FEATURE ARTICLES

THE RECORD OF PRIVATE ACTIONS UNDER SECTION 36 OF THE *COMPETITION ACT*

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Introduction

The Supreme Court of Canada's endorsement of the constitutionality of section 36 of the *Competition Act* (the Act) in *General Motors of Canada Ltd* v. *City National Leasing*[1] was initially hailed as confirming the availability of an important and powerful tool in curtailing anti-competitive practices. However, in the almost four years since the constitutionality of the provision has been settled, no reported decision has awarded damages under the provision. Although this may be the result of a number of cases settling before trial, the paucity of decisions is attributable in part to the section's limitations.

This article examines recent authority related to section 36 and addresses the reasons for the lack of successful private actions. Frequent reference is made to the U.S. experience, where the bulk of antitrust activity is private enforcement. A bibliography is attached to assist the reader.

Recent Private Actions Under Section 36

Section 36 permits private actions for breaches of Part VI of the Act, which contains the Act's criminal provisions, or for breaches of an Order made by the Competition Tribunal or another court regarding the civil proscriptions of the Act. The section is premised on the ability of a private party to prove the fact of injury. It stipulates that only a "person who has suffered loss or damage as a result of" a violation of the Act may sue. However, it has been noted that the availability of section 36 actions will be limited since many of the violations of the provisions of Part VI of the Act:

> "might occur because of the likelihood of competitive injury rather than injury in fact. For example, section 45 condemns conspiracies that, if carried into effect, would be likely to create an undue lessening of competition and section 61 condemns attempts to influence price. Similarly, a violation of an order issued by the Tribunal might not result in any injury in fact, and hence preclude private action. For example, section 77 is directed towards exclusive dealing or tied selling resulting in the likelihood of substantial lessening of competition".[2]

Civil liability may ensue even if there has been no conviction under the criminal provision of the Act related to the conduct complained of. Accordingly, the cases which have raised the section can be categorized into two groups. The first group contains cases where a party alleges a violation of the criminal provisions of the Act and then claims section 36 damages arising from the violation. The second group contains cases where there has already been a successful criminal prosecution and a plaintiff, relying on section 36(2), which reduces the evidentiary burden borne by plaintiffs, endeavours to prove causally-related damages.

(a) Party alleging criminal violation

With the first group of cases, parties have been unable to meet the burden of demonstrating a criminal violation, obviating their claim to causally related damages under section 36. In *Hurtig Publishers Ltd.* v. *Smith (W.H.) Ltd. et al.*[3] for example, the defendant attempted to amend its defence by adding a counterclaim alleging damages under section 36 as a result of price discrimination contrary to section 50. The court held that the defendant's claim under the Act had no chance of success, and therefore denied the defendant leave to amend its defence. In *Molnycke AB* v. *Kimberly-Clark of Canada Ltd.*[4] the defendant alleged conspiracy in obtaining a reissue patent contrary to section 45(1) of the Act. The court held that, as a matter of law, competition could not be "unduly" impaired solely by exercising rights under the *Patent Act*. Thus, the court concluded that no action could be founded on section 45. This conclusion can be contrasted with an earlier trial division decision of the Federal Court: *Proctor & Gamble Co. et al.* v. *Kimberly-Clark of Canada Ltd.*[5] In that case, the plaintiffs sought to strike a counterclaim for conspiracy and resulting damages under section 36. The Court held that it is "at least arguable that an agreement to use a patent which is known to be invalid, for the purposes of suppressing competition, could support an action under s. 31.1 [now s. 36] of the [Act]."[6]

(b) Party relying on previous criminal conviction

Only two reported decisions have addressed the merits of a damage claim under section 36 where a defendant has suffered a previous criminal conviction under Part VI of the Act. In both cases the claims were dismissed in a perfunctory fashion. The first case, *Petley* v. *Van Arnhem Construction Limited*,[7] demonstrates the difficulty of proving damages under section 36. In that case, the plaintiff sought damages under section 31.1(1) [now section 36] in relation to a purchase of a home pursuant to a newspaper advertisement. The defendant had been convicted of a violation under the *Combines Investigation Act* for false advertising regarding the sale of the semi-detached dwelling house. The plaintiffs alleged that they had suffered damages by having paid more than the advertised price. The Court held that although the plaintiffs relied upon the advertisement, they did not suffer loss or damage as a result. The Court stated:

> Indeed, the violation of the statute may well have caused her to journey to the premises, may well have whet her appetite with respect to the purchase, but having found out the facts, she proceeds to make an offer somewhat higher than the advertised price, and subsequently accepts the counter-offer of the defendant and completes the purchase on that basis. How can it be said that she suffered loss or damage as a result of the advertisement? It would have been different had she been claiming for travel expenses in response to the advertisement. It may have been different had she tendered an offer on the basis of the advertised price and then proceeded to attempt to enforce it. That was not the case.[8]

The second reported decision dealing with the merits of a section 36 action following a criminal conviction also involved misleading representations. In *Midas Equipment* v. *Zellers Inc. and 672318 Ontario Ltd.*[9] the plaintiff, a coin wrap manufacturer, brought an action against a former customer (Zellers) and a competitor (Cash Rolls). The plaintiff's claim was based on sections 52 and 53 of the Act. The plaintiff alleged that Cash Rolls had made a false representation by intimating that their product was manufactured in Canada, when it was in fact manufactured in the United States. The court held that although the representation was misleading in a material respect, there was no evidence that the representation induced Zellers to stop dealing with the plaintiff. Although it is not clear from the judgment, the court appears to have determined that section 52 was violated, but that no damages were assessable under section 36. The court seemed to believe that the plaintiff did not suffer loss or damage "as a result of" the criminal violation since damages would have ensued irrespective of the section 52 violation.

Type of Damages

It remains unclear whether section 36 contemplates only special damages or also extends to general damages. Two cases have commented on this issue. In *137240 Assn. Canada Inc.* v. *Ontario Medical Assn.*,[10] the court stated "it may well be that s. 31.1 [now s. 36] which is a relatively new section is intended to cover only economic loss and not general damages, but I am not persuaded that C.D.M.A. could not succeed in asserting a claim thereunder if the matter were to go to trial."[11] In an earlier case, *Regatta Investments Ltd.* v. *Shell Canada Products Ltd. et al.*,[12] the court was confronted with the question of whether section 36 is limited to special damages. In that case, the court did not make a decision on the issue. Instead, it held that since the plaintiff's claim was limited to special damages, nothing need be struck from the statement of claim.

Remoteness

The foregoing cases illustrate that the type of damages contemplated by section 36 are uncertain. The section also lacks any indication of the extent of damages recoverable. In the United States, where there is a developed body of law on the subject, the courts have adopted the remoteness of injury rule applied in tort cases. The test therefore is the forseeability of risk of injury for which damages are being claimed. A plaintiff must first prove an "antitrust injury", which is not an insubstantial burden.[13] A plaintiff must then prove an adequate basis for a reasonably correct estimate of damages, which need not show the precise quantum of damages, but at the same time must be sufficient to prevent speculation by the jury.[14]

In the United States, as a general rule an indirect purchaser cannot sue the original seller under section 4 of the *Clayton Act*, even if they can demonstrate having suffered damages from excessive prices "passed-on" to them. The converse is also true as a defendant cannot argue that the direct purchaser (plaintiff) has not suffered damages because the excessive prices have been passed-on to a subsequent purchaser.

The justifications for these restrictive rules were discussed in the two U.S. Supreme Court decisions which initially established the rules. The first case, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*,[15] rejected the use of "passing-on" as a defence. The Court stated that it would be too complex "to determine in the real world rather than an economist's hypothetical model" the correlation between increases in the defendant's prices and any effects on the plaintiff's business practices.[16] The Court was also fearful that allowing a "passing-on" defence would undermine the effective use of the private remedy. The Court believed that ultimately, the "passing-on" defence could be extended to the final purchasers, or consumers. By that point, in most cases, any loss would be so diluted that little interest could be summoned in initiating a class action.[17]

In the second case, *Illinois Brick Co.* v. *Illinois*,[18] numerous plaintiffs brought an action against several manufacturers alleging a conspiracy to fix the price of concrete block. The plaintiff-purchasers were two stages below the defendants in the distribution chain. The Supreme Court dismissed the plaintiffs' claim and rejected the offensive use of the "passing-on" theory. The court relied on the reasoning in *Hanover Shoe*, arguing that a complex pass-on analysis was beyond the means of the courts and, in addition, was too speculative.

At some point, a party in Canada will find the U.S. position beneficial to their case and will raise the "passing-on" issue. However, whether Canadian courts will adopt the U.S. position, which appears to be founded solely on pragmatism, is a matter of speculation.

Availability of Injunctive Relief

Contrary to the U.S. *Clayton Act*, which specifically provides for injunctive relief under its section 16, the Act is silent on the availability of such relief. Section 36 provides only for recovery of damages flowing from breaches of Part VI or Tribunal or Court orders. Accordingly, in the absence of a clear pronouncement on this issue, the availability of this important remedial device is in a state of uncertainty. A plaintiff with a strong *prima facie* case, whose business is in jeopardy as a result of proscribed behaviour, may face a lengthy delay until trial. Even after trial, there is no provision granting permanent injunctive relief. Damages are still the sole statutory remedy.

ACA Joe International v. *147255 Canada Inc.*[19] is the sole case to date expressly addressing the availability of injunctive relief under section 36. In that case, Collier J. decided that the remedy provided in section 36 is confined to damages and does not include injunctive relief, either interlocutory or permanent. Collier J. based this belief on his reading of the Act "as a whole".[20] Collier J. also held that section 44 of the *Federal Court Act*, which provides for injunctive relief, was inapplicable.

In spite of the decision in *ACA Joe*, the momentum towards finding a right to injunctive relief appears to be building. N. Finkelstein and R. Kwinter characterize *ACA Joe* as an "exceedingly weak" authority and argue that the courts should find a right to injunctive relief.[21] In a more recent case, a court refused to strike out pleadings requesting declaratory or injunctive relief on the grounds that whether equitable forms of relief were available was a "debatable legal issue".[22] In addition, an interlocutory injunction has been granted by the Federal Court on a consent basis in *Beamscope Canada Inc.* v. *Aviva Software Corp.*[23]

A recent Supreme Court of Canada ruling demonstrates the courts' desire to fortify remedies available under the Act. In *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*,[24] the Supreme Court addressed the issue of the availability of contempt orders by the Tribunal. The court decided that section 8 of the *Competition Tribunal Act*, which gives the Tribunal the jurisdiction to "hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto" was sufficient to confer jurisdiction to enforce its orders by way of contempt proceedings. The court added that effective enforcement of the *Competition Act* requires that the Tribunal have this power. This argument may be extended to injunctive relief under section 36. Clearly, effective enforcement of the conduct contemplated under sections related to section 36 requires that injunctive relief be available to plaintiffs with a strong *prima facie* case.

Limitation Periods as a Stumbling Block

Section 36(4) provides that:

> 36(4) No action may be brought under subsection (1),
>
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> i) a day on which the conduct was engaged in, or
>
> ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later; and

(b) in the case of an action based on a failure of any person to comply with an order of the Tribunal or another court, after two years from

i) a day on which the order of the Tribunal or court was contravened, or

ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

The implications of section 36(4) are somewhat paradoxical. If over two years have passed and neither the Crown nor the plaintiff have commenced proceedings, the plaintiff's claim would appear to be extinguished due to the lapse of the limitation period. However, the institution of action by the Crown could revive the plaintiff's formerly defunct claim.

Where a plaintiff intends to rely on the extended limitation period offered by the commencement of criminal proceedings by the Crown, the plaintiff must be careful to ensure that there is a factual and temporal nexus between the criminal charge and the civil wrong. An illustration of the importance of linking these factors is found in *Bérubé* v. *Makita Outils Eléctriques Canada* Ltée.[25] In that case, the defendants pleaded guilty to resale price maintenance for the period of May 1 to August 30, 1984. The plaintiff's Statement of Claim, delivered in October, 1991, alleged the same offence occurring between January 8 and March 25, 1985. The court held that:

> In order to interrupt or suspend the proscription period the criminal proceedings must have at least a minimal connection with the conduct complained of by the plaintiffs.[26]

In *Bérubé*, the court stated that the criminal proceedings brought against the defendant "had nothing to do with" the wrongful acts specified in the statement of claim.[27] Moreover, the conduct complained of related to an entirely different period. The court went on to hold that while the Act "speaks of extended limitation periods on account of criminal proceedings, any civil recovery should be made in connection with facts clearly established in those same criminal proceedings."[28]

Difficulties with Evidence from the Record of Proceedings

Where a person has suffered a conviction under Part VI of the Act or has been convicted or punished for failure to comply with an order of the Tribunal or another court, evidence from the record of proceedings relating to such a conviction may be used as evidence in a section 36 action. Although, the availability of this evidentiary relief is welcome for plaintiffs asserting a section 36 claim following a successful governmental prosecution, it is not clear that it differs greatly from relief otherwise available. For instance, several provincial Evidence Acts specifically provide that evidence of a prior criminal conviction is admissible if relevant to an issue in an action.[29] Moreover, the Ontario Court of Appeal has determined that a criminal conviction is *prima facie* proof that the party against whom a conviction was rendered committed

the offence.[30] A subsequent case, decided that the conviction is not, however, admissible as *prima facie* proof of every factual finding made in the previous criminal proceeding, only those necessary for the court's determination of the offence.[31]

The limitation on the use of the evidence of a prior conviction under Part VI by plaintiffs engaging section 36(2) is demonstrated by the U.S. experience with a similar provision. Section 5(a) of the *Clayton Act* provides that "a final judgment or decree ... rendered in any civil or criminal proceeding brought by ... the United States under the antitrust laws to the effect that a defendant has violated said laws is *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws...." While the clear purpose of section 5(a) is to provide private plaintiffs the advantage of a *prima facie* case against a defendant, plaintiffs must be cautious in relying solely on the subsection. The reason is adeptly explained as follows:

> ... the private plaintiff may find that the decision in the government case does not cover all the precise facts on which the plaintiff's case is based. There are frequently difficult problems in ascertaining what matters were put in issue and are considered determined by prior government action. Criminal cases, for example, usually result in a general verdict rather than specific findings, and an examination of the whole record made to determine what was decided. The leading decision is *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 (1951) where the Supreme Court said that is necessary to examine "the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts." Differences between the government suit and the private action in the time period covered by the violation, the geographic area, and the products and scope of the violation all complicate the problem of using the government judgment as *prima facie* evidence.[32]

The *Bérubé* case, discussed earlier, is an example of a situation where differences of this nature arose.

Section 69 Deeming Provision

Section 69 was introduced to limit evidentiary difficulties encountered by the Crown in prosecutions under the old *Combines Investigation Act*. The main thrust of the section is that a record shall constitute *prima facie* proof of the truth of the contents of the record.

(a) Constitutionality

While most courts have upheld the constitutionality of the section stating that the presumption is rebuttable, two Ontario court judgments have found that the section constitutes an unconstitutional reverse onus contrary to section 11(d) of the *Charter*.[33] Several other cases, however, have held that the presumption of innocence is not displaced and that the section is not therefore invalid by reason of the *Charter*.[34]

(b) Application to Section 36

Section 69 has not yet been applied in a case involving section 36. Thus, it is unclear whether it is available in civil proceedings. If so, the wording used in defining "participant" as any person *"against whom"* proceedings have been instituted appears to limit the availability of the section to plaintiffs. Jo'Anne Strekaf has suggested that, since the defendants would not seem to have a corresponding right with respect to the plaintiff's documents, the section may be subject to challenge pursuant to section 15 of the *Charter* on the grounds that it would violate an individual's right to be "equal before and under the law and...the right to the equal protection and equal benefit of the law".[35]

Relationship between *Competition Act* Remedies and Common Law Remedies

Parties alleging common law offenses in conjunction with a section 36 claim are well advised to launch their actions in a provincial court as opposed to a federal court. The main reason for this choice is that it appears that in a federal court a party may not successfully couple an action based on section 36 with a related or alternate claim for relief. In *A.G. Can.* v. *Quebec Ready-Mix Inc. and Rocois Construction Inc.*,[36] the Supreme Court of Canada held that the Federal Court is not competent to hear a claim based on Article 1053 of the Civil Code of Lower Canada. Similarly, in *Industrial Milk Producers Association* v. *British Columbia Milk Board*,[37] the Federal Court held that to the extent the plaintiff's claim was based on tortious conspiracy rather than section 31(1) of the *Competition Act*, R.S.C. 1970, it was outside the jurisdiction of the Federal Court.

Provincial courts, in contrast to the federal courts, have the ability to combine claims under the Act with alternate forms of relief. In *Westfair Foods Ltd.* v. *Lippens Inc.*,[38] the issue was whether the remedy offered under section 36 was merely supplementary to the existing rights of action under the common law. The plaintiff's claim included conspiracy and, in the alternative, unlawful interference with economic interests. These pleadings allowed the plaintiff to claim general damages as well as special damages. The court concluded that an action for conspiracy may be based on an act prohibited by statute.[39] The court also concluded that the remedy offered under section 36 is merely supplementary to the existing rights of action under the common law. The court stated that:

> the *Competition Act* cannot be classified as having overtaken the common law and foreclosed all common law remedies or civil actions. To give such a broad interpretation to the provisions of the *Competition Act* would be contrary to the rationale expressed by the Chief Justice [of the Supreme Court of Canada in *General Motors, supra.*][40]

The court's determination that section 36 provides a supplemental cause of action was buttressed by section 62 of the Act which reads:

> 62. Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of any civil right of action.

Thus, the court concluded that "Parliament recognized provincial jurisdiction in the area of civil rights and liberties and rebuts the presumption stated in Halsbury".[41] Halsbury's presumption is that a new statutory obligation coupled with a special remedy for enforcing it implies that the obligation cannot be enforced in any other manner. The court's determination was supported by the fact that "any restriction on existing common law rights could have been stated in section 36 with the simple inclusion of the word 'only' after the word 'order' in ss.(1)". The Court went on the say that "by purposely avoiding any intrusion upon existing common law rights, Parliament recognized its limited jurisdiction in this field".[42]

Reviewable Conduct as a Foundation for Civil Causes of Action

Section 36 is confined to breaches of the criminal provisions of the Act or for breaches of an order of the Tribunal. Reviewable transactions are not civilly actionable under section 36. Not surprisingly, however, some parties have argued that certain reviewable practices form a common law cause of action. In *Pindoff Record Sales* v. *CBS Music Products Inc.*,[43] CBS demanded assurances from Pindoff that certain products it wished to sell to Pindoff at reduced prices would not be exported to the United States. Pindoff refused to accede to this request and the products were never shipped. Pindoff subsequently sued CBS and others alleging, *inter alia*, conspiracy and breach of the Act. CBS sought to strike parts of Pindoff's action.

The Ontario Supreme Court confirmed that section 36 provides no basis for a suit for breach of a reviewable matter. The court then addressed Pindoff's claim that alleged civil conspiracy based on a violation of Part VII of the Act. The court examined earlier authority which defined the tort of civil conspiracy. In *Canada Cement Lafarge Ltd.* v. *Ocean Construction Supplies Ltd.*,[44] the Supreme Court cited with approval an earlier decision which defined conspiracy as consisting:

> ...not merely of the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do an unlawful act by unlawful means.

Thus, the issue was whether conduct which could be reviewable under Part VII of the Act could constitute "unlawful means". English authorities were cited which held that behaviour contrary to the *Restrictive Trade Practices Act* may amount to "unlawful means" even though the English Restrictive Trade Practices Court had not yet decided that the behaviour was illegal. On the basis that "other triable issues" required consideration, the court decided to allow the issue to be proceed to trial.

A subsequent case indicates that Canadian courts are unwilling to follow the English approach. In *Procter & Gamble Co.* v. *Kimberly-Clark of Canada Ltd.*,[45] Mr. Justice Teitelbaum, also a member of the Competition Tribunal, discussed the relationship between a reviewable practice and a civil cause of action. The defendant argued that the plaintiff was not entitled to equitable relief since the defendant had engaged in an abuse of dominant position. In ruling that the principle of *ex dolo malo non oritur actio* [no action arises from fraud] was inapplicable, Teitelbaum J. stated:

> ...abuse of dominant position in the *Competition Act* is not a criminal or even civil illegality. It is a reviewable practice under Part VIII of the Act and any proceedings relating to the practice are conducted before a civil administrative tribunal. There is no improper conduct until such time as the Competition Tribunal so finds.[46]

This view was affirmed in *R.D. Belanger & Associates Ltd.* v. *Stadium Corp. of Canada*.[47] In this case, the defendants required the plaintiffs to purchase food and beverages at high prices from the exclusive supplier designated by the owner. The plaintiffs pleaded, *inter alia*, breaches of sections 77 (exclusive dealing) and 79 (abuse of dominant position) of the Act as demonstrating the "unlawful means" necessary to support a civil conspiracy action. The court held that, in contrast to the English position, "reviewable conduct is *prima facie* legal until the Tribunal, following a review, rules otherwise."

Although the Ontario Court of Appeal subsequently reversed the lower court decision in the *Stadium Corp.* case,[48] the court did not clarify the availability of reviewable practices as forming the basis of common law relief. The court merely stated that "portions of the statement of claim could well be struck out under rule 25.11 as frivolous or vexatious, but we are not concerned here with the niceties of pleading. Given that the basic contractual and tortious reliefs sought are supportable, it will be up to the trial judge to determine what relief, if any, is appropriate."[49]

Thus, although it appears unlikely that a reviewable practice may form the basis of common law conspiracy, there remains an element of uncertainty. As will be displayed below, there is no such uncertainty in the U.S. The U.S. private remedy permits actions for all antitrust violations, including what would constitute reviewable matters in Canada.

Comparisons with the United States

The majority of antitrust activity in the United States is private enforcement. Latimer has stated that "private enforcement of the anti-trust laws through treble damage actions has been an integral part of the antitrust scene in the United States from its beginnings in 1890. As observed frequently by the Supreme Court, private actions have played an important role in penalizing wrongdoers and deterring wrongdoing."[50]

The failure of section 36 to mirror the enormous volume of private litigation in the United States may be explained in part by the differences between the two systems. The most conspicuous distinction is the mandatory award of treble damages. Under section 4 of the *Clayton Act*, any private person "injured in his business or property by reason by anything forbidden in the antitrust laws...shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The policy rationale for treble damages was expressed by former U.S. Chief Justice Berger in *Reiter* v. *Sonotone*:[51]

> Congress created the treble-damage remedy of section 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.[52]

Perhaps as a result of the availability of treble damages and the harsh impact this may have on defendants, the United States jurisprudence has developed restrictive rules regarding standing to sue. Roberts has stated that various parties, including "officers, stockholders and employees of corporations, where the injury was to the corporation, creditors, suppliers, landlords, minority partners of an injured partnership, etc." have been denied standing to sue. This restrictive interpretation of standing is mitigated by the ability of private parties to sue for an injunction under section 16 of the *Clayton Act*.[53]

Another significant distinction between American and Canadian private enforcement mechanisms is that the American remedy permits a much broader range of actions. Section 4 of the *Clayton Act* relates to damages sustained "by reason of anything forbidden in the antitrust laws". By contrast, the scope of section 36 of the Act is limited to conduct contrary to Part VI, the criminal proscriptions of the Act and to breaches of Orders of the Tribunal or another court. Section 36 does not extend to the reviewable transactions such as mergers or abuse of dominant position. Moreover, as discussed earlier, it is unlikely that an alleged violation of a reviewable practice, can form the basis of common law relief.

In spite of the differences between the Canadian and American provisions for private enforcement, there is a large body of American jurisprudence which may be called upon by Canadian lawyers to deal with issues such as standing, fact of injury, quantum of damages and class actions procedures. However, Canadian lawyers must be careful to consider how different private enforcement rules inform the U.S. jurisprudence.

Class Actions

A study prepared by the Department of Consumer and Corporate Affairs in 1976 proposed the introduction of class actions under the competition legislation as a means of enhancing anti-combines enforcement.[54] However, these proposals have never been incorporated into federal competition legislation. Since there

is no federal class action legislation, the Canadian situation stands in sharp contrast to the American situation, where antitrust class actions are common under the federal class action rule.

Although most provincial rules of court provide for class actions, these rules are largely based on the old English form of class actions, which greatly impair the availability of the mechanism. The rules create practical difficulties in that individual members of a class are subject to individual assessment. When the class is large, severe evidentiary difficulties are created and unwieldy discoveries may be involved. The Alberta Court of Queen's Bench has nonetheless held that class action proceedings under Rule 41 of the Alberta Supreme Court Rules, a rule based on the old English form of class action, are available to private plaintiffs under the Act.[55]

Recently, Ontario introduced the *Class Proceedings Act*.[56] It is anticipated that this new liberal class action legislation will facilitate founding competition law class action proceedings, especially in areas which lend themselves to this type of action, i.e. price fixing conspiracies, misleading advertising, bid-rigging and perhaps price discrimination.

Under the *Class Proceedings Act*, plaintiffs must be certified. The U.S. experience has shown that certification procedure can be a very significant barrier to a successful class action.[57]

Conclusion

In its short four year post-constitutionality history, section 36 of the Act has spawned little successful litigation relative to the U.S. private enforcement remedy. However, this should not be surprising to the careful observer since the Canadian and U.S. provisions are drafted quite differently. Moreover, many substantive and procedural barriers exist to the successful realization of a section 36 action.

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Notes

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[2] R.J. Roberts, *Roberts on Competition/Antitrust: Canada and the United States*, 2d ed. (Toronto: Butterworths, 1992) at 486.
[3] (1989), 99 A.R. 70 (Alta. Q.B.).
[4] (1991), 36 C.P.R. (3d) 493 (Fed. C.A.).
[5] (1986), 12 C.P.R. (3d) 430.
[6] *Ibid.* at 432.
[7] (1982), 67 C.P.R. (2d) 212 (First Small Claims Court, County of Middlesex).
[8] *Ibid.* at 215.
[9] (1991), 114 A.R. 58 (Alta. Q.B.).
[10] (1989), 29 C.P.R. (3d) 63 (Ont. H.C.J.).
[11] *Ibid.* at 65.
[12] (1988), 23 C.P.R. (3d) 378 (Man. Q.B.).
[13] See for example *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 489, 97 S.Ct. 690, 697 (1977).
[14] *Supra,* note 2 at 477-88.
[15] 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968).
[16] *Ibid.* at 489, cited to 392 U.S.; and at 2229, cited to 88 S.Ct.
[17] *Ibid.* at 493, cited to 392 U.S.
[18] 431 U.S. 720, 97 S.Ct. 2061, 52 L. Ed. 2d 707 (1977).
[19] (1986), 10 C.P.R. (3d) 301.
[20] *Ibid.* at 308.
[21] "*Competition Act*, R.S.C. 1985, 2nd Supp., c. 19 - *Section 36 Claims to Injunctive Relief* (1990) 69 Can. Bar Rev. 288 at 309.
[22] *Industrial Milk Producers Association* v. *British Columbia Milk Board*, [1989] 1 F.C. 463, 21 C.P.R. (3d) 33, 47 D.L.R. (4th) 710 (T.D.) at 51 C.P.R.
[23] (1987), 18 C.P.R. (3d) 100.
[24] (1992), 92 D.L.R. (4th) 609.
[25] (1991), 40 C.P.R. (3d) 108, 47 F.T.R. 287 (T.D.).
[26] *Ibid.* at 298, cited to 47 F.T.R.
[27] *Ibid.* at 294.
[28] *Ibid.* at 304.
[29] See *Alberta Evidence Act*, R.S.A. 1980, c. A-21, as amended, and *The Evidence Act*, R.S.B.C. 1979, c. 116, as amended.
[30] See *Demeter* v. *British Pacific Life Insurance Co.* (1983), 43 O.R. (2nd) 33.
[31] See *Taylor* v. *Baribeau* (1985), 51 O.R. (2nd) 54 (Div. Ct).
[32] S.C. Oppenheim, G.H. Weston and J. T. McCarthy in *Federal Antitrust Laws*, 4th ed. (West, St. Paul: 1981) at 1094.
[33] See *R.* v. *Dave Spear Ltd.* (unreported), August 23, 1985, Ont. Prov. Ct.; *R.* v. *Independent Order of Foresters (No.2)* (1986), 14 C.P.R. (3d) 254 (Ont. Dist. Ct.).
[34] See *R.* v. *Canada Packers Inc.* (1986), 71 A.R. 173 (Q.B.); *R.* v. *Metropolitan Toronto Pharmacists Ass'n (No.1)* (unreported, May 14, 1983, Ont. H.C.J.).

[35] J. Strekaf, "Private Enforcement of Canadian Competition Law, in N.R.S. Khemani and W.T. Stanbury, eds., *Canadian Competition Law at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 645 at 651.
[36] [1980] 1 S.C.R. 184.
[37] [1989] 1 F.C. 463, 21 C.P.R. (3d) 33, 47 D.L.R. (4th) 710 (T.D.).
[38] [1990] 2 W.W.R 42 (Man. C.A.) (appeal to S.C.C. dismissed.).
[39] *Ibid.* at 213.
[40] *Ibid.* at 215.
[41] *Ibid.* at 216.
[42] *Ibid.*
[43] [1989] O.J. No. 1302 (QL) (Ont. S.C.).
[44] [1983] 1 S.C.R. 452.
[45] (1991), 40 C.P.R. (3d) 1 (Fed. T.D.).
[46] *Ibid.* at 55.
[47] [1991] O.J. No. 538 (QL) (Gen. Div.).
[48] (1991), 5 O.R. (3d) 778 (C.A.).
[49] *Ibid.* at 782.
[50] H. Latimer, "*Private Enforcement of the Anti-Trust Laws in the United States - Is Reform Called For?*" in R.S. Khemani and W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) at 659-660.
[51] 442 U.S. 330, 99 S.Ct. 2326, 60 L. Ed. 2d 931 (1979).
[52] *Ibid.* at 344, cited to 442 U.S.
[53] *Supra,* note 2 at 486.
[54] M.J. Williams and J. Whybrow, Department of Consumer and Corporate Affairs, *A Proposal for Class Actions Under Competition Policy Legislation* (1976).
[55] *Alberta (Pork Producers' Marketing Board)* v. *Swift Canadian Company Co. Ltd.* (1981), 129 D.L.R. (3d) 411 (Alta. Q.B.).
[56] S.O. 1992, c. 6, proclaimed in force January 1, 1993.
[57] A.J. Roman, "Consumer Enforcement of Competition Laws" (Ottawa: Public Interest Research Centre, 1989) at 56-9.