding bar developed?

A plaintiffs' class-proceeding bar has developed across the country. This bar is relatively small and, with respect to private antitrust litigation, currently involves only a limited number of firms. These firms either litigate on a national basis or have developed relationships with firms in other jurisdictions so that they can coordinate national litigation.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

Section 36 of the Act states that a person who has suffered damage is entitled to recover an amount equal to the loss or damage proved to be suffered. This provision also allows the plaintiff to recover the full cost of investigating and bringing the action as well as pre- and post-judgment interest (see below). Damages are also available if the action is based on a common law cause of action or on the principles of civil liability (in Quebec).

Only actual (single) damages, and not multiple damages, are awarded in Canada.

Some plaintiffs have also made restitutionary, disgorgement and constructive trust claims in antitrust actions. The availability of such relief in this context has not been resolved in Canada.

In private cases before the Tribunal only prospective behavioural remedies are available in private proceedings; neither penalties nor damages may be awarded.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Interlocutory injunctions and interim remedies are not available in actions brought under section 36 of the Act. However, interlocutory injunctions and interim remedies may be available if the claim is brought under the common law tort of conspiracy or pursuant to the principles of civil liability (in Quebec). Generally speaking, a plaintiff seeking an interlocutory injunction must demonstrate (i) a good arguable case; (ii) irreparable harm; and (iii) that it is favoured by the balance of convenience.

Only behavioural relief is available in cases brought before the Tribunal by a private party, on either an interim or permanent basis. For example, the Tribunal can order a supplier to accept a customer in refusal to deal cases.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are available in Canada, but they are only awarded in extraordinary circumstances and in relatively modest amounts.

30 Is there provision for interest on damages awards and from when does it accrue?

Both pre- and post-judgment interest are available on damages awards in most jurisdictions. The rates of interest are set by the relevant legislation. Plaintiffs are typically entitled to pre-judgment interest from the date of the cause of action arose until the order disposing of the case. Thereafter, post-judgment interest accrues on the amount of the judgment.

31 Are the fines imposed by competition authorities taken into account when setting damages?

Fines are not a factor when determining damages in a private antitrust action. A successful plaintiff is entitled to be compensated for its losses. Fines are not a relevant factor in determining the plaintiff's losses. However, the imposition of a fine may reduce or eliminate the likelihood of punitive damages.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Each party to a litigation must initially bear its own legal costs. However, courts will typically award costs to the successful party at the end of the litigation. The common law courts will look at a number of factors such as settlement offers, the importance of the issue being litigated and behaviour of the parties when considering the quantum of the costs award. In a normal case the successful party can expect to recover between one-third and one-half of its actual costs. In Quebec, however, costs awards are nominal. The Tribunal also has complete discretion to award costs for cases brought before it. Class actions are an exception, however, as many provinces and the Federal Court have rules providing that no party shall pay the other's costs for either just the certification stage or the entire proceeding, except in extraordinary circumstances.

33 Is liability imposed on a joint and several basis?

It is common for two parties who are responsible for committing a tort (or a civil fault) to be held jointly and severally liable for the damage caused by them ('solidarily' in Quebec).

34 Is there a possibility for contribution and indemnity among defendants?

Canadian courts have not yet ruled on whether normal common law or statutory rules regarding contribution and indemnity among defendants will apply to members of an antitrust cartel. Private contribution and indemnity agreements (sometimes called 'judgment sharing agreements') are generally permissible as among defendants in Canada, and there is no reason to believe that they would not be available to defendants in a private antitrust action.

In Quebec, when defendants are held 'solidarily' liable they are each liable towards the aggrieved party for the entire loss. They may, however, have recourses as between themselves to apportion their liability.

35 Is the 'passing on' defence allowed?

The Supreme Court of Canada determined in late 2013 that the passing on defence is not available to defendants in antitrust cases.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

The Competition Act contains a number of defences to the various criminal provisions. For example, section 45 of the Act (conspiracy provisions) provides a defence in respect of agreements that are 'ancillary' to broader or separate agreements or arrangements that do not contravene the Act and that include the same parties.

37 Is alternative dispute resolution available?

Alternative means of dispute resolution are available in Canada, including mediation and arbitration. Alternative dispute resolution is not commonly used in private antitrust actions, but in principle there is no reason why the parties could not consent to arbitration or mediation. In some provinces one party can compel the others to engage in compulsory mediation.

mcmillan

David Kent **david.kent@mcmillan.ca**
Éric Vallières **eric.vallieres@mcmillan.ca**
Joan Young **joan.young@mcmillan.ca**
Lisa Parliament **lisa.parliament@mcmillan.ca**

Brookfield Place
Suite 4400, 181 Bay Street
Toronto, Ontario
Canada M5J 2T3

Tel: +1 416 865 7000
Fax: +1 416 865 7048
www.mcmillan.ca

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

iPad app

Available on iTunes

Law Business Research

Private Antitrust Litigation
ISSN 1742-2280

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law