Paul-Erik Veel
416-865-2842
pveel@litigate.com

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Class Actions for Reviewable Conduct Under the Competition Act? No, Not Really, but Sort Of

Recent years have seen a wave of reforms to the *Competition Act* being discussed and implemented. That wave has become a veritable tsunami with omnibus legislation introduced in Parliament in November 2023. That legislation proposes a number of fundamental changes to the *Competition Act*, which have the potential to dramatically impact Canadian businesses. While a detailed discussion of all of the amendments is beyond the scope of this blog post, perhaps the most interesting thing to litigators and businesses concerned about litigation risk, is the creation of what may prove to be a kind of pseudo-class action regime before the *Competition Tribunal* that ultimately allows consumers to recover losses as a result of certain types of reviewable conduct.

For context, under the *Competition Act* as it currently stands (before these amendments are implemented), consumers' right to bring a civil action for breaches of the *Competition Act* is primarily limited to contraventions of the criminal provisions of the Act. In practice, what this meant was that class actions were available for breaches of the criminal conspiracy provisions in section 45, as well for the breaches of the misleading advertising provisions in section 52 of the Act. However, there was no civil right of action for any harms caused by any reviewable conduct provisions in sections 75 to 79 of the Act (such as refusal to deal, resale price maintenance, exclusive dealing, or abuse of dominances). While there was a separate scheme available that allowed certain private parties to seek leave to advance cases under those provisions before the Competition Tribunal, those provisions had a number of important limitations. First, the test for seeking leave effectively limited those claims to other businesses who were directly and substantially affected by a respondent's alleged conduct. Second, no damages were available for the aggrieved party even if they were successful, so most parties had little incentive to bring a proceeding before the Competition Tribunal.

The proposed amendments to the *Competition Act* change each of these features in a way that create much more robust private litigation at the Tribunal.

First, in terms of the standard for leave being granted, the draft legislation proposes that subsection 103.1(7) of the Act be replaced with the following:

> 103.1(7)?The Tribunal may grant leave to make an application under section 75, 77, 79 or 90.?1 if it has reason to believe that the applicant is directly and substantially affected in the whole or part of the applicant's business by any conduct referred to in one of those sections that could be subject to an order under that section or if it is satisfied that it is in the public interest to do so.

The key part of this amendment is that it allows the tribunal to grant leave to a party "*if it is satisfied that it is in the public interest to do so*". This language appears to open the door to public interest litigants to bring proceedings. On its face, that language would seem to allow representative-style proceedings brought by a consumer or consumer group.

The second major change is the addition of provisions providing for damages for private parties who are granted leave under section 103.1. For example, the newly proposed section 79 (4.1) of the Act (which has analogs in the sections pertaining to other forms of reviewable conduct) provides as follows:

> 79 (4.?1)?If, as the result of an application by a person granted leave under section 103.?1, the Tribunal makes an order under subsection (1) or (2), it may also order the person against whom the order is made to pay an amount, not exceeding the value of the benefit derived from the practice that is the subject of the order, to be distributed among the applicant and any other person affected by the practice, in any manner that the Tribunal considers appropriate.

This new provision would open the door to monetary compensation to applicants. Two key aspects of this new provision are worth noting. First, the damages are quantified by "*the value of the benefit derived from the practice*". It is effectively a disgorgement remedy; this quantification can be significant in many circumstances. Second, the provision provides the Tribunal with jurisdiction to provide that the amount "*be distributed among the applicant and any other persons affected by the practice, in any manner that the Tribunal considers appropriate*". This language seems to

contemplate a broad discretion as to how to allocate those damages among a large group of individuals. Indeed, further provisions in a newly proposed section 75(1.3) of the Act expressly gives the Tribunal power to establish a claims process of the type commonly seen in class actions:

> 75 (1.3)?The Tribunal may specify in an order made under subsection (1.2) any term that it considers necessary for the order's implementation, including a term
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> (a)?specifying how the payment is to be administered;
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> (b)?respecting the appointment of an administrator to administer the payment and specifying the terms of administration;
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> (c)?requiring the person against whom the order is made to pay the administrative costs related to the payment as well as the fees to be paid to an administrator;
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> (d)?requiring that potential claimants be notified in the time and manner specified by the Tribunal;
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> (e)?specifying the time and manner for making claims;
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> (f)?specifying the conditions for the eligibility of claimants, including conditions relating to the return of the products to the person against whom the order is made; and
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> (g)?providing for the manner in which, and the terms on which, any amount of the payment that remains unclaimed or undistributed is to be dealt with.

Taken together, those provisions have the potential to create a form of a class action regime by another name at the Competition Tribunal: if it is found to be in the public interest, a person can be granted leave to pursue a claim at the Competition Tribunal that can result in damages being paid to everyone affected by that conduct. While it is not expressly a class action regime, the practical impact could be very similar.

That being said, the proposed regime has numerous differences from the class action regime. There are a number of well-established procedural protections in a conventional class action regime that ensure fairness to both class members and defendants for both class members and defendants that do not appear to be contemplated by the proposed amendments to the Act. No doubt those issues will have to be further fleshed out in

the legislation or through litigation before the Tribunal.

In any case, the proposed amendments, if implemented, provide a potentially robust mechanism for private litigation over reviewable conduct that has thus far been absent in Canada. Whether that occurs remains to be seen. However, it is reasonable to expect that these provisions will usher in a new era of increased litigation before the Competition Tribunal. When, 20 years ago, Parliament initially enacted section 103.1 and allowed private parties to seek leave to the Tribunal, there were concerns about a flood of litigation. Despite much initial hype, that flood never came. These new changes, however, are much more than tweaks: by creating a new procedure with some of the trappings of a class proceeding, the proposed amendments fundamentally change the ability and incentives of litigants to bring applications pertaining to reviewable conduct.

While increased litigation may be concerning to businesses who fear a flood of strategic or opportunistic litigation, the continued presence of a robust leave requirement should provide some reassurance that unmeritorious claims will be weeded out an early stage. It will be critical that the Tribunal continue to apply a preliminary merits test as part of the leave test to ensure that these provisions are not misused.