

BLG

Borden Ladner Gervais

It begins with service



The Antitrust Review of the Americas 2018

Canada: Private Antitrust Litigation

Robert Russell, Subrata Bhattacharjee,
Denes Rothschild and Ian Li

Reprinted with permission from
Global Competition Review

Canada: Private Antitrust Litigation

Robert Russell, Subrata Bhattacharjee, Denes Rothschild and Ian Li
Borden Ladner Gervais LLP

Two different venues provide opportunity for private antitrust litigation in Canada. Most commonly used is the civil court system for the pursuit of damages following criminal anticompetitive behaviour, usually pursued by means of class actions, which John Pecman, the Commissioner of Competition, has said is ‘the biggest growth area in antitrust in Canada.’ Far less common are administrative proceedings before the Canadian Competition Tribunal, which are available to private parties under certain circumstances. This chapter will describe recent activity in both forums with a focus on civil litigation as it is currently characterised by two important legal issues: who is properly situated as a plaintiff in Canadian competition class actions; and the navigation of multiple and overlapping parallel class actions. It will include a case study of competition class actions in Quebec in recognition of the significant differences between Quebec and the rest of Canada’s class action procedures.

Civil antitrust litigation in Canada

Section 36 of Canada’s Competition Act (the Act) allows private parties to bring an action for losses suffered as a result of conduct that is contrary to the criminal offences set out in Part VI of the Act.¹ Actionable conduct under section 36 therefore includes conspiracy, bid rigging, misleading advertising, deceptive telemarketing and pyramid schemes, but notably does not include conduct such as abuse of dominance (monopolisation), price maintenance or other conduct that may be the subject of private litigation in other jurisdictions, such as the United States.² A prior conviction for one of the criminal offences that can give rise to private claims is, in the absence of evidence to the contrary, proof that the person engaged in the conduct, and any evidence given in the criminal proceedings as to the effect of those acts is available for civil litigants to use.³ However, in practice, most criminal convictions result from negotiations rather than a trial, meaning that the agreed statement of facts will be an important piece of evidence in subsequent civil proceedings. In the absence of a conviction, the usual ‘balance of probabilities’ civil standard of proof applies. Only losses actually suffered, as well as the cost of the resulting investigation and proceedings, may be claimed. Neither punitive nor treble damages are available for actions brought under section 36. The limitation period for proceedings brought under section 36 is two years after the criminal conduct occurred or the criminal proceedings related to that conduct were disposed of, whichever is later.⁴

Plaintiffs often also frame these actions in common law conspiracy (both civil conspiracy and unlawful means conspiracy), unlawful interference with economic interests, or similar economic torts. These claims in tort are not limited by the Act and may, as a result, give rise to punitive damages, differing limitation periods, interlocutory injunctions and equitable disgorgements. A recent conflict between the courts of Ontario and British Columbia (BC) has now been resolved, and has confirmed that the common law tort of unlawful means conspiracy can be supported based solely on a breach of the Act.

In 2015 in *Watson v Bank of America Corporation*, the BC Court of Appeal held that the presence of a right of private action in the Act did not mean that a violation of its conspiracy provisions could not be the ‘unlawful act’ required to found a claim for unlawful means conspiracy.⁵ The Court’s logic for this was that the common law and the Act have different limitation periods, the common law allows for punitive damages, and generally there are (and predating the Act’s private right have been) broader remedies available in tort cases. Therefore, the Court held that the presence of the private right of action in the Act does not preclude a plaintiff (or class thereof) from also relying on conduct that breached the conspiracy provisions of the Act to support their tort claim for unlawful means conspiracy. The BC Court of Appeal strongly reaffirmed *Watson* in May 2016 in *Godfrey v Sony Corporation*.⁶

However, less than two months after the BC Court of Appeal’s decision in *Watson*, the Superior Court of Ontario came to a directly opposing conclusion. In *Shah v LG Chem, Ltd* the plaintiffs alleged that the defendants conspired to fix the price of lithium ion battery cells, bringing statutory, tort and restitutionary claims based on breaches of the Competition Act. The Court was not persuaded by *Watson*, and found that the statutory private right of action provided in the Act precluded any common law unlawful means conspiracy claim – leaving a direct conflict between the courts of these two major provinces. However, the *Shah* decision was recently overturned by the Ontario Court of Appeal in *Fanshawe College of Applied Arts and Technology v AU Optronics Corp.*⁷ In *Fanshawe*, the plaintiffs asserted a claim in civil conspiracy and a statutory claim pursuant to the Act. The Court of Appeal considered the reasoning in *Watson* and *Shah*, among others, before concluding that the motion judge in *Shah* erred in its analysis of Parliament’s intent. In the authorities relied upon by the motion judge in *Shah*, the courts considered statutes where the legislature simultaneously identified the proscribed behaviour and provided for a remedy. The legislative history of the Act’s predecessor, however, saw Parliament first prohibiting certain conduct without providing a corresponding civil remedy. The common law filled this void by allowing a criminal offence under Part VI of the Act to serve as the unlawful means in a civil conspiracy. Only after such remedy was established was the Act amended to provide a statutory remedy. In such circumstances, Court of Appeal found that the correct analysis was to determine whether Parliament intended to take away the established remedy with the enactment of the statutory cause of action, which, the court held, it did not. Therefore, a breach of the Act can constitute the unlawful act required to support a claim for unlawful means conspiracy.⁸ A subsequent appeal of the original *Shah* decision allowed the proceeding to be certified with respect to the unlawful means conspiracy claim on the principle of stare decisis in light of the ruling in *Fanshawe*.⁹

Since the jurisprudence in BC and Ontario regarding the continued ability of parties to bring common law claims for unlawful means conspiracy is now aligned, it appears that the law on this issue is settled for the time being.

In practice, many private antitrust actions in Canada arise out of international conspiracies that are initially investigated, prosecuted and litigated in other countries, particularly the US. As long as the conspiracy has a 'real and substantial connection' to Canada, in that the conspiracy, even if formed elsewhere, caused losses that were sustained in Canada, Canadian courts will have jurisdiction over related civil actions.¹⁰ Canadian plaintiffs typically attempt to benefit from prior or parallel actions in other countries, particularly from the evidence presented at such actions.

Some of the most recent developments in Canadian antitrust class actions include the commencement of approximately 35 class actions in Ontario, most with parallel actions filed in other provinces, against a variety of predominantly foreign auto parts manufacturers. The cases relate to numerous alleged conspiracies to fix the prices of auto-parts in North America and worldwide. The Ontario cases are being case-managed together, and the plaintiffs previously indicated that they may seek to have certain other elements of the cases heard together, including certification motions, which could have set a precedent that eased the prosecution of price-fixing class actions in Ontario. However, to date, this has not occurred. The parties have agreed to pause all of the cases in Ontario except the wire harnesses case (which will proceed first as a test case), for which the certification hearing is still pending. Certain rulings in that certification motion may affect certification of the other actions, but it is unlikely that the other actions will be formally argued together. Numerous settlements have also been reached but many defendants remain.

Requirements for class actions

Civil antitrust litigation in Canada largely proceeds by means of class actions. With the exception of Quebec, class actions filed in any province in Canada must generally satisfy the following five criteria to be granted certification (criteria usually set out in provincial legislation):

- the pleadings disclose a cause of action;
- there is an identifiable class of two or more persons;
- the claims of the class members raise common issues;
- a class proceeding would be the preferable procedure for the resolution of the common issues; and
- there is a representative who would fairly and adequately represent the interests of the class, has produced a workable plan for advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with the interests of other class members.¹¹

Although the criteria are to be construed generously in light of the three goals of class actions – judicial economy, access to justice and behaviour modification – plaintiffs do need to show some basis for each criterion.¹² Extensive evidence is now commonplace at the certification stage, including economic expert reports. Notwithstanding the large evidentiary records, courts have shown an increased propensity to certify actions. Whereas a decade ago the inability to demonstrate a common basis for tracing the alleged overcharge to the various class members may have been a sufficient obstacle to certification,¹³ more recent judgments have simply looked for a credible or plausible methodology to trace damages as among class members in order to certify an action for trial.¹⁴

Note that a different standard is applied for certification applications presented solely for the purpose of approving a proposed settlement because the courts are focused on whether the settlement is fair to the class. Such certification for settlement purposes

is typically expressly done with no prejudicial effect on the non-settling defendants.

Two issues are currently at the forefront of antitrust class actions in Canada. The first issue is whether indirect purchasers are proper members of a plaintiff class. The second issue is the developing response to Canada's lack of a procedure analogous to the US's multi-district litigation system. Both are described below.

Indirect purchaser claims

Canadian appellate courts were historically inconsistent in their determinations of whether indirect purchasers may claim for damages arising from antitrust violations. However, on 31 October 2013, the Supreme Court of Canada (SCC) released three simultaneous decisions affirming the right of indirect purchasers to assert claims against alleged wrongdoers who have engaged in anticompetitive conduct, even in the absence of any direct contact or dealings between the two parties,¹⁵ contrary to the position of the United States Supreme Court set out in *Illinois Brick*.¹⁶ In addition, the SCC held that passing-on can be used as an offensive manoeuvre by indirect purchasers, stating that 'it does not follow that indirect purchasers should be foreclosed from claiming losses passed on to them'.¹⁷ This has essentially given consumers the means by which to use class actions to recover directly from a supplier any losses through anticompetitive conduct occurring atop the chain of distribution that has been passed on to them indirectly.

The SCC held that remoteness and complexity are not reasons to bar indirect purchaser claims. The SCC acknowledged that:

*Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution making the tracing of the overcharges to their ultimate end an unenviable task.*¹⁸

Nevertheless, the SCC suggested that this task is 'willingly assumed' by the indirect purchaser, and the prospective difficulty an indirect purchaser may have in proving their claim on a case-by-case basis is not a sufficient reason to cast an all-encompassing bar on all actions by an indirect purchaser.¹⁹

The SCC dismissed any concern over the potential for double recovery if both indirect and direct purchasers are allowed to claim damages for essentially the same action. Their response was simply that '[p]ractically, the risk of duplicate or multiple recoveries can be managed by the courts'.²⁰ Particularly, where actions from direct and indirect purchasers are pending at the same time, Justice Rothstein stated that the defendant will have ample opportunity to voice these concerns before the trial judge, who will then have discretion to modify any damage award to avoid such double or multiple recovery.²¹

Despite their new ability to bring class actions, indirect purchasers may still face some difficulties. One such difficulty relating to remoteness and complexity for indirect purchasers was highlighted in *Microsoft*, where the SCC denied the certification of a class action relating to indirect purchasers given the impossibility of identifying an affected class.²² In this decision, both direct and indirect purchasers brought an action against the respondent supplier for engaging in an illegal conspiracy to fix the price of high fructose corn syrup (HFCS). Although it was clear that direct purchasers, including Coca-Cola and Pepsi, had purchased HFCS, these direct purchasers had used HFCS interchangeably and indistinguishably with liquid sugar, thus making it impossible to know which product was eventually sold to indirect purchasing consumers. As a result, it

was impossible for indirect purchasers to form an identifiable class, as there was no way to obtain any evidence suggesting that they were even affected.²³

Multiple parallel class actions

It is typical for various plaintiffs' counsel to file parallel proceedings in a number of Canadian provincial jurisdictions. Unlike the US, which has a procedure to consolidate multiple parallel class actions, there is no equivalent procedure in Canada. There is a growing recognition that national classes, or some form of inter-provincial cooperation, is desirable. The current practice of having multiple parallel proceedings gives rise to inefficiencies and inconsistent outcomes. Although the informal practice is to designate proceedings in one province as the lead case and stay other proceedings, such practices are ad hoc and are not legally binding for defendants. Again, at times, Quebec proves to be a differing factor. In certain cases, Quebec courts have recognised similar proceedings in other provinces,²⁴ but have also held that separate Quebec class actions are not necessarily barred by national class action settlements.²⁵ Where overlapping class actions cannot be informally coordinated between counsel, motions may be required which can become costly.

In response to the legal lacuna regarding national classes, the Canadian Bar Association (CBA) launched a National Task Force on Class Actions in 2010. The CBA approved the resulting Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions as best practice, and endorsed two of the American Bar Association's protocols regarding cross-border and multi-jurisdictional class actions. The Canadian Judicial Protocol aims to facilitate communications regarding developments and settlements by creating a Notification List of all counsel involved in all related actions. The CBA has also created a National Class Action Database to provide class action information and documents, including pleadings, to the public.²⁶ The Superior Court of Quebec became the first Canadian court to render a judgment ordering the application of the Judicial Protocol in 2012.²⁷ Despite the growing trend to accept the practical advantages of the Judicial Protocol, it remains optional.

In a further step supporting the advance of multi-jurisdictional national class proceedings and coordination of concurrent claims, the SCC held in *Endean v British Columbia* that section 12 of the Ontario and BC class proceedings statutes grant judges broad discretionary powers to manage proceedings, including the power to sit outside their home province if necessary to ensure a case's fair and expeditious determination.²⁸ Overruling the appellate courts of BC and Ontario, the SCC held that there is no requirement to establish a connection to the home province by video link or otherwise as an extra-provincial hearing is consistent with the open court principle. Nonetheless, although it is a step in the right direction, this decision is not likely to settle the issues presented by the parallel filing of multiple class actions in different provinces in the near future.

Class actions in Quebec

The indirect purchaser issue is not the only issue in class actions on which the province of Quebec has taken a different approach. Differences in that jurisdiction are important to note given their potential impact on litigation precedents nationally and, as discussed further below, Canada's ability to organise and consolidate multiple parallel proceedings.

Class action proceedings in Quebec are governed by a distinct set of rules found in the Code of Civil Procedure. Individual or non-profit organisation plaintiffs have the option of receiving funding from the assistance fund for class action lawsuits.²⁹ In order to be

certified,³⁰ proposed class proceedings must meet criteria similar to those for class certification in the rest of Canada.³¹ However, unlike the common law provinces, Quebec judges do not have broad discretionary power. Instead, they have more limited discretion to determine whether each of the criteria are fulfilled;³² and if those criteria are fulfilled, judges must certify the action. Plaintiffs need only demonstrate a prima facie case, and any doubt must be resolved in favour of the plaintiffs.³³ Judges may play a more active role, with the ability but not the obligation to redefine the class so that it can be certified.³⁴ Written arguments are not permitted at the certification stage, and parties must apply for leave to conduct examinations or file evidence.³⁵ A judgment authorising a class action may be appealed only with leave of a judge of the Court of Appeal.³⁶ Essentially, in Quebec, the courts' role at the authorisation stage is merely to filter out frivolous claims by determining whether the criteria are satisfied, nothing more.³⁷ Quebec also has a 'first to file' rule, where motions for authorisation filed subsequent to the first motion can be suspended.

Other recent Quebec antitrust class actions reveal some of the above-noted differences in practice. *Harmegnies v Toyota Canada*, a series of judgments that ended in 2008 at the Quebec Court of Appeal, was an attempt to certify a class action alleging Toyota's 'Access Toyota' programme maintained the resale prices of new Toyota vehicles. The Quebec Court of Appeal denied certification because, inter alia, the liability of Toyota and the dealers could not be established without individualised analysis of each class member. More to the point here, the Quebec Court of Appeal noted that, although prior cases in other provinces and the US were valuable, they should be used with care in Quebec owing to differences in the law, particularly at the certification stage.

One year later the *Jacques v Petro-Canada* action was certified despite significant differences between the proposed class members.³⁸ The action was against gas companies in four geographic areas, alleging a conspiracy to fix gas prices. The judgment acknowledged that wide price fluctuations meant that not all of the proposed class members actually suffered damages, and that it would be difficult to quantify the damages suffered by each individual. Nevertheless, it concluded that there was, in contrast with Toyota, a collective injury, and any difficulty regarding how to quantify damages does not negate its existence or its calculation in the aggregate. The trial judge also used her discretion to redefine the class as the original description was insufficiently precise to be certified.

In *Samsung Electronics v Option Consommateurs*, the Quebec Court of Appeal commented on the fact that parties cannot, in the absence of leave, adduce evidence at the certification stage. In the words of the court, 'the presentation of expert evidence is not the norm at the [certification] stage in Quebec [...] and, where rules applicable elsewhere might require a sophisticated methodology of proof of loss to be advanced before certification of a class action, the absence of such a methodology is not fatal here.'³⁹ In a demonstration of the rule regarding evidence at certification, the court also upheld the trial judge's refusal to postpone the proceedings in order to allow the defendant to adduce evidence, noting that the trial judge had previously refused permission to the plaintiffs to adduce evidence.⁴⁰ This decision was recently upheld by the SCC without providing any guidance on the issue of multiple parallel class actions.⁴¹

Private administrative proceedings

In addition to criminal offences, the Competition Act prohibits certain trade practices such as abuse of dominance, exclusive dealing, tied selling and refusal to deal. These practices are reviewable by

the Competition Tribunal. Most of the proceedings that come before the Tribunal are brought by the commissioner of competition. Indeed, for certain provisions – such as abuse of dominance – the commissioner is the only party entitled to initiate a proceeding.⁴² However, amendments passed in 2009 granted the right to private individuals to bring applications before the Tribunal, subject to obtaining leave.⁴³ This right is available for conduct constituting price maintenance, refusal to deal and exclusive dealing, tied selling and market restrictions. Remedies for actions brought before the Tribunal by private parties are limited to behaviour modification orders; damages are not available.

Leave to bring a private proceeding before the Tribunal under any of these provisions will not be granted if the matter is already being handled by the commissioner or was previously settled by the commissioner. The applicant must also demonstrate that he is ‘directly and substantially affected’ by the alleged conduct. Although the standard for this requirement is lower than the balance of probabilities, few private litigants have been able to demonstrate that they were substantially affected by the conduct. Since the first application for leave was brought and denied in 2002, most leave applications have been denied.

A private party was granted leave in *Used Car Dealers Association of Ontario v Insurance Bureau of Canada*. The Used Car Dealers Association (UCDA) is a not-for-profit organisation that provides a number of services to its members (motor vehicle dealers), such as Autocheck, which provides dealers with information about the accident history of vehicles they sell. The Tribunal gave leave to an application by the UCDA claiming that the Insurance Bureau of Canada’s (IBC) refusal to provide them with claims data regarding the accident history of cars constituted a refusal to deal.⁴⁴ According to the application, the IBC is the sole source of comprehensive claims data. The UCDA sought interim relief, which resulted in an interim supply order on consent. In March 2012, the UCDA won a motion when the IBC unsuccessfully sought permission to rescind the negotiated interim supply order granting the UCDA access to the data during the proceedings. The case has since been withdrawn.

An example of a private action that was granted leave, but which failed on the merits, is *Nadeau Poultry Farm Ltd v Groupe Westco Inc*, another refusal to deal claim. Nadeau accused Westco, a competitor, of refusing to sell them live chickens to be processed at their plant, contrary to the Act. Nadeau was granted leave and interim relief, namely that Westco was to supply Nadeau with live chickens on usual trade terms. However, the Competition Tribunal ruled against Nadeau on the merits, finding that Nadeau’s inability to access adequate supplies of live chickens was not the result of insufficient competition, and that the refusal to deal was not likely to have an adverse effect on competition in the market. The decision was upheld by the Federal Court of Appeal, and the Supreme Court declined to consider Nadeau’s appeal.⁴⁵

In late 2015, the Competition Tribunal underscored the importance of having at least a reasonable possibility (less than a balance of probabilities) that an applicant will be directly and substantially affected when considering a leave application to bring a private administrative proceeding. In *Audatex Canada, ULC v CarProof Corporation* the Competition Tribunal denied the applicant’s leave application on the basis that the evidence adduced by the applicant only amounted to speculation – a mere possibility that its business would be substantially and directly affected.⁴⁶ What is required in order to successfully secure leave is more substantial than mere speculation of an adverse effect on the applicant.

Conclusion

Although there are two venues for private antitrust litigation, most activity in Canada is found in the class actions brought before the regular courts, under the Act and through actions in tort. The most pressing issue is likely the continued effort to bring order to the issue of multiple parallel class actions, for which no simple solution appears to be in sight. Additionally, differences between provinces, changing case law and trends regarding cross-border issues will remain important and require practitioners to keep a sharp eye on this area of the law.

The authors would like to acknowledge the assistance of Anne Merminod and Gregory McLean (associates at the firm) for their valuable contributions to this article.

Notes

- 1 Competition Act, RSC 1985, cC-34, section 36. Plaintiffs may also sue for losses resulting from non-compliance with a Tribunal or court order made under the Act.
- 2 Ibid, sections 45, 47, 52, 52.1, 55.1. Recent amendments to the Act made conspiracy a per se offence. Now, subject to very limited defences, any agreement between competitors or potential competitors to fix prices, allocate markets or limit supply will violate the conspiracy provision, regardless of the conspiracy’s impact on competition. The same amendments also removed price discrimination, advertising allowances and price maintenance from the list of criminal offences in the Act (former sections 50, 51, 61).
- 3 Competition Act, section 36(2).
- 4 Competition Act, section 36(4).
- 5 2015 BCCA 362.
- 6 2016 BCSC 844.
- 7 2016 ONCA 621
- 8 Ibid at paras 90–92.
- 9 2017 ONSC 2586 at para 16.
- 10 *Vitapharm v F Hoffmann-La Roche Ltd* (2002), 20 CPC (5th) 351 (Ont Sup Ct).
- 11 See, eg, Ontario’s Class Proceedings Act, 1992, SO 1992, c6, section 5. Prince Edward Island is the only province without class action legislation, relying instead on common law class actions.
- 12 *Hollick v Toronto (City)*, 2001 SCC 68.
- 13 *Chadha v Bayer* (2003), 63 OR (3d) 22 (CA).
- 14 See, for example, *Irving Paper Ltd v Autofina Chemicals* (2009) OJ 4021 (Ont SCJ).
- 15 *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Limited v Archer Daniels Midland Company*, 2013 SCC 58; *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59.
- 16 *Illinois Brick v Illinois*, 431 US 720 (1977).
- 17 *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 60.
- 18 Ibid at para 44.
- 19 Ibid at para 45.
- 20 Ibid at para 37.
- 21 Ibid at paras 39–40.
- 22 *Sun-Rype Products Limited v Archer Daniels Midland Company*, 2013 SCC 58 at para 77.
- 23 Ibid at para 55.
- 24 See 9085-4886 *Québec Inc v Visa Canada Corporation*, 2012 QCCS 2572, where the Superior Court suspended the Quebec proceedings due to the rapid progression of the British Columbian proceedings, the outcome of which would have a significant impact on the Quebec proceedings.

- 25 See *Canada Post Corp v Lépine*, 2009 SCC 16, which denied its applicability to Quebec plaintiffs due to inadequate notice; see also *Hocking v Haziza*, 2008 QCCA 800.
- 26 National Class Actions Database, online: Canadian Bar Association.
- 27 *St-Marseille v Procter & Gamble Inc CSM*, 2012 QCCS 1527.
- 28 2016 SCC 42.
- 29 An Act respecting the class action, RSQ cR-2.1.
- 30 Typically called 'authorised' in Quebec.
- 31 See article 1003 Code of Civil Procedure (CPP).
- 32 *Marcotte v Longueuil*, 2009 SCC 43 in a 5–4 split; see also *Lallier v Volkswagen Canada Inc*, 2007 QCCA 920.
- 33 *Infineon Technologies AG v Option consommateurs*, [2013] 3 SCR 600, 2013 SCC 59.
- 34 Article 1005 CCP; *Nault v Canadian Consumer Co Ltd*, (1981) 1 SCR 553; *Lallier v Volkswagen Canada Inc*, 2007 QCCA 920.
- 35 Article 1002 CCP. The constitutionality of this article was unsuccessfully challenged in *Pharmascience Inc v Option Consommateurs*, 2005 QCCA 437, which held that the authorisation stage was merely a procedural prerequisite to bringing the main action, that an oral hearing still permitted a 'real, vigorous and unconstrained' defence, and that the financial consequences to the defendant of granting certification are irrelevant in Quebec law (at paras 31, 35).
- 36 Article 1010 CCP. The constitutionality of this article was unsuccessfully challenged in *New York Life Insurance Company v Vaughan*, 2003 CanLII 47914 (QC CA).
- 37 *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 at para 61; *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 37.
- 38 *Jacques v Petro-Canada*, 2009 QCCS 5603.
- 39 2011 QCCA 2116 at para 100.
- 40 *Ibid* at paras 122–23.
- 41 *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59.
- 42 Amendments to the Competition Act provide the Tribunal with the power to award administrative monetary penalties against a person found to have engaged in conduct which constitutes an abuse of dominance. These penalties can be up to C\$10 million for a first offence.
- 43 See section 103.1 of the Act, sections 75–77, which concern refusal to deal, price maintenance, refusal to supply, exclusive dealing, tied selling and market restriction.
- 44 2011 Comp Trib 10.
- 45 2011 FCA 188, leave to appeal to the Supreme Court denied 22 December 2011.
- 46 2015 Comp. Trib. 28 at para 77.



Borden Ladner Gervais

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Suite 3400
Toronto, Ontario
Canada M5H 4E3
Tel: +1 416 367 6000
Fax: +1 416 367 6749

Robert Russell
russell@blg.com

Subrata Bhattacharjee
sbhattacharjee@blg.com

Denes Rothschild
drothschild@blg.com

Ian Li
ili@blg.com

www.blg.com

Borden Ladner Gervais LLP (BLG) is a leading, national, full-service Canadian law firm focusing on business law, commercial litigation and arbitration, and intellectual property solutions for our clients. BLG is one of the country's largest law firms with more than 700 lawyers, intellectual property agents and other professionals in five cities across Canada. We assist clients with their legal needs, from major litigation to financing to trademark and patent registration.

BLG's competition and foreign investment review group provides advice to clients on all aspects of Canadian competition law and foreign investment review, including criminal and civil litigation, mergers, acquisitions, joint ventures, abuse of dominance and marketing law. The group possesses a unique insight in dealing with competition law matters as a result of having acted for private sector clients, the attorney general of Canada and the commissioner of competition, and the head of the Canadian Competition Bureau. Members of the group were extensively involved in consulting and assisting in the implementation of the 2009 amendments to the Competition Act. The group is ranked in Global Competition Review's *GCR 100* as one of Canada's leading practices, and its members are routinely cited for excellence in major domestic and international peer and industry surveys such as *Chambers Global*, *Chambers Canada*, *Legal 500* and *Who's Who Legal*.



Robert Russell
Borden Ladner Gervais LLP

Robert Russell is a senior partner at Borden Ladner Gervais LLP and national chair of the firm's competition/antitrust and foreign investment practice. Mr Russell has acted as senior counsel in multi-district class actions in Canada with respect to proceedings related to various sectors: airlines, technology, food products, petroleum industry, pharmaceuticals and automotive. He has appeared in trial and appellate courts across Canada, and before the Canadian Competition Tribunal on numerous occasions, acting on behalf of the commissioner of competition and private entities. Mr Russell has also acted for private sector clients in many of Canada's most significant and complex mergers, including the acquisition of Shoppers Drug Mart Corp by Loblaw Companies Ltd, the acquisition of Dome Petroleum by Amoco; the acquisition of Provigo by Loblaws; and the acquisition of Compaq by Hewlett-Packard. Mr Russell has been retained as a special adviser to the Canadian commissioner of competition concerning amendments to the Competition Act and has frequently been invited to appear before several Canadian parliamentary committees in respect of competition law reform.



Denes Rothschild
Borden Ladner Gervais LLP

Denes Rothschild is a partner in BLG's Toronto office and specialises in competition and antitrust law as a member of the firm's competition/antitrust and foreign investment practice. Mr Rothschild's practice includes complex and multi-jurisdictional antitrust class action proceedings, proceedings before the Competition Tribunal, and advocacy on behalf of the approval of complex mergers and acquisitions with the Competition Bureau. He has acted for clients in many major national cartel cases, including those involving auto parts, retail gasoline and airline cargo services and major mergers including Bass Pro Shop's recent acquisition of Cabela's, and Loblaw's acquisition of Shoppers Drug Mart, the largest retail merger in Canadian history. Mr Rothschild regularly speaks and writes on issues in competition law, including as an adjunct professor at Dalhousie University's School of Law.



Subrata Bhattacharjee
Borden Ladner Gervais LLP

Subrata Bhattacharjee is a partner at Borden Ladner Gervais LLP and national vice chair of the firm's competition/antitrust and foreign investment practice. Recent matters include the *Libor*, *air cargo*, *air passenger*, *auto parts*, *optical disk drives*, *lithium batteries* and *smart card chip* cases (cartel defence/class actions); and the *Google/Arris*, *Danaher/Beckman Coulter*, *Lionsgate/Icahn Group* cases (mergers). Subrata is ranked by clients and peers as one of Canada's leading competition/antitrust and foreign investment lawyers in *Chambers Global*, *Who's Who Legal* and other major peer-rated surveys. He was named by *GCR* as one of the world's top 40 competition lawyers under 40 (2008). He was appointed as a non-governmental adviser to the International Competition Network (CWG SG1 and SG2).



Ian Li
Borden Ladner Gervais LLP

Ian Li is an associate in BLG's Toronto office and specialises in competition and antitrust law as a member of the firm's competition/antitrust and foreign investment practice. Mr Li's practice includes complex and multi-jurisdictional antitrust class action proceedings, proceedings before the Competition Tribunal, and advocacy on behalf of the approval of complex mergers and acquisitions with the Competition Bureau. He has acted for clients in major national cartel cases, including those involving auto parts and airline cargo services and major mergers including the acquisition of Petro-Canada Lubricants by HollyFrontier Corporation, the acquisition of Fyffes plc by Sumitomo Corporation, and the acquisition of BWAY Corp by Stone Canyon Industries LLC.