

The International Comparative Legal Guide to:

Competition Litigation 2009

A practical insight to cross-border Competition Litigation



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1 General

1.1 Please identify the scope of claims that may be brought in Canada for breach of competition law.

The Attorney General of Canada (“Crown”), upon investigation by the Canadian Competition Bureau, may prosecute criminal charges in respect of conspiracy (cartels), bid-rigging, price maintenance, price discrimination (including with respect to promotional allowances), predatory pricing, and deceptive marketing and telemarketing.

Private parties may also, individually or by way of class proceeding, pursue a claim for damages suffered as a consequence of the criminal conduct described above, and for the full costs associated with pursuing the claim, whether or not there has been a criminal conviction (commonly referred to as “private actions”). Private actions based in common law, such as civil conspiracy, may also be pursued. There is no private right of action for abuse of dominance in Canada.

The Commissioner of Competition (“Commissioner”) may apply to Canada’s Competition Tribunal (“Tribunal”) for a remedy in respect of abuse of dominance, tied selling, exclusive dealing, market restriction, delivered pricing and refusal to supply, as well as for a remedy in respect of mergers, that have or are likely to have anticompetitive effects in Canada. The Commissioner may also apply to the Tribunal, the Federal Court or a provincial superior court in respect of certain deceptive marketing practices. Together, this conduct is referred to as “reviewable practices” in Canada’s *Competition Act*. Failure to abide by a remedy ordered in respect of the above is subject to criminal prosecution as an offence and/or to a private action referenced above.

Private parties may apply for a remedy to the Tribunal, with leave, with respect to exclusive dealing, tied selling, market restriction and refusal to supply, where the Commissioner is not inquiring into such conduct (commonly referred to as “private access”).

1.2 What is the legal basis for bringing an action for breach of competition law?

The principal legal basis for the claims outlined in question 1.1 is Canada’s *Competition Act*; the common law may also form the basis of claims asserted in private actions.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The principal legal basis is a national federal law, the *Competition Act*.

1.4 Are there specialist courts in Canada to which competition law cases are assigned?

The Tribunal is a specialist quasi-judicial tribunal that deals with all reviewable practices (see question 1.1); it sits in panels that include at least one judge of the Federal Court of Canada.

Criminal matters and private actions are dealt with principally in provincial (state) superior courts or the Federal Court.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Only the Crown may prosecute criminal conduct.

Private parties have standing to claim damages for such conduct, either individually or as a member of a class action, pursuant to s-36 of the *Competition Act*, which creates a private right of action in respect of the criminal provisions of the Act, whether or not there have been criminal proceedings taken against the defendants. The number of class actions has grown substantially in Canada in recent years, most frequently alleging a violation of the *Competition Act*’s cartel provisions (often following similar cases in the United States).

The Commissioner has standing to bring an application to remedy reviewable practices. Any person directly and substantially affected in their business has standing to bring a “private access” application, with leave of the Tribunal, for a remedy in respect of certain reviewable practices specified in question 1.1.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

There have been no contested cases dealing with the jurisdictional questions regarding the applicability of the *Competition Act* to non-Canadians in a criminal context. The Commissioner takes the position that once anticompetitive conduct has had an impact in Canada, a “real and substantial connection” has been established between the conduct and the Canadian court, such that a Canadian court would have jurisdiction to deal with a *Competition Act* criminal prosecution. Based on case law outside of competition law, there are good arguments that the level of connection required as a matter of law could not be established by the prosecution. A Canadian court would also need to have personal jurisdiction over a defendant, which would be established by presence in the

jurisdiction or proper service of court process (both of which would be difficult to achieve). That said, in a non-contested context, there have been several non-Canadian defendants who have attorned to the Canadian courts to enter guilty pleas following negotiated resolutions, leaving untested these difficult legal issues.

In civil proceedings, there is case law which states that once an alleged price-fixer places its products in the stream of commerce in Canada, it is reasonable to expect that the price-fixer will be called to a Canadian court to account for the alleged overcharge. On that basis, Canadian courts have been found to have jurisdiction in civil cases over non-Canadians.

1.7 Is the judicial process adversarial or inquisitorial?

The process before the courts and the Tribunal is adversarial in nature.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available in a number of circumstances.

2.2 What interim remedies are available and under what conditions will a court grant them?

In criminal matters, the *Competition Act* provides for the issuance of an interim injunction forbidding any person from doing anything that may constitute or be directed toward the commission of a criminal offence, generally where injury to competition will result or non-compensable harm will be suffered.

Injunctive relief may also be available to the Crown as a matter of common law.

In private actions for damages in respect of criminal conduct, interim injunctive relief is available on the usual injunction test: serious issue to be tried, irreparable harm and balance of convenience favouring the issuance of an injunction. The availability of injunctive relief where a claim has been made under s. 36 of the *Competition Act* has been the subject of conflicting decisions.

As regards reviewable practices, the *Competition Act* expressly provides for interim injunctive orders by the Tribunal in a number of circumstances.

In a merger context, there are provisions allowing for injunctive relief both where the Commissioner's inquiry has not been completed and more time is required (the injunction is not to exceed 30 days, with a possible extension of another 30 days), and where the inquiry is complete and the Commissioner's position is that the merger should not close as the anticompetitive effect could not be remedied absent the injunction (the injunction is for such period of time as the Tribunal considers appropriate).

For other reviewable practices (refusal to supply, exclusive dealing, tied selling, market restriction, abuse of dominance), there are provisions for injunctive relief. On an interim short-term basis (10 days, with the possibility of extensions of up to 70 additional days), an *ex parte* injunction may be granted prohibiting conduct. Once an application has been made to the Tribunal, an interim order may be made for such period of time as the Tribunal deems appropriate, on the usual injunction principles.

There are also provisions for injunctive relief in deceptive marketing practice cases.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Conviction of a criminal conspiracy (cartel) exposes the convicted to a maximum prison term of 5 years and a maximum fine of up to Cdn. \$10 million (foreign corporations have no maximum fine limit).

Conviction of bid rigging or (resale) price maintenance involves no maximum fine limit, but otherwise carries the same exposure as cartel offences.

Price discrimination and predatory pricing expose the convicted to a maximum term of imprisonment of two years.

For deceptive marketing and telemarketing (with the exception of one particular practice), those convicted by indictment are liable to a fine in the court's discretion and/or imprisonment for up to five years; if conviction by summary conviction, the liability is to a fine up to Cdn. \$200,000 and/or imprisonment not to exceed a term of one year. "Double ticketing" exposes those convicted to a fine not exceeding Cdn. \$10,000 and/or imprisonment for a term not exceeding one year.

Restitution and/or prohibition orders are available in addition to the above remedies.

Damages and the full costs of pursuing the claim are available in respect of the above conduct, by way of private action as described above.

Deceptive marketing practices pursued civilly are subject to an order prohibiting the conduct (or substantially similar conduct), a requirement to give notice of the conduct to those affected and/or an administrative monetary penalty (AMP) of up to Cdn. \$50,000 or \$100,000 for individuals and corporations, respectively, for a first offence.

Applications in respect of mergers and other reviewable practices generally involve a remedy which either prohibits the conduct in question and/or directs relevant persons to take such actions, structural and/or behavioural, as are necessary to overcome the anticompetitive effects (e.g. the substantial lessening of competition) of the conduct, such as dissolution of the merger or divestitures of assets, or the amendment of impugned conduct so as to remove any substantial lessening or prevention of competition found to have resulted or to be likely to result from the conduct.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

Damages in private actions in respect of criminal conduct are generally only compensatory. If the claim is based on s. 36 of the *Competition Act* alone, a claimant may only recover an amount equal to the loss or damage proved to have been suffered by the claimant, together with any amount that the court allows to cover the full cost to the claimant of the private action, including any investigation undertaken to pursue the private action.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

Insofar as damages in a private action are to be compensatory only, the amount of a criminal fine imposed by a court is not taken into account in an award.

4 Evidence

4.1 What is the standard of proof?

In criminal cases, the case must be proven beyond a reasonable doubt to secure a conviction.

In private actions alleging criminal conduct, the standard of proof of a violation of the *Competition Act* is the balance of probabilities; however, the burden with allegations of criminal conduct is said to be higher than the usual civil standard. The standard of proof of harm as a consequence of such a violation is the balance of probabilities.

In all applications by the Commissioner or private parties in respect of reviewable practices, the standard is the balance of probabilities.

4.2 Who bears the evidential burden of proof?

The Crown bears the burden in criminal cases.

The Commissioner or the private party, as the case may be, bears the burden in applications concerning reviewable practices or private actions for damages. In private actions, a criminal conviction is, absent evidence to the contrary, proof of the criminal violation and any evidence tendered in the criminal proceedings as to the effects of the conduct is accepted as evidence of such effect in the private action. As discussed in question 5.2 below, the difficulty of establishing that harm was actually suffered and by whom is a significant challenge for claimants, especially in a class action context.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no limitations on the forms of evidence which may be put forward, aside from those generally applicable to the admissibility of evidence. Expert evidence is accepted by the courts and Tribunal from duly qualified experts. The *Competition Act* contains specific provisions with respect to the admissibility, and effect, of evidence related to agents of an accused and documents proven to be in the possession of the accused, along with statistical evidence.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The disclosure process varies depending upon whether it is a criminal or a civil proceeding, and can vary, somewhat, depending on the particular court or Tribunal in issue and the nature of the civil proceeding (private action, applications by the Commissioner, private access).

Generally, in criminal matters, disclosure is made by the Crown in the form of the document used to lay charges (which should disclose particulars of the offence(s)) and by providing pre-trial disclosure of all material obtained in the investigation (inculpatory and exculpatory), subject to certain limited exceptions such as privilege. The Crown has an ongoing obligation of disclosure. The accused, generally, has no obligation of disclosure, save those provided for by criminal rules of procedure, e.g. regarding expert witness reports.

In civil matters, whether before the courts or the Tribunal, disclosure (or discovery) generally occurs through the obligation on each party to disclose, by way of sworn affidavit, all documents in their power, possession or control that are of relevance to the matter (subject to certain limited exceptions such as privilege), and by the

right of each party to examine an appropriate representative of the party with respect to the matters at issue in the proceeding. Each party has an ongoing obligation of disclosure in civil matters.

In civil matters, private action claimants (or even private access applicants) may attempt to obtain access to information and/or documentation gathered by the Commissioner as part of any investigation the Commissioner may have taken concerning the matter. The Commissioner's general policy is to resist any such attempt, asserting statutory and common law privileges, but the policy is not without exception. Most rules of civil procedure in Canada provide for disclosure by (discovery of) third (or "non") parties in specific circumstances with leave of the court.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Any (competent) witness can be compelled to appear (subpoenaed) in civil proceedings (whether before courts or the Tribunal) and is subject to cross-examination. Relevant privileges (such as solicitor-client) may be invoked in an attempt to refuse to testify or to testify in respect of certain matters.

Any (competent) witness, save the individual accused and their spouse, can be compelled to testify in a criminal proceeding and is subject to cross-examination, subject to any applicable privilege or immunity.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

As regards conviction by a Canadian court of a criminal offence under the *Competition Act*, see question 4.2 above.

General conflict of law rules apply to the recognition and enforcement of foreign antitrust judgments. The weight or persuasive value accorded a foreign judgment will depend on the circumstances of the case (e.g. how similar Canadian and foreign law is). As a matter of law, a foreign conviction or civil determination has no legal consequence in Canada, but is typically referred to repeatedly by claimants as important information.

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Whether in a criminal or a civil proceeding, a party concerned with the disclosure of its commercially sensitive information may apply for measures to protect the confidentiality of the information, such as protective orders providing for limited disclosure (e.g. to opposing counsel only) or *in camera* hearings. In the face of such an application, the court or Tribunal will consider the interests of the party seeking the protective measure(s) balanced against any prejudice suffered by parties opposite and the general preference of the courts and Tribunal for an open and transparent judicial system.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Generally, Canadian law does not recognise "justification" or "public interest" as defences. The applicable regulatory regime may provide a basis for a defence in certain circumstances.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Canadian courts have expressly declined to adopt the U.S. “*Illinois Brick* doctrine”, such that direct and indirect purchasers have the ability to assert claims for breaches of the criminal provisions of the *Competition Act*.

It should be noted that there are many practical difficulties associated with sorting out who sustained harm as between the various purchasers along a distribution chain. Consequently, it is challenging for a class of purchasers, particularly indirect purchasers, to meet the test for certification of a class in Canada, i.e. that a class proceeding is a preferable procedure. Indeed, recent decisions of superior courts (some upheld on appeal, others pending appeal) have denied certification of a class of direct and indirect purchasers on the grounds that the plaintiffs did not provide a workable method for determining whether any overcharge was passed on to all class members, i.e. for proving the fact of harm on a class-wide basis, and thus could not establish that the defendants’ liability was a common issue for the class.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

No limitation period exists with respect to the Crown’s pursuit of criminal conduct by way of indictment. Prosecutions regarding conduct punishable by way of summary conviction must be instituted within two years of the time when the subject matter of the proceeding arose.

A private action under s. 36 of the *Competition Act* in respect of criminal conduct must be instituted within two years from the day on which the conduct was engaged in or the day on which any criminal proceedings relating to the conduct were finally disposed of, whichever is later (this provision raises a number of issues, such as with respect to continuing conduct and the nature of a final disposition of criminal proceedings). A private action based on common law must be instituted in accordance with the limitation period applicable in the particular province in which the case has been brought.

An application by the Commissioner in respect of abuse of dominance must be made within three years of the conduct having ceased.

An application by the Commissioner in respect of a merger must be made within three years of the merger having been substantially completed.

No other application, whether by the Commissioner or a private party, in respect of reviewable practices is subject to a limitation period under the *Competition Act*.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The time it will take to bring a breach of competition law claim to trial and final judgment will vary depending on the nature of the claim and the forum. It is not an expeditious process.

Applications to the Competition Tribunal would routinely take in excess of 12 months to a trial and final judgment, although efforts have been made in recent Tribunal rules amendments to provide for greater speed. Injunction proceedings will obviously be dealt with much more quickly.

Criminal investigations routinely take months (and often years) before reaching the stage of charges being laid, and thereafter take years for a trial and final judgment.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Neither the Commissioner nor private parties need the permission of the Tribunal to withdraw an application in respect of reviewable matters. Cost consequences may flow from the withdrawal. The Crown may withdraw or stay charges in respect of criminal violations of the *Competition Act*.

For civil actions, class proceedings cannot be discontinued without court approval; other civil actions can be discontinued on agreement of the parties.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In private actions for damages pursuant to s. 36 of the *Competition Act*, the claimant can recover his or her legal costs and the costs of the investigation leading to the claim; a successful defendant can recover his or her legal costs pursuant to the general rules of practice before the particular court.

In applications before the Tribunal, the Commissioner or private parties may recover their costs of the proceedings if successful; similarly, respondents may recover their costs of the proceedings if successful.

In actual fact, only a portion of the legal costs incurred by the parties is recoverable given the nature of the costs rules.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are permitted to act on a contingency fee basis in private actions for damages, in accordance with the lawyers’ code of conduct applicable to the province in which the claim is brought.

8.3 Is third party funding of competition law claims permitted?

The general rules of professional conduct and regarding champerty and maintenance govern third party funding of private actions or private applications under the *Competition Act*.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of provincial courts can be appealed to higher courts within the province and ultimately the Supreme Court of Canada, with leave of that court.

Decisions of the Tribunal or the Federal Court can be appealed to the Federal Court of Appeal (if the decision is by the Tribunal, an appeal on a question of fact requires leave of the Federal Court of Appeal). Federal Court of Appeal decisions can be appealed to the Supreme Court of Canada, with leave of that court.

10 Leniency

10.1 Is leniency offered by a national competition authority in Canada? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Both immunity (called amnesty in the United States) and leniency are available in Canada. Immunity is available only to the “first in” who qualifies under the programme and provides complete protection from criminal prosecution; leniency is available to subsequent parties who qualify and thereby receive less severe consequences in respect of the conduct. Immunity and leniency do not immunise the applicants (whether successful or unsuccessful) from civil claims.



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Katherine Kay is a senior partner in the Competition/Antitrust and Litigation Departments of Stikeman Elliott LLP and the head of the Competition/Antitrust Group's competition litigation practice. She has acted as lead counsel on a broad range of cases dealing with all aspects of competition law, including cartel and other criminal defence work, class and other civil actions, mergers, abuse of dominance and other reviewable practices before the Competition Tribunal. A major focus of Katherine's practice is defence of class actions, where she has extensive experience across a range of cases, including those alleging anticompetitive conduct. Katherine's practice emphasises the key aspects of formulating and coordinating strategic responses, often working very closely with counsel in the United States, Europe and other jurisdictions; coordinating and directing multiple class actions across several Canadian jurisdictions; vigorous and highly effective advocacy before the relevant courts and tribunals; and negotiating, securing court approval and implementing settlements where appropriate.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The issue has never been litigated in Canada, but it is doubtful that an immunity applicant would be permitted to withhold evidence disclosed as part of immunity process in a subsequent private action.



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