
THE PRIVATE COMPETITION ENFORCEMENT REVIEW

FOURTH EDITION

EDITOR
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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Editor

ILENE KNABLE GOTTS

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CONTENTS

Editor's Prefacevii
	<i>Ilene Knable Gotts</i>
Chapter 1	AUSTRALIA..... 1
	<i>Trish Henry, Domenic Gatto and Peta Stevenson</i>
Chapter 2	BRAZIL..... 21
	<i>Carlos Francisco de Magalhães, Gabriel Nogueira Dias and Cristiano Rodrigo Del Debbio</i>
Chapter 3	CANADA 34
	<i>Eliot Kolers and Danielle Royal</i>
Chapter 4	CHILE..... 46
	<i>Paulo Montt and Benjamín Mordoj</i>
Chapter 5	ENGLAND & WALES 57
	<i>Peter Scott and Mark Simpson</i>
Chapter 6	EUROPEAN UNION..... 88
	<i>Bernd Meyring</i>
Chapter 7	FRANCE108
	<i>Mélanie Thill-Tayara and Marta Giner Asins</i>
Chapter 8	GERMANY120
	<i>Michael Dietrich and Marco Hartmann-Rüppel</i>
Chapter 9	HUNGARY141
	<i>Alexander Birnstiel and Peter Stauber</i>
Chapter 10	ISRAEL153
	<i>Eytan Epstein, Tamar Dolev-Green and Shiran Shabtai</i>
Chapter 11	ITALY.....173
	<i>Cristoforo Osti and Alessandra Prastaro</i>
Chapter 12	JAPAN189
	<i>Kozo Kawai and Madoka Shimada</i>

Chapter 13	KOREA201 <i>Sai Ree Yun, Kum Ju Son, Seung Hyuck Han, In Seon Choi and Sangwook Daniel Han</i>
Chapter 14	LITHUANIA.....212 <i>Ramunas Audzevičius and Tomas Samulevičius</i>
Chapter 15	NETHERLANDS225 <i>Naomi Dempsey, Albert Knigge and Weijer VerLoren van Themaat</i>
Chapter 16	NORWAY238 <i>Thomas Nordby and Nina Lea Gjerde</i>
Chapter 17	POLAND251 <i>Dorothy Hansberry-Biegunska</i>
Chapter 18	PORTUGAL.....260 <i>Joaquim Vieira Peres and Eduardo Maia Cadete</i>
Chapter 19	ROMANIA270 <i>Silvin Stoica and Mihaela Ion</i>
Chapter 20	SOUTH AFRICA281 <i>Jocelyn Katz</i>
Chapter 21	SPAIN.....294 <i>Alfonso Gutiérrez</i>
Chapter 22	SWITZERLAND307 <i>Christoph Tagmann and Bernhard C Lauterburg</i>
Chapter 23	TURKEY320 <i>Esin Çamlıbel</i>
Chapter 24	UNITED STATES334 <i>Ilene Knable Gotts</i>
Appendix 1	ABOUT THE AUTHORS.....359
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS377

EDITOR'S PREFACE

Ilene Knable Gotts

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States and reflects the societal views generally towards the objectives and roles of litigation. The United States litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. As a result, the process imposes high litigation costs (in time and money) on all participants and promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs has created an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty from the competition authorities. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high litigation activity in the near-term, particularly involving intellectual property rights and cartels.

The United States has not been alone, however, in having a long-established private litigation history. Brazil, for example, has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and on monopoly and market closure claims since the 1950s. Nonetheless, Brazil – as well as most of the other jurisdictions discussed in this book – has seen an increasing role for private antitrust litigation in the past few years. In addition, other jurisdictions have more recently initiated private litigation regimes (for instance, Israel and Poland) as a complement to increased public antitrust enforcement.

The European Union remains in a state of flux. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States

that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions [...]. The model is based on compensation through single damages for the harm suffered'. The key recommendations include collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia instead entered into a new round of consultations and may combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress. In the meantime, the EU issued a report regarding quantifying damages that might be of interest to the Member States.

Even in the absence of the issuance of final EU guidelines, the Member States throughout the European Union (and indeed in most of the world) have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of these states have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. Collective actions are now recognised in Denmark, Finland and Sweden. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and England and France are currently also contemplating collective action legislation. Some jurisdictions have not to date had any private damages awards in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages (e.g., Lithuania or Romania).

Almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis. Jurisdictions also vary regarding how difficult they make it for a plaintiff to have standing to bring the case. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its actors; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands or the UK), with liability arising for actors who negligently or knowingly

engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway or the Netherlands), others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, while yet others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permit the enforcement officials to participate in the case (e.g., in Brazil, and in Germany as well, the competition authorities may act as *amicus curiae*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Spain, until legislation loosened this requirement somewhat). Interestingly, no other jurisdiction has chosen to replicate the United States system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). Neither does any other jurisdiction permit the broad-ranging and court-sanctioned scope of discovery permitted in the United States. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Varying cultural views also clearly affect litigation models. Outside of the EU and North America, the availability of group or class actions varies extensively. Some jurisdictions (e.g., Turkey) only permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany or Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., Korea, Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis that courts are permitted to join similar lawsuits (Romania, Switzerland). In Japan, class actions are not available except to organisations formed to represent consumer members. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands, Spain, Switzerland) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In

Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work-product or joint work-product privileges in Japan, limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland).

The culture in some places, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pre-trial settlement conference is mandatory.

Private antitrust litigation is largely a work in progress in most parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction appears to be to acknowledge that private antitrust enforcement has a role to play. In Japan, for example, for the first time in the 10-year history of the enabling provisions, a private plaintiff prevailed in an injunction case. Also, a derivative shareholder action was filed in Japan in the last year against directors for negligence in 'not filing a leniency application' in a cartel matter. In other jurisdictions, the transformation has been more rapid. During the last year in Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the last year alone, some jurisdictions have had decisions that clarified the availability of pass-on defence (e.g., France, Korea) as well as indirect purchaser claims (e.g., Korea).

Many of the issues raised in this book, however, such as pass-on defence and the standing of indirect purchasers, remained unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues such as privilege are subject to proposed legislative changes. The one constant cutting across all jurisdictions is the upwards trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts

Wachtell, Lipton, Rosen & Katz

New York

September 2010

Chapter 3

CANADA

*Eliot Kolers and Danielle Royal**

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private antitrust litigation in Canada takes place either in the civil courts of the various provinces of Canada or before the federal Competition Tribunal (‘the Tribunal’), depending on the nature of the matter. Most of the litigation activity to date has occurred in the civil courts. Of those cases, most are class proceedings that allege the existence of price-fixing cartels among groups of defendants and seek damages in respect of the ‘overcharge’ (or inflated price) for the product.

In most of these class proceedings, the alleged price-fixed product is an input into another product (e.g., a microchip) that passes through a chain of distribution to end users or consumers (e.g., a computer). Given the requirement, discussed below, that a plaintiff must have suffered harm to have a private antitrust claim, important questions may arise as to whether direct purchasers of the price-fixed product passed on some or all of the overcharge down the chain of distribution to indirect purchasers, and if so, whether the indirect purchasers passed on some or all of the overcharge even further down the chain.

Until 2011, to the extent that Canadian courts had considered the ‘pass-on’ issue, they had ruled that both direct and indirect purchasers have standing to bring price-fixing conspiracy claims, and that defendants can use ‘pass-on’ to raise issues to challenge the benefit of certification of the class or to otherwise challenge a plaintiff’s claim of loss or damage. However, in April 2011, the Court of Appeal of British Columbia reversed certification orders in the *Microsoft* and *Sun-Rype* cases upon concluding that indirect purchasers have ‘no cause of action recognized in law’ and therefore no capacity to sue to recover an alleged overcharge.¹

* Eliot Kolers and Danielle Royal are partners at Stikeman Elliott LLP.

1 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186 [*Microsoft*] and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187 [*Sun-Rype*].

The plaintiffs in both *Microsoft* and *Sun-Rype* have sought leave to appeal these decisions to the Supreme Court of Canada. Should the Supreme Court hear the appeals – which had not been determined at the time of writing – its resolution of the issue would likely apply in all provinces of Canada. On the other hand, should it not hear the appeals, the arguments that were accepted in British Columbia will likely be litigated in the coming years in the courts of the other provinces. In any event, the *Microsoft* and *Sun-Rype* decisions do represent a change from the treatment of indirect purchasers in past Canadian litigation, and as such are likely the most significant development in private antitrust litigation in Canada in the past year or more.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Section 36: private actions for damages incurred as a result of criminal conduct

Section 36 of Canada’s Competition Act (‘the Act’) provides that individuals or companies can bring private actions in a court of competent jurisdiction to recover damages incurred as a result of an alleged violation of the Act’s criminal provisions (Part VI, Sections 45-62). The offences in respect of which damages can be sought are conspiracy (Section 45), bid-rigging (Section 47), misleading advertising (Section 52) and deceptive telemarketing (Section 52.1).² Recovery in such cases is limited to the actual loss suffered by the plaintiff, plus the full cost of any investigation and legal costs in connection with the matter. Double or treble damages are not recoverable, nor are punitive damages.

If the private defendant has been convicted of a criminal offence under the Act, the record of the criminal proceedings constitutes proof that the defendant engaged in anti-competitive conduct, absent evidence to the contrary. However, an essential element of actions under Section 36 is that the plaintiff must have suffered actual loss or damage as a result of the defendant’s conduct. It is not enough for the plaintiff to point to anti-competitive conduct that did not affect it. Where, however, the private defendant has not (yet) been convicted of a criminal offence under the Act, the plaintiff bears a burden of proof on the traditional civil ‘balance of probabilities’ standard.

A civil claim for damages under Section 36 is also available against a party that has breached an order of the Tribunal, the federal adjudicative body with exclusive jurisdiction over all non-criminal antitrust offences.³

ii Section 103.1: private access to the Tribunal for civil offences

Section 103.1 of the Act permits private litigants to bring an application before the Tribunal with respect to certain civil ‘reviewable matters’. Private access to the Tribunal

2 Prior to its repeal in March 2009, price maintenance (Section 61) was also a *per se* offence under Part VI and there are several ongoing class actions that seek damages based on the now-repealed Section 61 of the Act. Prior to the 2009 amendments, geographic price discrimination and predatory pricing were also criminal offences. These former offence provisions remain civilly reviewable.

3 *Canada Cement LaFarge v. BC Lightweight Aggregate*, [1983] 1 S.C.R. 452; Section 36 of the Act.

is permitted only with respect to the following restrictive trade practices: refusal to deal (Section 75); resale price maintenance and refusal to supply (Section 76); and exclusive dealing, tied selling and market restriction (Section 77). Notably, no private actions are permitted in respect of mergers or abuse of dominance. Further, even if an applicant is ultimately successful in showing that the respondent violated a provision of the Act, the Tribunal is only permitted to order the respondent to cease its anti-competitive behaviour. The Tribunal has no jurisdiction to grant monetary remedies or awards.

Private litigants must obtain leave from the Tribunal before being allowed to bring an application. To obtain leave, an applicant must show that it is ‘directly and substantially affected’ in its businesses by the allegedly anti-competitive conduct; to do so it must, at a minimum, provide ‘sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal (i.e., that the applicant may have been directly and substantially affected in the applicant’s business by a reviewable practice)’, which is ‘a lower standard of proof than proof on a balance of probabilities.’⁴ While this test might not seem difficult to meet, private litigants to date have faced some difficulty in obtaining leave.

iii Common law: torts of conspiracy and interference with economic interests

In practice, claims for damages under Section 36 of the Act are often accompanied by claims in tort. One potential reason for a plaintiff to add a common law tort claim is that it may allow for claims of punitive damages, which cannot be awarded under Section 36. The two tort claims most frequently pleaded in conjunction with Section 36 claims are claims of common law conspiracy and unlawful interference with economic interests. The constituent elements of these torts are different from the elements of claims under the Act but they can be complementary.

iv Limitation period

The limitation period is set out in Subsection 36(4) of the Act. Actions must be commenced within two years of the later of (a) a date on which the anti-competitive conduct was engaged in or (b) the final disposition of any criminal proceedings relating to the anti-competitive conduct.

III EXTRATERRITORIALITY

i General jurisdictional rule

In order for a Canadian court to have jurisdiction over a dispute, there needs to be a ‘real and substantial link’ between Canada and the conduct in issue in the case.⁵ In the context of private actions alleging anti-competitive conduct, the courts have held that the language of Section 45 of the Act prohibiting anti-competitive conspiracies is not limited to conduct

4 *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339 [*Barcode*], at paragraphs 16 and 17.

5 *R v. Libman*, [1985] S.C.J. No. 56 at paragraph 74.

that has taken place in Canada.⁶ An Ontario court held that the ultimate issues for the court were whether the subject matter of the action ‘has a real and substantial connection to Ontario’ and whether ‘the foreign defendant is connected to that subject matter.’⁷ In order to establish a connection between the subject matter and Ontario, the court said that ‘[t]here must be a causal connection between the alleged damage (sustained in Canada) and the defendants to establish a realistic possibility that the defendants may be responsible in law for the damage through their unlawful conduct.’⁸ In many cases, jurisdiction has been taken by Canadian courts on the basis of sales of a product having been made in Canada even if the defendant in question had no presence in Canada.

ii Forum non conveniens

Even though the jurisdiction of a court to examine the conduct in question may be established, the court still has the discretion to decline jurisdiction, based on the doctrine of *forum non conveniens*.⁹ The test on a motion for a stay of proceedings on the basis of *forum non conveniens* is whether there is clearly a more appropriate forum in which the case should be tried other than the forum chosen by the plaintiff.¹⁰ ‘Where a plaintiff has an action as of right against domestic defendants, the burden is upon the foreign defendants to establish that the domestic forum is *forum non conveniens*.’¹¹

iii Export cartels

Section 45(5) of the Act provides that the cartel provision of the Act does not apply to cartels that engage only in the export of products from Canada, unless the impugned cartel has resulted or is likely to result in a reduction or limitation of the real value of exports of a product; has restricted or is likely to restrict any persons from entering into or expanding the business of exporting products from Canada; or is in respect only of the supply of services that facilitate the export of products from Canada.

IV STANDING

i Standing under Section 36

Under Section 36 of the Act, ‘any person’ can bring a private action for damages against a defendant alleged to have violated a criminal provision of the Act or the order of

6 *Vitapharm Canada Ltd v. F Hoffmann-LaRoche Ltd*, [2002] OJ No. 298 at paragraph 95 (Ont. Sup. Ct.), affirmed [2002] OJ No. 1400 (Div. Ct.) [*Vitapharm*] (motion by five of the foreign defendants challenging the jurisdiction of the court).

7 *Id.* at paragraph 95.

8 *Id.* at paragraph 97. In this case, some of the foreign defendants pleaded guilty to the offence of conspiracy. The court stated that when the alleged conspiracy was proven, there was a real and substantial connection to Ontario with respect to the subject.

9 *Id.* at paragraph 103.

10 *Id.* at paragraph 106.

11 *Id.* at paragraph 107.

a court or the Tribunal issued under the Act. However, as noted in Section II above, the plaintiff must have suffered actual loss or damage from the impugned conduct. Quantifiable proof of harm is an important part of establishing liability under Section 36 of the Act.

As noted in Section I above, the standing of indirect purchasers to bring claims under Section 36 has recently been denied by the British Columbia Court of Appeal, a decision whose impact nationwide will likely be determined in the next one or two years.

ii Standing under Section 103.1

‘Any person’ may apply to the Tribunal for leave to bring a case under Sections 75-77 of the Act.¹² As discussed in Section II above, leave will only be granted to persons who are ‘directly and substantially affected’ in their business by the defendant’s allegedly anti-competitive conduct, and the applicants must provide ‘sufficient credible evidence’ of the alleged conduct to give rise to a *bona fide* belief by the Tribunal that the alleged activity could be subject to an order under Sections 75, 76 or 77.

V THE PROCESS OF DISCOVERY

In Canada, discovery is comprised of document production obligations and oral examinations for discovery. In civil proceedings, parties are generally required to provide an affidavit of documents identifying the documents that are relevant to the litigation, and to produce those that are not privileged. Document production obligations can be very broad. Principles of proportionality are intended to ensure that the cost and burden of document production in a civil trial is proportional to the matters and amounts at issue in the claim. The challenges of electronic discovery and the increasingly technological nature of documentary production are issues that are the subject of frequent commentary by lawyers and judges alike. Privileged documents are not disclosed, but are required to be identified with sufficient particularity in the affidavit of documents to enable the other party to evaluate the privilege claim.

Oral examinations for discovery are generally more limited than in the United States and certain other jurisdictions. For instance, in Ontario a plaintiff to a proceeding is entitled as of right to examine only one representative per defendant. That representative is required to inform him or herself about the issues in the litigation and may answer questions by way of written undertaking in circumstances where the information is available but not within the personal knowledge of the representative being examined.

In proceedings before the Tribunal, each party is required to serve an affidavit of documents identifying the documents that are relevant to any matter in issue. There are no provisions in the Tribunal Rules for pre-trial oral discovery, but the Tribunal maintains discretion to order it on a case-specific basis.

12 Competition Tribunal Rules SOR/2008-141. Section 1 defines person as ‘a corporation, a partnership and an unincorporated association’.

VI USE OF EXPERTS

The use of industry experts and expert economists is commonplace in Canadian private antitrust litigation. Expert affidavit evidence from economists is also typical in most Canadian jurisdictions at the class certification stage. Because a class certification motion is not a merits assessment, expert evidence tendered at this preliminary stage of the proceeding tends to focus on whether loss or damage can be proven on a class-wide basis.

Both in civil trials and hearings before the Tribunal, expert evidence plays a significant role. The civil procedure rules in each of the provinces address the delivery of expert reports before trial. The Tribunal Rules also provide for the delivery of expert evidence before the hearing. In addition, the Tribunal Rules provide the Tribunal the authority to appoint its own independent expert to inquire into or report on any question of fact or opinion relevant to an issue in the proceeding.¹³

VII CLASS ACTIONS

In Canada, class actions are provided for by statute in all provinces except Prince Edward Island.¹⁴ Unlike the United States, there is no procedure akin to the multi-district litigation process to manage multi-jurisdictional class actions.¹⁵ As a result, class actions alleging anti-competitive conduct will often be brought in more than one province. Frequently, class counsel in Canada will make informal arrangements to proceed in only one jurisdiction even though similar actions may be commenced in other jurisdictions. If a class action in one province has been certified as a ‘national class’ (or a class that includes residents from across Canada), a stay of similar proceedings may be sought, and will generally be obtainable, in other provinces.¹⁶ However, there remains jurisdictional uncertainty regarding the enforceability of national classes.¹⁷ Some of the more recent class action statutes have attempted to address the complications raised by multi-jurisdictional class actions through statutory language. For instance, the class action legislation in Saskatchewan and Alberta contains provisions that address when the court should exercise jurisdiction over a multi-jurisdictional class action.¹⁸

13 Competition Tribunal Rules (SOR/2008-141).

14 However, even in Prince Edward Island class actions may be allowed under a local rule of court subsequent to the Supreme Court of Canada’s decision in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

15 If a national class of plaintiffs is certified, it means that all Canadian residents, whether or not they have a connection with the jurisdiction where the class action is certified and who do not opt-out, will be included in the class.

16 For instance, see *Kelman v. Goodyear Tire & Rubber Co.* (2005), 5 CPC (6th) 161 (Ont. Sup. Ct.). The British Columbia and Alberta proceedings were stayed on consent pending the outcome of the Ontario proceeding.

17 *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549.

18 The Class Actions Act, SS 2001, chapter C-12.01, sections 6 and 6.1, the Class Proceedings Act, SA 2003, chapter C-16.5, sections 5(6) and 5(7).

i Requirements for certification

Although there are some differences in the statutory language in the common law jurisdictions in Canada, a class proceeding may be certified by the court if the following requirements are met:

- a* the pleadings disclose a cause of action;
- b* there is an identifiable class of two or more persons;
- c* the claims of the class members raise common issues;
- d* a class proceeding is the preferable procedure for the resolution of the common issues; and
- e* there is a representative plaintiff who can fairly and adequately represent the interests of the class, and a workable method or plan for advancing the proceeding.

In Quebec (a civil law jurisdiction in which the motion for certification is referred to as ‘authorisation’) there are two notable differences: (1) a ‘numerosity’ requirement similar to that imposed by US Federal Rule 23; and (2) a lack of a specific requirement that a proposed class action meet a ‘preferable procedure’ test (although, in practice, this second requirement is subsumed in the determinations relating to the existence of an identifiable class and the sufficiency of the common issues).

When determining the issue of certification, the courts assess the above prerequisites keeping in mind the following three important objectives of class proceedings legislation: judicial economy; improved access to the courts for actions that may not otherwise be asserted; and behaviour modification for actual or potential wrongdoers.¹⁹

ii Standing

Under the class actions laws of the various Canadian provinces, a plaintiff who meets the requirements of an adequate representative plaintiff, as set out above, may bring a private action on his or her own behalf and on behalf of all other persons who have allegedly suffered similar losses as a result of the defendant’s conduct (which, in the case of competition law, could include conduct contrary to the criminal provisions of the Act or conduct that consists in a failure to comply with an order of the Tribunal or a court under the Act).

iii Notice

Notice to the class members of key events such as certification and settlement is typically mandatory unless notice is dispensed with by order of the court. Among the different provinces in Canada, there are both ‘opt-out’ and ‘opt-in’ jurisdictions. For opt-out jurisdictions, once a class proceeding has been certified, members of the defined class are presumed to be in the proceeding and to be bound by the court’s determination unless they take active steps to ‘opt-out’ within a limited time period prescribed by the court.

19 *Id.* at paragraph 62.

iv Settlements in class proceedings

Settlements of competition class actions in Canada are common and often follow settlements in any related proceedings in the United States. Typically, the parties negotiate a settlement based on an agreed-upon overcharge amount and adjust the amount based on a myriad of factors. Where each consumer would receive only a small settlement amount, distributions may be made *cy-près* to organisations such as charities or trade organisations.

In Canada, all settlements of class proceedings must be approved by the courts in which the proceeding was commenced. Because Canadian price-fixing class actions are often commenced in several Canadian jurisdictions simultaneously, court approval of the settlement is required in each of these jurisdictions. Efforts to attempt to streamline this process through judicial cooperation are currently under discussion.²⁰

VIII CALCULATING DAMAGES

Damages under Section 36 of the Act are compensatory and where proven entitle a plaintiff to recover its loss or damage. Section 36 also entitles a plaintiff to claim for the costs of investigation of the matter. Although punitive damages cannot be claimed under Section 36, as noted above, damages for the common law torts of conspiracy or intentional interference with economic relations are often claimed along with Section 36 claims and may include claims for punitive damages.

To date, no contested class actions based on Section 36 of the Act have reached the stage of a trial, and there are no reported decisions on the methodology of the calculation of damages for price-fixing in the class proceeding context. Accordingly, to date most judicial commentary regarding damages-related issues have arisen in the class certification context (including in settlements).

The traditional approach to determining damages in competition cases has been to assess the difference between the alleged cartel prices and what prices would have been ‘but-for’ the cartels to arrive at the estimated amount of an ‘overcharge’. Expert evidence, including regression analysis, is often relied upon to estimate the amount of the overcharge and to address issues of pass-on (or pass-through).

Given the difficulties associated with establishing loss on a class-wide basis, class counsel are increasingly relying on alternative and less traditional approaches to damages as a means of making cases more amendable to class certification, including restitutionary theories that focus on disgorgement of the defendants’ gain as opposed to the loss suffered by the class members.²¹

20 Draft Judicial Protocol released for comment by Canadian Bar Association National Task Force on Class Actions.

21 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503; *Quizno’s Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, 2010 ONCA 466.

IX PASS-ON DEFENCES

As described in Section I above, pass-on has been used both by plaintiffs (to assert indirect purchaser claims) and defendants (to challenge damages by direct purchasers and to challenge the ability of plaintiffs to prove harm on a class-wide basis) in Canadian price-fixing class action litigation. However, the *Microsoft* and *Sun-Rype* decisions of the British Columbia Court of Appeal held that the pass-on defence is not recognised in Canada and that the corollary of that is that indirect purchasers do not have a cause of action. These decisions do not alter the law in the other provinces of Canada, so at present there are differences between provinces in the treatment of pass-on. At the time of writing, the Supreme Court of Canada is considering whether to hear appeals in *Microsoft* and *Sun-Rype*.

X FOLLOW-UP LITIGATION

i Section 36 claims: criminal conduct

As discussed in Section II above, Section 36(2) of the Act provides that a prior criminal conviction under the Act is proof that the defendant has engaged in illegal conduct, unless there is evidence to the contrary. Furthermore, any evidence given in criminal proceedings as to the effect of the defendant's conduct is evidence in the civil proceedings.

When there is no prior criminal conviction, a plaintiff can still bring a civil claim against the defendant, but must prove all elements of the case on a civil standard (i.e., on a balance of probabilities).

ii The Competition Bureau's immunity programme

Subject to certain conditions, parties who are the first to report an ongoing conspiracy to the Commissioner of Competition (before the Commissioner otherwise has enough evidence to commence an investigation) may receive immunity from prosecution.²² In Canada, such immunity applies only to criminal prosecutions and does not extend to private actions.

iii Sections 75-77: civilly reviewable conduct

One of the requirements for the granting of leave for a private application to the Tribunal under Sections 75 (refusal to deal), 76 (resale price maintenance and refusal to supply) or 77 (exclusive dealing, tied selling and market restriction) is certification by the Commissioner that the matter in respect of which leave is sought is not the subject of an inquiry or application by the Commissioner to the Tribunal (either ongoing or settled).

In *B-Filer Inc.*,²³ when a plaintiff brought two actions (a Section 75 refusal-to-deal claim before the Tribunal and a tort claim before the court) for the same conduct, the

22 Competition Bureau immunity programme under the Competition Act available at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html.

23 *B-Filer Inc v. The Bank of Nova Scotia*, 2006 Comp Trib. 42 CT-2005-006.

dismissal of the court proceedings²⁴ did not render the Tribunal proceedings *res judicata*, 'because the issues before the Tribunal are not the same as the issues that were before the Alberta court.'²⁵ The Tribunal also rejected the defendant's argument of estoppel, deciding that to continue the case before the Tribunal was not an abuse of process since the Tribunal had the exclusive jurisdiction to deal with issues under Sections 75 and 77 of the Act.²⁶

XI PRIVILEGE

i Solicitor and client privilege

As is the case in most common law jurisdictions, solicitor–client privilege (similar to attorney–client privilege in the US) protects communications between solicitor and client that are made in confidence for the purpose of giving or receiving legal advice. The solicitor–client privilege also applies to in-house counsel employed by a corporation, to the extent that they are performing the function of legal counsel to the company and not some other corporate function.

ii Litigation privilege

In addition to solicitor–client privilege, litigation privilege applies to work product and communications that are made specifically in contemplation of existing or anticipated litigation. Litigation privilege also applies to communications with third parties where the dominant purpose of the communication is to assist with existing or anticipated litigation.

iii Settlement privilege

In circumstances where parties involved in a dispute engage in settlement communications for the purpose of attempting to resolve the dispute and the proposed settlement communications are made on a 'without prejudice' basis, the communications will be protected from disclosure to the court by settlement privilege.

XII SETTLEMENT PROCEDURES

Settlements are actively encouraged by Canadian courts and many jurisdictions have mandatory mediation requirements in their civil procedure rules. Most class actions

24 *Id.* at paragraph 6. In this case, the tort claim was based on breach of contract, unlawful interfere with economic interests and unfair competition. The court dismissed the plaintiff's application for injunctive relief on the basis that the plaintiff did not show 'a strong *prima facie* case'.

25 *Id.*

26 *Id.* at paragraph 13. The court stated that '(i)njunctive relief in the Alberta Decision was denied on the basis of contract law. It has not yet been decided in the context of competition law'.

commenced to date have not proceeded to trial and are settled before and after class certification.

Class action settlements are subject to court approval. To grant approval of a class action settlement, the court must find that the settlement is fair, reasonable and in the interests of all those affected by it.²⁷ In determining whether to approve a class action settlement, the court will have regard to factors, including:

- a* the likelihood of recovery or success if the case were litigated;
- b* the amount and nature of discovery or investigation;
- c* the terms and conditions of the settlement;
- d* recommendations of counsel;
- e* future expense and likely duration of litigation;
- f* recommendations of neutral parties or experts;
- g* the number and nature of objections from class members;
- h* the presence of good faith bargaining; and
- i* the absence of collusion.²⁸

XIII ARBITRATION

Private arbitration is available as an alternative dispute resolution mechanism to litigated proceedings as long as all parties consent to the procedure. It is not possible for a party to force another to arbitrate (as opposed to litigating before a court or the Tribunal) a matter unless it has agreed to do so.

Some of the advantages of arbitration are the ability to appoint a mutually agreed-upon arbitrator and the ability to keep the arbitration confidential. In respect of class proceedings, it is common for counsel to seek the assistance of professional mediators to resolve class actions. It is not common to arbitrate class proceedings. Whether a representative plaintiff could bind the class to arbitrate as an alternative to a civil trial of the common issues has not been the subject of judicial consideration. However, given the court's role to protect absentee class members, it is likely that any such arrangement would require court approval.

A recent decision of the Supreme Court of Canada held that the standard arbitration clause in a telecommunications contract requiring customers to waive their right to participate in a class proceeding and requiring disputes to be arbitrated was not enforceable on the basis that consumer protection legislation in British Columbia manifested a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to arbitration.²⁹ Because many jurisdictions in Canada (including Ontario and Quebec) have consumer protection legislation that invalidates mandatory arbitration provisions in consumer contracts, this decision will likely have application outside British Columbia.

27 *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.)

28 *Id.*

29 *Seidel v. TELUS Communications Inc.*, 2011 SCC 15.

XIV INDEMNIFICATION AND CONTRIBUTION

Issues of indemnification and contribution in the context of cartel litigation have not been addressed definitively by Canadian courts. These issues have arisen to a limited extent in Canadian competition class action litigation where settling defendants who settle their claims with the plaintiff class in circumstances where co-defendants continue to defend the litigation seek to limit their exposure to any cross claims or claims for contribution and indemnity as part of the settlement. In these partial settlements, it is common for the settling defendants to seek a ‘bar order’ as part of the settlement approval order so as to protect them from claims for contribution and indemnity in the case of an eventual judgment against the non-settling defendants. The reach of such bar orders is frequently subject to significant negotiations in the context of settlement approval motions.

XV FUTURE DEVELOPMENTS AND OUTLOOK

There continues to be a growing number of competition class actions commenced each year and this area continues to attract the attention of the Canadian class action plaintiff’s bar, who are becoming more knowledgeable about the area. To date, no cartel class actions have proceeded to trial on their merits.

Private access to the Tribunal has been less prevalent to date than originally anticipated. It remains to be seen whether with the decriminalisation of price-maintenance activity in this area will see any marked increase.

Appendix 1

ABOUT THE AUTHORS

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Eliot Kolers is a partner in Stikeman Elliott's Toronto office and a member of the firm's litigation group. His practice focuses on complex corporate commercial litigation, competition litigation and securities litigation. He has worked extensively on matters related to the Ontario Business Corporations Act and the Canada Business Corporation Act and provided expertise in respect of oppression remedies, proxy contests, plans of arrangement, corporate governance, takeover bid, and shareholder issues. He has appeared before all levels of Ontario's courts, the courts of Alberta, British Columbia, New Brunswick and Prince Edward Island, the Federal Court of Appeal and the Supreme Court of Canada. He has also appeared before the Competition Tribunal, the Ontario Securities Commission and other regulatory and administrative tribunals, and has experience in commercial arbitration. Mr Kolers has been recognised in various national and international publications, including Chambers Global's *The Guide to the World's Leading Lawyers for Business*, Lexpert's *Guide to the Leading US/Canada Cross-border Litigation Lawyers in Canada* and Lexpert's *Rising Stars*. Additionally, he has written and spoken extensively on the subject of competition litigation. He received his BA (1991) and LLB (1994) from the University of Toronto and was called to the Bar in Ontario in 1996.

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Danielle Royal is a partner in Stikeman Elliott's Toronto office and a member of the firm's litigation group. Her practice focuses on complex commercial litigation, class actions and competition litigation, and she has represented clients on several cross-border class actions involving claims of price-fixing and conspiracy, other commercial disputes, as well as a range of product liability claims. She has significant experience advising and assisting companies regarding internal investigations and responding to regulatory or quasi-criminal investigations and the class action litigation that often accompanies allegations of regulatory misconduct. She has appeared before all levels of court in Ontario, the Federal Court of Appeal and the Supreme Court of Canada. Ms

Royal has written a number of articles for Stikeman Elliott's competition and foreign investment law blog, *The Competitor*, co-authored a chapter in the *Ultimate Corporate Counsel Guide* entitled 'Responding to Prosecutions' and has co-authored various papers on the subject of competition law. She received her BA in International Relations from the University of British Columbia, completed her combined JD/LLB programme with the University of Windsor and was called to the Bar in Ontario in 2000.

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