IN FACT AND IN LAW

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Increase in Class Actions for Violations of the *Competition Act*
How to Protect Your Business Today

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Class action lawsuits have become commonplace. Even though few class actions for violations of the Competition Act *have been certified to date, both the number of claims and the amounts of awards in class action lawsuits have increased sharply. Moreover, upon instituting a motion, the defendant company must spend large amounts of money to defend itself, and must face the defamation of its name. Consequently, companies must act now to protect themselves against the risk of class action lawsuits, notably by implementing a competition law compliance manual to be followed by their employees.*

Ease With Which Class Actions Are Brought

It is possible today to introduce class proceedings before the Federal Court of Canada, as well as within those provinces of Canada that have adopted class action legislation, which now includes the majority of provinces. In Ontario and Quebec, funds have been created to help plaintiffs pay either costs or both costs and legal fees throughout the often lengthy and costly class action court battles. These factors have made class action proceedings increasingly popular.

At the same time, claims for violations of anti-trust provisions in the United States and for breaches of the *Competition Act* in Canada have multiplied rapidly, and fines against violators have skyrocketed. For example, in 1999, F. Hoffman-Laroche Limited was fined $50,900,000 for conspiring to fix the prices of bulk vitamins and citric acid.

Section 36(1) of the *Competition Act* permits civil recourses to recover damages caused as a result of a breach of the *Competition Act*. This has provided the opening needed for class action lawyers to plead a contravention of the *Competition Act* as a separate cause of action in recent class action proceedings. This trend will undoubtedly continue in the future.

A Class Action Must First Be Certified

In order to understand the phenomenon of class actions alleging violations of the *Competition Act*, one must first understand the requirements to successfully certify a class action. To be certified, the proposed class action must adhere to the principle objectives of a class proceeding: judicial economy, increased access to justice for the victims, and behaviour modification.

With respect to the requirements to successfully certify a class action across the different Canadian jurisdictions mentioned above, the Supreme Court of Canada in *Western Canadian Shopping Centres Inc.* v. *Dutton*[1] noted that "while there are differences between the tests (for each jurisdiction), four conditions emerge as necessary to a class action":[2]

- the class is capable of clear definition;
- there are issues of fact or law common to all class members;
- success for one class member means success for all;
- the proposed representative plaintiff adequately represents the interests of the class.

In certain Common Law provinces, the satisfaction of these four conditions does not oblige the court to allow the action to proceed. Countervailing factors could lead a Court to exercise its discretion against certifying the class. These factors are, notably, that the defendant wishes to raise different defences with respect to certain plaintiffs or groups of plaintiffs, the need to examine each plaintiff in discovery, the need to deal with important issues raised only by a plaintiff or a group of plaintiffs, or the small number of plaintiffs in the class making joinder of proceedings a more cost effective option.

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[1] [2001] 2 S.C.R. 534 (*Dutton*).

[2] *Ibid.* at 554. Note that while this case was decided prior to coming into force of the class action legislation in Saskatchewan, Newfoundland, Manitoba and that of the Federal Court of Appeal, we believe that it would nevertheless apply to these jurisdictions as well.

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The class action legislation in Ontario, British Columbia, Saskatchewan, Newfoundland, Manitoba as well as Rule 299.2 of the *Federal Court Rules, 1998* each contain a list of five factors which, on their own, are not cause for denying certification:

- the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- the relief claimed relates to separate contracts involving different class members;
- different remedies are sought for different class members;
- the number of class members or the identity of each class member is not known; and
- the class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

Although Quebec's class action legislation does not contain this list, Quebec courts have generally chosen to follow these principles.

Competition Act Class Actions

Competition Act class actions follow the same certification rules outlined above.

Causes of action are limited to breaches of Part VI of the *Competition Act*, which include claims such as conspiracy to reduce competition, bid-rigging, price discrimination, false or misleading representations, deceptive telemarketing, pyramid selling and price maintenance.

To date, only conspiracy to reduce competition, false or misleading representations and price maintenance have been pleaded.

Conspiracy to reduce competition: The conspiracies involved the international fixing of prices of vitamins and vitamin by-products by manufacturers,[3] a conspiracy to fix the price of lysine (a food supplement for hogs),[4] a conspiracy to drive a new competitor out of the school magazine fundraising market,[5] and a conspiracy to fix the prices of iron ore and black pigment used to make bricks and certain other construction materials.[6] While none of these class actions has been certified to date, the courts have made important comments about Section 45 of the *Competition Act*.

First, in *Vitapharm*, the Court held that a conspiracy under Section 45 of the *Competition Act* is not limited to a conspiracy that occurs within Canada. A conspiracy that injures Canadians gives rise to liability in Canada, whether or not the agreement to conspire by fixing prices or allocating the market is made in Canada or abroad.[7]

Second, in *Chadha*, a class action alleging a conspiracy to fix the prices of iron ore and black pigment used to make bricks and certain other construction materials was attempted, but ultimately not certified. The Ontario Court of Appeal found that the issue of liability, including proof of loss, could not be an issue that is common to all members of the class.

The problem here was that plaintiff homeowners were all in different positions: Some may have bought their homes from the builder, while others were second or third purchasers. Thus, the proof of passing on the additional costs of building the home due to the additional cost of the iron ore would have to be made on an individual basis to ensure that such additional cost had in fact been passed on to any class member who now owned a home with bricks containing iron ore. Consequently, the Court was not prepared to determine the liability of the defendant on the basis of expert testimony which simply assumed that this additional cost had been "passed through" to each current homeowner.

The Court of Appeal decided that the following factors made it necessary to determine the issue of liability and damages on an individual basis, thus making the action unmanageable:

- the large number of parties in the chain of distribution;

[3] *Vitapharm Canada Ltd.* v. *F. Hoffman-Laroche Ltd.*, 99-GD-46719 (Ont. S.C.) [hereinafter *Vitapharm*]; *Ford* v. *F. Hoffman-Laroche Ltd.* 771/99 (Ont. S.C.); *McLeod* v. *Chinook Group Ltd.*, 99-CV-172410 (Ont. S.C.).

[4] *Minnema* v. *Archer Daniels Midland Co.*, [2000] O.J. No. 1685 (S.C).

[5] *Canadian Community Reading Plan Inc.* v. *Quality Service Programs Inc.* [2001] O.J. No. 205 (Ont. C.A.)

[6] *Chadha* v. *Bayer Inc.*, (1999) 45 O.R. (3d) 29 (S.C.), (September 29, 1999) 98-CV-142211 (S.C. certifies), leave to appeal granted 45 O.R. (3d) 478 (Div. Ct.), stay of proceedings (December 16, 1999) 459/99 (Div. Ct.); (2001), 54 O.R. (3d) 920 (Divisional Court denies certification), (January 14, 2003) C37244 (Ont. C.A. denies certification).

[7] Note that this accords with recent case law on the matter: *Gariepy* v. *Shell Oil Co.* (2000), 51 O.R. (3d) 181 (Ont. S.C.J.); *Nutreco Canada Inc.* V. *F. Hoffman- La Roche Ltd.* (2001), 14 C.P.R. (4th) 43 (B.C.S.C.).

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- the multitude of factors affecting the end purchase price of the homes; and
- the fact that the iron ore was only a very small component of the homes an a trivial part of the purchase (if at all).

However, the Court suggested that if a direct link between the conspirators and end-users had existed, the outcome might have been different.

False and misleading representation: One such case involved a misrepresentation made by a school with respect to the school's reputation and availability of scholarships[8], another involved misrepresentations with respect to the value of mining shares based on gold salting samples[9] and a third involved misrepresentations with respect to the value of shares of a company carrying on illegal operations.[10]

To date, only the class action in *Carom I* against Bre-X, Bresea, and certain directors, officers and employers of these companies for breach of Section 52 of the *Competition Act* has been certified.[11] None of the other cases were certified, however, since proof of the misrepresentations made to each of the plaintiffs would have had to be made so as to determine the liability of the plaintiff towards each class member, thereby making the action unmanageable. That is, as the misrepresentations made to each class action varied, the degree of reliance on the misrepresentations for each class member varied.

Price maintenance: The first case under this subheading is *Wong* v. *Sony of Canada.*[12] While the case was not certified for lack of evidence, Mr. Wong alleged Sony of Canada had published a "suggested price list" that it showed to customers and a lower "actual price list" so as to ensure that retailers would not sell products at prices lower than those at the Sony stores.

In *Price* v. *Panasonic Canada Inc.*,[13] the plaintiffs claimed that the defendant had prevented its dealers from lowering their prices for close to 20 years, thereby affecting the prices paid by consumers, contrary to Section 61 of the *Competition Act.* However, the defendants argued successfully that different distribution channels had been used, and that many sales were made by dealers over which they had no real control. Moreover, a myriad of factors affected the prices of their goods, ranging from retailer promotions to "extras" with which they promoted their products (e.g., free television stands).

The Court also held that a plaintiff under Section 36 of the *Competition Act* must prove actual loss or damage and cannot simply rely on an estimated quantum of damages to resolve issues of proof of liability. The damages were alleged to be 15% of every product sold to each of approximately 20 million consumers. The Court also held that, given that proof of actual loss or damage required numerous individual trials, and that this issue greatly outweighed the common issue of whether or not a statutory breach had occurred, a class proceeding would not be fair, efficient or manageable. The Court added that behaviour modification was better left to the Competition Bureau in *Competition Act* cases.

It is important to note that claims under Part VIII of the *Competition Act*, such as tied selling, exclusive dealing, market restriction and abuse of dominant position, are not legal causes of action in class action lawsuits by virtue of section 36.

There have been several settlements in class actions under the *Competition Act.*[14] For example, in a class action against Miralex Health Care Inc.[15] for misrepresenting their handcream as being all natural when in fact it contained a steroid, a settlement was reached for approximately two million dollars.

Increase Of Class Actions In The Long Run

The small number of successful class actions under the *Competition Act* should not give potential defendants a false sense of security: *Competition Act* class actions are expected to increase in the long run. Though, they may be only of limited utility in cases involving individualized misrepresentations or indirect purchasers.

The growing number of anti-trust cases in the United States with copycat suits in Canada and the partnering of law firms to share the risk of non-recovery, should

[8] *Moutheros* v. *Devry Canada Inc.*, No. 96-CU-107281, 1998-01-23 (Ont. Ct. Gen. Div.) (Winkler J.).

[9] *Carom II*, No. 97-GD-39574, 1998-10-19.

[10] *Mondor v. Fisherman* [2002] O.J. No. 4620 (Ont. S.C.J.).

[11] *Carom* v. *Bre-X Minerals Ltd.* (1999) 44 O.R. (3d) 173 (S.C.S.) at 198-199.

[12] [2001] O.J. No. 1707 (S.C.).

[13] [2002] O.J. No. 2362 (S.C.).

[14] *Alfresh Beverages Canada Corp.* v. *Archer Daniels Midland Co.* (unreported, October 23, 2001, Ont. S.C.J., London Court File No. 322562/99); *Sun-Rype Products Ltd.* v. *Archer Daniels Midland Co.* (unreported, November 9, 2001, B.C.S.C., Court File No. L003223); *Alfresh Beverages Canada Corp.* v. *Hoechst AG* (2002), 111 A.C.W.S. (3d) 413 (Ont. S.C.J.).

[15] *Head v. Miralex Health Care Inc.* Vancouver S000294.

bolster the number of *Competition Act* class actions in the near future. Moreover, the recent adoption of new legislation in Saskatchewan, Manitoba, Newfoundland, along with new legislation expected shortly in Alberta, should make the courts in these provinces more accessible to class actions claims.

Furthermore, the recently-added possibility of starting class actions in the Federal Court should also encourage class actions, as it will be easier to coordinate claims of class members who live across Canada and to avoid costly separate actions in each province or pleading the much-debated issue of the "national class" in front of a provincial court which may or may not have jurisdiction to certify such a class.

Another important factor to consider is that Section 36(2) of the *Competition Act* establishes convictions under Part VI as proof of unlawful conduct for the purpose of a civil trial. As such, a conviction following an investigation by the Competition Bureau under Part VI becomes proof in later class actions taken by clients or end-users of a company's product. This provision greatly reduces the burden of proof born by, and the resources expended by, the plaintiffs to make their case in a Section 36(1) class action.

Immediate Action To Protect Your Business

It is crucial for a company's employees to have an understanding of the *Competition Act* in order to protect against the risk of class actions. One of the best tools is a compliance manual that employees could consult in day–to-day operations.

An effective compliance program will:

- give early warning of potentially illegal conduct;
- reduce the exposure of corporate officers, directors and officers and the company itself;
- reduce costs related to litigation, fines, negative publicity, and the disruption of operations;
- increase the awareness of possible anti-competitive conduct by competitors, suppliers, or customers.

This bulletin is intended merely to provide general guidance with respect to *Competition Act* class action law suits. The particular circumstances of each case will dictate the Courts' decisions. For an analysis of your company's situation, please contact us.

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To Protect Yourselves Adequately

In addition to providing advice and representation, the Competition Law team at *Lavery, de Billy* can conduct seminars for your employees in order to inform and guide them with respect to Competition Law compliance. Moreover, the Competition Law team at *Lavery, de Billy* can, as it has done for many of its clients, draft comprehensive Competition Law compliance manuals which can, when combined with effective corporate enforceability policies, greatly reduce the risk of fines under the *Competition Act* and the expensive class actions that can result from convictions under the Act.

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