COMMENT AND ANALYSIS

CHALLENGES TO CONSENT AGREEMENTS AFTER *BURNS LAKE*

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Introduction

On March 27, 2006, the Competition Tribunal decided a reference brought by the Commissioner of Competition pursuant to subsection 124.2(2) of the *Competition Act*. The Commissioner brought the reference in the course of an application by Burns Lake Native Development Corporation and several First Nation groups (the "Applicants") under subsection 106(2) of the Act, which provides for third-party challenges to registered consent agreements. The Applicants had challenged a consent agreement that addressed the Commissioner's concerns arising out of the acquisition by West Fraser Timber Co. Ltd./West Fraser Mills Ltd. ("West Fraser") of Weldwood of Canada Ltd.("Weldwood").[2]

The Commissioner's reference posed two questions. First, the Commissioner asked the Tribunal to define the words "directly affected" in subsection 106(2). Second, the Tribunal was asked whether any evidence must be filed to support a consent agreement. The Tribunal answered both questions.

On the first question, the Tribunal concluded that, to be "directly affected", a third party must experience "first hand a significant impact on a right or interest relating to competition or on a serious interest which relates to competition"[3] as a result of the consent agreement in question. Turning to the facts,[4] the Tribunal found that the Applicants' concerns resulted from their position as minority shareholders and not from the consent agreement. Consequently, the Applicants lacked standing to challenge the consent agreement. On the second question, the Tribunal held that there was no statutory requirement to file supporting evidence with a consent agreement.

The decision is significant in that it is the first challenge by a third party to a registered consent agreement.[5] By taking a similar approach to granting standing to challenge consent agreements as has been adopted for granting leave to intervene,[6] the Tribunal effectively closed the door to challenges by third parties that are not involved in the markets in question (i.e., parties who are not customers, suppliers or existing/potential competitors). The Tribunal's decision is useful in that it provides a measure of comfort to the parties to the consent agreement that the agreement cannot be attacked by the public at large.

That said, two issues not addressed by the Tribunal in this case are likely to be more important than the two narrow questions that were addressed. These two issues are:

1. upon what basis can a directly affected applicant challenge a registered consent agreement?; and

2. what would such an applicant have to demonstrate to succeed on their application?

In this article, we consider both the issues that the Tribunal addressed and those that it did not. We begin by summarizing the *Burns Lake* case and the Tribunal's decision and then go on to explore the two open issues set out above.

Our position is that a properly qualified applicant should be able to challenge a registered consent agreement on its merits, as well as on other jurisdictional grounds. The Tribunal cannot knowingly make an order that is ineffective or that fails to adequately remedy the competitive harm that has been identified. Consequently, the applicant should bear the burden of demonstrating, with compelling evidence, that the consent agreement is ineffective, deficient or otherwise improper. Failure to carry the burden would mean that the parties would obtain a cost award for the proceedings.

For the reasons explored in more detail below, we believe that this view accords both with the language of the statute and with good public policy. In our view this approach properly balances the rights of affected parties to have enforcement decisions scrutinized by the Tribunal with the need to afford a degree of certainty and finality to consent agreements reached with the Commissioner. We explain why this approach is preferable to the one advocated by the Commissioner – that a consent agreement can only be challenged on a jurisdictional basis.

Background

On July 21, 2004, West Fraser agreed to purchase Weldwood from International Paper Company[7] for $1.26 billion. Upon review, the Bureau was concerned that the proposed transaction could result in a substantial lessening of competition in two local markets in British Columbia. As a result, on December 7, 2004, West Fraser and the Commissioner registered a consent agreement requiring West Fraser to divest its 90% direct and indirect interest in two sawmills located in Burns Lake and Decker Lake, as well as related timber harvesting rights. To do this, West Fraser had to sell its shareholding interest in Babine Forest Products Limited ("BFPL"), which was a joint venture with certain mill ownership and harvesting timber and other rights (known as the "Babine Joint Venture").

In February 2005, the Applicants, who included the Burns Lake Native Development Corporation ("BLNDC"), a minority shareholder in BFPL, as well as the Councils of the three Aboriginal Bands who are shareholders of BLNDC and the Chiefs of those Bands, challenged the consent agreement under subsection 106(2) of the Act[8] as persons "directly affected" by the agreement on the grounds that they had not been consulted with respect to the divestitures. The Applicants argued that the divestitures affected their aboriginal rights to economic autonomy self-government and terminated a successful 30-year commercial relationship.

To expedite the resolution of the challenge, the Commissioner brought a reference[9] to have the Tribunal clarify the scope of third party challenges to registered consent agreements. Specifically, the Commissioner posed two questions: (i) what is the nature and scope of the interest sufficient to satisfy the "directly affected" requirement

for standing in subsection 106(2) of the Act; and (ii) whether, at the time a consent agreement is registered with the Tribunal, the parties are required to file evidence to substantiate that the merger or proposed merger is likely to substantially lessen or prevent competition and, if so, whether the absence of such evidence is sufficient to support a finding that "the terms could not be the subject of an order of the Tribunal".[10]

The Meaning of "Directly Affected"

The Applicants' Position

The Applicants argued that all that was required to be "directly affected" was a direct causal link between the consent agreement and its effect on the person claiming standing.[11] They further argued that although the effect has to relate to a legal interest, it "need not be substantive, pecuniary or related to competition issues" and should include situations where "the long term consequences of a consent agreement are not known" [12]

The Commissioner's & West Fraser's Position

The Commissioner and West Fraser advocated for a much narrower interpretation, arguing that to be "directly affected", a party must have a substantive right, either legal or financial, that has been infringed by the consent agreement. The Commissioner further argued that, to satisfy the requirement for being directly affected, a party must show that "the impact of a consent agreement is imminent and real, as opposed to speculative or hypothetical".[13]

The Tribunal's Interpretation of "Directly Affected"

After considering the interpretation of the words "directly affected" elsewhere in the Act and in other statutes, the Tribunal held that a "fairly restrictive approach"[14] should be adopted, as this would respect Parliament's intention that the consent agreement registration process be expeditious and provide a measure of certainty. Accordingly, the Tribunal concluded that, to obtain standing under subsection 106(2) of the Act, a third party must be:

> ...a third party who experiences first hand a significant impact on a right which relates to competition or on a serious interest which relates to competition. The impact must be definite and concrete (i.e. not speculative or hypothetical) and must be caused by the consent agreement...[15]

Applying this definition to the facts of the case, the Tribunal held that the Applicants were not "directly affected" by the consent agreement as the alleged effect resulted entirely from their position as minority shareholders in the Babine Joint Venture and not from the consent agreement. Further, the Tribunal concluded that their concerns were "entirely speculative".[16] In dismissing the application, the Tribunal also held that the Applicants' position was in no way altered by the consent agreement and they had failed to demonstrate that the consent agreement significantly impacted a right or serious interest that related to competition.

Implications of the Decision

The *Burns Lake* decision is significant in two major respects. First, it provides some preliminary guidance on the meaning of subsection 106(2) of the Act. Second, it provides comfort to the business community that registered

consent agreements will not be lightly disturbed. The decision makes it clear that minority shareholders and investors with indirect or remote interests will not be able to use subsection 106(2) as a "backdoor" oppression remedy and will have to rely on the available corporate law remedies to address any concerns about frustrated business expectations.

While the decision is helpful, as the Applicants were in essence minority shareholders, it does not offer significant insight into how the Tribunal will consider applications brought by the types of third parties most likely to bring challenges. Customers facing higher prices, reduced supply or more onerous terms, suppliers that would receive less for their products or face more onerous terms, and/or competitors concerned about having their costs raised by a vertically integrated firm are the types of applicants most likely to be able to satisfy the "directly affected" requirement and, possibly, the other conditions of subsection 106(2).

The case provides little if any guidance as to the case that a directly affected third party can bring under subsection 106(2). This is not surprising as the reference process necessarily defines and limits the scope of the Tribunal's answers. The answers given by the Tribunal were direct and were sufficient to dispose of the case. Consequently, it was unnecessary to answer the more difficult, more interesting (and unasked) questions regarding (i) the basis upon which directly affected third parties can challenge consent agreements and (ii) what an applicant would have to prove for their application to succeed.

The Former Consent Order Approval Process

Prior to the 2002 amendments to the Act, the Commissioner and a party who had negotiated a settlement were required to file an application with the Tribunal seeking approval of their draft consent order.[17] In support of the application, the parties were required to file, among other documents, a statement of grounds and material facts, a consent order impact statement and a draft consent order. Those documents set out the Commissioner's case, outlined the material facts that supported the case and explained how the remedy set out in the draft order adequately addressed the Commissioner's concerns.[18] Notice of the consent order application was typically published in both the *Canada Gazette* and in two daily newspapers. The notice had to set out the parties against or in respect of whom the consent order was being sought, the particulars of the order, where the materials filed could be obtained by third parties and the date by which any leave to intervene application or comments had to be filed with the Tribunal.[19]

As indicated above, third parties who wished to participate in the process had the option of either filing written comments as of right or formally seeking leave to intervene. To obtain leave, applicants were required to demonstrate that:

(i) the matter alleged to affect them was legitimately within the scope of the Tribunal's consideration or relevant to the Tribunal's mandate;

(ii) the applicant was directly affected;

(iii) the representations to be made by the applicant were relevant to an issue specifically raised by the Commissioner; and

(iv) the applicant brought a unique or distinct perspective that would assist the Tribunal in deciding the issues before it.[20]

The consent order process caused delay and uncertainty on many levels. The parties had to prepare the Tribunal documents and then wait for the publication, comment and intervention periods to expire. There was no way for the parties to predict with any certainty the nature and substance of the comments and/or interventions that would be filed. The hearing would not be scheduled until after the periods for filing comments or intervention applications had expired. Because it was never clear whether there would be any interventions, the schedule would normally have two alternate tracks.[21] Finally, at the hearing, there was uncertainty as to whether the Tribunal would grant the requested order.[22] Under the former section 105 of the Act, the Tribunal could refuse to grant the order sought if, in particular, it determined that the agreement reached between the Commissioner and the merging party did not effectively address the substantive competition law issues raised.[23]

Under the relevant jurisprudence, the Commissioner had the burden of proving that the remedy set out in the proposed consent order was likely to eliminate the substantial lessening or prevention of competition identified.[24] The Tribunal also acknowledged that, while there was an assumption that the remedy approved by the Commissioner would be effective, its assessment of the proposed remedy was made in "an evidentiary vacuum with respect to the degree, nature and extent of the substantial lessening of competition" [25] The Tribunal further stated that intervenors could either (i) attempt to fill the vacuum or (ii) accept the facts as stated by the parties seeking to have the consent order approved and attempt to demonstrate that the remedy proposed was not likely to achieve the necessary competitive result.[26] Finally, the Tribunal clearly stated that it was not a "mere rubber stamp" and that its role was to determine whether the remedy proposed would, in all likelihood, eliminate the identified substantial lessening or prevention of competition.[27]

The consent order approval process was much criticized, particularly because of the time, costs and uncertainty associated with it. In a 2002 report entitled "The Role of Competition Policy in Regulatory Reform – Regulatory Reform in Canada", the Organization for Economic Co-operation and Development made the following comment about the consent order approval process:

> The consent order process at the Tribunal has been problematic. All orders, including those from negotiated settlements, must be issued by the Tribunal, which is the first-instance decision-maker. The process of reviewing a proposed consent order takes at least 60 days, for publishing notice and providing an opportunity for intervention and so on. It can stretch out to 6 months, though. Moreover, the Tribunal has sometimes demanded changes to the deal that the Bureau and the parties have reached. The risk of uncertainty and delay has reportedly encouraged firms to seek more informal resolutions rather than negotiating consent orders.[28]

As a result of these concerns, the Act was amended in 2002 and the consent order approval process was replaced with a new streamlined consent agreement registration process.

The Current Consent Agreement Registration Process

Section 105 of the Act sets out the consent agreement registration process and replaces the consent order approval process. Under the new process, once the Commissioner and a private party reach an agreement with respect to any matter under Part VII of the Act,[29] they file the agreement with the Tribunal, at which point the agreement has the same force and effect as if it were an order of the Tribunal. Once filed, notice of the agreement is published in the *Canada Gazette*, including the text of the agreement. Third parties who want to challenge the agreement must do so within 60 days after the agreement was registered.[30] Two key differences between the old and the new process[31] are that (i) the Tribunal no longer scrutinizes consent agreements before they are registered and (ii) third parties can no longer intervene before the consent agreement is registered and in force. Instead, subsection 106(2) of the Act gives "directly affected" third parties the right to apply to the Tribunal after a consent agreement has been registered to have it rescinded or varied if they can demonstrate that the terms of the consent agreement "could not be the subject of an order of the Tribunal"

The Scope of the Right to Challenge Consent Agreements

There is no reason why third parties should not have the right to challenge consent agreements by showing that the proposed agreement is based on an incorrect market definition and/or does not remedy the substantial lessening of competition in one or more markets.

In her submissions to the Tribunal in the *Burns Lake* case, the Commissioner advocated that the grounds for a challenge to a consent agreement should be extremely narrow and argued that the phrase "could not be the subject of an order of the Tribunal" refers only to the extent of the Tribunal's jurisdiction.[32] The Commissioner argued that her very narrow interpretation as to the permissible scope of third party challenges to consent agreements is supported by both the legislative history of sections 105 and 106 of the Act and the 2002 reforms dispensing with the Tribunal's "limited" powers of review under the old consent order approval process.[33] Further, the Commissioner argued that subsection 106(2) could not have been intended to provide third parties with a right to bring proceedings to substantially review consent agreements or a backdoor right of private access.[34] In the Commissioner's view, in introducing the summary registration process,

> Parliament signalled, in the clearest possible terms, that Tribunal review would be available in only the narrowest circumstances. This narrow right of review reflects Parliament's intent to facilitate the ease and speed of merger review, and to establish the Commissioner's role as gatekeeper to Tribunal proceedings on merger matters, as distinct from those matters in Part VIII which can be the subject of private access proceedings. Nothing short of a true extra-jurisdictional exercise of the Tribunal's remedial powers will suffice.
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> Accordingly, it is insufficient to question the Commissioner's assessment of the proposed merger as having the potential to cause a substantial lessening or prevention of competition or the efficacy of the remedies negotiated. Likewise, it is insufficient to argue that the applicant believes that a de novo review should be conducted by the Tribunal. Furthermore, it is insufficient to complain that the consent agreement was procedurally irregular or that there was a deprivation of natural justice, challenges which have no scope within subsection 106(2) and which, in any event, are

> reserved to the exclusive judicial review jurisdiction of the Federal Court. Rather, to trigger the Tribunal's discretion, an applicant must show that the consent agreement contains terms that exceed the Tribunal's remedial powers, such as a damages award or an order that is designed for ulterior objects not related to the Act.[35]

The Commissioner's position effectively is that her discretion with regards to the terms of a consent agreement is absolute and that third parties should not have any right to substantively challenge the effectiveness or factual basis of consent agreements. The only support cited by the Commissioner for these propositions was comments made by a former Commissioner to the Standing Committee on Industry, Science and Technology and the fact that section 105 of the Act as enacted gave the Commissioner less remedial discretion than had originally been proposed.[36] The Commissioner's position, therefore, must be examined in light of interpretation, logic and public policy.

The Commissioner's argument focuses on mergers (not surprisingly, since this was a merger case) and advocates an interpretation of subsection 106(2) in the context of merger review. It is important to note, however, that section 106(2) applies to consent agreements made with respect to all of the matters under Part VIII, and not just mergers.

The amendments were designed to remedy concerns about uncertainty and delay. In the merger context, the key concern is delay with respect to closing. In most transactions, the parties are unable and/or unwilling to delay closing for 6-12 months while the matter is contested at the Tribunal. Under the new consent agreement regime, this delay has been eliminated. However, if the Commissioner's position with respect to the permissible scope of third party challenges is adopted, it will make her the sole and final arbiter, rather than the "gatekeeper" with respect to remedies effected by way of consent agreements.

It is doubtful that Parliament intended such an outcome, especially given the fact that the Tribunal has often disagreed with both the Commissioner's view of the relevant markets and the effectiveness of proposed remedies. In this regard, as discussed above, in the context of the former consent order approval process, the Tribunal stated that its role was to ensure that the remedy proposed was likely to eliminate the identified substantial lessening or prevention of competition.[37] The importance of ensuring the effectiveness of remedies made pursuant to the Act and the Tribunal's role in this regard is supported by the Supreme Court of Canada's statement that "if the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough", the former option is preferable.[38] In terms of ensuring the effectiveness of a proposed remedy, the Tribunal has acknowledged that, absent third party consents or intervention, it assessed the consent order proposed by the Commissioner in an "evidentiary vacuum" In this regard, the Tribunal has suggested that intervenors could challenge a proposed remedy by presenting additional facts or questioning the effectiveness of the proposed remedy.[39] It is significant that the Commissioner provided no evidence to support the proposition that Parliament's intent in adopting the consent agreement registration process was to strip the Tribunal of its role of reviewing the factual basis for and ensuring the effectiveness of consent agreements.

Even if one accepts the Commissioner's unsupported view that the scope of the right to challenge consent agreements is limited to issues regarding the Tribunal's jurisdiction, as a matter of administrative law, it is outside

the Tribunal's jurisdiction to make an order that is not based on all relevant factors or that breaches the provisions of natural justice.[40] Further, given the purpose of the Act and the fact that the Tribunal's role is to make orders that remedy the anticompetitive effects caused by a merger or other conduct covered under Part VII of the Act, it would be both outside its jurisdiction and contrary to public policy for it to knowingly approve a remedy that did not adequately address the identified harm to competition. Accordingly, even under the current process, the Tribunal retains the role of ensuring that consent agreements are effective and enforceable.[41]

One of the key arguments made by the Commissioner in support of her view that the scope of any third party challenge should be limited to whether the terms of a consent order are within the Tribunal's jurisdiction is that, in enacting subsection 106(2), Parliament did not intend to create a private right of action in merger cases.[42] This position confuses the distinction between the right to challenge a merger (which is clearly the sole prerogative of the Commissioner) and the right to challenge a consent agreement, which subsection 106(2) clearly extends to directly affected third parties.[43] Using the Commissioner's "gatekeeper" analogy, one must distinguish between minding the gate and owning the property. Nothing can compel the Commissioner to actually bring a case. It is in this function that the Commissioner exercises her "gatekeeper" role. Once having "opened the gate", and engaged the process of the Tribunal, the Commissioner has fulfilled her role as "gatekeeper"

By limiting the scope of challenges to jurisdictional matters (as she defines them), the Commissioner essentially would, for all practical purposes, eliminate third party challenges to consent agreements. Clearly, subsection 106(2) gives directly affected third parties the ability to challenge consent agreements. Accordingly, it is reasonable to assume that Parliament's intention was to confer a new right.[44] In this context, the right to challenge is only meaningful if it includes the ability to challenge both the factual underpinnings and substantive effect of consent agreements.

Challenges - The Exception, Not the Norm

While some commentators have expressed the concern that giving a broad mandate to the Tribunal "would add significant uncertainty to the process for merging parties who, having consented to a set of remedies, could, for example, find themselves exposed to an order to divest additional assets".[45] Further, there was a concern that allowing consent agreements to be substantively challenged would create an incentive for "affected parties" to bring strategic applications. However, given that the first and only third party challenge to a consent agreement was brought some three years after subsection 106(2) was enacted, it appears that the concern about opening the floodgates to strategic litigation has not, and is unlikely to, materialize.

First, from a practical point of view, the vast majority of consent agreements will go unchallenged. In situations where a prospective merger likely raises competitive concerns, the Competition Bureau typically engages in extensive consultations with those third parties most likely to be "directly affected" by a possible consent agreement. Moreover, the private party to a consent agreement normally realizes that it must continue to deal with its customers and suppliers, and often moves proactively to address their concerns. Consequently, most consent agreements are and will be relatively non-controversial. This is supported by the fact that *Burns Lake* is the first application to be brought since the consent agreement registration procedure was introduced in late 2002.

Second, while our view is that a "directly affected" person can challenge the substance of a consent agreement, there are huge disincentives to actually doing so. As noted below, the "compelling evidence" threshold established by the Tribunal will likely be a high standard to meet. Given this standard, bringing a successful challenge will likely be difficult, time consuming and extremely expensive. Moreover, if unsuccessful, the applicant would be liable to pay costs to both the Commissioner[46] and the private party to the consent agreement.

Third, given the realities of the business environment, it is unlikely that potential applicants such as customers or suppliers of merging parties will be willing to jeopardize their business relationships by bringing a consent agreement challenge unless they genuinely believe it raises significant concerns. Accordingly, we submit that the Tribunal's involvement will be reserved only for those cases where third parties truly believe that the consent agreement raises serious issues and, for this reason, in the vast majority of cases, the consent agreement process will be quick, efficient and generally certain, thus preserving the Parliamentary intent for the amendments to the process.

Tribunal Oversight – An Important Safeguard

While the legislative intent behind the consent agreement registration process was certainly to facilitate the ease and speed of merger review, Parliament likely did not intend to turn the Tribunal into a mere "registry office" or "post office", which was a concern identified by some commentators.[47] As noted by certain commentators in their remarks to the House Committee, after the 1986 amendments to the Act, the Tribunal was made to be a central figure in adjudicating the enforcement of competition law. Accordingly, it is unlikely that Parliament intended to eliminate the Tribunal's adjudicative oversight with respect to enforcement of the Act.

It is also highly unlikely that Parliament intended to completely immunize agreements entered into by the Commissioner to resolve substantive competitive concerns from public accountability or to create an administrative process where the Commissioner can make deals with private parties without any kind of external overview or public oversight. In this regard, the consent order approval process appears to be unique in that it allows the Commissioner and a private party to effect a settlement to a proceeding brought under a public interest statute without any scrutiny by an independent adjudicative body.[48]

It is also conceivable that, in the absence of evidence provided by third parties, the bulk of the evidence the Commissioner has on the relevant markets and competitive effects of the merger is that provided by the merging parties, which may not be complete. In a merger, the parties have usually had months to prepare and have an intimate knowledge of the industry. The Commissioner, on the other hand, must start from ground zero in most cases and has a relatively short period of time and limited resources to gather additional facts and make her own assessment of the likely effects of a proposed merger. As a result, the market definition agreed upon by the Commissioner and the merging parties may be incorrect and/or the proposed remedy may not adequately address the substantial lessening or prevention of competition resulting from the merger. Often, third-party market participants are well-positioned to provide facts and insights that are not otherwise available to the Commissioner. For this reason, the existence of a right to substantively challenge consent agreements helps ensure that proposed consent agreements effectively remedy the competitive harm identified. Also, given the paucity of contested

merger cases, substantive third-party challenges may provide an opportunity for the Tribunal to further develop Canadian competition law with respect to market definition and/or remedies.

Allowing substantive challenges to consent agreements is clearly supported by the cases decided under the previous consent order approval regime, which in this respect are analogous to challenges brought under subsection 106(2). On this point, in *(Canada) Director of Investigation and Research v. Bank of Montreal at el.*, the Tribunal made the following statement regarding the scope of third party intervention in the context of the consent order approval process:

> In our view, it is open to third parties participating in a consent proceeding before the Tribunal to challenge the Director's formulation of an abuse of dominance case brought on consent on the grounds that, for example, the Director has artificially or simply mistakenly drawn the boundaries of the relevant markets, has wrongly omitted some practice from the list of anticompetitive acts and, thus, has neglected to describe fully the effective substantial lessening of competition. Of course, since the Tribunal begins with a presumption that the Director is acting in the public interest, compelling evidence will be required to overturn his judgment on this basis.[49]

While *Interac* was a consent case premised on the abuse of dominance provisions, there is no reason why the approach taken by the Tribunal in that case should not apply equally to the new consent agreement registration process including consent agreements entered into in the context of mergers.[50]

Adopting the Tribunal's requirement that third parties provide "compelling evidence" to challenge the Commissioner's position serves as a safeguard against the possibility of strategic or frivolous challenges. Given the high hurdles that must be cleared for a challenge to be successful, potential applicants will likely have to engage in both legal and economic analyses to assess the merits of their application. The very high costs associated with collecting and preparing the economic evidence likely necessary for a challenge to have any possibility of success, as well as the prospect of having to pay adverse cost awards, if unsuccessful, make it unlikely that potential applicants will even contemplate bringing a challenge unless they feel they have a legitimate and serious concern.

Finally, the requirement that the impact be "definite and concrete and not merely speculative" places further evidentiary burdens on potential applicants as it may be difficult to obtain the econometric evidence likely necessary to demonstrate the requisite effect within the sixty day time period allowed for applications. In addition, any concerns regarding the potential for abusive challenges can likely be addressed by requiring applicants to at least establish a *prima facie* case before requiring the Commissioner or the private party to justify the terms of the consent agreement.

Conclusion

Allowing third parties to substantively challenge consent agreements reached in either mergers or in the context of other reviewable matters such as abuse of dominance in no way undermines the consent agreement procedure or its underlying policy objectives. On the contrary, the fact that substantive challenges can be brought may serve

as an important and, in our view, necessary safety valve on the Commissioner's discretion. While it is certainly desirable to give merging parties a degree of confidence that an agreement which has been reached by them and the Commissioner will not be reopened by way of extensive litigation, from a public interest perspective, it is also desirable that these agreements should remain subject to both public scrutiny and Tribunal oversight. The possibility of a substantive challenge encourages the merging parties to be upfront and comprehensive with respect to the information they provide and to assist the Commissioner as fully as possible in obtaining an accurate picture of the relevant market(s). Similarly, it encourages the Commissioner to conduct a thorough market inquiry and properly canvass the views of stakeholders before entering into consent agreements. Further, the right to substantially challenge consent agreements likely ensures that the Commissioner will take care to craft effective consent agreements. In addition, to the extent that subsection 106(2) provides a limited form of private enforcement in appropriate circumstances, it should be welcomed by the Commissioner and her staff. This is particularly so given that the goal of the consent agreement process is not to avoid scrutiny, but to ensure that the proposed remedy is effective and achieves the merging parties' business objectives while considering concerns of relevant stakeholders and preserving competition.

It will be interesting to see how the Tribunal addresses an application brought by an applicant who meets the "directly affected" requirement of subsection 106(2) and seeks to challenge either the substantive effect of the consent agreement or the market definition advanced by the parties. How the Tribunal decides the first such case will likely determine whether subsection 106(2) provides third parties with a meaningful ability to challenge problematic consent agreements or is reduced to a right without substance.

Notes

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2 *Burns Lake Native Development Corporation et al. v. Commissioner of Competition and West Fraser Timber Co. Ltd. et al.* 2006 Comp. Trib. 16 [*Burns Lake*].

3 *Ibid.* at para. 81.

4 It is worth noting that a determination of issues of fact or mixed law and fact is technically outside the scope of a reference under subsection 124.2(2). Specifically, subsection 124.2(2) allows the Commissioner to bring a reference to the Tribunal for determination of a "question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Parts VII.1 to IX" of the Act. This is in contrast to subsection 124.2(1), which also permits the Tribunal to determine questions of mixed law and fact on consent.

5 The consent agreement registration process was introduced in 2002 following amendments to the Act. Previously, the Tribunal would grant a consent order proposed by the Commissioner and the merging parties following a hearing in which third parties could intervene. Parties were required to file supporting materials, including a draft consent order and a consent order impact statement. After 2002, the procedure changed to the simple registration of a consent agreement with the Tribunal, which then has the force of an order. A detailed explanation of the former consent order approval process and the current consent agreement registration process is set out below.

6 *Canada (Dir. of Investigation & Research) v. Imperial Oil* (1990), 45 B.L.R. 1 (Comp. Trib.) [*Imperial Oil*].

7 Both West Fraser and Weldwood were forestry companies operating in British Columbia.

8 "Directly affected persons – A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal."

9 The reference was the first brought pursuant to subsection 124.2(2) since section 124.2 was enacted in 2002.

10 *Burns Lake*, *supra* note 2 at paras. 3 and 5. On the second question, the Tribunal concluded that there was no statutory requirement to file supporting evidence when registering a consent agreement. Consequently, it did not address the second part of the question, i.e. whether the absence of such evidence is sufficient to support a finding that "the terms could not be the subject

of an order of the Tribunal" While the discussion of this issue is beyond the scope of this paper, our view is that, although it is clearly not a statutory requirement, it would be beneficial if some form of supporting evidence was filed with a consent agreement for at least the following three reasons: (i) filing some supporting evidence improves the transparency of the Commissioner's decision to enter into the consent agreement in question and provides guidance to the business community and their counsel; (ii) supporting evidence may, by setting out the basis for the consent agreement, reduce the likelihood of a third party challenge; and (iii) for the right to challenge a consent agreement to be meaningful, there must be some factual basis upon which potential applicants can assess the consent agreement and determine whether to bring a challenge. While this may impose additional costs on the Bureau and merging parties, we believe that on balance, these policy considerations weigh in favour of filing some form of supporting evidence, at least in cases that are potentially controversial.

11 *Ibid.* at para. 23.

12 *Ibid.* at paras. 21-23.

13 *Ibid.* at para. 21.

14 *Ibid.* at para. 49.

15 *Ibid.* at para. 55.

16 *Ibid.* at para. 54.

17 This was pursuant to the former section 105 of the Act.

18 Section 77 of the *Competition Tribunal Rules*, Can. Reg. SOR 94-290 SOR 94-290, as am. SOR 96-307; SOR 2000-198; SOR/2002-62 (the "Tribunal Rules") sets out the consent order approval process.

19 Tribunal Rules section 65. Under subsection 65(2)(f), the time for third parties to file comments or seek leave to intervene was 21 days following the date of publication of the notice in the *Canada Gazette*.

20 See *e.g. Canada (Commissioner of Competition) v. Air Canada* (unreported, April 20, 2001, Comp. Trib., McKeown J., Docket No. CT- 2001002 and *The Commissioner of Competition v. Canadian Waste Services Holdings* (26 June 2000), CT2000002 20, Reasons and Order Granting Request for Leave to Intervene at para. 3.

21 A shorter, simpler one, with the hearing taking place by telephone if there were not intervenors and a much longer, more complex one if there were intervenors, in which case the hearing took place in person.

22 Under section 105 as it existed, the Tribunal had the right to approve, vary or reject the proposed consent order. Specifically, the language of former section 105 was as follows:

> "Consent Orders – Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal <u>may</u> make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested." [emphasis added]

The former section 105 was replaced with the current consent agreement provision in 2002.

23 See *e.g. Canada (Commissioner of Competition) v. Ultramar Ltd.* (2000), 6 C.P.R. (4th) 519 where the Tribunal refused to grant the consent order because it found that certain supply obligations were not sufficiently well defined to be effective and enforceable.

24 *Imperial Oil, supra* note 6.

25 *Ibid.*

26 *Ibid.*

27 *Canada (Dir. of Investigation & Research) v. Air Canada.* (1989) 27 C.P.R. (3d) 476 (Comp. Trib.).

28 Cited in *Burns Lake, supra* note 2 at para. 29 [emphasis added]. See also Speaking Notes for Konrad von Finckenstein, Bill C-23 An Act to Amend the *Competition Act* and the *Competition Tribunal Act*, to the Senate Standing Committee on Banking, Trade and Commerce (February 20, 2002).

29 The only condition being that the agreement must be based on terms that could be the subject of an order of the Tribunal against the private party.

30 Subsection 106(2) of the Act.

31 As discussed in note 10, *supra*, the other key difference is that, under the consent agreement registration process, there is no need for the Commissioner to file any evidence in support of her position regarding the efficacy of the proposed remedy.

32 Memorandum of Argument of the Commissioner of Competition (Reference re. Section 106 of the *Competition Act*), filed April 5, 2005 (the "Memorandum"), at para. 5.

33 *Ibid.* at para. 3.

34 *Ibid.* at para 48.

35 *Ibid.* at para. 5.

36 It was initially proposed that section 105 of the Act would have allowed consent agreements to contain terms "whether or not they could have been imposed by the Tribunal" The Commissioner argued that the fact that section 105, as enacted, restricts her remedial discretion to orders that could have been made by the Tribunal is evidence that the grounds for a challenge to a consent agreement under subsection 106(2) are limited to situations where the terms of the agreement exceed the Tribunal's jurisdiction. We question the logic of this argument, especially as it is equally plausible that the language used reflects that, from an administrative law standpoint, it would be improper to allow consent agreements to have the same force and effect as Tribunal orders if their terms could exceed those that could be ordered by the Tribunal.

[37] *Canada (Dir. Of Investigation & Research) v. Air Canada*, *supra* note 27.
[38] *Canada (Director of Investigation and Research) v. Southam Inc.* (1997), 71 C.P.R. (3d) 417 at 446 (S.C.C.).
[39] *Imperial Oil*, *supra* note 6.
[40] See, for example, *Anisminic v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.) per Lord Reid and *Service Employees' International Union Local No 333 v. Nipawin District Staff Nurses Association of Nipawin et al.* (1973) D.L.R. (3d) 6 (S.C.C.) where Dickson J. stated that:

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

[41] This view is supported by the comments made by John Bodrug and Christopher Margison in their article, "The Consent Order Process: Post-*Ultramar* and Looking Ahead" (2002) 21:1 Can. Comp. Rec. 59 [Bodrug & Margison].
[42] And by logical extension, any cases brought under Part VII of the Act, with the exception of sections 77 and 75, where there is an express private right of action.
[43] Memorandum, *supra* note 32 at para. 48.
[44] Individuals always have the right to challenge an order on the narrow jurisdictional grounds advocated by the Commissioner in this case. See *Findlay v. Canada (Minister of Finance)* (91986) 33 D.L.R. (4th), 321 (S.C.C.)
[45] Bodrug & Margison, *supra* note 41 at 69.
[46] Section 8.1 of the *Competition Tribunal Act* (R.S.C., 1985, c. 19, as amended) gives the Tribunal the power to make costs orders. Section 8.1 was enacted in the same package of amendments as subsection 106(2) and the creation of a private right of enforcement in respect of sections 75 (refusal to deal) and 77 (exclusive dealing, tied selling and market restriction) of the Act.
[47] See Stanley Wong, Remarks to the Standing Committee on Industry, Science and Technology (November 6, 2001) and Michael Trebilcock, Remarks to the Standing Committee on Industry, Science and Technology (November 6, 2001).
[48] We note, for example, that under section 48 of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6), a complaint before the Human Rights Tribunal can be settled by the parties subject to approval or rejection by the Human Rights Commission. If the settlement is approved by the Commission, a party can apply to the Federal Court to have the settlement made an order of that court for enforcement purposes.
[49] *(Canada)Director of Investigation and Research v. Bank of Montreal at el.* (1996), 68 C.P.R. (3d) 527 at 540 [*Interac*] [emphasis added].
[50] In fact, it appears from the decision in *Canada (Dir. Of Investigation & Research) v. Imperial Oil Ltd.* CT-89/3 (Comp. Trib.) that the Tribunal was open to considering evidence adduced by intervenors with respect to market definition. After hearing evidence adduced by one of the intervenors, Pioneer Petroleum, the Tribunal appeared to concede that the geographic market may have been defined improperly. The Tribunal did not order divestiture of a station because of the difficulty in defining highway markets due to the transient nature of customers and difficulties in identifying overlap areas. It should be noted that, in contrast to a consent proceeding, the Tribunal held that in a contested proceeding intervenors are restricted to making representations on issues as outlined by the Director in the pleadings. See *(Canada) Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1995) 61 C.P.R. (3d) 528.

AND THE MONEY KEEPS ROLLING (IN AND OUT) – CONSPIRACY CLASS ACTION SETTLEMENTS AFTER *CHADHA v. BAYER*

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Introduction

The Ontario Court of Appeal's decision in *Chadha v. Bayer*[1] in January 2003 appeared to signal that plaintiffs would have an uphill battle in certifying class actions alleging price fixing conspiracies where the proposed plaintiff class includes indirect purchasers. One would therefore expect that *Chadha* might embolden defendants to resist certification instead of settling, or would at least increase defendants' negotiating power and reduce settlement amounts.

It was not to be, at least in the short term. Since *Chadha*, there have been no contested certification motions in price fixing cases. Moreover, in the period between *Chadha* and the settlement in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* ("*Vitamins*"), total settlement amounts expressed as a percentage of sales remained constant, at about 10-12%. The amounts allocated to indirect purchasers declined slightly, however.

After *Vitamins*, the landscape appears to have changed. Settlement amounts expressed as a percentage of sales appear to have dropped to about six percent, and the amounts allocated to indirect purchasers have plummeted.

This article examines some of the details attending, and issues raised by, settlements of price fixing class actions both before and after *Chadha* and *Vitamins*.

Class Actions Under the *Competition Act*

Section 36 of the *Competition Act* creates a civil cause of action for damages caused by breaches of the criminal provisions of the Act. Section 36 itself specifies two remedies: damages and costs. The amount of damages is limited to the actual loss suffered by the plaintiff. Punitive damages are not available.[2]

Provincial class proceedings legislation has made it possible for private actions under section 36 to be structured as class actions. In Ontario, for example, the *Class Proceedings Act, 1992* ("Ontario CPA")[3] provides for certification of class actions. Most other provinces have similar legislation.[4]

One important feature of class action legislation is how it treats national classes. All provincial statutes allow the certification of a national class. The Ontario model provides that class members living outside of Ontario are automatically included in the class, unless they opt-out. Manitoba has also adopted this model. The British Columbia model requires that class members living outside of BC must opt in. Alberta, Saskatchewan, New Brunswick and Newfoundland have adopted this model.

Until recently, only Ontario, British Columbia and Quebec had class action legislation. Consequently, all of the conspiracy class actions to date have been brought in these provinces. Because Ontario's legislation facilitates national classes, the Ontario actions have been structured as national classes, and the companion BC and Quebec actions, as provincial in scope.

Chadha v. Bayer

Chadha was the first contested class certification motion in a conspiracy class action under section 36 of the *Competition Act*.[5] The Ontario Court of Appeal denied certification, mainly because the plaintiffs, who were indirect purchasers, did not show how they would be able to prove, on a class-wide basis, that they suffered losses due to an alleged conspiracy to fix prices for iron oxide pigments. These pigments were used to colour concrete bricks for use in houses and other buildings. The plaintiffs proposed a class of homeowners and other end purchasers of buildings containing bricks containing iron oxide. Not surprisingly, they were at the end of a long distribution chain. If at any point in the chain the price increase was absorbed and not passed on, the chain would be broken. Pigments form a minimal part of the building, and thus of the price, compounding the problem.

The court declined to adopt the so-called *Illinois Brick* rule, which prohibits indirect purchasers in the U.S. from suing for conspiracy.[6] The court left open the possibility that a class plaintiff could marshal an evidentiary record sufficient to show that liability to indirect purchasers could be proved as a common issue in price fixing cases.

Attempting to Avoid *Chadha*

The way plaintiffs' counsel have tried to avoid – or at least postpone – the problems posed by *Chadha* is to include both direct and indirect purchasers in the class definition. Arguably, defining the class in this way will include all of those who suffered a loss as a result of the conspiracy, and thus cover the whole of the damage caused by the conspiracy. This allows damages to be determined on an aggregate or global basis. Pass-on then becomes a question of apportionment between direct and indirect purchaser members of the class. This strategy has yet to be tested in a contested certification motion, and still suffers from the problem that individual assessments of damages will likely be required.

Apportionment of damages within the class between direct and indirect purchasers creates a potential conflict within the class. This issue was raised in the context of a carriage battle in the *Vitamins* case. One group of firms proposed to represent the entire class, including direct and indirect purchasers. A rival group proposed representing retail purchasers only. This group argued that the loss suffered by direct purchasers is only what the direct purchasers were unable to pass on to indirect purchasers, who suffered the greatest loss. Thus, they argued, there was a conflict between direct and indirect purchasers within the putative class.

Cumming J. held that a global assessment of damages, on a product by product basis, was necessary. This assessment would involve calculating the difference between economic rents with the conspiracy, and the likely economic rents had the conspiracy not occurred. The question of distribution among class members would only arise after the global assessment, Cumming J. held. At that point, purchasers at different levels in the distribution chain may have different interests, and require division into subclasses and separate representation. Consequently,

there was no conflict among class members with respect to the common issues (which included global assessment of damages, but not apportionment). Indeed, Cumming J. added, class members were likely to maximize their recovery through joint pursuit.[7]

In approving the *Vitamins* settlement, Cumming J. returned to this theme, commenting that "[a]ll groups of class members must be present...to protect the rights of the class members to make a claim against a common fund to address their losses".[8]

It should be noted, however, that negotiation by class counsel of the apportionment as part of settlement negotiations does in principle raise the conflict that Cumming J. identified: class members at different levels in the distribution chain have competing claims over the global settlement amount.

But these attempts to get around *Chadha* have a still more serious flaw: they do not avoid the central problem in *Chadha*, namely, how will loss by each class member as a component of liability be proven on a class-wide basis? As noted above, in *Vitamins* Cumming J. approved of the notion of combining direct and indirect purchasers in one class and calculating damages in the aggregate.

However, section 24(1) of the Ontario CPA allows for the determination of damages in the aggregate provided that "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability". Under section 36 of the *Competition Act*, proof of loss by the plaintiff is an essential element to establishing the defendant's liability, as the Court of Appeal emphasized in *Chadha*.[9] The Court of Appeal refused to certify the *Chadha* class action because the representative plaintiffs could not show how they could establish proof of loss suffered by indirect purchasers on a class-wide basis as a component of liability.

Lumping direct and indirect purchasers together into a class does not relieve the plaintiffs of the obligation of proving the loss suffered by the indirect purchasers as a component of liability. The central problem in *Chadha* remains under this approach: to certify the action, the plaintiffs must still show how they intend to prove, on a class-wide basis, that all of the indirect purchasers suffered a loss. If they cannot, liability cannot be certified as a common issue, and, as in *Chadha*, it is at least questionable whether the class could be certified at all. An aggregate damages approach does not get around this problem and is inconsistent with section 24(1) of the Ontario CPA and the decision of the Court of Appeal in *Chadha*.

Settlement Agreements

Total Settlement Amounts

Settlement agreements generally provide for a settlement amount that includes damages, pre-judgment interest, plaintiff counsel fees and administration expenses. Traditionally, counsel negotiate a global amount based on percentages of total sales in the relevant market during the period of the alleged conspiracy. Percentages for cases before *Chadha* vary from 7.4% to 12%. After *Chadha* and up to and including *Vitamins*, they vary from 5.9% to 14%. For both of these periods, the settlement amount is most commonly about 11% of sales. Less data is available for cases after *Vitamins*,[10] but percentages appear to have dropped to six.[11]

Interestingly, the settlement amounts bear little relationship to criminal fines assessed in relation to the same conspiracies. Except for *Vitamins*, class action settlement amounts have typically been less than the criminal fines. For instance, in *Lysine* (see Table 1), the fines were more than three times the class action settlement, whereas in *Vitamins*, the fines were just over 70 percent of the class action settlement.

The following table shows the settlement amounts, percentage of sales and criminal fine amounts, for class action settlements:

Table 1 - Settlement Amounts

Case	Settlement amount	Percentage of sales	Criminal fines amount	Settlement as percentage of fine
Pre-Chadha				
Sorbates[12]	2.9 million	11	7.4 million	39%
Citric Acid[13]	7.7 million	7.4	11.6 million	67%
Sodium erythorbate[14]	1.4 million	12	1.5 million	93%
Post-Chadha				
Lysine[15]	5.25 million	5.9	17.6 million	30%
Maltol[16]	567,000	11		
MCAA[17]	490,000	11	1.9 million	
MSG[18]	6.4 million	?		
Vitamins[19]	132.2 million	14	94.7 million	140%
Post-Vitamins				
Polyester staple[20]	974,929	?	1.5 million	65%
EPDM[21]	4.7 million	6%[22]		
Polychloroproprene[23]	566,274			
Rubber chemicals[24]	7.2 million	6%[25]	9 million	80%
Linerboard / Corrugated Materials[26]	1.8 million	?		
Copper[27]	1.7 million	?		

Allocation and Distribution of Settlement Amounts

The Ontario CPA provides a number of mechanisms for determining and distributing damages that can be used to facilitate settlement of indirect purchaser class actions. The court can determine damages in the aggregate in certain circumstances.[28] The court can allocate the damages to individual class members on an average or proportional basis, particularly if it would be impractical or inefficient to determine exact shares.[29] The court can require individual claims, or not, and can specify a procedure for dealing with individual claims.[30] Alternatively, the court can direct a reference to determine individual issues, including damages.[31]

The Ontario CPA provides that the court can direct any means of distribution of damages it considers appropriate.[32] Either the defendant or someone else can be ordered to distribute damages.[33] Typically, in settlements, distribution is handled either by the representative plaintiff's counsel, or by professionals, such as an accounting firm, engaged for that purpose.

Table 1 shows three settlements that occurred before *Chadha*, five in the *Chadha* to *Vitamins* period, and six thereafter. As noted above, conspiracy class actions generally combine direct and indirect purchaser claims. Settlements up to and including *Vitamins* allocate most of the settlement funds to direct purchasers, with between 10% and 30%, but most often 20%, allocated to indirect purchasers (intermediaries and consumers). Amounts that are originally allocated to direct purchasers but then not claimed are usually added to the indirect purchaser fund. The percentages allocated to indirect purchasers in post-*Chadha* settlements are slightly lower than pre-*Chadha*, and much lower in the period after *Vitamins*.

The *Vitamins* settlement represents the high point in complexity and sophistication in class action settlements to date in Canada. The settlement allocated the settlement fund between direct purchasers, intermediate purchasers and consumers. The settlement terms "direct purchasers" as those who purchased vitamins directly from the defendant manufacturers, as well as those who purchased them from distributors. Normally, a purchaser from a distributor would not be considered a direct purchaser.

The *Vitamins* settlement defines "consumer" as any natural person who purchased "vitamin products" for personal consumption. "Vitamin products" is defined as products that contain vitamins or are made from animals that consumed vitamins. It is likely, therefore, that every Canadian is a "consumer" of vitamins under the *Vitamins* settlement. Intermediate purchasers are defined in the settlement as anyone who purchased vitamin products and is not a direct purchaser, a distributor or a consumer.

While other price fixing class action settlements are less complex, they follow a similar pattern to the *Vitamins* settlement, although most do not separate out an "intermediate purchaser" group.

The most recent settlements have eschewed the complexity of *Vitamins*. The *Polychloroproprene, EPDM, Rubber Chemicals, Polyester Staple, Linerboard* and *Copper* settlement agreements all leave the development of the plan of distribution, including the allocation of the settlement between direct and indirect purchasers, to be determined by class counsel, subject to court approval.

The following table shows the allocations between direct and indirect purchasers:

Table 2 – Allocations Between Direct and Indirect Purchasers

Case	Settlement date	Direct purchasers	Indirect purchasers
Pre-Chadha			
Sorbates	2001	70	30
Citric Acid	2001	80	20
Sodium erythorbate	2002	80	20
Post-Chadha			
Lysene	28 Feb 2003	90	10
Maltol	13 Mar 2003	80	20
MCAA	16 Dec 2003	Unclear	Remainder after distribution to direct purchasers
MSG	2004	85	15
Vitamins	January 2005	83	17
Post-Vitamins			
Polyester staple	April – June 2005	80% less fees and costs	20%
EPDM	May 2005	Up to 100% to manufacturers and distributors	Remainder
Polychloroproprene	September 2005	Not yet determined	Not yet determined
Rubber chemicals	December 2005	Up to 100% to manufacturers and distributors	Remainder
Linerboard[34]	December 2005	95%	5%
Copper	December 2005	96%, less fees and costs	6%

Distribution to Direct Purchasers

Typically, the settlement agreement provides that direct purchasers are entitled to a rebate of a certain percentage of purchases of the product at issue. Direct purchasers obtain this rebate through a claims or reference process.

For example, the *Vitamins* settlement provides that direct purchasers are entitled to a 12% refund on purchases directly from defendant manufacturers, and 10% on purchases from distributors. Distributors are entitled to a 1% refund. The assumption appears to be that distributors would pass on virtually all of the increase in the price of vitamins caused by the conspiracy. Direct purchasers and distributors can obtain their rebates by applying to the administrator of the settlement fund. Interestingly, the settlement requires the administrator to maintain a web-based database of direct purchaser claims. If the administrator rejects the claim, the direct purchaser or distributor can appeal through a reference process.

Distribution protocols for the post-*Vitamins* settlements take two forms. In *EPDM* and *Rubber Chemicals*, the entire settlement amount, net of legal fees and distribution costs, appears to be available to direct purchasers. Direct purchasers share in the settlement funds *pro rata* up to 6% of purchases in the case of manufacturers or 0.6% in the case of distributors, with any remainder being allocated to indirect purchasers and distributed *cy-près*.[35]

Polyester Staple, *Linerboard* and *Copper* allocate the bulk of settlement funds to direct purchasers and a small percentage to indirect purchasers (except for *Polyster Staple*, which allocates 20% to indirect purchasers). Legal fees and costs are to be paid out of the direct purchaser fund. Direct purchasers then share *pro rata* in the direct purchaser fund, instead of receiving rebates expressed as a percentage of sales.

Cy-près Payments to Non-profit Organizations

Only well-recognized entities that have an established record of providing not-for-profit services, and that are transparent in their activities and accounting, can benefit from a *cy-près* distribution.[36]

Settlement amounts allocated to indirect purchasers have so far always been distributed *cy-près* to a variety of non-profit organizations, including universities, charities and consumer organizations. One noteworthy recipient is the Quebec consumer group Options Consommateurs, which is not only the recipient of these settlement funds, but frequently the representative plaintiff in the Quebec class action. To date there have been no attempts to distribute settlement funds to consumers through rebates, coupons or other similar distributions.

For example, the *Vitamins* settlement provides for monies allocated to both consumers and indirect purchasers to be distributed *cy-près*. The indirect purchaser fund is mainly allocated to producer associations, such as the Canadian Pork Council, the Canadian Cattlemen's Association, etc., while the consumer fund is allocated to various consumer associations, research institutions, charities and universities.

The Ontario CPA also allows *cy-près* distribution if the award "has not been distributed within a time set by the court". The award can then be distributed to non-members of the class, but the court must be satisfied that a reasonable number of class members would benefit from such a distribution.[37] This provision has been relied on

to support *cy-près* distribution to non-profit organizations, universities and the like, of settlement funds allocated to indirect purchasers, because of the "significant problems in identifying possible claimants" below the direct purchaser level.[38]

However, in approving *cy-près* distribution to indirect purchasers, the courts seem to have ignored the Ontario CPA's requirement that only funds that remain to be distributed after a certain time period can be distributed in this way.[39] While distribution directly to consumers is almost always impracticable, making *cy-près* distribution necessary, the fact remains that the Ontario CPA, on its face, does not allow it except after an initial distribution period. To date, no decision has addressed this problem. In the author's view, the current practice is not consistent with the Ontario CPA. Either the Ontario CPA needs to be amended to permit *cy-près* distribution without an initial distribution period; or a *bona fide* distribution period should be provided for before the *cy-près* distribution occurs. The fact that *cy-près* distribution is likely the only practical way to distribute funds earmarked for indirect purchasers does not permit derogation from the statutory requirements.

Class Counsel Fees

Most indirect purchaser class action settlements state a global settlement amount, including costs. Plaintiffs' counsel's fee is usually dealt with in the settlement agreement and is typically between 15% and 25% of the settlement amount.

Even in the context of a settlement, class counsel fees must be approved by the court. Approval is not automatic. For instance, in *Citric Acid*, class counsel sought a fee of $1.2 million, a multiplier of three times docketed time of about $400,000, and equivalent to about 20% of the settlement. The defendants objected, and the court reduced the fee to $900,000.[40] In *Vitamins*, the court approved a fee of $15 million, or approximately 15%, but was concerned that opt-outs could drive the percentage fee higher (because opt-outs reduce the total value of the settlement). The court thus ordered a 15% cap on the fee.[41]

Partial Settlements and Bar Orders

"Bar orders" have become routine when not all defendants participate in the settlement. These orders typically bar claims by non-settling defendants for contribution or indemnity from settling defendants, and vice versa, and provide that class members must restrict claims against non-settling defendants to the damages that those defendants are responsible for. They can also include terms allowing the plaintiffs to apply for discovery of the settling defendants.

Normally, all participants in a conspiracy would be jointly and severally liable to the plaintiffs for the damages, and could claim contribution and indemnity amongst themselves in accordance with an apportionment of liability between them determined by the trial judge.[42] Bar orders sever the joint liability of the defendants.[43]

Jurisdiction to grant bar orders has been inferred from provisions of the Ontario CPA allowing the court to stay related actions, and to make such orders as are necessary for the fair and expeditious determination of the class proceeding.[44]

In the context of conspiracy proceedings, bar orders might be objected to on the basis that joint liability is particularly appropriate for conspiracy. Since the cooperation of all parties is needed for a conspiracy to work, each party to a conspiracy can fairly be held responsible for the entire loss caused by the conspiracy. However, in approving bar orders, courts have noted that no defendant would agree to a settlement that did not include all defendants without a bar order.[45]

Bar orders will be rejected if they apply to non-parties or to class members who opt out.[46] Moreover, bar orders must be restricted to claims arising from the subject matter of the action.[47]

Notice and Opt-outs

All Canadian class action statutes require publication of a notice once a class action is certified, and permit class members to opt out.[48] The notice published following a settlement typically sets out (among other things), the class, the nature of the action, the settlement amount and distribution scheme, the right to opt-out and applicable deadlines. A person who wants to opt out is usually required to complete an opt-out form and deliver it by the opt-out deadline to the claims administrator. Opt-out deadlines are typically very tight: the norm appears to be only 60 days after approval of the settlement.[49]

Class action settlements typically provide for refunds to settling defendants for direct purchasers who opt out. For instance, the *Vitamins* settlement provides for opt out refunds equal to the payment that would be made under the settlement to direct purchasers and distributors that opt out.

Approval and Enforcement

Test for Approval

Settlement agreements are generally negotiated on a national basis, and settle the actions in all jurisdictions, but they must be approved by the court in each province where a parallel class action has been commenced.[50] Consequently, settlement agreements are always expressly conditional on certification and approval in all jurisdictions where actions have been commenced. Typically they provide for certification for purposes of settlement of a national class in Ontario that excludes Quebec and British Columbia, and for certification of classes in Quebec and British Columbia. The expansion of the availability of class actions across Canada may complicate class action settlements in the future by multiplying the number of approvals that must be sought. This, in turn, would increase the number of lawyers who must be paid and the costs of obtaining settlement approval. Moreover, each additional jurisdiction adds to the risk of not obtaining approval in one or more provinces. A settlement that is not approved in one or more provinces may well collapse altogether.

To be approved, a settlement must be "fair, reasonable and in the best interests of the class as a whole".[51] Courts apply a number of criteria derived from U.S. class action settlements.[52] Moreover, the courts are reluctant to second-guess the judgment of the parties and their counsel;[53] indeed, there is a strong presumption that a settlement negotiated at arms length by counsel is fair.[54] But the approval process does require sufficient evidence to satisfy the court that the statutory requirements for certification are met.[55]

Ironically, *Chadha* may have made it easier to obtain approval of price fixing class action settlements: courts have cited *Chadha* as an obstacle to class certification, and thus a factor in favour of settlement.[56]

The recent trend to leaving the allocation and distribution protocol out of settlement agreements has led to a disturbing development. In *Linerboard*, the settlement agreement was approved of as being "fair, reasonable, and in the best interests of the Settlement Class", despite the fact that the allocation and distribution protocol had not yet been developed and proposed by class counsel. The order approving the settlement then provides that class members have 60 days after the first publication of the notice of settlement to opt out. The notice that was published does not contain the proposed allocation and distribution protocol either. In the result, the court has approved a procedure that forces class members to decide whether to accept compensation under a settlement before there is any possibility of knowing how they will be compensated.

In *Currie v. McDonald's Restaurants of Canada Ltd.*, the Ontario Court of Appeal emphasized that the right to opt out is an important procedural protection for class members that allows them to preserve legal rights that would otherwise be determined or compromised in the class proceeding. For this right to be meaningful, the court held, the class member must have adequate notice of the settlement.[57] It is unlikely that notice of a settlement that gives no information whatsoever as to how much compensation a class member may be entitled to would constitute adequate notice of the settlement.

This problem seems to have been remedied in later settlements. In *EPDM*, *Rubber Chemicals*, *Polyester Staple* and *Copper*, the distribution protocol was disclosed in the notice that contained the opt-out deadline. However, in each of these settlements, the amount of legal fees and costs has not yet been determined. The reasonableness of these amounts, and the exact total compensation available to class members therefore cannot be assessed by class members before the opt-out deadline.

Evidence

Class counsel frequently retain an economist to provide expert evidence in favour of approval of the settlement. Generally the economist attempts to quantify the amount of the overcharge caused by the conspiracy and identify what percentage of the overcharge was borne by direct and indirect purchasers.

Enforcement in Other Provinces

As noted above, price fixing class actions are routinely commenced and settled in three Canadian provinces: Ontario, British Columbia and Quebec, with the Ontario action being structured as a national class, to include members in the other seven provinces and territories. Defendants that settle such class actions depend upon the willingness of the courts in these other provinces to enforce the Ontario settlement by dismissing any action brought in those provinces subsequently.

To date, however, there has been very little jurisprudence on enforceability of a class action settlement in one province that includes class members in another province. In *Currie v. McDonald's Restaurants of Canada Ltd.*, the Ontario Court of Appeal held that foreign class actions that include Canadian plaintiffs as class members may

be recognized and enforced in Ontario, so long as the foreign court had jurisdiction and Ontario class members are given sufficient procedural protections, including sufficient notice.[58] In *Currie*, the court refused to enforce the settlement because it was not advertised widely enough in Canada. Similarly, in *Lépine v. Canada Post*,[59] the Quebec Superior Court refused to enforce an Ontario class action settlement that included Quebecers, as the notices approved in Ontario would confuse Quebec readers. These cases suggest that commencement of parallel class actions, certification and approval in every province may not be necessary, so long as the notices approved for the national class are sufficient to bring the settlement to the attention of potential class members in every province.

However, the recent trend to setting an opt-out deadline that occurs before all aspects of the settlement are determined may deny class members the procedural protections they are entitled to and make enforcement in other provinces less likely.

Conclusion

The discussion above raises three concerns about the present approach to settlement of class actions alleging conspiracy under the *Competition Act*. First, courts appear willing to assume that combining direct and indirect purchasers in one class makes the problem identified in *Chadha* go away, and that this can be accomplished without intra-class conflicts. Both of the assumptions are at least questionable, as discussed above. Second, courts have ignored the Ontario CPA's restriction on *cy-près* distribution. Third, opt-out deadlines are being set such that class members must decide whether to opt-out before knowing how much money will be available as part of the settlement.

While some might applaud the flexibility being shown in these class actions, this flexibility raises fairness concerns for defendants. In particular, the court's encouragement of the tactic of combining direct and indirect purchaser claims and performing an aggregate assessment of damages in *Vitamins* is troubling, given that (i) under the Ontario CPA, aggregate assessment of damages is not permitted until liability is established; (ii) liability under the *Competition Act* cannot be established without proof of loss; and (iii) loss by indirect purchasers is difficult, if not impossible, to prove on a class-wide basis.

Because of their high stakes, class actions are an extremely effective tool for extracting wealth from corporations, regardless of the merits of the case. Decisions that allow plaintiffs to circumvent difficult requirements increase the extractive power of class actions. In *Vitamins*, Cumming J. commented that class members were likely to maximize their recovery through joint pursuit.[60] While maximization of recovery may be the goal of the representative plaintiff on behalf of class members, it is not the goal of class proceedings.

Notes

[1] (2003), 63 O.R. (3d) 22 (C.A.), affirming (2001), 54 O.R. (3d) 520 (Div. Ct.), reversing (1999), 45 O.R. (3d) 29 (Gen. Div.), leave to appeal to Supreme Court of Canada denied, [2003] S.C.C.A. No. 106 [*Chadha*].

[2] *Wong v. Sony of Canada Ltd.*, [2001] O.J. No. 1707 at ¶¶ 16-18 (S.C.J.).

[3] S.O. 1992, c. 6.

[4] The following provinces have class proceedings legislation similar to Ontario's: New Brunswick (*Class Proceedings Act*,

S.N.B. 2006 c. C-5.15). British Columbia (*Class Proceedings Act*, R.S.B.C. 1996, c. 50), Alberta (*Class Proceedings Act*, SA 2003, c. C-16.5), Saskatchewan (*The Class Actions Act*, S.S. 2001, c. C-12.01), Manitoba (*The Class Proceedings Act*, C.C.S.M. c. C130), Quebec (*Code of Civil Procedure*, R.S.Q., c. C-25, Book IX) and Newfoundland and Labrador (*Class Actions Act*, S.N.L. 2001, c. C-18). The Federal Court of Canada has also recently amended its rules to allow class actions within its limited jurisdiction. In *Western Canadian Shopping Centres v. Bennett Jones Verchere*, [2001] 2 S.C.R. 534, the Supreme Court ruled that a class action could be brought even in the absence of class action legislation.

[5] *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.) (certification refused) was earlier; it involved alleged misleading advertising contrary to section 52 of the *Competition Act*. A number of other certification motions involving *Competition Act* claims were decided around the same time as *Chadha*, including: *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (S.C.J.) (resale price maintenance; certification refused on similar grounds as *Chadha*); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) (fraud, misrepresentation and misleading advertising; certification granted); and *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (S.C.), affirmed [2003] O.J. No. 1160 (C.A.) (misrepresentation and misleading advertising; certification refused).

[6] 431 U.S. 720 (1977). Many U.S. states have, however, adopted legislation repealing the *Illinois Brick* rule in state courts.

[7] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at ¶36-46.

[8] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 at ¶23 (S.C.J.).

[9] *Supra* note 1 at ¶60-61.

[10] Market size information is available in settlement agreements or other materials for most settlements up to *Vitamins*.

[11] Because it is usually impossible to discern the damages net of interest and costs, it is difficult to compare settlements in the various cases. Moreover, the percentage of sales often is not expressed in the settlement agreement and associated materials. In some cases, the author has been able to infer it from other sources.

[12] Settlement Agreement in *Alfresh Beverages Canada Corp. v. Hoechst AG*, Ontario Superior Court File No. 33817/00. Only the Ontario style of cause and court file number will be given for settlement agreements. All of the settlement agreements referred to are available at www.classaction.ca.

[13] Settlement Agreement dated September 28, 2001, in *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Company*, Ontario Superior Court 322562/99.

[14] Settlement Agreement dated July 4, 2002, in *Bona Foods Ltd. v. Pfizer Inc.*, Ontario Superior Court File No. 38409.

[15] Settlement Agreement dated February 28, 2003, in *Minnema v. Archer Daniels Midland*, Ontario Superior Court File No. G23495-99CP.

[16] Settlement Agreement dated March 13, 2003, in *Newly Wed Foods Co. v. Pfizer Inc.*, Ontario Superior Court File No. 39495.

[17] Settlement Agreement dated December 16, 2003, in *A&M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V.*, Ontario Superior Court File No. 40300CP.

[18] Settlement Agreements and Addenda dated November 7, 2003, March 14, 2003, May 20, 2003, November 13, 2003, and November 18, 2003, in *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.*, Ontario Superior Court File No. 37708.

[19] Settlement Agreement amended January 6, 2005, in *Ford v. F. Hoffman La Roche Ltd.*, Ontario Superior Court File No. 00-CV-202080CP.

[20] Settlement Agreement dated May 4, 2005, in *Randall Klein Inc. v. Nan Ya Plastics Corp*; Settlement Agreement dated May 2, 2005, in *Randall Klein Inc. v. Wellman, Inc.*; Settlement Agreement dated June 18, 2004, in *Randall Klein Inc. v. E.I. Du Pont de Nemours and Company*; Settlement Agreement dated April 11, 2005, in *Randall Klein Inc. v. Arteva Specialities, S.a.r.l.* Not all defendants have settled. Only one defendant (Arteva) has paid a fine in Canada.

[21] Settlement Agreement dated May 16, 2005, in *R.N. Parton Ltd. v. DuPont Dow Elastomers L.L.C.*; Settlement Agreement dated September 19, 2005, in *Stone Paradise Inc. v. Chemtura Corporation*. Not all defendants have settled.

[22] Inferred from Distribution Protocol. Manufacturers receive a pro-rata share of settlement funds up to 6% of purchases.

[23] Settlement Agreement dated September 2005, in *Luigi del Guercio v. DuPont Dow Elastomers L.L.C*

[24] So far only Crompton Corporation (and Uniroyal) have pleaded guilty and settled.

[25] Inferred from Distribution Protocol. Manufacturers receive a pro-rata share of settlement funds up to 6% of purchases.

[26] Settlement Agreement dated December 1, 2005, in *La Cie McCormick Co. v. Union Camp Corp.*, Ontario Superior Court File No. 43669CP.

[27] Settlement Agreements dated December 8, 2005, and November 14, 2003, in *Cello Products Inc. v. Sumitomo Corporation*.

[28] Ontario CPA s. 24(1). See also *supra* note 4, BC CPA, s. 29; Alta CPA, s. 30. Note that this provision cannot be used to escape

the necessity of proving that each class member suffered damage for purposes of establishing liability, since s. 24(1)(b) stipulates that all issues necessary to establish liability apart from the issue of quantum must have been determined. See *Chadha, supra* note 1 at ¶ 60-61.

[29] Ontario CPA s. 24(2)-(3). See also ibid., BC CPA, s. 29; Alta CPA, s. 30.

[30] Ontario CPA s. 24(4). But see the caveat expressed in footnote 28, *supra*.

[31] Ontario CPA s. 25.

[32] Ontario CPA s. 26(1).

[33] Ontario CPA s. 26(2).

[34] Proposed distribution plan. Not yet approved.

[35] The distribution plans are circular however. For example, the *Rubber Chemicals* distribution plan says that direct purchasers get the entire settlement fund less various deductions, including the amount allocated to indirect purchasers. It also says that indirect purchasers get the whole settlement fund, less various deductions, including the amount allocated to direct purchasers. Nowhere does it say, however, how much is allocated to either direct or indirect purchasers! The *EPDM* distribution protocol contains the same circularity.

[36] *Vitamins, supra* note 8 at ¶158 (S.C.J.).

[37] Ontario CPA s. 26(4)-(6). See also *supra* note 4, BC CPA s. 34; Alta CPA s. 34; Man CPA s. 34; Sask s. 37.

[38] *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 at ¶ 15 (S.C.J.), *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 at ¶16 (S.C.J.), *Vitamins, supra* note 8 at ¶132-134 (S.C.J.).

[39] The BC, Alberta, Saskatchewan, and Manitoba class proceedings legislation all contain this requirement.

[40] *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*, [2001] O.J. No. 6028 at ¶ 7.

[41] *Vitapharm Canada Ltd. v. F. Hoffman-La Roche*, [2005] O.J. No. 1117, at ¶ 112 (S.C.J.).

[42] *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.) at ¶ 53-55; Negligence Act, R.S.O. 1990, c. N.1, s. 1, 5.

[43] *Furlan v. Shell Oil Co.*, [2002] B.C.J. No. 2549 (S.C.) at ¶ 18.

[44] Ontario CPA s. 12, 13; *Ontario New Home Warranty Program v. Chevron Chemical Co.*, 46 O.R. (3d), ¶41-42.

[45] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495, ¶ 48; *Killough v. Canadian Red Cross Society*, [2001] B.C.J. No. 1481 ¶28 (S.C.); *Vitamins, supra* note 8 at ¶135-140.

[46] *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.*, [2004] O.J. No. 908 (S.C.J.) at ¶ 36, *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495, 51-52.

[47] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495, ¶51.

[48] Ontario CPA s. 9, 17(1). As discussed above, several provinces require out of province class members to opt in. In practice, indirect purchaser classes within those provinces are always limited to residents.

[49] 30 days in Quebec.

[50] Ontario CPA, s. 29(2).

[51] *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*, [2001] O.J. No 6028, ¶ 5 (S.C.J.); *Dabbs v. Sun Life*, 40 O.R. (3d) 429; *Parsons v. Canadian Red Cross*, [1999] O.J. No. 3572.

[52] In the leading case on approval, *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598, ¶13-14(Gen. Div.), Sharpe J. adopted the criteria from *Newberg on Class Actions*, (3rd ed), ¶ 11.43, and relied on Callaghan A.C.J.H.C.'s analysis of a number of other U.S. authorities in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 255 at 230-1.

[53] *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598, ¶ 14 (Gen. Div.).

[54] *Vitamins, supra* note 8 at ¶113 (S.C.J.).

[55] *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.*, [2004] O.J. No. 908, ¶¶ 21-30 (S.C.J.).

[56] *A&M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V.*, December 22, 2003, Ontario Superior Court File No. 40300CP (London); *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79, ¶¶ 7, 15 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1117, ¶73 (S.C.J.).

[57] (2005), 74 O.R. (3d) 321, ¶28

[58] (2005), 74 O.R. (3d) 321, ¶ 30

[59] [2005] Q.J. No. 9806.

[60] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at ¶¶ 36-46.

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