

**PRIVATE ENFORCEMENT OF COMPETITION LAWS IN  
CANADA**

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## **INTRODUCTION**

In Canada, there are two avenues for private parties seeking redress for conduct that is contrary to the provisions of Canada's *Competition Act*<sup>1</sup> (the "Act"). First, section 36 of the Act grants a private right of action to sue for loss or damage resulting from contravention of the Act's criminal provisions, such as conspiracy, bid-rigging and price maintenance. Second, section 103.1 of the Act permits private parties to seek leave from the Competition Tribunal (the "Tribunal") to launch an application against a party for allegations of refusal to deal, exclusive dealing, tied selling and market restriction. Such practices are not criminal offences under the Act, but the Tribunal may make a remedial order and award an amount for costs to a successful applicant.

### **I. CIVIL ACTIONS BROUGHT PURSUANT TO SECTION 36 OF THE COMPETITION ACT**

Section 36 of the Act grants a right of private action to parties who have suffered loss or damage as a result of conduct that is prohibited by the criminal provisions<sup>2</sup> of the Act. Claims brought 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. Although this appears to be a relatively short limitation period, the date upon which the limitation period begins to run may be extended indefinitely since there is no limitation period with respect to criminal offences under the *Competition Act*.

Where one or more defendants in a section 36 action has pled guilty to an offence under the Act, the "record of proceedings" may be used in the subsequent civil suit against that defendant as *prima facie* proof that it engaged in conduct contrary to the criminal provisions of the Act.<sup>3</sup> In addition, any admissions made in the criminal proceedings are admissible as evidence in the

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<sup>1</sup> R.S.C. 1985, c.C-34, as amended.

<sup>2</sup> Such conduct includes conspiracy (s. 45), bid-rigging (s. 47), predatory pricing (s. 50(1)(a)), price discrimination (s. 50(1)(b) and (c)), false or misleading representations (s. 52(1)), deceptive telemarketing (s. 52.1), deceptive notice of winning a prize (s. 53), double-ticketing (s. 54), pyramid selling (s. 55), and price maintenance (s. 61). Plaintiffs may also sue for the failure of a party to abide by a court order or order of the Competition Tribunal made pursuant to the Act.

<sup>3</sup> *Competition Act, supra.*, note 1, s.36(2).

subsequent civil proceedings.<sup>4</sup> In the many criminal cases that are resolved by guilty pleas and a jointly recommended fine, such admissions are generally contained in a Statement of Admissions filed with the Court.

The most common source for section 36 claims in Canada is alleged cartel activity. Under section 45 of the Act, everyone "who conspires, combines, agrees or arranges with another person" to prevent or lessen competition "unduly" is guilty of an indictable offence and subject to criminal penalties. 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.

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 registered or record of criminal proceedings, plaintiffs must prove all of the elements of the particular offence on the civil standard of a balance of probabilities in order to make a successful claim. 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>5</sup>;
- b) That the conspiracy unduly lessened competition in a market in Canada<sup>6</sup>; and
- c) That the plaintiff has suffered actual loss as a result of the defendants' conduct.<sup>7</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, must prove its actual loss at trial, and may only recover the amount of its actual losses plus the costs of pursuing the

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, s. 45(2).

<sup>6</sup> There is no *per se* category for conspiracy in Canada. The requirements of proving an "undue" lessening of competition were canvassed by the Supreme Court of Canada in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.) and include a modest degree of market power coupled with behaviour that tends to reduce competition or limit entry.

<sup>7</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.)

legal action (including the costs of investigating the matter and the costs of court proceedings).<sup>8</sup> In addition, plaintiffs may (and generally do) allege common law tortious activity, such as civil conspiracy or intentional interference with economic relations. Provided common law tortious activity is proven in addition to the requirements for a section 36 claim, plaintiffs may also seek punitive damages. 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>9</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. However, 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.

#### **A. Class Proceedings**

Section 36 claims are increasingly launched as class proceedings and are most commonly issued after one or more of the defendants have pleaded guilty to, or have been proven guilty of, criminal anti-competitive conduct. This provides the plaintiffs with the benefit of using the record of the criminal proceedings to support their allegations in the civil claim.

In Canada, there is no national class proceedings legislation. Instead, most of Canada's provinces have their own statutory regimes. Seven provinces (and the Federal Court of Canada) now have statutory provisions relating to class proceedings.<sup>10</sup> Due to the similarity in most of

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<sup>8</sup> *Competition Act*, *supra*. note 1, s. 36(1).

<sup>9</sup> *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (S.C.C.).

<sup>10</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.

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>11</sup> (the "CPA").

In order to be granted certification to proceed as a class proceeding by an Ontario court, 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;<sup>12</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>13</sup>

In addition, 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>14</sup>

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<sup>11</sup> S.O. 1992, c.6

<sup>12</sup> 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. (*Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4<sup>th</sup>) 19 (S.C.C.)).

<sup>13</sup> *CPA*, *supra*. note 11, s. 5.

<sup>14</sup> *Ibid*, s. 6.

In *Chadha v. Bayer Inc.*<sup>15</sup>, the only case in Canada to date which has substantively examined certification in the competition law context, the Ontario Court of Appeal applied the pre-requisites for certification to 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, in turn, affected the cost of certain brick and paving stones allegedly used in his home's 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 chain of distribution in all cases. Pursuant to section 36, members of the class would have to demonstrate that they suffered actual loss or damage.

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>16</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>17</sup>

In Ontario, Statements of Defence are not generally required unless or until an action is certified. Once an action is certified, Statements of Defence, documentary and oral discovery, and potentially trial will follow. The limitation of discovery rights prior to certification has led some Canadian plaintiffs to seek intervention rights in other jurisdictions in order to support their case on certification, as discussed in greater detail in the next section.

Class proceeding settlements must also 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

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<sup>15</sup> (2003), 63 O.R. (3d) 22 (Ont. C.A.) leave refused [2003] S.C.C.A. No. 106 (S.C.C.)

<sup>16</sup> *CPA*, *supra*. note 11, s. 9. In some other provinces, there is an "Opt-in" provision.

<sup>17</sup> *Ibid*, s. 28.

as a whole.<sup>18</sup> In March and April, 2005, courts in Ontario, British Columbia and Quebec approved significant settlements of class proceedings alleging an international price fixing conspiracy among vitamin producers.<sup>19</sup>

In cases involving settlements by some, but not all defendants (which is common in international cartel cases), some courts have issued "bar orders" precluding non-settling defendants from suing settling defendants for contribution and indemnity. This has the effect of limiting the plaintiffs' claims against non-settling defendants to damages flowing from the conduct of those non-settling defendants. In effect, such bar orders transform joint and several claims into several claims against the non-settling defendants.<sup>20</sup>

Despite the lack of a national class proceedings regime, courts in some provinces have certified national classes of plaintiffs.<sup>21</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.

## **B. Access by Canadian Plaintiffs and Courts to Evidence in Foreign Proceedings**

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<sup>18</sup> *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 1598 (Gen. Div.).

<sup>19</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>20</sup> See for example: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* [2005] O.J. No. 1118 (Ont. Sup. Ct.).

<sup>21</sup> See for example *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.) and *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (S.C.J.).

Certification proceedings are a significant step in the action, often involving the submission of expert evidence, particularly in competition law claims. As mentioned above, in Canada, discovery rights in class proceedings are not triggered until after certification is granted. This puts a significant responsibility on the prospective representative plaintiff to produce adequate evidence to meet the certification criteria. Meeting this threshold can be difficult, especially in international cartel claims.

International cartels usually spawn actions by different plaintiffs in several jurisdictions against the same alleged cartel participants. For example, a customer or consumer may sue a European-based corporate defendant in the United States, alleging the same conduct as a different customer or consumer suing the same defendant in Canada. The same defendant may have been subject to investigations by competition authorities in Europe, the U.S. and Canada.

Plaintiffs or prospective plaintiffs will be keenly interested in monitoring the progress of proceedings in other jurisdictions and in getting access to any information produced in those proceedings to further their own case. Canadian plaintiffs may bring motions in other jurisdictions for access to material that they may not have access to in Canada. Two recent cases, each decided on opposite sides of the Canada/U.S. border, will likely encourage further attempts by Canadian plaintiffs to gain access to information that is not available to them under the relevant Canadian procedural rules.

In *Ford v. F. Hoffman-LaRoche Ltd.*<sup>22</sup> ("*Ford*"), the plaintiffs in a series of proposed class proceedings in Ontario brought motions in a U.S. court seeking access to the fruits of discovery in parallel U.S. actions - information that was subject to a protective order in the U.S. litigation. If successful on their U.S. motion, the Ontario plaintiffs would be permitted to obtain discovery evidence to investigate and support their class proceedings pending in Ontario, before the class proceeding had been certified in Ontario, and before their discovery rights in the Ontario class proceeding were operative. As such, the Canadian defendants brought motions in Ontario to prohibit the plaintiffs from proceeding with their motions in the U.S. Pending the outcome of

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<sup>22</sup>[2003] O.J. No. 868 (Ont. C.A.) affirming [2002] O.J. No. 1400 (Div. Ct.), leave to appeal to the Supreme Court of Canada denied [2003] S.C.C.A. No. 245 (S.C.C.).

those motions in Ontario, the U.S. Court deferred its decision on whether to give the plaintiffs access. However, the Canadian Courts declined to intervene. The Ontario Courts, and ultimately the Supreme Court of Canada, rejected the defendants' attempts to prohibit the U.S. motions from proceeding. In doing so, they held, *inter alia*, that because the Ontario Court retains jurisdiction regarding the admissibility of any information obtained from the U.S. proceeding, it was unnecessary for the Ontario Court to interfere with the U.S. courts' jurisdiction over the motions before it.

In their motion in the U.S., the Canadian *Ford* plaintiffs relied on U.S. Federal Rule of Civil Procedure 24(b) which provides that "upon timely intervention anyone may be permitted to intervene in an action...when an applicant's claim or defence and the main action have a question of law or fact in common." U.S. courts have held that the requirements for permissive intervention under Rule 24(b) are:

- (1) an independent basis of subject matter jurisdiction;
- (2) a timely motion to intervene; and
- (3) a claim or defence that has a question of law or fact in common with the main action.<sup>23</sup>

All three of these requirements have been interpreted broadly to apply to parties who raise a common question in a suit in another jurisdiction and who seek to modify a confidentiality order in U.S. litigation, even after the U.S. proceedings have been completed.<sup>24</sup> In *Ford*<sup>25</sup>, the U.S. District Court found the criteria to be met, but deferred modification of the protective order until the Ontario Court had made its decision.<sup>26</sup>

In addition to Rule 24(b), Canadian (or other foreign) plaintiffs can seek access to discovery materials in the U.S. pursuant to 28 U.S.C. §1782(a) ("§1782(a)"), the utility of which has

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<sup>23</sup> *EEOC v. National Children's Ctr.*, 146 F. 3d 1042 (D.C. Cir. 1998).

<sup>24</sup> *In re Linerboard Antitrust Litigation* 333 F.Supp.2d 333 at 339 (E.D. Pa. 2004) ("*Linerboard*"), discussed below.

<sup>25</sup> *In re Vitamins Antitrust Litigation*, 2001 U.S. Dist. LEXIS 25068.

<sup>26</sup> In addition to *Ford*, Canadian plaintiffs were granted intervener status under Rule 24(b) and protective orders were modified permitting them access to confidential discovery in *In re Baycol Products Litigation* MDL No. 1431 (D.Minn. 2003) (Pre-trial Order No. 77) and *In re Linerboard Antitrust Litigation*, *supra* note 24.

recently been affirmed by the U.S. Supreme Court. In *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>27</sup> ("*Intel*") the U.S. Supreme Court laid out rules for foreign parties seeking access to U.S. production for use in foreign proceedings, expanding the rights of foreign complainants and plaintiffs in Canada (and elsewhere) to seek access to information produced in law suits in the United States, regardless of whether the same information would be discoverable in Canadian proceedings.

In *Intel*, Advanced Micro Devices ("*AMD*") filed an antitrust complaint against Intel Corp. with the Directorate-General for Competition (the "*DG*") of the Commission of the European Communities (the "*Commission*"), alleging that Intel had abused its dominant position in the European market through loyalty rebates, exclusive purchasing agreements, price discrimination and standard-setting cartels. Although AMD had recommended to the DG that it seek documents produced or filed by Intel in a private antitrust suit filed in Alabama, the DG decided not to seek such production. AMD then applied to the District Court for an order directing Intel to produce the documents, relying on §1782(a). §1782(a) provides that a federal district court "may order" a person residing or found in a district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal" upon the application of "any interested person." The District Court declined to order production under §1782(a) but was reversed by the Court of Appeals for the Ninth Circuit which held that production could be ordered (but remanded the determination of whether it should be ordered on the facts of the Intel case back to the District Court).<sup>28</sup> Intel appealed the Court of Appeals decision to the U.S. Supreme Court. Intel's appeal was supported by an *amicus* brief from the Commission stating that the Commission did not want or need the assistance of the District Court. Further, it characterized its own function as being more in the nature of a prosecuting authority than a Tribunal within the meaning of §1782(a), and that the granting of the relief sought could lead to the disclosure of confidential information, encourage fishing expeditions and undermine the Commission's Leniency Program.

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<sup>27</sup> 124 S. Ct. 2466 (2004).

<sup>28</sup> *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664 (9th Cir. 2002).

Despite these concerns, the U.S. Supreme Court affirmed the decision of the Court of Appeals for the Ninth Circuit, holding that:

- (1) a complainant before the European Commission qualifies as an "interested person" within the meaning of §1782(a);
- (2) the Commission is a "tribunal" within the meaning of §1782(a) when it acts as a decision-maker at first instance;
- (3) the "proceeding" for which discovery is sought under §1782(a) must be in reasonable contemplation, but need not be "pending" or "imminent"; and
- (4) §1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding.

The U.S. Supreme Court rejected the argument that §1782(a) was intended to restrict assistance to litigants in foreign proceedings to seek information that would be discoverable in the litigant's home jurisdiction. In rejecting the foreign-discoverability threshold, the Court noted that the domestic tribunal would retain jurisdiction to determine the use to be made of any information produced from the U.S. proceeding in accordance with its own domestic laws.

The U.S. Supreme Court stopped short of granting the order for production, cautioning that §1782(a) authorizes, but does not require, the federal district court to provide judicial assistance to foreign or international tribunals or to "interested persons" abroad. The merits of AMD's application was remanded to the District Court for determination. The District Court ultimately declined to order production on the facts presented.<sup>29</sup>

Since *Intel*, U.S. district courts have exercised their discretion under §1782(a) in favour of granting access to discovery in U.S. proceedings by foreign litigants. In *Proctor & Gamble v. Kimberly-Clark Corporation*<sup>30</sup>, the U.S. District Court for the Eastern District of Wisconsin permitted Proctor & Gamble ("P&G") access to discovery evidence in U.S. proceedings for use in foreign patent infringement proceedings pending in several countries in Europe and Japan.

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<sup>29</sup> 2004 U.S. Dist. LEXIS 21437 (N.D. Cal.).

<sup>30</sup> 334 F. Supp. 2d 1112 (U.S. Dist. Ct.).

P&G was the defendant in all of the actions and sought access to discovery from the U.S. action from the parties who were the Plaintiff in all of the foreign actions. The plaintiff resisted the motion for production on the basis that both it and P&G were participants in the foreign proceedings and as such, P&G could obtain discovery in those proceedings and should not receive assistance under §1782(a) until it had exhausted its discovery opportunities in the pending foreign proceedings. The District Court rejected this argument, stating that such a proposal "is inefficient and possibly ineffective":

It is more efficient for a court located in the Eastern District of Wisconsin to order discovery from persons located in such district than to force P&G to seek the same discovery in as many as five foreign actions and return to this court if its efforts fail.<sup>31</sup>

Access to production was also granted under §1782(a) in *In re Application of Jonathan Guy Phillips*<sup>32</sup> and *In re Servicio Pan Americano de Proteccion*<sup>33</sup>.

In conspiracy cases, the U.S. courts have not drawn a significant distinction between a Canadian plaintiff's standing under Rule 24(b) and §1782(a). In *Linerboard*<sup>34</sup>, a Canadian company sought to intervene under Rule 24(b) in pending U.S. antitrust litigation alleging conspiracy among linerboard manufacturers, for the limited purpose of obtaining access to discovery material in the U.S. case that was subject to a confidentiality order. As mentioned above, in *Linerboard*, the U.S. court held that the Canadian plaintiff met all three requirements of Rule 24(b), thereby granting intervener status and permitting them access to production material subject to a U.S. protective order.

The plaintiffs in *Linerboard* did not seek access based on §1782(a). The defendants argued that the plaintiffs ought to have sought production by relying on the more direct route of §1782(a) and that the plaintiffs had not met the requirements set out by the U.S. Supreme Court in *Intel*. In particular, the defendants argued that the plaintiffs were seeking to circumvent the proof-gathering restrictions of Canada in two ways:

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<sup>31</sup> *Ibid* at 1115.

<sup>32</sup> 2004 U.S. Dist. LEXIS 16426 (S.D.N.Y.). This is an estates case where the administrators of a British estate sought discovery against U.S. citizens who were not parties to the U.K. proceedings.

<sup>33</sup> 2004 U.S. Dist. LEXIS 24430 (S.D.N.Y.). A Venezuelan security firm was granted access to documents held by HSBC Bank USA that were relevant to a law suit brought by HSBC against the security firm in Venezuela for damages suffered when an employee of the security firm absconded with \$5.6 million.

<sup>34</sup> *Supra.*, note 24.

- (1) Under the Ontario *Rules of Civil Procedure*, the plaintiffs were not yet entitled to discovery (since certification had not yet been granted); and
- (2) Under the Ontario *Rules of Civil Procedure*, the plaintiffs would not be entitled to the breadth of discovery that was available in the U.S. proceedings.

In dismissing this argument, the U.S. District Court referred to the Ontario Court's decision in *Ford* and affirmed the distinction drawn by the Ontario Court between seeking discovery in a U.S. action and seeking access to the discovery of the litigants in the U.S. litigation. In the absence of the confidentiality order, the plaintiffs in the U.S. action could have disclosed the fruits of its discovery to the Canadian plaintiffs. It was therefore simply more efficient to grant the Canadian plaintiffs access to the U.S. productions.

So far, U.S. Courts have been receptive to requests from Canadian plaintiffs seeking access to discovery in the U.S. While this approach may be practical and efficient for plaintiffs, it may overlook several substantive issues. As discussed earlier, most Canadian conspiracy class proceedings are commenced in the wake of guilty pleas by some or all of the defendants. Those guilty pleas, in turn, are largely the result of Canada's Immunity Program<sup>35</sup> which encourages early disclosure of conduct that is contrary to the criminal provisions of the Act and which, in the absence of the Immunity Program, would be difficult to detect and prosecute. Enforcement authorities, as reflected in the *amicus* brief file by the European Commission in *Intel*, worry that the broadening of rights under §1782(a) could undermine the effectiveness of immunity programs. Potential immunity applicants may be less likely to come forward to disclose anti-competitive conduct if the protection from disclosure afforded under the rules of the investigating jurisdiction could be undermined by the production rules of another jurisdiction.

In addition, different approaches to privilege in different jurisdictions could lead to the disclosure of privileged information or information protected from disclosure by statute. For example, the documents produced by a litigant in U.S. proceedings could include a complaint by a party to the Canadian Competition Bureau or documents produced to the Competition Bureau during an investigation. Under Canada's law of public interest privilege, complaints or confidential

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<sup>35</sup> *Competition Bureau*, Information Bulletin on the Immunity Program under the Competition Act, September 2000, available online at [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca). See also: *Competition Bureau*, Immunity Program - Frequently Asked Questions, October 2005, available online at [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca)

information provided to the Bureau during an investigation would be protected from disclosure. Section 29 of the Act also provides some protection of confidentiality. In addition, plea negotiations with the Government are protected by settlement privilege in Canada. Those same protections may not apply to the very same documents under U.S. law.<sup>36</sup>

**C. Canadian Plaintiffs seeking to Recover for International Cartel Activity in the U.S. -  
The Effects of *Empagran* in Canada**

In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*<sup>37</sup> ("*Empagran*"), the U.S. Supreme Court considered the jurisdiction of U.S. courts to entertain treble damage claims by foreign purchasers of products allegedly the subject of price fixing. In the U.S., plaintiffs who suffer loss or damage as a result of conduct that is contrary to the *Sherman Act*<sup>38</sup> are entitled to collect treble damages - a prospect that is very attractive to Canadian plaintiffs. In addition, plaintiffs who bring actions in Canada alleging conspiracy must prove an "undue" lessening of competition, which can be difficult and requires substantial expert evidence to establish. As a result, the *per se* violation rule under the *Sherman Act* is also an attractive prospect.

In *Empagran*, foreign purchasers of vitamins brought claims in the U.S. alleging that they suffered damages as a result of an international conspiracy to fix the price of vitamins. The lower courts were divided on whether a U.S. court could assume jurisdiction and apply U.S. antitrust law when the alleged conduct has direct, substantial and reasonably foreseeable effects in the U.S., but the foreign plaintiff's injury is independent of the U.S. effects.

In the U.S., the Foreign Trade Antitrust Improvement Act (the "FTAIA") generally precludes the application of the *Sherman Act* to "conduct involving trade or commerce (other than import trade and commerce) with foreign nations...". However, there is an exception to this rule where two prerequisites are met:

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<sup>36</sup> See for example *In re Vitamins Antitrust Litigation* 2002 U.S. Dist. LEXIS 25815 where the U.S. District Court for the District of Columbia ordered production of, among other things, letters between Bioproducts legal counsel and the Competition Bureau.

<sup>37</sup> 124 S. Ct. 2359 (2004).

<sup>38</sup> 15 U.S.C. §1.

1. The conduct has "a direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce; and
2. The direct, substantial and reasonably foreseeable effect gives rise to a claim under the *Sherman Act*.

In *Empagran*, the federal District Court judge interpreted the FTAIA to require a direct effect within the United States stemming from the foreign conduct.<sup>39</sup> Because the foreign plaintiffs in *Empagran* had not alleged precise injuries stemming from the direct U.S. domestic effects, their claims lacked the required connection under the FTAIA and were dismissed. The U.S. Court of Appeals for the District of Columbia reversed, holding that the FTAIA permits foreign plaintiffs who suffer loss as a result of the foreign effects of the international cartel conduct to sue in the U.S. as long as the conduct gives rise to "a" private claim by a U.S. plaintiff under the *Sherman Act*.<sup>40</sup>

The U.S. Supreme Court reversed, holding that foreign purchasers cannot use the U.S. courts to pursue damages for price fixing conspiracies where their damages are "independent" of those suffered by purchasers in the U.S. In so holding, the *Empagran* decision put to rest the contention that an exception enumerated under the FTAIA could apply to provide foreign purchasers with treble damage claims in U.S. courts against foreign companies where they could demonstrate simply that there was "an" effect of the international conspiracy on U.S. commerce.

The U.S. Supreme Court held that in order to bring themselves within the jurisdiction of the U.S. courts, foreign plaintiffs must demonstrate that the effect on foreign plaintiffs of the anticompetitive conduct is not independent of the adverse domestic effect on U.S. commerce. The U.S. Supreme Court did not specify when an effect is considered to be independent of the effect on U.S. domestic commerce and remanded the question of whether such an effect existed on the facts pleaded in *Empagran* back to the Court of Appeals.

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<sup>39</sup> *Empagran v. F. Hoffman-LaRoche Ltd.*, No. CIV 001686 TFH, 2001 WL 761360 (June 7, 2001), rev'd 315 F. 3d 338 (D.C. Cir. 2003), vacated, 124 S.Ct. 2359 (2004).

<sup>40</sup> *Ibid.*, 315 F. 3d 338 (D.C. Cir. 2003).

On remand, the Court of Appeals held that, based on the facts presented in *Empagran*, the plaintiffs had not met the burden of demonstrating that the effect on U.S. domestic commerce was adequately tied to the effects on foreign commerce to permit the foreign plaintiffs to pursue their claims in the U.S.<sup>41</sup> The Court held that to come within the FTAIA exception, a foreign plaintiff must show that the U.S. domestic effects were the "proximate cause" of the plaintiffs' foreign injury.

Although the foreign plaintiffs in *Empagran* were not successful, in most international cartel cases which involve Canada, the allegation is a North American conspiracy - not separate conspiracies relating to Canada and the U.S. In those cases, it could be more straightforward for Canadian purchasers to assert that their claims are not "independent" of the effect of the conspiracy on U.S. prices. As a result, Canadian plaintiffs who want to advance their claims in the U.S., and to sue for treble damages, may be less likely to be turned away by U.S. courts than other foreign claimants. To date however, and perhaps fortunately for Canadian defendants, the active class plaintiffs' bar in Canada continues to bring these claims in Canada, rather than pursuing them in the U.S.

## **II. PRIVATE APPLICATIONS BROUGHT PURSUANT TO SECTION 102.1 OF THE COMPETITION ACT**

Since 2002, private individuals and corporations in Canada have been able to bring applications before the Competition Tribunal, with leave, for refusal to deal under section 75<sup>42</sup> and for exclusive dealing<sup>43</sup>, tied selling<sup>44</sup> and market restriction<sup>45</sup> under section 77 of the Act.

<sup>41</sup> *Empagran S.A. v. F. Hoffmann-Laroche* 2005 U.S. App. LEXIS 12743 (D.C. Cir. 2005).

<sup>42</sup> The restrictive practice of refusal to deal occurs where the Competition Tribunal finds that:

- i) a person is substantially affected in his or her business or is precluded from carrying on business due to the inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- ii) the inability to obtain supply is the result of insufficient competition among suppliers;
- iii) the buyer is willing and able to meet the usual trade terms in the industry;
- iv) the product is in ample supply; and
- v) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

<sup>43</sup> Generally speaking, exclusive dealing is a practice whereby a major supplier of a product, as a condition of supplying the product to a customer, requires that customer to deal only or primarily in products supplied by the supplier or a practice whereby the supplier induces the customer to deal only or primarily in products supplied by the supplier by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to the exclusive arrangement. In order to be subject to an order of the Tribunal, the practice must also be found to lessen competition substantially in a market.

Previously, only the Commissioner of Competition could commence an application for prohibition of these “reviewable trade practices” (i.e. non-criminal). Subsection 103.1(7) of the Act opened up a new route of access to the Tribunal for private enforcement for such claims.

Unlike claims under section 36, a private party cannot seek damages through an application to the Tribunal. The remedies available to private applicants are limited to an order to cease the offending conduct or requiring any other measure that, in the Tribunal's opinion, is necessary to restore competition. In addition, a successful private applicant may seek reimbursement for the costs of the Tribunal proceedings.<sup>46</sup>

Before a private party can make an application to the Competition Tribunal under section 75 or 77, that party must obtain leave to do so from the Tribunal itself. The Federal Court of Appeal in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*<sup>47</sup> adopted the following two-part test to be met by private applicants seeking leave:

- (i) First, the Tribunal has to be satisfied that the applicant is *directly and substantially affected* in the applicant's business by any practice referred to in section 75 or 77 of the *Competition Act*; and
- (ii) Second, the Tribunal must have reason to believe that the alleged practice *could be subject to an order* under that section.

To satisfy part (ii) of the test above, the Court of Appeal held that the applicant must show sufficient credible evidence to give rise to a *bona fide* belief by the Tribunal *that an order could be made* under the provision in question. This requires that all elements of the alleged reviewable practice be addressed in the application for leave.

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<sup>44</sup> Tied selling is a practice whereby a major supplier, as a condition of supplying a product to a customer, requires that customer to acquire any other product from the supplier or refrain from using another product not sold by the supplier in conjunction with the product that is supplied. The practice also involves inducing a customer to acquire other products by offering to supply a product on more favourable terms and conditions if the customer agrees to acquire other products. In order to be subject to an order of the Tribunal, the practice must also be found to lessen competition substantially in a market.

<sup>45</sup> Market restriction is a related practice to exclusive dealing and tied selling and occurs where a supplier, as a condition of supplying a product to a customer, requires that customer to supply that or any other product only in a defined market or exacts a penalty of any kind from the customer if any product is sold outside a defined market. In order to be subject to an order of the Tribunal, the practice must also be found to lessen competition substantially in a market.

<sup>46</sup> *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.) as amended, s.8.1.

<sup>47</sup> [2005] F.C.R. 254 (F.C.A.).

The Federal Court of Appeal in *Barcode* set a relatively low standard of proof for private leave applications. The Court described the threshold for an applicant obtaining leave as "not a difficult one to meet". The applicant need only provide "sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal." This, stated the Court, is a "lower standard of proof than on a balance of probabilities", the standard applicable to a decision on the merits.

Once a private party obtains leave to bring an application under section 75 or section 77, he or she can seek an interim order pursuant to section 104 of the *Competition Act*. Under section 104, the Tribunal may issue "such interim order as it considers appropriate, *having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.*" While a relatively high threshold must generally be met to obtain a mandatory interim order at common law, the Competition Tribunal in *Quinlans of Huntsville Inc. v. Fred Deeley Imports Limited*<sup>48</sup> ("*Quinlans*"), stated that a mandatory interim supply order under section 104 ought not to be considered an extraordinary remedy. Rather, the three-part test to obtain such relief ought to be based on a relatively low threshold, as is the application for leave.

First, the applicant need not show a strong *prima facie* case, but only a serious issue in the sense that the issue is not frivolous or vexatious. Second, the applicant must show that he or she will suffer irreparable harm without interim relief, but according to the Tribunal in *Quinlans*, just as there is no duty to mitigate when bringing a case under section 75, there is no duty to mitigate during the leave application stage. Third, the applicant must show that the balance of convenience favours granting interim relief.

Since the implementation of private access to the Tribunal in 2002, there have been several successful applications for leave brought to the Tribunal and a few interim orders granted. To date, however, most applications have been settled or withdrawn prior to a hearing on the merits of the allegations.

From the perspective of a private party who has been substantially affected in his business by refusal to deal, tied selling, exclusive dealing or market restriction, private access to the Tribunal presents a real opportunity to resolve those disputes, without the prior requirement of convincing

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<sup>48</sup> [2004] C.C.T.D. No. 26 (Comp. Trib.)

the Commissioner that such an application would be in the public (rather than simply their own) interest. Prior to private access, there were few applications brought under s. 75 and s. 77 because the Commissioner, with a public enforcement mandate and limited resources, exercised her/his discretion to pursue cases where there was (in the Commissioner's view) significant harm to competition, rather than significant harm to individual market participants.