JUSTICE MY LORD – JUSTICE, AND COSTS: THE AVAILABILITY AND SCALE OF LITIGATION AND INVESTIGATION COSTS IN PRIVATE COMPETITION ACT LITIGATION

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Cet article traite du recouvrement de dommages-intérêts dans des litiges en vertu de la Loi sur la concurrence. Le litige privé en vertu de l'article 36 de la Loi sur la concurrence a crû en importance au courant des deux dernières décennies. Cependant, étant donné que la vaste majorité des litiges en vertu de l'article 36 ont été réglés hors cour ou résolus avant jugement, il existe peu de jurisprudence traitant du recouvrement de dommages-intérêts en vertu de l'article 36, ou traitant du libellé particulier de l'article 36 selon lequel le plaignant peut recouvrer « toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour [lui], de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article ». Une récente décision de l'Alberta Court of Queen's Bench, 321665 Alberta Ltd. v. ExxonMobil Canada Ltd., et al., énonce des principes et des pratiques applicables à cet égard.

The title of this article is the apocryphal answer to the question from the bench "What are you seeking, counsel?" It reflects, however, a serious point – that costs in litigation are no small matter. They are a very important practical consideration. This article explores costs in *Competition Act* litigation. Private litigation under Section 36 of the *Competition Act* has become a pretty big business since we first wrote about it in a more or less theoretical sense almost two decades ago.[2] However, since the vast majority of cases brought under Section 36 have settled or been resolved short of judgement, there is very limited jurisprudence with respect to litigation costs under Section 36, or with respect to the peculiar statutory formulation found in Section 36 that plaintiffs are entitled to recover "any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section".

A recent decision of the Alberta Court of Queen's Bench, *321665 Alberta Ltd. v. ExxonMobil Canada Ltd., et al.*[3] provides some guidance on this front. We wrote about the main decision in this case some time ago,[4] but the subsequently released decision on costs also provided some interesting practical guidance. The plaintiff, having won at trial, was seeking his costs – both litigation costs and the costs of the investigation. The plaintiff also sought interest on the

damages awarded, and interest on money borrowed to pursue the case. Those latter two portions of the decision are not particularly interesting as matters of general application, but the court's analysis of entitlement to litigation costs and investigative costs under Section 36 are applicable generally for private *Competition Act* litigation.

The first somewhat odd point to note is that there appears to have been little debate in the costs decision – at least none that shows up in the reasons – as to whether or not any damages award was actually made under Section 36 of the *Competition Act*. In our note on the main decision[5] we had observed that it is difficult to tell from that decision whether or not an award was actually made under Section 36 or whether the breach of the *Competition Act* was simply an element of the plaintiff's cause of action for damages made in tort. At least for the purposes of this decision on costs, the assumption appears to have been that there was an award made under Section 36.

The court considered whether the plaintiff was entitled to "solicitor-client" full indemnity costs. It noted that in Alberta, as in most other provinces, cost recovery is normally on a party and party scale, but that solicitor-client scale costs may be awarded in exceptional circumstances. However, those circumstances typically involve improper conduct as part of the litigation. Whatever bad conduct the court may have found the defendants to have undertaken, in the present case it did not find that the defendants' conduct within the litigation itself warranted an award of costs on a solicitor-client basis. It noted that the law is settled that solicitor-client costs are not to be awarded with respect to alleged bad conduct giving rise to the cause of action, but rather the conduct which is improper, reprehensible, scandalous, outrageous, etc. must be within the litigation. The court further noted that punitive damages – which were in fact awarded in this case – which may be awarded with respect to the costs giving rise to the cause of action, are separate and distinct from costs. Conduct which may give rise to an award of punitive damages is not conduct which would normally give rise to an award of solicitor/client costs.

The second litigation costs question was, aside from the question of alleged bad conduct, whether the wording of Section 36, referring as it does to "the full costs to him of...proceedings under this section", supports an award of solicitor-client costs. If so, that would suggest that the solicitor-client costs would typically be available in any Section 36 private action, regardless of the parties conduct during the litigation. The court rejected the argument that the term "full costs" found in Section 36 of the *Competition Act* is designed to support an award of solicitor-client costs in litigation, noting that if Parliament intended Section 36 to allow for solicitor-client costs it could easily have said so, and that the term "full cost" is not synonymous with solicitor-client costs. Except

in some special circumstances it means party and party costs. The court also noted that it had been cited no authorities in which a successful Section 36 plaintiff had been awarded solicitor-client costs. The Nova Scotia Court of Appeal had not done so in the *Go Travel Direct* case.[6] Of course, as noted at the outset there have been relatively few section 36 cases which have proceeded through a trial, such that an award of costs would have been made at all.

Turning from the issue of scale of litigation costs to be awarded in a Section 36 action, the other interesting question raised was what if anything the plaintiff was entitled to by way of its investigative costs, since Section 36 clearly permits the court to award "the full cost to him of any investigation in connection with the matter". By way of investigative costs, the plaintiff asserted that Mr. Gary Whelen, the "principal" of the plaintiff corporation, incurred investigative costs in the range of $963,000, and sought an award in that amount with respect to investigative costs.

There appears to have been no serious consideration of whether investigative costs incurred by the principal of a corporation may properly be awarded to the corporation or not, and/or what agreement needs to exist between the corporation and its principal to support such an award. The court did, however, give some detailed consideration to what investigative costs might be recoverable. It noted that in the *Polar Ice* case[7] the court had disallowed a claim for investigative costs, not because such an award was not available under Section 36 of the *Competition Act,* but rather that insufficient evidence to support the claim had been provided to the court in that case.

In this case, the court had evidence by way of an affidavit from Mr. Whelen as to very significant amounts of time which he allegedly took away from other business and his family to investigate the case. His affidavit asserted that the investigation occurred over a period of eighty months at a cost of $3,000 per month; an additional sixty-five months at $4,500 per month; and finally for the period of January 31, 2009 to May 31, 2011at a per diem rate of $1,500. All of this added up to $963,000. The court noted that none of these claims had any detail beyond that and Mr. Whelen had no records of what he did on any given day.

By way of responding evidence, the defendants provided the affidavit of a retired Assistant Deputy Commissioner of Competition, who reviewed the trial materials and indicated that a maximum of 48 days would have been required to investigate a claim of this nature. Applying the salary of a Competition Bureau commerce officer to the period of time, he concluded that there should have been investigative costs in the range of $15,000.

The court was critical of the defence evidence in a couple of respects. It noted the Deputy Commissioner's position that this agreement was overt and

therefore would be much simpler to investigate then typical 'covert' conspiracies, but did not accept that position. The court observed that the details of the arrangements between ExxonMobil and Husky were not known to anyone but the parties to those arrangements until well into the litigation. So, while the agreement itself or at least aspects of it were not covert there were many aspects which were not known and had to be investigated.

The court was also critical of the defence position that Mr. Whelen did not proceed efficiently, insofar as it noted "I do not accept that a citizen who undertakes an investigation pursuant to Section 36 can be fairly compared to the trained personnel within the Bureau who by virtue of their training have the expertise to investigate complaints efficiently". This analysis begs the question as to whether, in awarding amounts with respect to investigative costs, litigants are entitled to investigate *inefficiently* and obtain full compensation for that, or whether there is some onus on them to employ people appropriately trained and with the appropriate expertise – retired Competition Bureau officials being one possible source of such expertise – to investigate matters efficiently.

In ruling on the claim for investigative costs the court noted, amongst other things, that reasonable disbursements should be covered by such a award, including travel costs where appropriate; that investigative costs must relate to the actual investigation and not to participating litigation which is not compensable; that it would not be fair to compare Mr. Whelen's investigation to an investigation which would have been carried out by trained investigators (as noted above, this may be a matter of some contention in future cases); that assessing investigation costs has to be done from the perspective of the person conducting the investigation, not with the benefit of perpendicular hindsight; and there must be an evidentiary basis for investigative costs, although the court did not accept that it is fair to apply to rigorous a standard of record keeping in that regard.

The court ultimately concluded that "[a]s the evidence of investigation costs has not been particularized, I am left with no alternative but to estimate a lump sum award, and given all of the foregoing have concluded that the costs of the investigation should be awarded in the amount of $75,000 inclusive of disbursements". With respect, it is difficult to imagine a claim which could have been less particularized than that put forward. It appears that the court simply picked a lump sum, accepting that the plaintiff, or its principal, had spent a great deal of time investigating the case.

With respect to the question of investigative costs, it seems to us that there are a number of important questions which this case touches on, but which may be explored in future cases. These include whether the time of a "principal"

of a corporate plaintiff is compensable as investigative costs without evidence of any agreement between the corporation and the principal in that regard; whether plaintiffs in these cases have an obligation to investigate the claim efficiently with the use of appropriately trained personnel if they wish to have their investigative costs reimbursed – or at least wish to have any more costs than would have been incurred if the claim had been efficiently investigated; and whether a completely non-particularized claim for investigative costs will support a claim.

As noted, since we have so few final decisions under Section 36 of the *Competition Act* the *ExxonMobil* case is useful in helping to flesh out these practical questions.

Endnotes

[1] The authors acknowledge with appreciation the assistance of Kate MacDonald, student-at-law, McMillan LLP.

[2] Private Remedies Under the Competition Act", J. Musgrove, Canadian Bar Association - Ontario, - "Tough 'Acts' to Follow: A Pot-Pourri of New and Not-So-New Statutory Remedies Litigators Need to Know", May 1993.

[3] *321665 Alberta Ltd. v. ExxonMobil Canada Ltd. et al.*, Registry Docket #9703-06830, Belzil J., Feb. 7, 2012.

[4] *Buying Groups as a Criminal Offence: 321665 Alberta Ltd. v. ExxonMobile Canada Ltd. and Husky Oil Operations Ltd.*, Competition Law Newsletter, Volume XIII, No. 4, Winter 2011.

[5] *Supra* note 3 at 1.

[6] *Maritime Travel Inc. v. Go Travel Direct.com Inc.* [2008] NSJ no 224, 66 CPR (4th) 61 (NSSC), aff'd by 276 NSR (2d) 327.

[7] *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2007 ABQB 717, costs aff'd by 2009 NSCA 42, 2009 NSCA 42.