
THE PRIVATE
COMPETITION
ENFORCEMENT
REVIEW

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LAW BUSINESS RESEARCH

Chapter 3

CANADA

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Although class action suits for damages in respect of criminal competition-law violations have been growing more frequent in Canada, class certification is far from automatic. Recent decisions have generally been fairly restrictive, adopting an approach similar to the Ontario Court of Appeal's decision in *Chadba v. Bayer*,¹ in which the court focused on whether there is a workable method by which to establish the fact of harm on a class-wide basis. In a recent decision from Ontario,² the court refused to certify a class action on the basis that the plaintiffs had failed to establish that damages could be determined globally as a common issue.³ A 2008 British Columbia decision refusing to certify an alleged price-fixing conspiracy case involving silicon memory chips ("DRAM") addresses all of these pertinent issues.⁴ The plaintiffs' inability to demonstrate a workable method to prove the fact of harm on a class-wide basis (due at least in part to the multiple chains of distribution and the associated issue of 'pass through' to indirect purchasers) led the court to conclude that a class proceeding would not be the preferred procedure. The court predicted that the case would necessarily 'dissolve into a series of individualised

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1 [2003] OJ No. 27, 63 OR (3d) 22 (CA), additional reasons [2003] OJ No. 1162, leave to appeal to SCC denied [2003] SCCA No. 106, 65 OR (2d) xvii (SCC) ("*Chadba*").

2 2038724 *Ontario Ltd v. Quizno's Canada Restaurant Corp* (2008), 89 OR (3d) 252 (Ont SCJ).

3 *Id.* at paragraph 9. The court also found that the class action was not the preferred procedure since the quality and quantity of the individual issues overwhelmed any common issues.

4 *Pro-Sys Consultants v. Infineon Technologies*, [2008] BCJ, No. 831, 2008 BCSC 575 (SC). The proposed class in this case involved both direct and indirect purchasers of DRAM and products containing DRAM (such as computers), but it was overwhelmingly an indirect purchaser class and, as such, certification was refused.

inquiries that would overwhelm the common aspects of the case.⁵ Similarly, a proposed class action in Quebec was recently denied authorisation to proceed because of the absence of proof of harm in the case. The plaintiff alleged that certain automobile dealerships had conspired to fix and maintain prices in contravention of the Competition Act.⁶ The court found there was insufficient proof of loss, and, as such, no basis for proceeding with the class action. The court also expressed concern that, at a minimum, numerous individual assessments of harm would be required. The decision was upheld by the Quebec Court of Appeal.⁷

Another area of developing competition law in Canada has been in the realm of private applications to the Competition Tribunal (‘the Tribunal’) under the civil reviewable practice provisions of the Competition Act.

Several leave applications have been brought under Section 103.1 of the Competition Act since its enactment in 2002. The Tribunal has denied most of the leave applications. The first private access case to go to a full hearing was heard in late 2006 and decided in January 2007.⁸ The Tribunal held that the applicants had failed to establish that they were substantially affected in their business, or precluded from carrying on their business, due to the refusal by the Bank of Nova Scotia to provide banking services to an online gambling business.⁹ The applicants had also failed to establish, *inter alia*, that the refusal to deal was having or likely to have an adverse effect on competition in a market. The Tribunal mentioned that even if the applicant had established all the elements necessary to grant an order, ‘this would not be a proper case for the granting of discretionary relief to the applicants because they are unable to comply with the contractual terms and conditions pursuant to which the banking services they seek are provided to customers of The Bank of Nova Scotia.’¹⁰

In a somewhat novel twist, a British Columbia plaintiff recently asserted unjust enrichment giving rise to a constructive trust as one of the causes of actions in a price-fixing conspiracy claim, which entitled the plaintiff to a 10-year limitation period rather than the two-year period specified in the Competition Act and at common law.¹¹

5 *Id.* at paragraph 143.

6 RSC 1985, c. C-34 (‘Competition Act’).

7 *Hammegnies v. Toyota Canada*, [2007] JQ no 1072 (CS), aff’d on appeal [2008] JQ No. 1446, 2008 QCCA 380 (CA).

8 *B-Filer Inc v. The Bank of Nova Scotia* (20 December 2006), 2006 Comp Trib 42 CT-2005-006 (‘*B-Filer Inc*’).

9 *Id.* at paragraph 2. The applicants were not able to comply with the usual terms of their former banker, the Bank of Nova Scotia (the ‘Bank’); the Bank subsequently terminated its service to the applicants. The applicants claimed the Bank had engaged in a refusal to deal under Section 75(1) of the Competition Act and requested the Tribunal to issue an order requiring the Bank to supply them with the requested banking services.

10 *Ibid.*

11 *Sun-Rype Products Ltd v. Archer Daniels Midland Co*, [2007] 12 WWR 285, varied on other grounds [2008] BCJ No. 1298 (CA). In this case, the plaintiffs alleged that the defendants had conspired illegally to fix the price of fructose corn syrup from 1988-1995. The action was not commenced

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Private actions for damages incurred as a result of criminal violations

Section 36 of Canada's Competition Act provides that individuals or companies can bring private actions in a court of competent jurisdiction (including the Federal Court) to recover damages incurred as a result of an alleged criminal violation of the Competition Act. The offences in respect of which damages can be sought include conspiracy (Section 45), bid rigging (Section 47), predatory pricing and price discrimination (Sections 50 and 51), misleading advertising (Section 52), deceptive telemarketing (Sections 52.1) and price maintenance (Section 61). Where one of these offences is alleged, a criminal conviction – or even criminal charges – are not required in order to commence a civil action. That said, a prior conviction does raise a presumption that the criminal violation has taken place, and evidence in the criminal trial as to the effect of such violation is also evidence thereof in the private action for damages.

When there is no prior conviction, the burden of proof for the criminal offence that must be met by a plaintiff in its Section 36 civil claim is, as a practical matter, somewhat higher than the civil standard (balance of probability) but lower than the criminal standard (beyond a reasonable doubt).¹²

Accordingly, while a plaintiff may succeed in a Section 36 civil claim for damages without a prior criminal conviction, a prior conviction certainly facilitates such a claim.¹³ For a more detailed discussion on this topic, see Section X, *infra*.

ii Private access to the Competition Tribunal for civil offences

Subsection 103.1 of the Competition Act, enacted in 2002, affords a right of private access to the Tribunal in respect of certain civilly reviewable conduct excluding, however, mergers and abuse of dominance. Before this section was enacted, only the Commissioner of Competition ('the Commissioner'), who heads the Competition Bureau ('the Bureau') could bring an application before the Tribunal with respect to any of the civilly reviewable offences, including under Sections 75 (refusal to deal) and 77 (exclusive dealing, tied selling and market restriction).¹⁴ Since 2002, however, if leave is granted under Section 103.1, private access is permitted, but only with respect to alleged breaches of Sections 75 and 77. Notably, the Tribunal cannot award damages,

until more than six years after the conclusion of the alleged conspiracy. The plaintiffs pleaded several cause of actions, including 'unjust enrichment founding a claim for restitution giving rise to a constructive trust.'

12 *Continental Insurance Co v. Dalton Cartage Co*, [1982] SCJ No. 116, [1982] 1 SCR 164; and in a competition case, *Janelle Pharmacy Ltd v. Blue Cross of Atlantic Canada*, [2003] NSJ No. 307, 2003 NSSC 179 (SC).

13 Stikeman Elliott LLP, 2009 Competition Act & Commentary, (2008 LexisNexis Canada Inc) at 34.

14 *Symbol Technologies Canada ULC v. Barcode Systems Inc*, [2004] FCJ No. 1657 at paragraph 6, 2004 FCA 339 (FCA).

and the Competition Act application cannot be combined with other heads of action (such as breach of contract). Accordingly, private applications to the Tribunal have been infrequent.

In order to grant leave, the Tribunal must have reason to believe that:

*(1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section.*¹⁵

The threshold for obtaining leave is lower than proof on a balance of probabilities: '[i]t need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal.'¹⁶

iii Common law tort claims of conspiracy and interference with economic interests

In practice, a Section 36 claim for damages is normally combined with a claim of common law conspiracy or unlawful interference with economic interests in tort. This approach is often advantageous for the plaintiff as it may be easier to satisfy the required elements for a tort claim and, in some jurisdictions, the limitation period for a tort conspiracy action is six years, while a claim under Section 36 is subject to a two-year limitation period.¹⁷ In addition, a common law tort claim may allow for punitive damages, which are prohibited under Section 36 claims.

It should be noted that only a criminal violation of the Competition Act can found a tort claim for damages. The civilly reviewable practices such as abuse of dominance, refusal to deal, exclusive dealing, tied selling and market restriction are legal business practices unless and until the Tribunal issues an order or a consent agreement is registered with the Tribunal prohibiting such conduct. Accordingly, only a violation of such a Tribunal order in respect of a civil offence would give rise to a civil case for damages under Section 36, or a common law tort claim based on unlawful conduct.¹⁸

iv Limitation period

Section 36(4) of the Competition Act imposes a two-year limitation period on private actions under Section 36. The limitation period commences when the offensive conduct occurs, or when any criminal proceedings in relation to the conduct are finally disposed of, whichever is later. As with other heads of action, however, a limitation period is subject to the 'discoverability' of the damages.

15 *National Capital News Cantula v. Canada (House of Commons)*, [2002] CCTD No. 38, 23 CPR(4th) 77 (Comp Trib) at paragraph 8, off'd [2004] ECJ No. 83 (FCA) (*'National Capital News'*).

16 *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, [2004] FCJ No. 1657 at paragraph 17, 2004 FCA 339 (FCA) (*'Barcode'*).

17 For example, see Section 3 of the Limitation Act, RSBC 1996, c. 266.

18 See *Canada Cement LaFarge v. BC Lightweight Aggregate*, [1983] 1 SCR 452.

III EXTRATERRITORIALITY

i General jurisdictional rule

In order for a Canadian court to assert jurisdiction, there needs to be a ‘real and substantial link’ between the alleged conduct and Canada.¹⁹

Subject to some provisions of the Competition Act that clearly only apply to activities ‘in Canada’,²⁰ the Commissioner’s ability to take action against foreign anti-competitive conduct having an effect in Canada is rarely challenged.²¹

In the context of private class actions against anti-competitive conduct, the courts have held that the language of Section 45 of the Competition Act prohibiting anti-competitive conspiracies is not limited to conduct that has taken place in Canada.²² An Ontario court held that the ultimate issues for the court were whether: (i) the subject matter of the action ‘has a real and substantial connection to Ontario’; and (ii) ‘the foreign defendant is connected to that subject matter.’²³ In order to establish a connection between the subject matter and Ontario, the court said ‘[t]here must be a causal connection between the alleged damage (sustained in Canada) and the defendants to establish a realistic possibility that the defendants may be responsible in law for the damage through their unlawful conduct.’²⁴ If so, the jurisdiction test is satisfied and the court will assume subject matter jurisdiction.

ii Forum non conveniens

Even though the jurisdiction of the court to examine the conduct in question may be established, the court still has the discretion to decline jurisdiction, based on the doctrine of *forum non conveniens*.²⁵ ‘The test on a motion for a stay on the basis of *forum non conveniens* is whether there is clearly a more appropriate forum in which the case should be tried other than the forum chosen by the plaintiff.’²⁶ ‘Where the plaintiffs have an action as of right against domestic defendants, the burden is upon the foreign defendants to establish that the domestic forum is *forum non conveniens*.’²⁷ In *Vitapharm*, an

19 *R v Libman*, [1985] SCJ No. 56 at paragraph 74, [1985] 2 SCR 178.

20 E.g., geographic price discrimination under Section 50(1)(b) of the Competition Act.

21 B Facey & D Assaf, *Competition & Antitrust Law, Canada & the United States*, 2nd ed (Butterworths, 2006) at 495.

22 *Vitapharm Canada Ltd v F Hoffmann-LaRoche Ltd*, [2002] OJ No. 298 at paragraph 95 (Ont Sup Ct J), aff’d [2002] OJ No. 1400 (CA) (*‘Vitapharm’*), motion by five of the foreign defendants challenging the jurisdiction of the court.

23 *Id.* at paragraph 95.

24 *Id.* at paragraph 97. In this case, some of the foreign defendants pleaded guilty to the offence of conspiracy. The court stated that when the alleged conspiracy was proven, there was a real and substantial connection with Ontario with respect to the subject matter of the actions in tort (at paragraph 100).

25 *Id.* at paragraph 103.

26 *Id.* at paragraph 106.

27 *Id.* at paragraph 107

Ontario court stated that, in determining the application of this doctrine, ‘given modern technology and means of transportation’, the location of the witness and evidence was not a significant factor.²⁸ The court considered loss of judicial advantage to the plaintiff, however, to be a significant factor in favour of hearing the case.²⁹ Further, the court ‘will not decline jurisdiction simply because a foreign jurisdiction has a so-called blocking statute, whereby documents may not leave that jurisdiction’.³⁰ Neither will jurisdiction be declined simply because a judgment from a Canadian court will not be enforced in a foreign jurisdiction.

iii Considerations of comity

In *Vitapharm*, the defendant argued that because other countries had enacted blocking statutes either to prevent evidence from going out of the country or not to enforce a Canadian judgment, based on the principles of comity, the court should decline to assume jurisdiction. The court rejected this argument, stating that:

...the contrary is the case. Such a position by a foreign country flies in the face of the modern principles of international comity. In reality, such a statute has the effect of protecting nationals from the consequences of unlawful conduct abroad: Hunt v. T & N plc, [1993] 4 SCR 289 at 327. Given the inexorable forces of globalisation, it is particularly archaic for any country to insulate its nationals from the reach of judgments for conduct committed within Canada that is unlawful by Canadian law.³¹

IV STANDING

i Standing under Section 36

Under Section 36 of the Competition Act, ‘any person’ can bring a private action for damages against a defendant alleged to have violated a criminal provision of the Act or a court or Tribunal order issued under the Act, as long as the plaintiff has suffered actual

28 *Id.* at paragraphs 109-111.

29 *Id.* at paragraphs 113-121. The court held that a Canadian court should assume jurisdiction in the case. It found that, if Ontario was not the forum, there would be a significant increase in cost for the plaintiff to bring actions in several jurisdictions based on the nationalities of the defendants. The court also stated that ‘[i]t is appropriate that a Canadian court deals with claims of damages to Canadians by reason of torts allegedly committed in Canada due to conspiracies directed at, inter alia, Canadians.’ The court also considered that Canada’s Class Proceedings Act was arguably more flexible and favourable for a class proceeding than the corresponding legislation in the U.S. and ‘the record established in relation to a conviction under s. 45 of the Competition Act is *prima facie* evidence of an alleged conspiracy in a civil action. Such an issue is best dealt with by a Canadian court.’

30 *Id.* at paragraph 117. The court stated that a blocking statute ‘does not as a matter of law prevent or preclude an Ontario court from assuming jurisdiction.’

31 *Id.* at paragraph 119.

loss or damage as a result of the defendant's conduct.³² Under Section 36, quantifiable harm must be sustained and this must be proven at trial. Several cases in the class action context make it clear that proof of harm is part of establishing liability under Section 36 of the Competition Act (see Section I, *supra*).

Based on the language of Section 36, indirect purchasers can have standing to bring a case. For example, in a price-fixing case where the conspiracy has caused a higher price for a product, all the direct and indirect purchasers in the chain of supply would potentially have a cause of action to claim damages from the defendant.³³ However, establishing loss by indirect purchasers can be challenging in practice. Thus, several courts have refused to certify indirect purchasers' class actions on the basis that the indirect purchasers had failed to establish a reasonable methodology to trace the overcharges passing through the distribution chain to the indirect purchasers, and to account for subjective factors such as individual bargaining power.³⁴

ii Standing under Section 103.1

Any person³⁵ may apply to the Tribunal for leave to bring a case for conduct violating Sections 75 or 77 of the Competition Act, two of the civilly reviewable practices listed in the Act. Leave will only be granted to persons who are 'directly and substantially affected' in their business by the alleged anti-competitive conduct³⁶ and the applicants must provide 'sufficient credible evidence' of the alleged conduct to give rise to a *bona fide* belief by the Tribunal that the alleged practice could be subject to an order under Section 75 or 77.³⁷

V THE PROCESS OF DISCOVERY

i Scope of discovery

For private actions before the courts, although court procedure may differ from province to province, the scope of discovery in Canada is fairly broad. There are several types of discovery, including discovery of documents and oral discovery. In Ontario, for instance, parties are required to disclose, in an affidavit of documents, 'to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.'³⁸ Each party is entitled to inspect the documents listed unless privilege or confidentiality is

32 It is not enough for a plaintiff to recover damages by pointing to, for instance, a price fixing scheme that was never implemented (although this may be sufficient for criminal liability).

33 Katherine Kay, 'Canadian Competition Class Actions: "Are We Having Fun Yet?"', Stikeman Elliott LLP, April 2008 at 4; available at www.stikeman.com.

34 See *Chadha*.

35 Competition Tribunal Act Competition Rules SOR/2008-141. Section 1 defines person as 'a corporation, a partnership and an unincorporated association'.

36 See *National Capital News* (*supra*, note 15).

37 See *Barcode* (*supra*, note 16).

38 Rule 30.03 of Ontario's Rules of Civil Procedure ('the Ontario Rule') RRO 1990, Reg 194f.

claimed for the documents.³⁹ Individuals may also be examined under oath for discovery. Similar discovery is available for private actions for which leave is granted to bring an action before the Tribunal.⁴⁰

ii *Confidential business information and discovery from a third party*

Confidentiality is not a form of privilege; confidentiality alone will not insulate the information or documents from discovery.⁴¹ The law has imposed upon a party engaged in litigation an implied undertaking not to use information or documents obtained through the discovery process for any purpose other than litigation, unless the party providing the information has given consent.⁴²

The rules of most provinces, to varying degrees, allow discovery from non-parties.⁴³ For instance in Ontario, the court may, on motion by a party, order production of a document from a non-party that is relevant to a material issue in the action and is not privileged.⁴⁴

Efforts to date to obtain access to the Commissioner's files for use in a private civil action have met with divided success.⁴⁵ Under Section 10(3) of the Competition Act, all inquiries by the Commissioner are required to be conducted in private. However, Section 29 of the Act provides that information or documentation obtained⁴⁶ by the Commissioner may not be communicated to third parties, other than to Canadian law

39 For example see Rules 30.02 and 30.04 of the Ontario Rule; Rule 188 of the Alberta Rule; Rule 26(7) of the British Columbia Rule. See also Janet Walker, *The Civil Litigation Process, Cases and Materials*, 6th ed. (Toronto: Emond Montgomery Publications Limited, 2005) at 701.

40 Competition Tribunal Rules, SOR 2008-141, Rules 60-64.

41 F D Cass *et al.*, *Discovery, Law, Practice and Procedure in Ontario* (Toronto, Carswell Thomson Professional Publishing 1993) at 425.

42 For instance, See Rule 30.1 of the Ontario Rule, which states that 'all parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.' See also Competition Tribunal Rules, Rule 62.

43 By examining potential witnesses under oath, parties can expand the information-gathering possibilities. See Walker, *Civil Litigation Process* at 694.

44 See Rule 30.10(1) of the Ontario Rule. To issue the order, the document needs to be in the possession, control or power of a non-party and the court needs to be satisfied that: '(a) the document is relevant to a material issue in the action; and (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.'

45 See *Forest Protection Ltd v. Bayer AG*, [1996] NBJ No. 238, 68 CPR (3d) 59 (QB) ('*Forest Protection*'); and *British Columbia Children's Hospital v. Air Products Canada Ltd*, [1997] BCJ No. 494 (SC). While, as a matter of general policy, the Commissioner has stated that the Bureau will assert statutory confidentiality and relevant privileges, the Commissioner did not oppose efforts by third parties to obtain documents in the Commissioner's possession in *Forest Protection*.

46 Information may be obtained voluntarily or as a result of orders for oral examination, production of records, preparation of written returns, wiretaps or search and seizure pursuant to a search warrant.

enforcement agencies or for the purpose of the administration or enforcement of the Competition Act.⁴⁷ Based on this section and common law principles, the Commissioner has asserted statutory confidentiality and relevant privileges (include public interest and litigation privilege) with respect to the material gathered in the course of an inquiry.

Discovery on the merits of the case can sometimes be obtained earlier in the litigation process in the United States (or such action may pre-date the Canadian action) and some documents protected by privilege in Canada may sometimes nonetheless be obtained by plaintiffs in the US. Canadian plaintiffs therefore sometimes seek access to evidence obtained in the US in order to assist the prosecution of a Canadian case. In some cases, the US courts have granted such access;⁴⁸ however, one US court denied a request on the basis that comity between US and Canadian courts should be respected so as not to allow Canadian plaintiffs to have access to discovery before they are otherwise entitled to it.⁴⁹

iii Limitations

A party does not need to produce any documents for which privilege has been claimed. The privileges that can be claimed include solicitor–client communications, documents prepared in contemplation of litigation, without prejudice communications for purposes of settlement, crown privilege, etc. In the context of a private action under Section 36 of the Competition Act, the courts have applied privilege to protect information communicated to the competition authority by a defendant for the purpose of settling a case.⁵⁰ The courts have also prevented defendants from discovering the contents of a settlement agreement reached by the plaintiff and other co-defendants.⁵¹

VI USE OF EXPERTS

The courts have decided that admission of expert evidence depends on the application of the following criteria:⁵²

- a relevance;
- b necessity in assisting the trier of fact (the court needs to be satisfied that the proposed witness, by virtue of his or her learning and experience, has knowledge not commonly shared);

47 Section 29 also protects the confidentiality of information and documentation provided to the Bureau in required merger notification filings or in applications for an advance ruling certificate; in 2002, Section 29 was amended to protect the confidentiality of the information provided voluntarily pursuant to the Act, including in the initial investigation stage of a reviewable matter, always subject to the same caveats.

48 *Vitapharm Canada Ltd v. F Hoffmann-LaRoche Ltd*, [2001] OJ No. 237 (SCJ), affd [20021 OJ No. 1400 (SCJ) and *In re: Linerboard Antitrust Litigation*, 333 F Supp 2d 333 (ED Pa 2004).

49 *In re: Hydrogen Peroxide Litigation*, No. 05 666 (D Pa July 31, 2006) (Order).

50 *Middelkamp v. Fraser Valley Real Estate Board* (BCCA), [1992] BCJ No. 1947, 45 CPR (3d) 213.

51 *British Columbia Children's Hospital v. Air Products Canada Ltd*, 2003 BCCA 177, 29 CPC (5th) 16.

52 *R. v. Mohan*, [1994] 2 SCR 9, 29 CR (4th) 243.

- c* the absence of any exclusion rules; and
- d* a properly qualified expert. Thus, before a witness may give expert testimony at trial, he or she must first be qualified by the court as an expert. The party who called the expert will engage in a detailed review of the witness's professional experience. The courts have discretion to decide whether the qualifications of the witness have been made out.⁵³

It is commonly held that an expert is confined to expression of opinions based on facts proved at the trial, proved by the expert or proved by the testimony of other witnesses.⁵⁴ In competition law litigation, expert opinions, including an analysis of statistical data, could be used to establish loss on a class-wide basis.⁵⁵ Since in Canada indirect purchasers can bring a private action for price-fixing offences, in principle, expert testimony could be used to establish that a price increase has been passed on to indirect purchasers.⁵⁶ However, the courts have discussed the practical difficulties of proving harm by indirect purchasers.⁵⁷ See Section I, *supra*.

VII CLASS ACTIONS

i Requirements

Section 5(1) of the Class Proceedings Act⁵⁸ governs class action procedure in Ontario. This section provides that a class proceeding may be certified by the court, if all of the following seven requirements are met:

- a* cause of action – '[t]he pleadings or the notice of application must disclose a cause of action.'⁵⁹ The certifying court needs to be satisfied, on an evidentiary basis, that 'loss as a component of liability could be proven on a class-wide basis'.⁶⁰ For class actions brought on the basis of anti-competitive conduct, actual damage is a necessary component of the cause of action of each plaintiff⁶¹ and establishing that all members in a proposed class have suffered an actual loss is a challenging task. This is a major 'battleground' in certification motions;

53 *Preeper v. R* (1888), 15 SCR 401. See also R Delisle, D Stuart and D Tanovich, *Evidence Principles and Problems* (Toronto, Thomson and Carswell, 2004) at 715.

54 *Evidence Principles and Problems* at 752.

55 *Chadha* at paragraph 51. The Ontario Court of Appeal quoted two US cases: *Re: Linerboard Antitrust Litigation*, 305 F (3d) 145 (2002) and *Illinois Brick v. Illinois*, 431 US 720 (1977).

56 *Chadha* at paragraphs 40, 48.

57 *Ibid.* In this case, the court held that the appellant's expert witness had failed to prove that all purchasers had overpaid for houses containing the defendant's products.

58 SO 1992, c. 6 ('Class Proceedings Act').

59 Class Proceedings Act, Section 5(1)(a).

60 *Chadha* at paragraph 65. No. 106. When whether such evidence could have been obtained was not clear, the court has rejected the certification application.

61 *Chadha* at paragraph 3.

- b* identifiable class – there is ‘an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant.’⁶² The Ontario court in *Chadha* held that ‘the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided’;⁶³
- c* common issues – ‘[t]he claims or defences of the class members raise common issues.’⁶⁴ In *Chadha*, the court recognised that ‘it remains to be determined whether in a particular case a sufficient evidentiary record can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done was a question left open for future cases.’⁶⁵ The court in that case rejected the allegation that liability was a common issue and could be proven in the trial.⁶⁶ The plaintiff had failed to show, on a preliminary basis, that ‘there was a sufficient record to support a decision to certify based on liability as a common issue’;
- d* preferable procedure – ‘[a] class proceeding would be the preferable procedure for the resolution of the common issues.’⁶⁷ The Supreme Court of Canada in *Hollick* concluded that ‘the question of preferability, then, must take into account

62 Class Proceedings Act, Section 5(1)(b).

63 *Chadha* at paragraph 69. The court further stated that circular definitions ‘...make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.’

64 Class Proceedings Act, Section 5(1)(c).

65 *Chadha* at paragraph 68.

66 *Id.* at paragraph 52, no. 106. In this case, one of the issues in the certification motion was whether the defendant was liable to the members of the plaintiff class (home owners) for conspiracy to fix the price of iron oxide, which was used as pigment in products used in the houses. The motion judge held that the loss could be proved at trial as one of the common issues through proof of two components: ‘(1) an overall assessment of damages on the basis of the net gain realized by the defendants as a result of their allegedly unlawful agreement; and (2) a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigments. The appellants argue further that proving these two components of loss would not require the participation of the plaintiff class. Finally, and critically, they state that there was ‘probative evidence’ before the motion judge to support as reasonable the judge’s conclusion on proof of loss through the two proposed components.’ (at paragraph 26). The Ontario Court of Appeal rejected the motion judge’s finding and concluded that liability could not be a common issue to be proven during the trial. It quoted from *Hollick*: “‘the [Class Proceedings Act] requires the representative plaintiff to provide a certain *minimum evidentiary* basis for a certification order. While... the [Class Proceedings Act] does not require a preliminary merits showing, the judge must be satisfied of certain basi[c] facts required by s. 5 of the [Class Proceedings Act] as the basis for a certification order” (paragraph 24) [emphasis added in *Hollick*]’ (at paragraph 29).

67 Competition Act, Section 5(1)(d).

the importance of the common issues in relation to the claims as a whole.⁶⁸ The court decided that where the number of potential plaintiffs was very large⁶⁹ and individual trials were needed to establish loss, the action would be unmanageable and therefore a class action was not the preferable procedure;⁷⁰

e fair and adequate representation – a representative plaintiff or defendant ‘must fairly and adequately represent the interests of the class’;⁷¹

f workable method of advancing the proceeding – a representative plaintiff or defendant must ‘[have] produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding’;⁷² and

g no conflict of interests – a representative plaintiff or defendant must not have, in respect of the common issues for the class, an interest which conflicts with the interests of other class members.⁷³

In addition, when determining the issue of certification, the Ontario Court in *Chadha* considered and balanced the objectives of the Class Proceedings Act.⁷⁴ Three important objectives of the Class Proceedings Act are:

(a) *judicial economy*; (b) *improved access to the courts for actions that may not otherwise be asserted*; and (c) *behaviour modification for actual or potential wrongdoers*.⁷⁵

The court also recognised that the Competition Act provides criminal sanctions for the defendant’s conduct, and that this would help to achieve the goal of behaviour modification; in doing so, the Ontario court seemingly advocated giving this goal less consideration in a Section 36 class action certification than in class actions based on non-criminal behaviour.⁷⁶

68 *Hollick v. The City of Toronto*, [2001] 3 SCR 158 at paragraph 22. (This case was cited in *Chadha*). McLachlin CJC quoted with approval the statement of the Chairman of the Attorney General’s Advisory Committee that the class representative must ‘demonstrate that, given all the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings’ (paragraph 30). See also in *Chadha* at paragraph 54.

69 See *Chadha* at paragraph 56. In this case, the number of potential plaintiffs was estimated at 1.1 million.

70 *Ibid.*

71 Class Proceedings Act, Section 5(1)(e)(i).

72 *Id.*, Section 5(1)(e)(ii).

73 *Id.*, Section 5(1)(e)(iii).

74 *Chadha* at paragraphs 11, 62.

75 *Id.* at paragraph 62.

76 *Ibid.* The court stated that ‘... where access to justice through compensation of individual plaintiffs who have suffered a loss is not a significant goal (because the amounts in issue are so minimal, and most plaintiffs do not know if or that they suffered any damage), and where judicial economy would be undermined, not enhanced, by certifying the action, the

A potential representative may also have to meet additional requirements set out by the courts in order to obtain certification, including standing, the provision of notice, and the consideration of a national class.

ii Standing

In jurisdictions where class actions are allowed,⁷⁷ a plaintiff may bring a private action on his or her own behalf and on behalf of all other persons who have suffered similar losses as a result of the defendant's criminal conduct or as a result of failure to comply with an order of the Tribunal or a court under the Competition Act.

iii Notice

Notice to the class members of certification and settlement is normally given, but is not mandatory. The court may determine how the notice is to be given (or dispensed with) and who will bear the cost.⁷⁸ Once a class proceeding has been certified, members of the defined class are presumed to be in the proceeding and to be bound by the court's determination, unless they take active steps to 'opt out' within a limited time period prescribed by the court.⁷⁹

iv National classes

In Canada, there is no national class⁸⁰ action regime, although class actions are now permitted in all provinces except Prince Edward Island. Nevertheless, courts in some jurisdictions have approved national classes of plaintiffs.⁸¹ As a result, class actions against anti-competitive conduct normally will be brought in more than one province. If a class action in one province has been certified as a 'national class', however, all the similar proceedings in other provinces may be stayed pending the outcome of the certified class action.⁸²

circumstances requiring behaviour modification would have to be extremely compelling to allow that single goal to overcome the other deficiencies.

77 Now every Canadian province except Prince Edward Island.

78 Walker, *Civil Litigation Process* at 886.

79 *Ibid.*

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

81 See for instance, *Carom v. Bre-X Minerals Ltd* (1999), 44 OR (3d) 173 (SCJ) and *Wilson v. Servier* (2000), 50 OR (3d) 219 (SCJ).

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

VIII CALCULATING DAMAGES

i Type of damages cognisable under a Section 36 claim:

A Section 36 plaintiff (for damages incurred as a result of an alleged criminal violation of the Competition Act or a breach of a court or Tribunal order) can claim actual loss or damages, but must prove at trial that quantifiable harm has been sustained.⁸³

An additional amount not exceeding the full costs to the plaintiff of pursuing the legal actions may also be recoverable. Under Section 36(1), this additional amount can include the costs of investigating the matter.

Punitive damages are not allowed under Section 36. Such a claim was struck out on a preliminary motion in a 2001 Ontario decision.⁸⁴ However, common law conspiracy claims (often coupled with a Section 36 claim) may allow for punitive damages.

The possibility of recovering losses or damages resulting from non-criminal conduct is not currently available under the Competition Act, although proposals have surfaced several times in recent years to empower the Tribunal to award damages to private plaintiffs in respect of civil practices such as refusal to deal, abuse of dominance, tied-selling, etc.⁸⁵

Remedies available for private litigants who bring applications to the Tribunal in respect of Sections 75 and 77 are currently the same as those available to the Commissioner (typically a prohibition or other behaviour order). Indeed, Section 77(3.1) prohibits the Tribunal from awarding damages to a private litigant for a breach of Section 77.

IX PASS-ON DEFENCES

i Indirect purchasers' claims

In Canada, indirect purchasers are not barred from bringing private actions in price-fixing cases; nevertheless, the evidentiary complexity of the 'pass-through problem' has been recognised by an Ontario court.⁸⁶ The court quoted passages from the US decision in *Illinois Brick v. Illinois*⁸⁷ to illustrate the problem of proving that overcharges had been passed on to indirect purchasers.⁸⁸ Nevertheless, the courts in Canada have not gone

83 See *Chadba* at paragraph 3. In this case, the Ontario Court of Appeal upheld the trial judge's finding that 'damage , a necessary component of the cause of action of each plaintiff, could not be proved on a class-wide basis; rather, damage must be proved individually for each plaintiff, making the class action process not the preferable process;' therefore the certification of the class action was denied.

84 *Wong v. Sony of Canada Ltd*, [2001] OJ No. 1707,9 CPC (5th) 122 (SCJ).

85 Government of Canada, Discussion Paper at p.11.

86 *Chadba* at paragraph 44.

87 431 US 720 (1977).

88 *Chadba* at paragraph 44. The Division Court noted 'the many problems of proof facing the appellants with respect to the pass-on issue, including the number of parties in the chain of distribution and the 'multitude of variables' which would affect the end-purchase price of a building.' 'The appellants would have to show that the price increase (or a part of it) was

so far as to fully bar claims of indirect purchasers. The court in *Chadha* suggested a case-by-case approach and left this issue to be considered in future cases.⁸⁹ The Ontario Court of Appeal further indicated in that case that ‘if it could be shown that all home prices were artificially inflated as a result of the use of both iron oxide-pigmented and non-iron oxide-pigmented building materials, that could well have formed the basis for concluding that proof of loss could be presented on a class-wide basis as a common issue.’⁹⁰

ii Direct purchasers’ claims

In Canada, defendants can assert a pass-on defence against even direct purchasers, if they can show that the direct purchaser was able to pass on the harm to subsequent purchasers. An Ontario court declined to certify a class action as the plaintiffs had failed to show a workable method to prove the fact of harm on a class-wide basis due to, at least in part, the multiple chains of distribution and the associated issue of ‘pass through’. In such a case, the court concluded that a class proceeding was not the preferable procedure.⁹¹

X FOLLOW-ON LITIGATION

i Section 36 claims

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

When there is no prior criminal conviction, a plaintiff can still bring a civil claim against the defendant, but must prove all elements of the case.

ii Private applications to the Tribunal (civilly reviewable conduct)

One of the requirements for the granting of leave for a private application to the Tribunal under Sections 75 (refusal to deal) and 77 (exclusive dealing, tied selling and market restriction) is certification by the Commissioner that the matter in respect of which

passed through from the respondents to the building materials manufacturer and distributor, to the builder, to the purchaser and on to any subsequent purchaser. If the price increase was absorbed at any point, the chain would be broken.’ (at paragraph 45).

89 *Chadha* at paragraph 68. The court held that ‘[i]n this jurisdiction it remains to be determined whether in a particular case a sufficient evidentiary record (for the passing on of price increases) can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done is a question left open for future cases.’

90 *Chadha* at paragraph 48. In this case, the court decided that the appellants’ expert evidence failed to discuss the issue of variables, nor to show how to prove the flow of the price increase through the distribution line.

91 *Pro-Sys Consultants v. Infineon Technologies*, [2008] BCJ No. 831 at paragraph 143.

leave is sought is not the subject of an inquiry or application by the Commissioner to the Tribunal (either ongoing or settled).

In *B-Filer Inc.*,⁹² when a plaintiff brought two actions (a Section 75 refusal-to-deal claim before the Tribunal and a tort claim before the court) for the same conduct, the dismissal of the court proceedings⁹³ did not render the Tribunal proceedings *res judicata*, ‘because the issues before the Tribunal are not the same as the issues that were before the Alberta court.’⁹⁴ The Tribunal also rejected the defendant’s argument of estoppel, deciding that to continue the case before the Tribunal was not an abuse of process since the Tribunal had the exclusive jurisdiction to deal with issues under Sections 75 and 77 of the Competition Act.⁹⁵

iii Immunity

In Canada, immunity applies only to criminal prosecutions and does not extend to private actions. ‘A party implicated in criminal anti-competitive activity that may violate the Act may offer to co-operate with the Bureau and request immunity from criminal prosecution.’⁹⁶ The Bureau will treat the identity of the self-reporting persons as confidential, subject to some (limited) exceptions.⁹⁷ The Bureau’s policy with respect to private actions under Section 36 of the Act is to provide confidential information only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking protective court orders.⁹⁸

XI PRIVILEGES

i Solicitor–client privilege

Solicitor–client privilege protects communications with a solicitor for the purpose of obtaining legal advice. It applies in the private enforcement of competition law to the same extent that it applies in other contexts.

Communications between company employees or officers and its in-house counsel enjoy solicitor–client privilege, as long as the communications are for the purpose of

92 See *supra*, note 8.

93 *Id.* at paragraph 6. In this case, the tort claim is based on breach of contract, unlawful interference with economic interests and unfair competition. the court has dismissed the plaintiff’s application for injunctive relief on the basis that the plaintiff did not show ‘a strong *prima facie* case’.

94 *Ibid.*

95 *Id.* at paragraph 13. The court stated that ‘Injunctive relief in the Alberta Decision was denied on the basis of contract law. It has not yet been decided in the context of competition law.’

96 Competition Bureau Information Bulletin, Immunity Program under the Competition Act, October 2007, at paragraph 3 (available at www.competitionbureau.gc.ca).

97 *Ibid.*

98 *Ibid.*

obtaining legal advice, not for other business purposes.⁹⁹ In practice, of course, the dividing line can sometimes be difficult to discern.

ii Litigation privilege

Litigation privilege protects the work product of counsel that is prepared in anticipation of litigation. The English courts have applied a ‘dominant purpose’ test to determine whether the ‘dominant purpose’ of the communication was for the preparation or conduct of litigation.¹⁰⁰ The Supreme Court of Canada adopted this test and held that only documents prepared for the dominant purpose of submission to counsel for the purpose of litigation will be protected from disclosure.¹⁰¹

iii Without prejudice communications/ settlement privilege

In order to encourage parties to settle disputes without going to court, the law has recognised that *bona fide* communications, whether oral or written, made with the intention to settle an existing or contemplated dispute, are privileged.¹⁰² Communications expressed to be ‘without prejudice’ are not automatically privileged; in order for this privilege to apply, the communications must constitute a *bona fide* attempt to facilitate settlement.¹⁰³

iv Limitations

Neither category of privilege allows the parties to withhold facts. A party has to produce documents or answer questions related to objective facts and actions.¹⁰⁴ Solicitor–client privilege only applies to communications, for example, and a solicitor may be compelled to answer questions and produce materials related to factual matters.¹⁰⁵

99 *Alfred Crompton Amusement Machines Ltd v. Commissioners of Customs and Excise (No. 2)*, [1972] 2 QB 102 (CA), aff’d [1974] AC 405 (HL). See also, Sheila Block and Lynn Iding, ‘Privilege in Civil Cases Revisited’, The Law Society of Upper Canada Special Lecture 2003, at 220. (‘Privilege in Civil Cases Revisited’).

100 *General Accident Assurance Company et al. v. Chrusz et al.* (1999), 45 OR (3d) 321 at 331. See also *Wheeler v. Le Marchant* (1881), 17 Ch D 675 at 681. See also Privilege in Civil Cases Revisited.

101 *General Accident Assurance Company et al. v. Chrusz et al.* (1999), 45 OR (3d) 321. The court stated: ‘the privilege as serving the following purposes: promoting frank communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognising the inherent value of personal autonomy and affirming the efficacy of the adversarial process. Each of these purposes should guide the application of the established criteria when determining the existence of client-solicitor privilege in specific fact situations.’ See also Privilege in Civil Cases Revisited at 224.

102 Cass, *Discovery – Law, Practice and Procedure in Ontario* at 419.

103 *Ibid.*

104 *Ontario (Securities Commission) v. Greymac Credit Corp* (1983), 41 OR (2d) 328 (Div Ct) See also Privilege in Civil Cases Revisited at 220.

105 *Ontario (Securities Commission) v. Greymac Credit Corp.*

The protection of lawyer's work product under the litigation privilege is also not absolute. For instance, the Ontario Rules of Civil Procedure require parties to disclose evidence on discovery (Rule 31.06(1)), and names and addresses of potential witnesses (Rule 31.06(02)). The case law has also, at times, required parties to reveal the substance of a witness's evidence.¹⁰⁶

v *Waiver*

Privilege may be waived by a party explicitly or a party can implicitly do so by putting the legal advice he or she received directly in issue.¹⁰⁷ Disclosure of the information to a third party generally would constitute waiver of the privilege attached to that information.¹⁰⁸ In the competition law enforcement context, the British Columbia courts have held that information disclosed to the competition authority for the purpose of settlement was protected by the privilege for 'without prejudice' communications, whether or not a settlement was reached.¹⁰⁹

In some situations, a plaintiff may allege that he or she was relying on the defendant's representations, only to have the defendant deny and allege that the plaintiff was relying on legal advice. The solicitor–client privilege may be waived in such a situation and the court has held that the parties were deemed to have waived privilege when they put into issue their state of mind.¹¹⁰ When determining the issue of waiver, the court has considered the principle of 'fairness and consistency'.¹¹¹

Canadian courts have generally held that privilege may only be waived by the client and only when 'it is waived deliberately and knowingly and not inadvertently'.¹¹² Nevertheless, the Ontario courts have contemplated two situations where privilege could be waived by inadvertent disclosure:

- a* when 'documents have come into the hands of the opposing party through the carelessness of the party claiming privilege, but not through any wrongdoing of the opposing party'; and
- b* when 'the information might have been so widely distributed that it would be futile as a practical matter to attempt to prevent its admission.'¹¹³

106 *Dionisopoulos v. Provias* (1990), 71 OR (2d) 547, 45 CPC (2d) 116.

107 Privilege in Civil Cases Revisited at 235.

108 *Descôteaux v. Mierzvinskij*, [1982] 1 SCR 860.

109 *Middelkamp v. Fraser Valley Real Estate Board* (BCCA), [1992] BCJ No. 1947, 45 CPR (3d) 213.

110 *Allarcom Ltd v. Canwest Broadcasting Corp.*, [1987] BCJ 1977 (SC).

111 *S&K Processors Ltd v. Campbell Ave Herring Producers Ltd* [1983] 4 WWR 762 at paragraph 10 (BCSC).

112 *Somerville Belkin Industries Ltd v. Brocklesby Transport Division of Kingsway Freightliners Ltd* (1985), 65 BCLR 260 (SC).

113 *Airst v. Airst*, [1998] OJ No. 2615, 37 OR (3d) 654 (Ont Gen Div).

XII SETTLEMENT PROCEDURES

In Canada, the vast majority of civil actions are resolved between the parties before reaching trial. In order to encourage and facilitate settlements, the law has imposed cost consequences for failure to accept a reasonable offer to settle.¹¹⁴ The Federal Court Rules¹¹⁵ provide that the solicitors for the parties to an action in Federal Court must discuss the possibility of settling any or all of the issues in the action, within 60 days of the close of pleadings.¹¹⁶ In some jurisdictions, a pre-trial settlement conference is mandatory.¹¹⁷

The parties normally have autonomy to negotiate the terms of a settlement without need of the court looking into the issue of fairness.¹¹⁸ However, in a class action, any settlement will affect the rights of everyone in the defined class, without the consent of the class members. This is different from other civil suits where settlement is only binding upon the parties negotiating the settlement.¹¹⁹ In order to protect the interests of absent class members, therefore, class actions may be settled only with the approval of the court. Typically, Canadian price-fixing class actions are commenced in several Canadian jurisdictions, and court approval of the settlement is sought in each of those jurisdictions.¹²⁰ The court must find that ‘in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it.’¹²¹

XIII ARBITRATION

In Canada, anything that is the proper subject matter of the litigation process can be resolved by arbitration, except criminal law matters or matters governed by statutes with special rules. However, there have been no reported Canadian cases addressing the issue of whether a private anti-competitive claim is arbitrable.

114 For instance, Rule 49 of Ontario’s Rules of Civil Procedure.

115 SOR/98-106.

116 Federal Court Rules, Rule 257.

117 For instance Rule 77 of Ontario’s Rules of Civil Procedure, prescribes for civil case management, in which a settlement conference is automatically scheduled, on 45 day’s notice, no later than 90 days after the first defence is filed.

118 Unless one of the parties is under a disability, or the court’s approval is specifically required by the law.

119 Walker, *Civil Litigation Process* at 929.

120 *Ibid.*

121 *Ford v. Hoffman – La Roche Ltd* (2001), 6 CPC (5th) 245 (Ont. SCJ); (2002), 212 DLR (4th) 563 (Ont Div Ct); (2003), 223 DLR (4th) 445 (Ont CA); leave to appeal to SCC dismissed [2003] SCCA No. 245.

XIV INDEMNIFICATION AND CONTRIBUTION

In a 2007 Ontario case, a commercial contract (a contract for buying a business) contained an indemnification clause specifying that a third party (the seller) would indemnify the defendant (the buyer of the business) for any liability incurred as a result of the transaction. When the defendant was sued by a private party under Section 36 of the Competition Act, the court upheld the contractual indemnity and required the seller to indemnify the defendant for the legal costs of defending the claim, even though the defendant was found not liable under the Competition Act.¹²²

When there is no contractual indemnification clause, it is possible for a defendant to bring a cross-claim to seek contribution and indemnification from co-defendants if the defendants are found jointly and severally liable for the harm.¹²³ However, if some (but not all) of the defendants reached settlement with the plaintiffs, the court could grant an order to bar future claims for contribution and indemnity against the settling defendants, if requested in the settlement.¹²⁴

XV FUTURE DEVELOPMENTS AND OUTLOOK

In June 2003, a Discussion Paper released by the government of Canada suggested a number of changes to the Act, including the broadening of the Section 36 private right of action to allow for the recovery of damages resulting from civilly reviewable conduct in respect of which the Tribunal had made an order. While proposed legislative amendments regarding these and other issues have been introduced by various governments since then, they have not become law and there have been no further changes to these provisions to date. Discussions about future amendments, including the imposition of 'administrative monetary penalties' for abuse of dominance, increased rights of private access to the Tribunal, and recovery of damages for civilly reviewable conduct, continue.

122 *Bass Clef Entertainments Ltd v. HOB Concerts Canada Ltd*, [2007] OJ No. 1928, at paragraph 151.

123 For instance, see *Vitapharm (supra, note 22)*.

124 *Ibid.*

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