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Private Competition Law Actions

Practical Law Canada Practice Note 2-618-8410 (2017)

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This Practice Note provides an overview of key issues related to private competition litigation in Canada, including statutory rights of action, available remedies and recent Supreme Court of Canada competition class action decisions.

To date, outside of competition law class actions, private competition litigation has generally not played a significant role in the enforcement of competition law in Canada. The Canadian regime shares many features of US private antitrust enforcement, but with certain notable differences, such as a much more limited statutory right of action for damages and the unavailability of treble damages.

Private Rights of Action

Statutory Rights of Action for Damages

The Competition Act, R.S.C. 1985, c. C-34 (Competition Act) is the principal competition law statute in Canada. The key substantive provisions of the *Competition Act* include criminal offenses in Part VI (titled "Offences in Relation to Competition") and civil, "reviewable matters" in Parts VII.1 (titled "Deceptive Marketing Practices") and VIII (titled "Matters Reviewable by Tribunal").

The *Competition Act*'s criminal prohibitions include conspiracy (section 45), bid-rigging (section 47) and false or misleading representations (section 52). Misrepresentations to public (section 74.01), refusal to deal (section 75), price maintenance (section 76), tied selling (section 77) and abuse of dominance (section 79) are among the anti-competitive practices that are civilly reviewable by the Competition Tribunal (Tribunal) and/or the courts under Parts VII.1 and VIII of the *Competition Act*. The Tribunal is a specialized, quasi-judicial body with exclusive jurisdiction over the *Competition Act*'s civil provisions in Part VIII and shared jurisdiction with the courts with respect to the deceptive marketing practices in Part VII.1.

Section 36 of the *Competition Act* provides a limited statutory right of action for damages for persons who have suffered loss or damages as a result of violations of the criminal provisions of the *Competition Act* or orders made under the Act.

A prior criminal conviction is not required to commence a damages claim under section 36 (*Rocois Construction Inc. v. Quebec Ready Mix Inc., 1985 CarswellNat 10 (Fed. C.A.)*, at paragraph 3) and an on-going or concluded criminal investigation does not preclude a statutory claim. Further, a plaintiff need only prove the elements of the alleged criminal offence on the ordinary civil standard proof, namely proof on a balance of probabilities, and not to the criminal standard of beyond a reasonable doubt (*C.(R.) v. McDougall, 2008 CarswellBC 2041 (S.C.C.)*, at paragraphs 40 and 46).

To date, as discussed further below, the vast majority of private litigation under section 36 has been through class actions. While there have been many settlements (particularly of class actions) involving significant payments, in the 40 years that there has been a statutory right of action for damages under Canadian competition legislation, damages have been awarded on a contested basis in only a single case (see *Maritime Travel Inc. v. Go Travel Direct.Com Inc., 2009 CarswellNS 219 (N.S. C.A.)*).

The *Competition Act* does not currently permit private litigants to bring statutory damages claims under section 36 in respect of anti-competitive practices that are reviewable under Parts VII.1 and VIII of the *Competition Act* (that is, the civil reviewable matters provisions), unless the conduct in question also amounts to a breach of an order under the *Competition Act*. Subject to a limited right of private claimants to bring applications to the Tribunal with respect to certain reviewable practices (discussed below), at this time only the Commissioner of Competition (Commissioner) (who is the head of the Competition Bureau (Bureau), the government agency responsible for administering and enforcing the *Competition Act*) has standing to enforce the *Competition Act*'s civil provisions.

However, prospective amendments to the *Competition Act* originally scheduled to come into force on July 1, 2017, will give private litigants the right to sue for damages for violations of civil and criminal deceptive marketing practices provisions (see sections 74.011 and 52.01 of the *Competition Act*) added to Part VII.1 on July 1, 2014, through the enactment of Canada's federal anti-spam legislation (CASL). These provisions of the *Competition Act* target false or misleading representations in emails and other commercial electronic messages. Under the new statutory cause of action created by CASL, anyone "affected" by an alleged breach of section 74.011 (or section 52.01) will be able to sue for compensatory damages under section 36 and for statutory damages (without proof of loss) of $200 per contravention, to a maximum of $1 million for each day on which the conduct occurred.

For the time being, the implementation of the CASL private right of action has been suspended due to broad-based concerns raised by businesses, charities and the not-for-profit sector. The Canadian government has indicated that a parliamentary committee will be asked to review CASL, and there has not yet been any indication as to when or if these provisions will come into force.

Provincial consumer protection legislation also provide statutory rights of action for damages in respect of the unfair trade or business practices proscribed by those statutes (see, for example, sections 14-18, *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A and sections 4-6, 8-10 and 171-172, *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2).

Private Applications

Under section 103.1 of the *Competition Act*, a private litigant may seek permission from the Tribunal to file an application under the refusal to deal (section 75), price maintenance (section 76) and/or exclusive dealing, tied selling and market restriction (section 77) provisions in Part VIII of the *Competition Act* (see *Barcode Systems Inc. v. Symbol Technologies Canada ULC, 2004 CarswellNat 3582 (F.C.A.)* and *Safa Enterprises Inc. v. Imperial Tobacco Co., 2013 CarswellNat 5767 (Competition Trib.)*).

In addition to the requirement that private claimants must first obtain permission from the Tribunal to commence a proceeding, the right to bring private applications is limited by the following:

- An application may not be brought in respect of conduct, which is the subject of an ongoing inquiry or application by the Commissioner or that was the subject of an inquiry that has since been settled.
- There is a one-year limitation period running from the date the conduct in issue ceased.

- Damages are not available, only behavioural remedies (for example, an order prohibiting a person from continuing to engage in the impugned conduct) may be granted by the Tribunal in the event that a private application is successful.

Since 2002, when private applications were first permitted, only 34 applications for leave to commence private proceedings have been filed, nine of which were granted. Of these nine applications, only three have proceeded to a full hearing on the merits and all three were dismissed. For more information, see *Practice Note, Private Access Applications to the Competition Tribunal*.

Common Law and Equitable Causes of Action

Private litigants may also assert a variety of common law (for example, civil conspiracy and unlawful means tort) and equitable (for example, unjust enrichment) causes of action in respect of alleged anti-competitive conduct. In light of the unavailability of punitive damages and injunctive relief under section 36 of the *Competition Act*, and uncertainty regarding the limitation period for bringing a section 36 claim (see *Punitive or Exemplary Damages* and *Limitation Periods*), private competition law actions typically combine a section 36 claim with various common law and equitable causes of action.

There is now appellate authority for the position that a violation of a criminal provision of the *Competition Act* can serve as the foundation for certain common law tort and equitable claims (see *Watson v. Bank of America Corp, 2015 CarswellBC 2356 (B.C. C.A.)*, at paragraph 58; *Fanshawe College of Applied Arts and Technology v. AU Optronics, 2016 CarswellOnt 12776 (Ont. C.A.)*, at paragraphs 18 and 83-92 (Fanshawe (CA)). See also *Godfrey v. Sony Corp., 2016 CarswellBC 1313 (B.C. S.C.)*, at paragraphs 83-89 (Godfrey), affirmed *2017 CarswellBC 2245 (B.C.C.A.)*, at paragraphs 164-186 (Godfrey (CA)), but see *Shah v. LG Chem, Ltd., 2015 CarswellOnt 15099 (Ont. S.C.J.)*, at paragraphs 215, 226-228 and 231 (Shah), reversed on this issue *2017 CarswellOnt 6145 (Ont. Div. Ct.)*, at paragraphs 8-16. However, this issue is likely destined for the Supreme Court of Canada. In contrast, in Quebec, such a violation can constitute a fault for the purposes of a civil law claim (section 1457, *Civil Code of Quebec* and *Harmegnies c. Toyota Canada, 2008 CarswellQue 1155 (C.A. Que.)*).

A reviewable practice under the *Competition Act* cannot found a damages claim unless the conduct in issue also independently gives rise to and supports such a claim (see *Novus Entertainment Inc. v. Shaw Cablesystems Ltd., 2010 CarswellBC 1962 (B.C. S.C.)*).

Class Actions

Competition class actions, particularly those involving allegations of price-fixing and other cartel conduct, are the most prevalent and important form of private competition litigation in Canada.

In contrast to the United States, indirect purchasers (that is, those who purchased the allegedly cartelized product from someone in the distribution chain other than the defendants) have standing to sue for competition law violations. The Supreme Court of Canada recently rejected the US federal bar on indirect purchaser antitrust claims established by the United States Supreme Court in *Illinois Brick Co. v. Illinois, 431 U.S. 720 (U.S. Ill. S.C.)* (see *Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 CarswellBC 3257 (S.C.C.)* (Pro-Sys)). There is mixed case law in Canada on the question of whether so-called "umbrella purchasers"—that is, direct or indirect purchasers from non-cartel members—have a cause of action against alleged cartel members under the *Competition Act* and/or claims for unjust enrichment and waiver of tort (see, for example, *Shah*, at paragraphs 164-165, affirmed on this issue

2017 CarswellOnt 6145 (ont. Div. Ct.), at paragraphs 17-53*; Godfrey*, at paragraphs 71-79, 116 and 119, affirmed on this issue *2017 CarswellBC 2245 (B.C.C.A.)*, at paragraphs 187-248*;* and *Fanshawe College of Applied Arts and Technology v. Hitachi, Ltd., 2016 CarswellOnt 12972 (Ont. S.C.J.)*, at paragraphs 30-40), leave to appeal granted on this issue *2017 CarswellOnt 11443 (ont. Div. Ct.)*, at paragraphs 39-51.

Also in contrast to the US, competition class actions in Canada are generally filed in provincial superior courts rather than in the federal court system. Nine of Canada's ten provinces have their own class action legislation. Where the alleged wrongful conduct is potentially national in scope, a defendant will typically face multiple class actions in two or more provinces, usually with overlapping classes. Because there is no consolidation mechanism in Canada similar to the US Multi-District Litigation system and because Quebec, unlike the rest of the Canadian provinces, is a civil law (as opposed to a common law) jurisdiction with a unique procedure governing class certification (or "authorization", as it is called in that province), a single plaintiff firm or, more typically, a consortium of plaintiff firms will (either by agreement of the competing firms or, if they cannot agree, by court order after a contested motion) usually represent a de facto national class through parallel proceedings in Ontario, Quebec and British Columbia, with interlocking classes that cover all plaintiffs/class members in Canada.

Although the test varies slightly between and among the common law provinces, on a certification motion, a proposed representative plaintiff must generally establish all of the following:

- The pleadings disclose a cause of action.
- There is an identifiable class of two or more persons that would be represented by the representative plaintiff.
- The claims of the class raise common issues.
- A class proceeding would be the preferable method for resolving the common issues.
- The representative plaintiff would fairly and adequately represent the class, has no conflict of interest with other class members on the common issues and has produced a litigation plan that is workable (see, for example, section 5, *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*Ontario Class Proceedings Act*) and section 4, *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*BC Class Proceedings Act*)).

There is no requirement that common issues predominate over individual issues, although the legislation in British Columbia, Alberta, Newfoundland and Labrador, New Brunswick and Nova Scotia permits the court to consider this factor.

The proposed representative plaintiff must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action. In discussing this standard of proof, the Supreme Court of Canada recently rejected the “rigorous analysis” standard mandated by the US Supreme Court for certification under Rule 23 (*Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (U.S. Sup. Ct.)*; *Comcast Corp. v. Behrend (2013), 569 US 27 (U.S. Sup. Ct.)*), but held that the “some basis in fact” standard requires more than “symbolic scrutiny” (*Pro-Sys*, at paragraph 103).

In this regard, the Supreme Court directed that a certification motion judge is required to find that “[t]here [are] sufficient facts to satisfy [her] that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage” (*Pro-Sys*, at paragraph 104). Applied to the expert evidence put forward by plaintiffs at the certification stage to satisfy a court that a plausible methodology exists by which the fact that each member of the class was overcharged and suffered a loss can be established using common evidence (see *Pro-Sys Consultants v. Microsoft Corp., 2013 CarswellBC 3257 (S.C.C.)*, at paragraphs 114-116, 118, 129, 131-133 and 140 and *Sun-Rype Products Ltd. v. Archer Daniels Midland Co., 2013 CarswellBC 3259 (S.C.C.)*, at paragraphs 74-76, 79. See also, e.g., *Chadha v. Bayer Inc. 2003 CarswellOnt 49 (Ont. C.A.)*, at paragraphs 30-68, and *Irving Paper Ltd. v. Atofina Chemicals Inc., 2010 CarswellOnt 3898 (Ont. S.C.J.)*, at paragraphs 49-53. But see *Godfrey (CA)*, at paragraphs 112-163, and *Shah v. LG Chem, Ltd., 2015 CarswellOnt 15099 (Ont. S.C.J.)*, at paragraphs 58, 63-64, leave to appeal on this issue denied *2016 CarswellOnt 12609 (On. Div.*

Ct.), holding that plaintiffs are merely required to put forward a plausible methodology for demonstrating that an overcharge reached the indirect purchaser level of the relevant distribution chain(s), not each individual within that level), this standard requires that the proposed methodology "must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e., that passing on has occurred)" (*Pro-Sys*, at paragraph 118). Further, "[t]he methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question" and "[t]here must be some evidence of the availability of the data to which the methodology is to be applied" (*Pro-Sys*, at paragraph 118). On the other hand, the Supreme Court concluded that a certification motion judge is not required to resolve conflicting facts or weigh evidence on a balance of probabilities because at the certification stage courts are "ill-equipped" to handle that level of evidentiary analysis (*Pro-Sys*, at paragraph 102).

Unlike the other nine Canadian provinces that are common law jurisdictions, Quebec is a civil law jurisdiction with a unique procedure governing class certification, or "authorization", as it is called in that province (see section 1003, Quebec *Code of Civil Procedure*, CQLR, c. C-25). On a motion to authorize the bringing of a class action in Quebec, the representative plaintiff (who is referred to as a petitioner) must allege sufficient facts in its motion to authorize to demonstrate all of the following:

- The claims of the proposed class members raise at least one common issue.
- The facts alleged seem to justify the conclusions sought.
- The composition of the class makes joinder difficult or impracticable.
- The proposed representative is in a position to represent the members of the class adequately.

A Supreme Court of Canada decision confirms that the evidentiary burden for authorization is a low one (and lower than the one that applies at the certification stage in the common law provinces) and that a petitioner need only establish an "arguable case" in light of the facts and the applicable law (*Option consommateurs v. Infineon Technologies AG, 2013 CarswellQue 10520 (S.C.C.)*). In the same decision, the Court also explained that, applying that standard at the authorization stage, the authorization motion judge's role is merely to filter out frivolous or manifestly improper cases.

Another key issue in class actions involving allegations of anti-competitive conduct, including under various provincial consumer protection statutes, has been the question of in what circumstances a court may properly decline to enforce an arbitration and class action waiver clause in a consumer contract in favour of a class proceeding.

Certain Canadian courts had concluded that, where a court determines that a class action is the preferable procedure for resolving the class members' claims, this finding had the effect of rendering any arbitration agreement invalid or inoperative (see, for example, *MacKinnon v. National Money Mart Co., 2004 CarswellBC 2253 (B.C. C.A.)*). However, the Supreme Court of Canada rejected this earlier jurisprudence and has held that arbitration clauses (even when they appear in standard form contracts) are to be given effect, and the class action claims subject to arbitration must be stayed absent a statutory provision expressly stating the legislature's intention to foreclose the use of arbitration (see *Seidel v. Telus Communications Inc., 2011 CarswellBC 553 (S.C.C)*, but see *Wellman v. TELUS Communications Co., 2014 CarswellOnt 16562 (Ont. S.C.J.)*, at paragraphs 82-91).

Remedies

Compensatory Damages

Under the statutory right of action for damages in section 36 of the *Competition Act* and for common law claims, only single or compensatory damages equal to the actual loss or damage proved to have been suffered by the plaintiff are recoverable. As previously noted, unlike in the US, trebling is not permitted or available.

Restitution

Restitution or disgorgement of a defendant's ill-gotten gains from anti-competitive conduct is available as a remedy for an equitable claim of unjust enrichment. There is a continuing controversy in Canada regarding the doctrine of waiver of tort. That doctrine provides that a plaintiff may elect to waive or give up the normal tort damages available in respect of a claim of civil conspiracy or unlawful means tort, for example, in favour of disgorgement of the benefit unjustly accruing to the defendant as a result of the tortious conduct in issue (*Pros-Sys*, at paragraph 93). The controversy relates to whether waiver of tort is a cause of action or merely a remedy and, in either event, whether the plaintiff is required to prove each of the essential elements of the underlying tort (including the fact of loss or damage), which is purported to be waived before recovery is permitted.

Restitution is not an available remedy in a statutory claim pursuant to section 36 of the *Competition Act*. Canadian case law confirms that the sole remedy available for claims under that provision is compensatory damages equal to the actual loss suffered by the plaintiff as a result of a breach of a provision in Part VI or an order made under the *Competition Act* (see, for example, *Wakelam v. Johnson & Johnson, 2014 CarswellBC 203 (B.C. C.A.)*, at paragraphs 90-91).

However, there is authority that a breach of the *Competition Act* may indirectly give rise to an entitlement to restitution to the extent that an equitable claim or common law tort claim is founded on that breach (see, for example, *Watson v. Bank of America Corp., 2015 CarswellBC 2356 (B.C. C.A.)*, at paragraph 58 and *Apotex Inc. v. Hoffman-La Roche Ltd., 2000 CarswellOnt 4773 (Ont. C.A.)*, at paragraph 21).

Punitive or Exemplary Damages

The words of section 36 of the *Competition Act*, which restrict recovery to "an amount equal to the loss or damage proved to have been suffered," have been interpreted as proscribing an award of punitive or exemplary damages for claims brought under that provision (*Wong v. Sony of Canada Ltd., 2001 CarswellOnt 1546 (Ont. S.C.J.)*, at paragraph 17 and *Cuzzetto v. Business in Motion International Corp., 2014 CarswellNat 112 (F.C.)*, at paragraph 113).

Accordingly, private litigants will normally also assert common law causes of action, such as civil conspiracy, which permit such damages. A successful common law claimant may be awarded punitive damages only where it has shown that the defendant(s) engaged in misconduct "so malicious, oppressive and high-handed that it offends the court's sense of decency" (*Hill v. Church of Scientology of Toronto, 1995 CarswellOnt 396 (S.C.C.)*, at paragraphs 196 and 199 and *Whiten v. Pilot Insurance Co., 2002 CarswellOnt 537 (S.C.C.)*).

Injunctive Relief

Injunctive relief is also not available under section 36 of the *Competition Act* (see, for example, *947101 Ontario Ltd v. Barrhaven Town Centre Inc., 1995 CarswellOnt 322 (Ont. Gen. Div.)*, but see *Telus Communications Co. v. Rogers Communications Inc., 2009 CarswellBC 3424 (B.C. C.A.)*). As a result, private litigants typically also assert common law claims in respect of which injunctive relief may be granted upon showing all of the following:

- A serious issue to be tried (that is, the claim is neither frivolous nor vexatious).
- Irreparable harm (that is, harm not compensable in damages).
- The balance of convenience favours issuance of an injunction (that is, that the moving party will suffer the greater harm if the injunction is refused) (*RJR-MacDonald Inc. v Canada (Attorney General), 1994 CarswellQue 120 (S.C.C.)*, at paragraphs 83-85).

The same test applies for the issuance of interim and interlocutory injunctive relief in connection with a private application to the Tribunal (see section 104, *Competition Act* and *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd., 2004 CarswellNat 5577 (Competition Trib.)*).

Legal (Attorneys') Fees

The general rule in Canada is that the successful party in an action (whether the defendant or the plaintiff) is entitled to recover a portion of its costs in connection with the litigation (that is, legal fees and disbursements plus applicable taxes). Costs awards commonly vary between one quarter and one half of the successful party's costs. However, the courts and the Tribunal generally enjoy significant discretion in fixing both the quantum and scale of costs.

Section 36 of the *Competition Act* departs from the general rule in that it authorizes a plaintiff asserting a statutory claim for damages under the *Competition Act* to seek up to the full costs of both:

- The proceeding (rather than only partial indemnification).
- Any investigation undertaken by the plaintiff in relation to the alleged anti-competitive conduct (for example, surveys, market analyses and economic studies) (*321665 Alberta Ltd. v. ExxonMobil Canada Ltd., 2012 CarswellAlta 197 (Alta. Q.B.)*, at paragraphs 61-62).

In the class action context, certain provinces are no-costs jurisdictions. Except where there has been vexatious, frivolous, abusive or improper conduct or there are other exceptional circumstances, the courts in British Columbia, Manitoba and Newfoundland and Labrador may not award costs to any party to an application for certification, class proceeding or related appeal (see section 37, *BC Class Proceedings Act*; section 37, *The Class Proceedings Act*, S.M. 2002, c. 14 and section 37, *Class Actions Act*, S.N.L. 2001, c. C-18.1).

Joint and Several Liability

It is likely that defendants are jointly and severally liable for civil conspiracy and unlawful means tort, with the result that each may be held individually liable for the full amount of a plaintiff's loss or damage. It is still an open question, however, whether there is joint and several liability for a statutory damages claim under section 36 of the *Competition Act*.

Similarly, to the extent that there is joint and several liability in price-fixing and other cartel cases alleging civil and statutory conspiracy claims and/or unlawful means tort, it remains to be decided whether a defendant has a right of contribution and indemnity from its co-defendants in the event that a plaintiff requires that defendant to pay an amount in excess of its proportionate liability.

Limitation Periods

Under section 36(4) of the *Competition Act*, the limitation period for an action under section 36 is two years from the **later of**: (a) a day on which the criminal conduct at issue was engaged in, or the order of the Tribunal or the court was breached; or (b) the day on which any criminal proceedings relating to the conduct contrary to Part VI of the *Competition Act* or the failure to comply with the order "were finally disposed of."

One of the curious consequences of the wording of this provision is a limitation period for a statutory claim for damages that has started running based on the day on which the conduct in issue ceased may be restarted by the subsequent commencement of criminal proceedings in respect of that violation. Similarly, a criminal prosecution could resurrect a claim under section 36 that occurred more than two years after the conduct ceased and would otherwise have been statute-barred. Notably, in this regard, in contrast to the US, there is no statute of limitations for the commencement of criminal proceedings in respect of indictable offences (such as conspiracy and bid-rigging).

There is conflicting authority as to whether the limitation period for bringing an action under section 36 of the *Competition Act* runs independent of knowledge by the plaintiff of the conduct on which the statutory claim for damages is based, although there is now appellate authority for the position that the judge-made discoverability principle (that is, that time begins to run only when the plaintiff knew or ought reasonably to have known that a cause of action had accrued) applies to claims under that provision (see *Fanshawe (CA)*, at paragraphs 18 and 32-49). See also *Godfrey (CA)*, at paragraphs 69-95, but see, for example, *Fairview Donut Inc. v. TDL Group Corp., 2012 CarswellOnt 2223 (Ont. S.C.J.)* (Fairview Donut), at paragraphs 635-650, affirmed *2012 CarswellOnt 15496 (Ont. C.A.)*).

As discussed above, there is a one-year limitation period for private applications to the Tribunal running from the date the conduct in issue ceased.

Common law and equitable causes of action are subject to the limitation periods set out in provincial statutes of limitation. The applicable limitation periods vary by province and can range from two to six years from the day on which the claim was discovered or ought reasonably to have been discovered.

In certain circumstances, a limitation period may be tolled (that is, suspended), including in all of the following cases:

- In the case of statutory actions for damages under section 36 of the *Competition Act*, as described above, by the commencement of criminal proceedings.
- For both common law and equitable claims, and also arguably for statutory claims under section 36 of the *Competition Act* (although the point has not been judicially considered or decided), as a result of the fraudulent concealment by a defendant of a plaintiff's cause of action. The deliberate concealment of facts will suspend the applicable limitation period until the time the plaintiff can reasonably discover the existence of his cause of action (see, for example, *M. (K.) v. M. (H.), 1992 CarswellOnt 841 (S.C.C.)*, at paragraphs 53-66 and *Giroux Estate v. Trillium Health Centre, 2005 CarswellOnt 241 (Ont. C.A.)*, at paragraphs 22-30). The doctrine of fraudulent concealment has been codified in certain provincial statutes of limitation (see, for example, section 4, *Limitations Act*, R.S.A 2000, c. L-12, and section 5, *The Limitations of Actions Act*, R.S.M. 1987, c. L150).
- On the commencement of a class proceeding. Under the provincial class actions statutes, the commencement of a class action generally suspends the limitation period for any cause of action asserted in that proceeding in favour of a class member until he or she "opts out" of the proceeding or is excluded from the class, or the proceeding otherwise comes to an end, including by way of a decertification order (see, for example, section

39, *BC Class Proceedings Act*; section 28, *Ontario Class Proceedings Act*; section 43, *The Class Actions Act*, S.S. 2001, c. C-12.01 and section 2908, *Civil Code of Quebec*, S.Q. 1991, c. 64; see also *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp., 2015 CarswellOnt 7762 (Ont. S.C.J.)*).

For more information, see *Practice Note, Private Action Limitation Periods*.

Jurisdictional Issues

Most jurisdictional disputes related to private competition litigation in Canada have arisen in the context of class actions involving international conspiracies to fix prices, allocate markets and/or limit output, where some or all of the defendants had no physical presence in Canada.

The test for determining whether a Canadian court may assume jurisdiction over a foreign defendant is commonly referred to as the "real and substantial connection" test. As elaborated by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd., 2012 CarswellOnt 4268 (S.C.C.)*, that test has three parts:

- Does the court have presumptive jurisdiction based on the existence of one or more prescribed connecting factors that link the subject matter of the litigation to the forum (such as whether the defendant carries on business in the forum or the tort was committed in the forum)?
- Can the court's presumptive jurisdiction be rebutted by showing that the connecting factors do not point to a real relationship or to only a weak relationship between the subject matter of the litigation and the forum?
- If the court has jurisdiction, should it decline to exercise its jurisdiction in favour of a clearly more appropriate forum based on the doctrine of *forum conveniens*?

Applying the real and substantial connection test in class actions alleging common law and statutory conspiracies, Canadian courts have held that "any conspiracy entered into abroad that fixes prices or allocates markets in Canada so as to create losses through artificially higher prices in Canada, gives rise to the tort of civil conspiracy in Canada. [...] [A] conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad" (see, for example, *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., 2002 CarswellOnt 235 (Ont. S.C.J.)*, at paragraphs 58, 63-86 and 101-102 and *Sun-Rype Products Ltd. v. Archer Daniels Midland Co., 2013 CarswellBC 3259 (S.C.C.)*, at paragraphs 44-47).

A recent decision clarifies that on a motion by a foreign defendant challenging the jurisdiction of a Canadian court, the plaintiff is required to establish a "good arguable case" for the court to assume jurisdiction on the basis of one or more of the prescribed connecting factors, "through either the allegations in the statement of claim [which are presumed to be true unless put in issue by the defendant] or a combination of the allegations in the statement of claim and admissible evidence filed on the jurisdiction motion" (*Shah v. LG Chem, Ltd., 2015 CarswellOnt 5769 (Ont. S.C.J.)* (Shah), at paragraph 61).

The threshold test of a good arguable case is a low one but requires "something more than allegations of a conspiracy and reliance on a class action in another jurisdiction", such as evidence that it was reasonably foreseeable that the allegedly cartelized product would enter the Canadian market (*Shah*, at paragraphs 15 and 70).

With respect to absent foreign class members, a recent Ontario Superior Court of Justice decision holds that Ontario courts cannot assert jurisdiction over foreign claimants based on the real and substantial connection test (*Airia Brands v. Air Canada, 2015 CarswellOnt 12787 (Ont. S.C.J.)*). Presence, consent or submission is required (i.e., absent foreign claimants can only become a plaintiff in an Ontario proceeding if they actually bring the claim themselves or join an existing claim) for jurisdiction.

Standard to Strike Pleadings

The test for a motion to strike a pleading on the ground that it discloses no reasonable cause of action is "assuming that the facts as stated in the Statement of Claim can be proved, is it 'plain and obvious' that the plaintiff's Statement of Claim discloses no reasonable case of action?" (*Hunt v. T & N plc, 1990 CarswellBC 216 (S.C.C.)*, at paragraph 33). In a class action, the same standard is applied under the first prong of the test for certification in the common law provinces which requires a finding that the pleadings disclose a cause of action (*Fairview Donut*, at paragraph 210).

Government Enforcement and Private Competition Litigation

In Canada, while private competition actions often follow government investigations and prosecutions, it is increasingly the case that private litigation (especially class action litigation) will be commenced in the absence of an investigation or prosecution (see, for example, *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.* in advance of an investigation or prosecution in Canada (see, for example, *Osmun v. Cadbury Adams Canada Inc., 2010 CarswellOnt 2813 (Ont. S.C.J.)*), or despite a decision by the Bureau to discontinue an investigation (see, for example, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2009 CarswellBC 3035 (B.C. C.A.)*).

Below is a brief overview of the government competition enforcement regime in Canada and a few of the key issues and considerations that government enforcement may raise for private litigants.

For more information, see *Practice Notes, Criminal Competition Law Enforcement* and *Competition Bureau Investigations*.

Competition Authorities

As noted above, the Bureau is the government agency responsible for administering and enforcing the *Competition Act*, including investigating alleged violations of the Act. In criminal cases, the Bureau will investigate the alleged wrongdoing but it is the Attorney General of Canada, through the Director of Public Prosecutions (DPP), who determines whether charges should be laid and conducts any resulting prosecutions.

Penalties for Criminal Anti-Competitive Conduct

The *Competition Act* imposes severe sanctions for criminal anti-competitive conduct. For example, conspiracy, bid-rigging and false or misleading advertising each carry sentences of up to 14 years imprisonment. An accused person convicted of these offences also faces, either in the alternative to or in addition to incarceration, a fine in the discretion of the court (that is, without a set limit), in the case of bid-rigging and misleading advertising, and a fine of up to $25 million for conspiracy (see sections 45(2), 47(2) and 52(5), *Competition Act*).

Immunity and Leniency

In Canada, both immunity and leniency are available to firms and individuals participating in cartels. The immunity regime (as set out in the Bureau's Immunity Program) is "winner-take-all"; only the first to self-report gets full immunity from criminal prosecution (provided that, among other things, the Bureau is unaware of the offence or is aware of the offence but has insufficient evidence to warrant a referral of the case to the DPP). For those who self-report thereafter, only leniency in the form of reduced criminal sanctions is available (as described in the Bureau's Leniency Program). Even where leniency is granted, a guilty plea is required and employees of leniency applicants may face jail time.

In order to obtain immunity, an applicant must satisfy several requirements, including all of the following:

- Terminating its involvement in the cartel.
- Disclosing to the Commissioner and the DPP "any and all conduct of which it is aware, or becomes aware, that may constitute an offence under the *Competition Act* and in which it may have been involved".
- Providing "full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct for which immunity is sought" (Bulletin, *Immunity Program under the Competition Act*, Competition Bureau, June 7, 2010, at pages 3-4).

Leniency applicants must also have ceased participating in the cartel, must provide full, frank, timely and truthful cooperation, both in the Bureau's investigation and in any subsequent prosecution, and are required to plead guilty. Using a base fine equal to 20% of the cartel participant's affected volume of commerce in Canada, the Bureau will generally recommend to the DPP that the first leniency applicant receive a 50% reduction in the fine that it would otherwise have recommended, and that charges not be laid against the employees, officers or directors of the first applicant. For the second, third and subsequent leniency applicants, the Bureau will recommend progressively smaller discounts and will consider, on a case-by-case basis, whether to recommend charges against officers, directors or employees (see Bulletin, *Leniency Program*, Competition Bureau, 2010, at pages 8-9 and *Leniency Program: Frequently Asked Questions*, Competition Bureau, at Q30).

Leniency applicants may also be eligible for Immunity Plus. Where the party seeking leniency provides evidence of another offence under the *Competition Act* of which the Bureau was previously unaware, and the applicant otherwise satisfies the requirements of the Immunity Program, the Bureau will recommend immunity in respect of the newly disclosed offence and an additional 5% to 10% increase in that applicant's leniency discount in relation to the original offence.

Successful immunity and leniency applicants receive no benefits or advantages in related civil litigation. Further, pursuant to the Government of Canada's supplier integrity regime, leniency applicants who do business with the Canadian government face automatic debarment for 10 years.

For more information, see *Practice Note, Competition Bureau Immunity and Leniency Programs*.

Issues and Considerations in Private Actions

Access to Wiretap Evidence

The Supreme Court has held that private plaintiffs in a class action are generally entitled to production from the Bureau of wiretap surveillance from a related criminal investigation under the *Competition Act* (*Jacques c. Pétroles Irving inc., 2014 CarswellQue 9818 (S.C.C.)*). While the *Criminal Code*, R.S.C. 1985, c. C-46 (Code) prohibits the disclosure of intercepted private communications, that prohibition is subject to various exceptions, including disclosure "in the course of or for the purpose of giving evidence in any civil ... proceedings in which the person may be required to give evidence on oath." (section 193(2)(a), Code).

Access to Information from Immunity/Leniency Applicants and Bureau Investigations

The Bureau's policy is to assert settlement privilege in respect of the identity of and information provided by immunity and leniency applicants and to disclose such privileged and confidential information to private litigants only if required to do so by court order (*Immunity Program Bulletin*, at page 8).

A recent decision supports the Bureau's policy in this regard, affirming (albeit in *obiter*) that settlement privilege "extend[s] to any use of the information, against the person who provided it, in another type of proceeding, such as a civil claim" (*R. v. Nestlé Canada Inc., 2015 CarswellOnt 1323 (Ont. S.C.J.)*, at paragraph 53).

Public interest privilege or immunity prohibits the disclosure to private plaintiffs of documents and information collected by the Bureau from third parties in connection with an investigation. Documents submitted by a defendant in a civil case to the Bureau in the course of an investigation under the *Competition Act* may be subject to settlement or another legal privilege but, if not, will be producible through the ordinary civil discovery process if they are relevant (*Pro-Sys Consultants Ltd. v. Microsoft Corp., 2016 CarswellBC 137 (B.C. S.C.)*, at paragraphs 25-28).

Presumptions

The *Competition Act* creates two presumptions in favour of private litigants asserting claims under section 36. First, absent proof to the contrary, a person who has been convicted of a criminal offence under Part VI of the *Competition Act* or convicted or punished for breaching an order issued under the *Competition Act* is presumed to have engaged in the prohibited conduct. Second, evidence given in a prior criminal proceeding as to the effect of the defendant's unlawful conduct is also evidence of the effect of that conduct in a follow-on private action under section 36.

The purpose of these statutory aids is to assist those who have suffered a loss as a result of anti-competitive conduct and to avoid the duplication of evidence in actions under section 36 of the *Competition Act* (*Forest Protection Ltd. v. Bayer AG, 1998 CarswellNB 449 (N.B. C.A.)*, at paragraph 21).

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