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

August 12, 2016

Waiting forever for the axe to drop? Discoverability and the limitation period for Competition Act claims

The limitation period for claims under s. 36 of the *Competition Act* is a longstanding question of Canadian competition law. The plain language of the statute suggests that such claims must be brought within two years of the anticompetitive conduct. But in *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, the Ontario Court of Appeal has reached a conclusion that is much more generous to Plaintiffs, holding that such claims must be brought within two years of the Plaintiff discovering the anticompetitive conduct.

In this case, the Plaintiff, Fanshawe College, brought a class action against a number of companies who were alleged to have conspired to artificially inflate the prices of liquid crystal display (LCD) panels. Among the Plaintiff's claims were statutory claims under s. 36 of the *Competition Act.* Two of the Defendants brought a motion for summary judgment, on the basis that Fanshawe's claim was commenced after the expiry of the applicable limitation period. The Court below dismissed the Defendants' motion. The Defendants appealed the dismissal of their summary judgment motion, and that appeal was ultimately heard by the Ontario Court of Appeal.

At issue before the Ontario Court of Appeal was the applicable limitation period for claims brought under s. 36 of the *Competition Act*. That provision allows a person who has suffered loss as a result of breaches of the criminal prohibitions of the *Competition Act* (including conspiracies to fix prices) to bring claims for damages against the wrongdoers.

The statutory cause of action in s. 36 of the *Competition Act* is subject to the limitation period in s. 36(4)(a) of the *Act*, which provides as follows:

(4) No action may be brought under subsection (1),

> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (i) a day on which the conduct was engaged in, or

> (ii) the day on which any criminal proceedings relating thereto were finally disposed of, w hichever is the later…

The issue before the Court of Appeal was whether the two-year limitation period in s. 36(4)(a)(i) is subject to the discoverability principle: that is, does the two-year period start from the day on which the conduct occurred, or does it start on the day on which the plaintiff learned about the conduct? The Court of Appeal concluded the latter, holding that s. 36(4)(a)(i) contains an implied discoverability principle as a matter of statutory construction.

Unlike in Ontario's *Limitations Act, 2002*, there is no explicit discoverability principle written into the *Competition Act*. However, citing earlier case law, the Court of Appeal held that there is a presumption that where a limitation period begins running from the accrual of a cause of action or from some other event that depends on the knowledge of the injury sustained, there will be a presumption that the limitation period is subject to the principle of discoverability.

Applying such reasoning to s. 36(4)(a)(i) of the *Competition Act*, the Court of Appeal held the limitation period in that section begins running from the date of conduct that gives rise to any damage or loss. The Court noted that the accrual of damages is a constituent component of the cause of action under s. 36. The Court in turn held that the limitation period for such claims only began to run upon the Plaintiff's knowledge of such damage.

Consequently, the Court of Appeal held that the discoverability principle applied to s. 36(4)(a)(i) of the *Competition Act*, and declined to grant summary judgment in favour of the Defendants.

The policy motivation for the Court of Appeal's decision is clear: a relatively brief limitation period applied to clandestine conduct will, without a discoverability principle, have the effect of foreclosing most claims in respect of such conduct.

Yet despite this decision and an understandable policy rationale, the interpretation of s. 36(4)(a)(i) may not be entirely free from doubt. The statutory language could easily be read to conclude that the discoverability principle does not apply. Moreover, the Court of Appeal's decision in *Fanshawe College* runs contrary to other cases, notably in the Federal Court, that have reached the opposite interpretation of s. 36(4)(a)(i). Finally, without a separate ultimate limitation period (as exists in Ontario's *Limitations Act, 2002*), reading a discoverability principle into s. 36(4)(a)(i) means that companies will face class action risk indefinitely. Companies could face claims decades

later, well after the employees involved in the alleged conspiracy may have left and documents lost, without any ability to defend themselves.

This issue will undoubtedly continue to be raised by Defendants until either the Supreme Court weighs in, or a greater body of case law establishes a definitive conclusion.