

## **Civil Conspiracy Claims under the *Competition Act***

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## **Introduction**

In Canada, private legal actions brought by one or more individuals or companies who have been harmed by the anti-competitive conduct of others are available as a means of private enforcement of competition laws. Section 36 of the *Competition Act* (the "Act") grants a right of private action with respect to conduct that is contrary to the criminal provisions of the *Act*, allowing a plaintiff to sue to recover damages stemming from such conduct. In addition, at common law, private actions with respect to unlawful activity such as conspiracy and intentional interference with economic relations are also available.

## **Criminal Anti-competitive Conspiracy**

Section 36 of the Act provides for a private action with respect to conduct that is contrary to the criminal provisions of the Act. For conspiracy claims, the most relevant criminal provisions of the Act are sections 45 and 46.

Subsection 45(1) states:

45. (1) **Conspiracy** - Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sales, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

The Supreme Court of Canada has held that an agreement to lessen competition "unduly" requires proof of the following two elements:

1. a moderate degree of market power among the parties to the agreement, and
2. behaviour that tends to reduce competition or limit entry in the relevant market.<sup>1</sup>

It is not necessary that the agreement *actually* result in an undue lessening of competition. Nor is it necessary that the parties to the agreement intend to lessen competition unduly. The offence will be made out where the parties to the agreement intended to enter the agreement, which, if carried out, would likely result in the requisite undue lessening of competition. A conspiracy can be inferred from circumstantial evidence. Direct evidence of communications or an agreement between the parties is not necessary for the offence to be proved.

Section 45 does not apply to agreements between companies that are affiliates of one another.<sup>2</sup> In addition, the Act specifically excludes some agreements from the ambit of section 45, including agreements relating "only" to: the exchange of statistics; the definition of product standards; the definition of terminology used in an industry; cooperation in research and development; the export of products from Canada; the exchange of credit information; the definition of terminology used in trade, industry or profession; and measures to protect the environment.<sup>3</sup> It is important to note that these exceptions do not apply to agreements that lessen competition unduly in respect of price, quantity or quality of production, markets or customers, or channels or methods of distribution, or to agreement that restrict entry into an industry.

Under section 46 of the Act, a corporation carrying on business in Canada that implements a foreign conspiracy in Canada, regardless of whether it has knowledge of the foreign conspiracy, is guilty of an indictable offence and subject to criminal penalties. Section 46 states:

46. (1) **Foreign directives** - Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any

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<sup>1</sup> *Canada v. Pharmaceutical Society (Nova Scotia)* [1992] 2 S.C.R. 606 (S.C.C.)

<sup>2</sup> *Competition Act, supra.*, s. 45(8).

<sup>3</sup> S. 45 (3)

director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Foreign companies with no Canadian affiliate, who may have taken part in an international conspiracy not to sell into the Canadian market and/or with respect to prices in Canada may be pursued by the authorities for aiding and abetting a section 46 offence. In such cases, the Attorney General of Canada, in the context of a negotiated plea of guilty, has charged foreign companies with *aiding and abetting* an offence under section 46, rather than seeking to indict those companies directly under section 45. In other words, it is alleged that the foreign company aided and abetted a foreign competitor in directing the competitor's Canadian affiliate to implement a conspiracy entered into outside Canada.<sup>4</sup> Neither the validity of section 46 nor whether it can be aided and abetted, has been determined by a Court in a contested proceeding.

In practice, most convictions under either section 45 or 46 are the result of negotiated plea agreements and Statement of Admissions.

### **Section 36 and Common Law Conspiracy Claims**

Section 36 allows persons who have suffered harm as a result of anti-competitive conspiracies to bring civil damage claims in the courts. Section 36 provides as follows:

36. (1) **Recovery of damages** - Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

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<sup>4</sup> See for example the indictment against Tokai Carbon Co., Ltd. dated February 1, 2001, Federal Court File number T-24-01. Available online at [www.strategis.ca](http://www.strategis.ca).

Where one or more defendants in a section 36 action has pleaded guilty to an offence under the Act, the "record of proceedings" may be used in the subsequent civil suit against that defendant as proof that it engaged in conduct contrary to the criminal provisions of the Act.<sup>5</sup> In addition, any admissions or statements made in the criminal proceedings may be admitted as evidence in the subsequent civil proceedings.<sup>6</sup>

Claims pursuant to section 36 must be issued within two years of the date of the completion of criminal proceedings or the last date on which the conduct was engaged in, whichever is later. An as yet unresolved question is the effect of criminal proceedings against one defendant on the limitation periods for civil claims against other defendants.

Although section 36 claims may be brought following criminal proceedings, plaintiffs need not wait for a finding or plea of guilty against a defendant to commence a section 36 action. Where there is no criminal conviction, plaintiffs must prove all of the elements of the particular offence on the civil standard of a balance of probabilities. For allegations of anti-competitive conspiracies where there has been no criminal conviction, plaintiffs would have to prove the elements of an anti-competitive conspiracy under Canadian competition laws, including:

- a) That the defendants conspired, combined, arranged or agreed with one another, which may be proved either through direct evidence of agreement or through circumstantial evidence<sup>7</sup>;
- b) That the conspiracy unduly lessened competition in a market in Canada<sup>8</sup>; and
- c) That the plaintiff has suffered actual loss as a result of the defendants' conduct.<sup>9</sup>

Unlike private antitrust claims in the United States, there is no provision for treble damages in Canada. In a section 36 action, the plaintiff must suffer quantifiable harm and must prove its actual loss at trial. The plaintiff may only recover the amount of its actual losses plus the costs of pursuing the legal action, including the costs of investigating the matter and the costs of court

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<sup>5</sup> *Competition Act*, *supra*. note 1, s.36(2).

<sup>6</sup> *Ibid.*

<sup>7</sup> s. 45(2)

<sup>8</sup> The requirements of proving an undue lessening of competition is undue was canvassed by the Supreme Court of Canada in *Canada v. Pharmaceutical Society (Nova Scotia)* [1992] 2 S.C.R. 606 (S.C.C.)

<sup>9</sup> *Chadha v. Bayer Inc.*, (2003) 63 O.R. (3d) 22 (Ont. C.A.) leave refused [2003] S.C.C.A. No. 106 (S.C.C.)

proceedings.<sup>10</sup> In addition, plaintiffs may (and generally do) allege common law tortious activity, such as civil conspiracy or intentional interference with economic relations.<sup>11</sup> A plaintiff may also claim punitive damages, provided common law tortious activity is proven in addition to a section 36 claim. The threshold for an award of punitive damages is high. They may only be awarded where there is evidence of egregious, high-handed conduct on the part of the defendant(s).<sup>12</sup>

Defendants who are successfully sued under section 36 are generally jointly and severally liable to compensate the plaintiff for the entire amount of his or her loss. Liability to the plaintiff is not limited to the loss suffered at the hands of one particular defendant in proportion to that defendant's degree of fault, but defendants may claim for contribution and indemnity from co-defendants in proportion to their degree of fault for the plaintiff's loss. A claim for contribution may not be an effective means to limit liability where one or more of the co-defendants is judgment proof due to insolvency or other jurisdictional difficulties involved in enforcing a judgment in other jurisdictions.

### **Class Proceedings in Competition Law Cases**

Many section 36 claims are brought as class proceedings and are usually issued after one or more of the defendants have pleaded guilty to, or have been proven guilty of, criminal anti-competitive conduct. In Canada, there is no national class proceedings legislation. Seven provinces (and the Federal Court of Canada) now have statutory provisions relating to class proceedings.<sup>13</sup> Due to the similarity in most of the key statutory provisions (although there are some important differences), we will limit our discussion of the statutory provisions to the Ontario *Class Proceedings Act, 1992*<sup>14</sup> (the "CPA").

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<sup>10</sup> *Competition Act*, *supra*. note 1, s. 36(1).

<sup>11</sup> For further discussion see Houston, Bell, Bhattacharjee, and Chun, "Private Remedies for Anticompetitive Conduct," prepared for the 1998 Canadian Bar Association Annual Fall Conference on Competition Law.

<sup>12</sup> *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (S.C.C.).

<sup>13</sup> For further detail regarding the class proceedings legislation in provinces other than Ontario, please see: British Columbia *Class Proceedings Act*, RSBC 1996 c. C-50; Alberta *Class Proceedings Act*, S.A. 2003, c. C-16.6; Saskatchewan *Class Actions Act*, S.S. 2001, c. C-12.01; Manitoba *Class Proceedings Act*, C.C.S.M., c. C-130; Quebec's *An Act Respecting the Class Action*, R.S.Q., c. R-2.1; and Newfoundland and Labrador *Class Actions Act*, S.N.L. c. C-18.1. See also for class proceedings in the Federal Court of Canada, 2002 *Rules Amending the Federal Court Rules, 1998*

<sup>14</sup> S.O. 1992, c.6

In order to be granted certification, the proposed representative plaintiff must provide evidence to satisfy each of the following five criteria:

1. The pleadings must disclose a cause of action;
2. There must be an identifiable class of two or more persons who are to be represented in the proceedings;
3. The claims of the class members must raise common (but not necessarily identical) issues;
4. A class proceeding must be the preferable procedure for the resolution of the common issues. This factor has been held to mean that the plaintiff must demonstrate that, given all the circumstances of a particular claim, a class proceeding would be preferable to other methods of resolving the claims and in particular, preferable to the use of individual proceedings<sup>15</sup>; and
5. The proposed representative plaintiff must satisfy the Court that he or she will adequately represent the interests of the class, that he or she has a plan for advancing the litigation and that he or she is not in a conflict of interest with other members of the proposed class.<sup>16</sup>

The *CPA* specifically provides that a Court may not refuse to certify a class solely because the relief sought involves separate contracts, different remedies for different class members or individual damage assessments. In addition, class certification will not be precluded solely because the number of class members is unknown or because there is a subclass whose claims raise common issues not shared by all class members.<sup>17</sup>

Due to the burden on the plaintiff to provide evidence to satisfy the above criteria, certification proceedings are a significant step in the action, often involving the submission of expert evidence, particularly in competition law claims.

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<sup>15</sup> *Hollick v. Metropolitan Toronto (Municipality)* (2001)205 D.L.R. (4<sup>th</sup>) 19 (S.C.C.)

<sup>16</sup> *CPA*, supra. s. 5.

<sup>17</sup> *CPA*, supra. s. 6.

In *Chadha v. Bayer Inc.*<sup>18</sup>, the only case in Canada to date which has considered certification of a competition law conspiracy claim in a contested proceeding<sup>19</sup>, the Ontario Court of Appeal examined the application of the pre-requisites for certification in a section 36 claim. The proposed representative plaintiff was an indirect purchaser of iron oxide pigment who alleged that the defendants conspired to fix the price of the pigment which affected the cost of concrete brick and paving stones used in his home construction. The Ontario Court of Appeal denied certification, holding that the third and fourth pre-requisites for certification listed above had not been met. The representative plaintiff could not establish that there was a common issue of liability on the part of the defendants for any price increase because the plaintiff could not demonstrate that the price effect of the defendants' alleged price fixing activity had been passed on through the supply chain in all cases.

Where the plaintiff satisfies the Court that the pre-requisites for certification are met and the action is certified as a class proceeding, members of the class are notified and provided with time to determine whether they wish to be bound by the outcome in the class proceeding or whether they wish to opt out of the class proceeding.<sup>20</sup> Those who opt out will not share in any judgment or settlement obtained in the class proceeding, but they are free to commence separate proceedings and the two year limitation period in section 36 of the Act is suspended during the time that they were members of the class.<sup>21</sup>

In Ontario, Statements of Defence are not generally required unless an action is certified. Once an action is certified, Statements of Defence, documentary and oral discovery, and potentially trial will follow.

Where a class proceeding is settled, the settlement must be approved by the Court. The Court will approve the settlement where it is demonstrated that it is fair, reasonable and in the best interests of the class as a whole.<sup>22</sup> In March and April, 2005, Courts in Ontario, British

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<sup>18</sup> (2003) 63 O.R. (3d) 22 (Ont. C.A.) leave refused [2003] S.C.C.A. No. 106 (S.C.C.)

<sup>19</sup> Certification of a section 36 class proceeding claim alleging conduct contrary to the price maintenance provisions of the *Competition Act* was examined in *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5<sup>th</sup>) 382 (Ont. Sup. Ct.)

<sup>20</sup> *CPA*, supra. s. 9. In some other provinces, there is an "Opt-in" provision.

<sup>21</sup> *CPA*, supra. s. 28

<sup>22</sup> *Dabbs v. Sun Life, Assurance Company of Canada*, [1998] O.J. No. 1598 (Gen. Div.)

Columbia and Quebec approved significant settlements of class proceedings alleging an international price fixing conspiracy among vitamin producers.<sup>23</sup>

In cases involving settlements by some, but not all defendants, some courts have issued "bar orders" precluding non-settling defendants, and correspondingly, limiting the plaintiffs' claims against non-settling defendants to damages flowing from the conduct of those non-settling defendants. In effect, joint and several claims are transformed into several claims against the non-settling defendants.<sup>24</sup>

Despite the lack of a national class proceedings regime, courts in some provinces have certified national classes of plaintiffs.<sup>25</sup> In practice, competition law claims have usually been launched in one or more provinces, each of which may seek to certify a national class. Once a national class is certified in one province, proceedings in other provinces, while not technically precluded from continuing, may be stayed pending the outcome of the action in the first certifying province. It is important to note, however, that it is not yet clearly established in Canada that certification of a national class in one province precludes the continuation of class proceedings in a second province. In effect, this could mean that a defendant could settle or defend a class proceeding involving a certified national class, and still face continuing or new proceedings in other provinces.

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<sup>23</sup> *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*[2005] O.J. No. 1118 (Ont. Sup. Ct.); *Ritchie-Smith Feed, Inc. v. Rhone-Poulenc Canada Inc.* [2005] B.C.J. No. 857 (B.C.S.C.)

<sup>24</sup> See for example: *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. Up. Ct.) and *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*[2005] O.J. No. 1118 (Ont. Sup. Ct.).

<sup>25</sup> See for example *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.), *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (S.C.J.) and *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*[2005] O.J. No. 1118 (Ont. Sup. Ct.).