

Canadian Competition and Foreign Investment Law

Year in Review

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Recent Developments In Canadian Competition and Foreign Investment Law

There has been a range of recent developments across the Canadian competition law landscape, but a common thread through many of them has been the Competition Bureau's sustained focus on digital economy enforcement cases¹ and its efforts to foster innovation. These areas continue to be top priorities for the Bureau because of their impact on consumers and businesses.² Included in these efforts, for example, are the Bureau's recently produced reports on "Big Data"³ and "FinTech"⁴. The Bureau's "Big Data" report draws from its recent abuse of dominance investigations involving big data considerations, and also considers US and European developments in order to identify challenges raised by "Big Data" in the context of criminal cartels, mergers, and misleading advertising cases. Another significant development dealing with "Big Data" was the much-anticipated Court of Appeal decision in the Toronto Real Estate Board (TREB) case, in which TREB was found to have abused its dominant position. TREB is precedent-setting for a number of reasons. While raising numerous competition law issues, this case fundamentally determined that an organization could be found to be engaged in an anti-competitive practice when it restricts access to data. From a "Big Data" perspective, the case has the potential to be a significant factor driving the opening up of data sources in other sectors, notably financial services.

These and other recent developments in Canadian Competition and Foreign Investment Law are discussed below.

MISLEADING ADVERTISING

The Bureau's recent enforcement actions cover a broad spectrum of misleading advertising (from performance claims to product labelling), including million dollar penalties for ordinary selling price contraventions, with much of this activity impacting digital economy enforcement. The Bureau continues to focus on online and mobile advertising as well as *Competition Act* provisions that specifically prohibit misleading representations in electronic messages, which came into force as part of Canada's Anti-Spam Legislation (CASL).

For detailed discussion see: [Misleading Advertising](#).

MERGERS (COMPETITION ACT)

A number of proposed mergers across a variety of industries resulted in remedy negotiations between the parties and the Competition Bureau, ultimately leading to merger consent agreements. Companies considering a merger will want to be aware of these recent mergers, as well as deals where clearance was obtained without remedies. One of the most notable deals recently cleared is the acquisition of Canexus Corporation, which was allowed without remedies on the basis that the expected efficiencies gained from the transaction would significantly outweigh the likely anti-competitive effects of the transaction. Understanding the enforcer's competition law concerns, as highlighted by these mergers, will allow prospective parties to better prepare for and navigate potential obstacles in their own merger review process.

For detailed discussion see: [Mergers \(Competition Act\)](#).

MERGERS (INVESTMENT CANADA ACT — FOREIGN INVESTMENT REVIEW)

Recent events signal an increased willingness to encourage foreign investment. These events include an increase to one of the most commonly applicable pre-closing review and approval thresholds under the *Investment Canada Act* (to C\$1 billion in 2017), the introduction of a new C\$1.5 billion review threshold for private sector trade agreement investments, new guidelines that shed some light on the circumstances that may draw foreign investors and parties involved in an investment into the realm of a national security review, and the setting aside of the prior Federal government's decision requiring a foreign investor to divest its investment in a Canadian business due to national security concerns.

For detailed discussion see: **Mergers (Investment Canada Act – Foreign Investment Review)**.

CARTEL ENFORCEMENT

Fundamental and controversial changes may be on the horizon for Canada's immunity program. Many have expressed concerns that the proposed revisions will result in uncertainty and place a significant burden on immunity applicants, which would have the effect of deterring cooperation in Canada. Another area that looks to be on the cusp of change is the introduction of a deferred prosecution agreement (DPA) regime to address corporate criminal liability in Canada. A report on the public consultation conducted in the fall of 2017 (on whether Canada should adopt a DPA regime, how such a regime should be constructed, and how DPAs would interact with the federal Integrity Regime) is expected later in 2018. Also in line for possible enhancement later this year is the federal Integrity Regime (under which a corporation that is convicted or pleads guilty to a cartel or bid-rigging offence is automatically debarred for a period of at least five years). There are also a number of updates on the Competition Bureau's cartel and bid-rigging cases. Guilty pleas have been secured in connection with a number of Bureau investigations, including motor vehicles components, retail gas, sewer and water services, information technology services, and ventilation systems. The Bureau's bread price-fixing investigation came to light when search warrants were executed at a number of major grocery retailers and a bread wholesaler in the fall of 2017 with respect to alleged arrangements involving the coordination of retail and wholesale prices of some packaged bread products.

For detailed discussion see: **Cartel Enforcement**.

ABUSE OF DOMINANCE

A major abuse of dominance case moved one step closer to its conclusion with the long-awaited Federal Court of Appeal decision confirming the decision of the Competition Tribunal, which found that the Toronto Real Estate Board (TREB) was abusing its dominant position by preventing its members from offering data through innovative brokerage models. Among other things, this case set an important precedent, as it confirms that in some cases the burden of proof on the Commissioner of Competition to prove anti-competitive effects in an abuse of dominance case can be met solely by adducing qualitative evidence (as opposed to quantitative evidence). The case is also significant in how it deals with Big Data arising from the court's determination that an organization could be found to be engaged in an anti-competitive practice when it restricts access to data (in this case, home sales data). The Bureau has touted its case against TREB as one that "clearly underscores that crucial link between competition and innovation and the Bureau's role in upholding both". On the investigation side, the Bureau recently closed four high-profile abuse of dominance investigations (Loblaws, Apple, the TMX Group and Google). With respect to new enforcement activity, the Bureau initiated a case against the Vancouver Airport Authority for restricting in-flight catering services.

For detailed discussion see: [Abuse of Dominance](#).

PRIVATE TRIBUNAL APPLICATIONS

The *Competition Act* provides for private parties to seek leave to bring certain applications before the Competition Tribunal if they are affected by certain restrictive trade practices. However, recent cases reveal the Tribunal's strict approach, which brings into question whether this right has practical application for parties seeking access to remedies under the *Competition Act*.

For detailed discussion see: [Private Tribunal Applications](#).

CLASS ACTIONS

A number of recent court decisions and events will impact the scope of potential liability facing class action defendants. The Ontario Court of Appeal recently held that the "discoverability" principle applies to the limitation period for civil damage claims that can be brought for criminal anti-competitive conduct. On the topic of whether "umbrella plaintiffs" have a cause of action against alleged cartelists, Canadian courts have issued contrasting views.

In other news, the Canadian Government's decision to suspend the coming into force of the private right of action provisions in Canada's Anti-Spam Legislation (CASL) provides at least some temporary relief to legitimate advertisers who would have been exposed to potentially significant damage claims for immaterial misrepresentations that cause no harm.

The Competition Bureau has issued an information bulletin affirming its position that it will not voluntarily provide information from its investigative files to private litigants.

An Ontario court held that class action plaintiffs improperly circumvented procedural rules when they sought an *ex parte* order from a U.S. court compelling a non-party to submit to discovery in the U.S. for purposes of the Ontario proceeding.

For detailed discussion see: [Class Actions](#).

Misleading Advertising

Many of the Competition Bureau's recent misleading advertising enforcement activities have focussed on the digital economy. Recognizing that most businesses have an online presence and use digital media to advertise⁵, the Bureau can be expected to continue to pursue deceptive marketing practices impacting this area⁶.

False or misleading advertising and sales above advertised price rank in the top 5 complaints to the Bureau⁷, so it is no surprise that the Bureau has also shown a sustained focus on price advertising, including false or misleading representations regarding the "ordinary selling price" of a product for large and small companies. That said, as discussed below, the Bureau's recent enforcement actions cover a broad spectrum of misleading advertising, including settlements for contraventions involving performance claims and product labelling, as well as imprisonment for certain deceptive marketing activities⁸. Even donation bin operators have been required to correct information displayed on their bins.⁹

On the competition advocacy front, the Bureau has released a report (discussed below) which calls for the re-evaluation of restrictions on health care advertising (e.g., pharmaceutical, dental, veterinary).

ONLINE AND MOBILE ADVERTISING

The Bureau continues to focus on online and mobile advertising, as well as the application of *Competition Act* provisions specifically prohibiting false or misleading representations in electronic messages (which came into force as part of CASL).

Significantly, in response to concerns raised by businesses, charities and the not-for-profit sector, the government suspended the implementation of private right of action provisions in CASL (including those relating to *Competition Act* reviewable conduct) that were supposed to come into force on July 1, 2017. For further discussion, see *Private Right of Action For Competition Act Reviewable Conduct Suspended*, below.

Amazon Pays \$1.1 million to Settle Ordinary Selling Price Advertising Concerns

In the latest in a string of million-dollar-plus advertising settlements, Amazon agreed to pay a \$1 million administrative monetary penalty and \$100,000 towards the Bureau's costs for failing to verify its regular prices when discounts are advertised.¹⁰

The e-commerce company entered into a consent agreement with the Bureau to settle an investigation into Amazon's practice of comparing its prices to a regular price (or "list price") to advertise savings for consumers. The consent agreement also mandates that Amazon implement an advertising compliance program under Bureau oversight.

To ensure compliance with the ordinary price provisions,¹¹ advertisers must follow either the volume test (a substantial volume of the product was sold at that price or a higher price within a reasonable period of time) or time test (the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price) set out in the Bureau's *Ordinary Price Claims Enforcement Guidelines*. The purpose of these tests is to ensure that advertised discounts are based off of a regular price that is accurate. Advertisers are prohibited from advertising illusory discounts based off of "regular" prices that were never offered to the public in good faith. Amazon relied on its suppliers to provide accurate regular prices, but those suppliers failed to do so.

The Bureau concluded that Amazon had relied on list prices provided by suppliers without verifying that those prices were prevailing market prices. The Bureau reviewed savings claims advertised on www.amazon.ca, on Amazon mobile applications, in emails sent to consumers, and in other online advertisements.

Notably, the Bureau also concluded that Amazon, as an online business, violated the *Competition Act* section prohibiting representations contained in electronic messages that are "false or misleading in a material respect".¹² This provision, recently introduced as a result of CASL, takes the traditional misleading advertising provision¹³ and applies it to electronic messages. The Bureau recently relied on these provisions as part of its [investigation into car rental prices and discounts](#), and the Amazon settlement underlines the Bureau's focus on online advertising.

For further detail, see our article [Online Price Advertising: Amazon to Pay \\$1.1 Million to Settle Canadian Competition Bureau Investigation](#).

The Amazon price advertising settlement follows the May 2015 consent agreement with retailer Michael's, in which the company agreed to [pay \\$3.5 million](#) to settle the Bureau's concern over price advertising for picture framing. On the heels of Amazon's settlement, the [Bureau is also suing Hudson's Bay Company for what it alleges to be deceptive regular price claims and clearance sales](#) for mattresses. The Bureau is seeking an administrative monetary penalty of an unspecified amount.

Car Rental Companies Pay Millions in Penalties For "Drip Pricing"

According to the Bureau, "drip pricing is when a headline price is used in advertisements, but when you add up all the additional fees, taxes or charges, the real price is much higher. The additional costs are incrementally disclosed or 'dripped' during the purchasing process."¹⁴

Avis and Budget pay \$3.25M

Avis and Budget, which are under common ownership, agreed to pay a \$3 million administrative monetary penalty and \$250,000 towards the Bureau's costs in order to settle misleading advertising litigation relating to their advertisement of car rental prices.¹⁵ The Bureau had commenced litigation before the Tribunal in 2015; for further detail see our article [Competition Bureau seeks 30M\\$ against Avis and Budget over non-optional fees](#).

The Bureau alleged that certain prices and discounts advertised by Avis and Budget were not actually available to customers because of additional mandatory fees that were only disclosed later in the checkout process. The Bureau found that this practice violated the *Competition Act's* misleading advertising provisions even though the full amount due was disclosed before payment.

As part of the consent agreement documenting the settlement, the Bureau concluded that Avis and Budget had contravened sections 74.01(1)(a) (representations that are “false or misleading in a material respect”) and 74.011 (a parallel provision with respect to electronic communications) of the Act. This case is notable because it was the first time that a violation of section 74.011, which was recently introduced as part of CASL, was alleged. The Bureau had also initially alleged that Avis and Budget had contravened section 74.05 of the Act (sale above advertised price). Under the consent agreement, Avis and Budget must also institute a compliance program and submit to reporting requirements and monitoring by the Bureau.

Hertz and Thrifty Pay \$1.25M

Hertz and Thrifty, which are under common ownership, agreed to pay a \$1.25 million administrative monetary penalty for their advertisement of car rental prices.¹⁶ Similar to Avis/Budget discussed above, the Bureau concluded that Hertz and Thrifty advertised prices and discounts that were not attainable due to additional mandatory fees. Interestingly, the Bureau reached this conclusion even though Hertz and Thrifty provided an estimate of the total price before checkout.

These cases illustrate the Bureau’s ongoing focus on price advertising, especially with respect to improperly disclosed mandatory fees. A consent agreement has the force of a court order and is in effect for 10 years, which means that, even after paying their penalties, the rental car companies will have to continue honouring the other terms of the agreement or face criminal consequences. Given the potential consequences, it is important to carefully consider how pricing is advertised.

Ticketmaster Sued For Using “Drip Pricing” in its Ticket Price Advertising

The Bureau has investigated Ticketmaster on the basis that its advertised prices for sports and entertainment tickets are deceptive because consumers must pay additional fees that are added later in the purchasing process, which results in consumers paying much higher prices than advertised. According to the Bureau, Ticketmaster’s mandatory fees often inflate the advertised price by more than 20% (in some cases by 65%). Following its investigation, the Bureau is suing Ticketmaster and its parent company, Live Nation, for allegedly making deceptive claims to consumers when advertising prices. The Bureau is seeking an administrative monetary penalty of an unspecified amount.

PERFORMANCE CLAIM PENALTY: \$17.5 MILLION

Volkswagen and Audi¹⁷ agreed to pay \$17.5 million in administrative monetary penalties and \$280,000 towards the Bureau’s costs for false and misleading advertising regarding environmental claims that were used to promote certain 3.0 and 2.0 litre diesel vehicles.¹⁸ Volkswagen and Audi also agreed to enhance their compliance program and subject it to oversight from the Bureau.

The Bureau concluded that Volkswagen and Audi violated sections 74.01(1)(a) of the Act (catch-all provision for representations that are “false or misleading in a material respect”) and section 74.01(1)(b) of the Act (addresses performance claims that are not based on “adequate and proper” testing).

In the spring of 2017, a \$2.1 billion class action settlement was approved by the court for buyback and restitution payments to Canadian customers of 2.0 litre diesel vehicles. There is also a class action settlement agreement for Canadian customers of 3.0 litre vehicles that provides for a \$290.5 million settlement, if approved by the courts.

While performance claim cases are less frequent than price advertising cases, this is one of the largest deceptive marketing practices cases ever (globally and in Canada), with approximately 125,000 vehicles affected in Canada alone.

PRODUCT LABELLING CASE SETTLES FOR \$750,000 DONATION

In the second Tribunal case ever settled by mediation,¹⁹ Moose Knuckles, a winter jacket manufacturer, agreed to donate \$750,000 to charity over five years and correct its “Made in Canada” representations to make it clear that certain of its products contain imported materials.²⁰

The Bureau alleged that Moose Knuckles violated the *Competition Act*’s prohibition on representations that are “false or misleading in a material respect”²¹ for claiming that jackets with imported materials were “Made in Canada”.²² The Bureau’s “*Product of Canada*” and “*Made in Canada*” *Claims Enforcement Guidelines* require that “Made in Canada” products must (i) undergo their last substantial transformation in Canada, (ii) have at least 51% of their direct production costs incurred in Canada, and (iii) be accompanied by disclosure that appropriately qualifies the “Made in Canada” claim (e.g., stating that the product contains imported content). The Bureau alleged that Moose Knuckles failed to meet any of these conditions.

This case highlights the Bureau’s focus on misleading advertising even in areas that may not always be front of mind, such as product labelling.

LEON’S AND THE BRICK “DON’T PAY A CENT”, BUT AGREE TO DONATE FURNITURE TO CHARITY

In another mediated settlement, Leon’s and The Brick agreed to make furniture donations to charity of \$750,000 each in order to settle the Bureau’s allegations of misleading advertising. Notably, Leon’s and The Brick were not required to enter a consent agreement with the Commissioner of Competition.

BUREAU REPORT CALLS FOR RE-EVALUATION OF RESTRICTION ON HEALTH CARE ADVERTISING

The Bureau released a report calling for an evidence-based approach to restrictions on the advertisement of health care services (e.g., pharmaceutical, dental, veterinary).²³ While acknowledging the legitimate policy objectives of advertising restrictions, the Bureau pointed to evidence indicating that advertising can result in lower prices and increased awareness of options without a decline in quality. To determine whether such an outcome is possible, the Bureau has called for the collection of the necessary data to make an empirical assessment. Although it would require a significant effort by the health care regulatory bodies to collect the relevant data and conduct the analysis to determine the minimum level of restriction necessary to achieve the policy objectives, the Bureau believes that the benefits of increased competition justify the effort. It remains to be seen whether this report will impact the regulation of health care services in Canada.

Mergers – Competition Act

A number of proposed mergers across a variety of industries underwent remedy negotiations between the parties and the Competition Bureau and ultimately led to merger consent agreements.²⁴

Most companies are aware that early identification of competition law risk is a must for mergers that require pre-merger notification to the Competition Bureau. However, it is important to be aware that the Competition Bureau has also been active in reviewing non-notifiable transactions. Mergers such as *Iron Mountain/Recall* (discussed below) serve as a reminder that non-notifiable deals can similarly pose competition law risks.

MERGER REMEDIES

Litigated Merger Case Resolved by Mediated Consent Agreement

*Commissioner of Competition v. Parkland Industries Ltd.*²⁵ is one of the rare merger cases to have been brought before the Tribunal. The proposed transaction consisted of Parkland's acquisition of gas stations and gas supply agreements, comprising substantially all of the assets of Pioneer Energy. The Bureau claimed that the transaction would likely result in a substantial lessening of competition in 14 local markets and sought an interim order directing Parkland to hold separate and preserve the assets in those areas, pending the Tribunal's determination of whether the transaction was anti-competitive. The Tribunal issued the order sought for six of the local areas, but declined to do so for the eight remaining areas. The Tribunal found that the Bureau did not satisfactorily prove the boundaries of the geographic markets and therefore found sufficient evidence of irreparable harm only in the six local areas where Parkland had conceded competition concerns or that high market shares would result. In an attempt to avoid an order, Parkland offered commitments to address the competition concerns, but the Tribunal rejected the proposal because it was too vague. Eventually, the Bureau and Parkland entered into a consent agreement stipulating remedies for those six local areas. Notably, the consent agreement is the first to have been reached through a mediation process in a Competition Tribunal proceeding.²⁶

Non-Notifiable Transaction Leads to Negotiated Merger Remedy

The Bureau has jurisdiction to review and challenge proposed and completed mergers that are non-notifiable.²⁷ Moreover, the Bureau has said that one of its compliance priorities for 2017-2018 is to continue to "review mergers of all sizes to ensure they do not reduce or prevent competition".²⁸ Although Iron Mountain's acquisition of Recall, a competing supplier of records management services, was a non-notifiable deal, it caught the Bureau's attention.²⁹ In order to resolve the Bureau's concerns, Iron Mountain was required to sell facilities and customer contracts in six Canadian cities to a Bureau approved buyer (Summit Park LLC). Iron Mountain/Recall is a reminder that a substantive competition analysis should be part of an early days assessment of proposed transactions, of any size, that may give rise to competition issues.

Merger Remedies - Gas, Pharmaceutical, Medical Products, Agriculture and Wireless Services and Industrial Wood Coatings

Recently, the Bureau also obtained remedies for mergers involving gas, pharmaceutical, medical products, agriculture, wireless services and industrial wood coatings:

- **Divestitures of Retail Fuel Sites, Gas Supply Agreements:** In addition to the Parkland transaction, other gasoline mergers resulted in divestitures.

To address the Bureau's concerns with respect to two local markets impacted by Le Group Harnois Inc.'s acquisition of Distributions Pétrolières Therrien Inc.'s gasoline supply arrangements, Harnois was required to divest a retail gas station or dealer supply agreement in one local market. In the other local market, Harnois was prevented from having material influence on the price of retail gas charged by dealer stations.³⁰

To resolve the Bureau's concerns arising from Couche-Tard's acquisition of 51 retail gas sites in the Greater Montreal Area from Imperial Oil, Couche-Tard agreed to sell two retail gas stations in two local areas. Under the Bureau's analytical framework for reviewing retail gas mergers, the relevant product market is deemed to be the retail sale of gas and the relevant geographic market is generally considered to be local. Factors in the Bureau's geographic market analysis differ as between dense urban areas (e.g., impact of numerous overlapping pricing strategies which results in a station indirectly competitively constraining relatively distant stations by way of a chain reaction of price responses by nearer competitors) and locations outside of major metropolitan areas (e.g., potential competitive constraint on gas stations in commuter towns by those in the nearest urban center).³¹

In another retail gas transaction, this time involving Couche-Tard's acquisition of CST Brands Inc. (the owner of the Ultramar brand), the Bureau allowed the acquisition on the condition that Couche-Tard divest 366 gas stations and gas supply contracts in numerous local markets across Canada to Parkland, as well as one retail gas site to Philippe Gosselin & Associés Limitée (FILGO). Couche-Tard also agreed to sell to Parkland a number of other sites and contracts (in a separate transaction) which did not raise competition concerns in relation to the Couche-Tard/CST transaction. The Bureau allowed this separate transaction to proceed on condition that Parkland divest certain assets in order to address concerns regarding the anti-competitive effect the separate transaction could have on the sale of retail gas in certain local markets in Ontario.³²

To remedy the Bureau's concerns regarding the retail sale of bulk propane arising from Superior Plus LP's proposed acquisition of Canwest Propane, Superior agreed to sell retail propane sites and associated assets in 12 local markets in western Canada, northern Ontario and the Northwest Territories. The Bureau concluded that efficiency gains resulting from the deal would likely not outweigh the effects of the substantial lessening of competition in those 12 markets.³³

- **Firewalls and Divestitures of Pharmacies, Pharmaceutical products:** To resolve the Bureau's concerns regarding the acquisition by McKesson (wholesaler of pharmaceutical products and supplier to pharmacy retail chains) of Katz Group's healthcare businesses (which include the Rexall pharmacy chain and a healthcare claims adjudication business), McKesson was required to divest Rexall retail locations in 26 markets. Rx Drug Mart Inc. (RXDM) is the approved buyer of these retail pharmacies. McKesson was also required to put firewalls in place to restrict the exchange of commercially sensitive information between the wholesale business, the retail business and the health care claims adjudication business to address the likely substantial lessening or prevention of competition resulting from the increased probability of coordinated effects in local retail markets.³⁴

In another transaction, this time involving generic pharmaceuticals, the Bureau concluded that Teva's acquisition of Allergan's generic pharmaceuticals business would eliminate future competition for two pharmaceutical products (tobramycin inhalation solution and buprenorphine/naloxone tablets) in Canada. As a result, Teva was required to divest either its own assets or Allergan's assets relating to these two products to a Bureau approved buyer or buyers.

- **Medical Products:** Abbott Laboratories agreed to divest a vessel closure devices (VCDs)³⁵ business to an up-front buyer in order to have its global acquisition of St. Jude Medical cleared by the Bureau. The medical devices sold by both companies are complementary, except for VCDs, of which they were the two largest suppliers. The purchaser of the VCD business was approved by the Bureau prior to the execution of the Consent Agreement. Reflecting their coordinated review of the transaction, the Bureau and US Federal Trade Commission (FTC) appointed the same monitor to oversee the divestiture sale and transitional supply and services arrangements between Abbott and the purchaser of the divested assets. In another acquisition by Abbott, this time in respect of its proposed acquisition of Alere Inc. (a global medical diagnostics company with a focus on point-of-care testing), the sale of Alere's Epoc system (to Siemens AG) and Triage system (to Quidel Corporation) resolved the Bureau's concerns regarding the supply of certain types of medical diagnostic testing products in Canada³⁶.
- **Agriculture:** The merger of E.I. du Pont de Nemours and Company (DuPont) and The Dow Chemical Company (Dow) received approval on condition that DuPont sell a significant part of its global herbicides business and R&D branch to FMC Corporation (a U.S. chemical technologies company) and Dow sell its global business of certain specialized plastics products to SK Global Chemical Co. LTD (a new entrant in these markets). The Bureau concluded that these sales would address concerns regarding the anti-competitive effect (including the impact on innovation) that the merger could have in the sale and development of key crop protection products and specialized packaging plastics.

In another transaction, Crop Production Services (CPS), an Agrium Inc. subsidiary, agreed to divest one Wendland retail store and two CPS standalone anhydrous ammonia tanks to secure the approval of its acquisition of six agri-product retail stores in Saskatchewan from Wendland. Regarding potential purchasers of the ammonia tanks, the Bureau noted that it would assess whether a potential purchaser had effective complementary retail facilities nearby to ensure that such purchaser could effectively compete with other retailers. CPS also agreed to supply anhydrous ammonia to any purchaser of the divested assets for up to two years at prices not to exceed those charged to its retail outlets in Saskatchewan, at purchaser's option. The Bureau's analysis of the CPS/Wendland deal focused on the local retail supply of fertilizer (urea and anhydrous ammonia) to farmers.

- **Retail Wireless Services:** The acquisition of Manitoba Telecom Services (MTS) by BCE Inc. (Bell) was allowed to proceed on the basis of a consent agreement under which Bell agreed to, among other things, sell retail stores, subscribers and spectrum to Xplornet; provide Xplornet with certain key services, support and access for 3-5 years; and sell MTS subscribers and MTS dealer locations to TELUS.³⁷ The Bureau indicated that the divestiture to Xplornet, a provider of rural broadband internet through fixed wireless and satellite networks throughout Canada, will establish a new entrant in the Manitoba mobile wireless services market.
- **Industrial Wood Coatings:** To resolve the Bureau's concerns related to Sherwin-Williams Company's acquisition of Valspar Corporation, Valspar's Canadian and U.S. assets used in support of the supply of large batch shipments of industrial wood coatings in Canada (including manufacturing plants, R&D assets, intellectual property and customer contracts) were required to be sold³⁸. Axalta Coating Systems was approved by the Bureau as an acceptable purchaser.

MERGERS CLEARED WITH NO REMEDIES

Merger Allowed Based on the Efficiency Exception

Although Superior Plus's proposed acquisition of Canexus ultimately did not proceed, it is important to note that the Bureau cleared the deal based on the efficiency exception under the *Competition Act*. The Bureau concluded that the proposed transaction would likely result in a substantial lessening of competition for the supply of certain chemicals primarily serving the pulp and paper industry, but did not challenge it on the basis that the anti-competitive effects of the merger would be outweighed by the efficiency gains from the transaction. In assessing efficiencies, factors such as the elimination of overhead costs, freight optimization, and the elimination of duplicate corporate services were considered. The FTC also reviewed the proposed transaction, but since the US does not have an efficiency exception, it came to a different conclusion whereupon the transaction was challenged. The Bureau said it worked closely with the FTC, with each authority having "reviewed the effects of the transaction under its distinct legal framework". Days after the Bureau announced it would not challenge the deal, the deal was terminated after the parties were unable to agree to extend the deal pending legal action addressing the FTC's challenge of the proposed transaction. The efficiency defence is a point of contention. In respect of the different decisions reached by the Bureau and the FTC, the Commissioner of Competition said this: "recent developments, like our decision in Superior/Canexus, show that Canada's approach to efficiencies is increasingly misaligned with other jurisdictions. My view is that this is bad for business and bad for consumers".³⁹

In March 2017, the Bureau once again concluded that it would not challenge a proposed acquisition of Canexus Corporation (this time by Chemtrade Logistics Income Fund) on the basis that the expected efficiencies gained from the transaction (including savings related to transportation costs) would significantly outweigh the likely anti-competitive effects of the transaction.

Other Mergers Cleared Without Remedies

The large majority of mergers reviewed by the Competition Bureau are cleared without remedies.⁴⁰ These decisions provide insight into the factors the Bureau considers when it decides not to challenge a deal. For the most part, the approved deals that the Bureau publicly reported on were cleared on the basis that a sufficient number of effective competitors remained in markets where the parties overlapped. This was the case for deals involving home improvement products retailers,⁴¹ restaurants,⁴² modular units,⁴³ hotels,⁴⁴ car dealerships⁴⁵ and fertilizers⁴⁶. In clearing a high profile global beer merger, the Bureau cited the limited impact of certain beer brands across various markets in Canada and that the owner of those brands was not likely to more aggressively compete with incumbent firms in Canada absent the merger.⁴⁷ The Bureau also allowed a power merger⁴⁸ and a wireless services deal⁴⁹ on the basis that the parties do not compete against each other. A Northern Canada airlines merger was also cleared based on, among other things, the merger's likely significant efficiency gains.⁵⁰

Increased Merger Notification Threshold

The pre-merger notification transaction-size threshold for 2018 increased to \$92 million from the 2017 threshold of \$88 million.⁵¹ The transaction-size threshold is based on the book value of assets in Canada of the target (or in the case of an asset purchase, of the assets in Canada being acquired), or the gross revenues from sales "in or from" Canada generated by those assets. The Competition Bureau must generally be given advance notice of proposed transactions when the acquired assets in Canada or revenues generated in or from Canada from such assets exceed \$92 million (transaction-size threshold), and when the combined Canadian assets or revenues in, from or into Canada of the parties together with their respective affiliates exceed \$400 million (size of parties threshold). The size of parties threshold remains the same.

Mergers – Investment Canada Act

Recent events reflect an increased willingness by the Government of Canada to encourage foreign investment, which includes efforts to improve the predictability of Canada's regulatory environment for foreign investment. These events include an increase to one of the most commonly applicable thresholds for pre-closing review and approval under the *Investment Canada Act*; the introduction of a new review threshold for private sector trade agreement investments; new guidelines intended to increase the transparency of national security reviews; and the setting aside of the prior Federal government's decision requiring a non-Canadian investor to divest its investment in a Canadian business on the basis that the investment would be injurious to national security.

FEWER INVESTMENTS WILL REQUIRE INVESTMENT CANADA ACT APPROVAL

The review threshold that applies to direct acquisitions of control of Canadian businesses by foreign, non-state-owned investors from World Trade Organization (WTO) member states was increased to C\$1 billion in enterprise value in June 2017 (two years ahead of schedule). Further, in September 2017, amendments to increase the threshold to \$1.5 billion for *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA) and other bilateral trade partners came into force. This new \$1.5 billion enterprise value review threshold applies to private sector trade agreement investments (direct acquisitions where the acquirer or the target is a non-state-owned "trade agreement investor" from EU Member States, the US, Mexico, South Korea, Chile, Peru, Columbia, Honduras, or Panama.) Generally speaking, one of these two review thresholds will apply to most direct acquisitions of control of Canadian businesses by non-state-owned enterprise investors from WTO member states, which means that fewer investments will require *Investment Canada Act* Approval.

NATIONAL SECURITY REVIEW UPDATE

All investments by non-Canadians (including minority investments) may be reviewed to determine whether they could be injurious to Canada's national security under the national security regime (created in 2009). Until recently, publicly available information regarding the Canadian government's approach to national security reviews has been scant. This lack of information, coupled with the fact that a number of important terms regarding the national security scheme are not defined in the legislation, has created uncertainty for foreign investors. With the highly anticipated release of its [Guidelines on the National Security Review of Investments](#), the Canadian government has shed some welcome light on circumstances that may draw foreign investors and parties involved in an investment into the realm of a national security review.⁵² The guidelines provide a list of factors (focusing on defence, technology and critical infrastructure and supply) that the Canadian government considers when assessing whether an investment poses a national security risk. The government has also committed to make reporting on the administration of the national security provisions of the *Investment Canada Act* mandatory while protecting commercial confidentiality and national security.

GOVERNMENT OVERTURNS EARLIER DECISION TO BLOCK O-NET COMMUNICATIONS' PROPOSED INVESTMENT

In an unusual move in late 2016, the new Liberal government consented to setting aside an order made under the previous Conservative government which required O-Net Communications (a high technology company listed on the Hong Kong Stock Exchange) to

divest its investment in ITF Technologies (a specialty fiber components and modules provider in Quebec) on the basis that the investment would be injurious to national security.⁵³ In 2017, under a fresh national security review, the Liberal government reversed the prior government's decision and approved O-Net's acquisition of ITF Technologies. This development appears consistent with the Liberal government's foreign policy objective to deepen trade relations with China. Time will tell whether this move by the government is a sign of an overall policy shift or whether it is a unique case.

INCREASED THRESHOLD FOR STATE-OWNED ENTERPRISE WTO INVESTMENTS

The pre-closing review threshold for direct acquisitions of Canadian businesses by non-Canadian, WTO investors that are state-owned has increased to C\$398 million in asset value of the Canadian business from the 2017 threshold of C\$379 million.

Cartel Enforcement

PROPOSED SIGNIFICANT CHANGES TO THE CANADIAN IMMUNITY PROGRAM

In October 2017, the Competition Bureau released for comment a revised version of its Immunity Program.⁵⁴ First adopted in 2000, the Program and accompanying Frequently Asked Questions have been updated on numerous occasions; however, these previous changes were relatively minor refinements. This time, if implemented, the proposed revisions would result in fundamental changes to the immunity process. Concerns have been expressed that the proposed revisions would impose significant burdens and uncertainties on immunity applicants and therefore undermine the immunity program.

The revisions are presented in response to recent prosecution setbacks, namely the acquittal in the *Durward* bid-rigging case⁵⁵ and the stay of proceedings in the chocolate price-fixing case⁵⁶. The changes also address a recent Court decision requiring disclosure to the accused of all “factual information” provided to the Bureau by cooperating parties under the Immunity and Leniency programs⁵⁷. The changes are intended to allow the Bureau and the Public Prosecution Service of Canada (PPSC) “to be prosecution-ready by requiring that credible and reliable evidence be provided earlier in the process”.

The main proposed changes include the following:

- Automatic coverage under a corporate immunity agreement for all directors, officers and employees would no longer be provided. Instead, individuals that require immunity would need to admit their involvement as a party to the offence and demonstrate their willingness to cooperate with the Bureau’s investigation.
- An interim grant of immunity (IGI) stage would be added to the current immunity process. Once the proffer process has been completed, documentary and testimonial evidence would be provided under an IGI issued by the PPSC. Under the IGI, the applicant would receive a *conditional form of immunity*, subject to the applicant’s obligations of continuing cooperation and compliance with the other requirements of the program. The PPSC would enter into a final immunity agreement only after prosecution has been completed, or when the Bureau and PPSC consider that no further assistance from the applicant is required. Concerns have been raised that the proposed IGI process would increase uncertainties as it could result in a final immunity agreement being provided several years after the initial proffer. Some have suggested setting a more reasonable and certain timeline for finalizing an immunity agreement.
- Bureau officers could take an audio recording of counsel proffers. This would depart from the current “paperless process” and the current practice of applicants’ counsel to deliver oral proffers. The rationale for this proposed revision has been questioned, as counsel proffers have no evidentiary value and are presumptively subject to settlement privilege. Concerns have also been expressed that this proposal would increase the risks associated with the immunity process, as the recorded proffer could be the subject of disclosure and discovery disputes as part of follow-on class actions.

- Witness interviews could be conducted under oath and be video- or audio-recorded. The Bureau could also request and record witness interviews before the proffer process has been completed, with the assurance that information provided will not be used directly against the applicant for investigative purposes. This proposed change to the Program reflects the Bureau's recent practice to record witness interviews. This practice has been criticized as adding disincentives to self-report, given the risk that recorded witness interviews may result in additional discovery and production demands in follow-on civil class actions. Recording witness interviews would also be a departure from the practice of antitrust enforcers in other jurisdictions, including in the United States, and therefore raise concerns in the context of coordinated international immunity applications.
- The proposed changes would also introduce a new mandatory protocol for identifying, reviewing and adjudicating privilege claims by immunity applicants. Following the IGI stage, the applicant would have to provide notice of its privilege claims to the Bureau, presumably by delivering a privilege log, and the Bureau would seek the advice of the PPSC. If it is not persuaded by the applicant's privilege claims, the PPSC would appoint an independent counsel (IC), and the applicant would have to submit its documents to the IC under seal. The IC would, on the basis of observations and representations by the applicant and the PPSC, determine the applicant's privilege claims. The applicant would then be expected to abide by the IC determination; if the IC determines that the applicant's claim of privilege is not "reasonably supportable in law and fact", the applicant would have to disclose the information. Failure by the applicant to comply with the protocol or abide by the determinations of the IC could constitute a breach of the cooperation requirements and result in the denial of a grant of immunity. Significant concerns have been expressed about the scope of the proposed privilege review process. Specifically, concerns have been raised as to whether external counsel's notes and other documents created during the internal investigation, in Canada and in other countries, would have to be disclosed and whether such disclosure could result in a waiver and loss of privilege in other jurisdictions. Uncertainties raised by these additional requirements could result in further disincentives for potential immunity applicants.

The consultation process is now closed and it remains to be seen whether the Bureau and the PPSC will address these concerns that have been raised. The publication of the final revised Immunity Program will be a key development in 2018. The Bureau has also announced that it will revise its Leniency Program with the possibility of the Immunity and Leniency programs being merged into a single program.

CONCURRENT CONSULTATIONS ON THE INTRODUCTION OF DEFERRED PROSECUTION AGREEMENTS (“DPAs”) AND REVISIONS TO THE FEDERAL INTEGRITY REGIME

In contrast to the United States and the United Kingdom, Canada does not have a DPA regime to address corporate criminal liability.⁵⁸ Under a DPA, prosecutors agree to suspend or defer prosecution against the accused, in exchange for the cooperation of the accused, the payment of a financial penalty and the implementation of compliance measures. An independent corporate monitor may also be appointed to ensure compliance with the terms of the DPA. For corporations, DPAs could, when immunity is not available, resolve cartel and bid-rigging investigations while avoiding a criminal conviction, therefore mitigating certain collateral consequences, including the current automatic ineligibility (or “debarment”) to obtain federal procurements contracts under the Government of Canada’s Integrity Regime (discussed below). A public consultation was conducted in the fall of 2017 as to whether Canada should adopt a DPA regime, how such a regime should be constructed, and how DPAs would interact with the federal Integrity Regime.⁵⁹

A concurrent consultation was conducted on enhancing the Integrity Regime administered by Public Services and Procurement Canada.⁶⁰ Under the current regime, a corporation that is convicted or pleads guilty to a criminal cartel or bid-rigging offence under the *Competition Act* (and certain other economic crimes) is automatically debarred for a period of at least five years and up to ten years. Bidders that have been charged or convicted of cartel offences outside of Canada, or had affiliates charged or convicted of such offences in Canada or abroad (when the bidder directed, influenced, or authorized the commission of the offence), may also be declared ineligible or suspended from being awarded federal contracts. The fixed ineligibility periods raise concerns for cooperation under the Bureau’s Leniency Program, given that leniency applicants are required to plead guilty. While an earlier version of the Integrity Regime provided an express debarment exemption to leniency applicants, this exemption was later removed and is no longer available. Comments submitted as part of the consultation process recommend reinstating the debarment exemption for participants under the Leniency Program. It has also been recommended to allow more flexibility into the Integrity Regime by introducing discretion to determine the relevant ineligibility periods. Submissions also supported expressly stating that a corporation may not be debarred by virtue of entering into a DPA or participating in the Bureau’s Immunity Program.

It is expected that reports on these consultations will be released in 2018.

INTERNATIONAL CARTEL CASES

The Bureau secured additional bid-rigging guilty pleas as part of the motor vehicle components investigation:

- Japanese car parts manufacturer NGK Spark Plug Co. pleaded guilty and was fined \$550,000 for its role in an international conspiracy relating to the supply of spark plugs to General Motors.⁶¹
- Mitsubishi Electric Corporation pleaded guilty and was fined \$13.4 million, the second highest bid-rigging fine in Canada, for having entered into illegal agreements with a competing Japanese car parts manufacturer for the supply of alternators to Honda and Ford and the supply of ignition coils to General Motors.⁶²

- Showa Corporation pleaded guilty and was fined \$13 million for participating in illegal arrangements with another supplier of electric power steering gears sold to Honda Motor for cars manufactured in Canada.⁶³

Since 2013, investigations involving car parts have resulted in nearly \$85 million in fines in Canada.

The most interesting development, however, comes from the Bureau decision to not seek a separate guilty plea in Canada from Nishikawa Rubber Co. (“Nishikawa”), following its guilty plea in the U.S. and payment of a US\$130 million fine. The Bureau collaborated with the U.S. DOJ in this investigation and agreed that the matter would be addressed by the U.S. DOJ as the conduct primarily targeted U.S. consumers. The Bureau statement indicates that Nishikawa had approximately US\$236 million of sales of body sealing products sold in Canada and incorporated into automobiles assembled in Canada, but that a significant percentage of these vehicles were exported to the U.S. The U.S. DOJ included Nishikawa’s sales to Toyota and Honda in Canada in its assessment of the proposed fine.⁶⁴

Domestic Bid-Rigging and Cartel Cases

New national bread investigation: The Bureau conducted search warrants at a number of major grocery retailers and a bread wholesaler in late 2017 with respect to alleged arrangements involving the coordination of retail and wholesale prices of some packaged bread products. A national retailer and its affiliated bakery division publicly stated that they participated in an industry-wide bread price-fixing arrangement from 2011 to 2015, and have cooperated under the Bureau’s Immunity Program since March 2015.⁶⁵

Ongoing retail gas case: As part of the long-standing regional retail gas price-fixing case in Québec, Irving Oil pleaded guilty to one count of retail price maintenance and paid a \$287,583 fine.⁶⁶ This plea is surprising given that price maintenance was decriminalized in 2009, and that other involved companies and individuals have pleaded guilty or were prosecuted under the criminal price-fixing provisions of the Act. The Bureau statement indicates that “the decision to accept this guilty plea was taken independently by the PPSC”. Trials against certain accused individuals are scheduled for late 2018.

Sewer and water services cases come to an end:

- Kelly Sani-Vac pleaded guilty to participating in a bid-rigging scheme to obtain municipal contracts for sewer services in Québec and was fined \$85,000. The charges against the company’s owner were stayed. This seventh guilty plea concludes the Bureau’s investigation that led to charges in 2011 and 2012 against six companies and five individuals for rigging bids for municipal and provincial sewer services totalling \$4 million in value. All six accused companies pleaded guilty and were collectively fined a total of \$353,000. Only one individual pleaded guilty and was ordered to do 100 hours of community service.⁶⁷
- The last remaining accused corporation following charges laid in 2015 for the supply of water services to municipalities in Québec pleaded guilty and was fined \$160,000.⁶⁸

First guilty plea from a government employee under the federal Financial Administration

Act: Following charges laid in 2014 as part of the Bureau's bid-rigging investigation into the supply of information technology (IT) services to Library and Archives Canada (LAC) worth \$3.5 million, a former LAC manager pleaded guilty under the *Financial Administration Act* (FAA) for failing to report wrongdoing related to a public contract. The manager received a conditional discharge including 15 months' probation and 100 hours of community service.⁶⁹ This is the first time that a Bureau bid-rigging investigation has resulted in a guilty plea under the FAA. Bid-rigging charges were laid in this case against one corporation, its owner and two of its employees. Three federal government employees were also charged under the FAA. To date, three individuals have pleaded guilty and were sentenced \$43,000 in fines, 36 months of conditional sentences to be served in the community and 250 hours of community service. Charges against the company and remaining three individuals are still before the courts.

Ongoing ventilation matter: In respect to bid-rigging charges initially laid in 2010 for the installation of ventilation systems on high-rise residential construction projects, the Bureau has secured additional guilty pleas from three companies and one individual. To date, four companies and two individuals have pleaded guilty and were imposed fines totalling over \$1 million, as well as 50 hours of community service. The total value of the tenders was approximately \$8 million.⁷⁰

Other Cartel Highlights

- The Bureau has launched an anonymous tip line in partnership with Public Services and Procurement Canada and the Royal Canadian Mounted Police to promote the detection of bid-rigging and price-fixing activities with respect to federal contracts.⁷¹
- In partnership with Public Services and Procurement Canada and the Office of the Inspector General of Montreal, the Bureau is developing pilot programs with respect to the use of bid-screening algorithms to detect bid-rigging.⁷²
- The Bureau also continues to expand its partnerships, having entered into a memorandum of understanding (MOU) with the Office of the Inspector General of Montreal to enhance cooperation and information-sharing between the two organizations.⁷³

Competitor Collaborations

E-BOOKS CASES FINALLY OVER: BUREAU ENTERS INTO CONSENT AGREEMENT WITH HARPER COLLINS AND FEDERAL COURT DISMISSES KOBO'S APPLICATION FOR JUDICIAL REVIEW

On January 9, 2018, the Bureau entered into a consent agreement with Harper Collins, settling the Bureau's application before the Tribunal alleging that Harper Collins had entered into an anti-competitive arrangement with competitors, thereby violating the Act's civil prohibition on competitor collaborations in section 90.1. In addition to agreeing to cease the impugned conduct, Harper Collins agreed to donate \$150,000 to charity.

This was the penultimate chapter in a long-running investigation (which included multiple attempts at settlement) where the Bureau alleged that Harper Collins, other e-book publishers and Apple (as an e-book retailer) entered into arrangements that increased the price of e-books to consumers. Specifically, the Bureau alleged that, previously, publishers wholesaled e-books to retailers who were free to set their own retail prices. However, since that practice allegedly resulted in low prices, the publishers chose to introduce an agency model instead. Under the agency model, the e-book publishers set the retail prices and the retailers received a commission.

In 2014, the Bureau entered into a consent agreement with the e-book publishers and Apple that prohibited the agency model. However, Kobo, an e-book retailer, successfully challenged the validity of the consent agreement primarily on the basis that it did not include a conclusion by the Bureau that the Act had been contravened. In January 2017, the Bureau entered into consent agreements (having corrected the deficiencies in the 2014 consent agreement) with each of the e-book publishers (except Harper Collins) and Apple. Since Harper Collins did not join the settlement, the Bureau launched its application.

Unsurprisingly, Kobo also sought judicial review of the validity of the 2017 consent agreements. On February 1, 2018, ending what looks to be the final chapter of this saga, the Federal Court denied Kobo's application on procedural and substantive grounds. At this time it is not known whether Kobo intends to appeal this decision.

Abuse of Dominance

A major abuse of dominance case moved one step closer to its conclusion with the long-awaited Federal Court of Appeal decision confirming the decision of the Competition Tribunal, which found that the Toronto Real Estate Board (TREB) had abused its dominant position. On the investigation side, the Bureau recently closed four high-profile abuse of dominance investigations (Loblaws, Apple, the TMX Group and Google). With respect to new enforcement activity, the Bureau initiated its case against the Vancouver Airport Authority for restricting in-flight catering services.

LONG-AWAITED FEDERAL COURT OF APPEAL DECISION CONFIRMS DECISION AGAINST THE TORONTO REAL ESTATE BOARD

In December 2017, the Federal Court of Appeal **confirmed the decision** of the Competition Tribunal, which found that TREB abused its dominant position by preventing its members from offering data through innovative brokerage models.

This decision creates an important precedent as it confirms that the burden of proof on the Commissioner of Competition to prove anti-competitive effects in an abuse of dominance case can sometimes be met solely by adducing qualitative evidence (as opposed to quantitative evidence). It also confirms the Tribunal's finding that the evidence was insufficient to support the privacy arguments raised by TREB, which, accordingly, could not be used as a legitimate business justification to preclude a finding of anti-competitive conduct. Finally, the Federal Court of Appeal confirmed the Tribunal's refusal to apply the exception based on a mere exercise of a copyright and, by doing so, raised questions on the scope of this exception. TREB intends to seek leave to appeal to the Supreme Court. For further detail, see our article **Long-Awaited Federal Court of Appeal Decision Confirms Decision Against the Toronto Real Estate Board**.

The TREB case is also significant from a "Big Data" perspective because it determined that an organization could be found to be engaged in an anti-competitive practice when it restricts access to data (in this case, home sales data). Although dealing specifically with the data held by TREB in the Greater Toronto Area, the case is seen as precedent-setting, as it has the potential to be a significant factor driving the opening up of data sources in other sectors, notably financial services⁷⁴. The Bureau has touted its case against TREB as one that "clearly underscores that crucial link between competition and innovation and the Bureau's role in upholding both"⁷⁵.

INVESTIGATION OF GROCER'S SUPPLIER POLICIES CLOSED

The Bureau's three-year investigation into allegations of abuse of dominance by Loblaw in connection with certain policies imposed by Loblaw on its suppliers⁷⁶ has closed with the Bureau concluding that there was insufficient evidence.⁷⁷ The investigation focused on Loblaw policies which sought compensation from suppliers when Loblaw's profitability decreased due to the competitive activity of other retailers (e.g. when they sold products at lower prices).⁷⁸ The Bureau's concern was whether the Loblaw policies caused suppliers to implement strategies (which would impact rivalry among retailers) to minimize the potential financial impact of the policies. In particular, the Bureau looked at whether the Loblaw policies caused suppliers to provide less favourable trade terms to other retailers (or to otherwise suppress competition among certain retailers). Although a number of suppliers suggested that the Loblaw policies had caused them to engage in such strategies, the Bureau concluded that these allegations were not sufficiently supported by the evidence.

BUREAU DISCONTINUES INVESTIGATION INTO APPLE'S IPHONE SALES PRACTICES

The Bureau concluded that it does not have enough evidence to proceed with its abuse of dominance investigation into Apple with respect to its contracts to supply iPhones to wireless carriers (who, in turn, sell smartphones to consumers).⁷⁹

The Bureau inquiry commenced in 2014, when Apple was ordered to produce information. The Bureau's inquiry focused on the contract terms that Apple has with wireless carriers (e.g., Bell, Rogers, Telus) for iPhones. In particular, the Bureau focused on minimum order quantities, most-favoured nation clauses and requirements to provide retail subsidies to consumers. Such contract terms are not inherently anti-competitive, but can be, to the extent that they exclude other smartphone manufacturers from competing. For example, if a wireless carrier is required to order large quantities of iPhones, then it may promote iPhones to the exclusion of other smartphones in order to meet its volume commitment.

The Bureau concluded that Apple has market power (a required element of abuse of dominance) due to the ubiquity, profitability and "must-have" nature of iPhones. However, the Bureau found that Apple's contract terms did not cause a significant enough impact on wireless carriers to affect the competitiveness of competing smartphone manufacturers.

BUREAU DROPS INQUIRY INTO TMX GROUP'S RESTRICTIONS ON SHARING SECURITIES MARKET DATA

The Bureau ended its abuse of dominance investigation into the TMX Group, which owns the Toronto Stock Exchange and the TSX Venture Exchange, in relation to contractual restrictions imposed on investment dealers regarding sharing securities market data (i.e., trading information about publicly-traded securities).⁸⁰

Securities market data is used by investors to make trading decisions. Aequis, which owns NEO Exchange, complained to the Bureau that the TMX Group's data sharing restrictions precluded it from launching a new product that would supply securities market data to investors at lower prices. Aequis' proposed product was dependent on collecting data from several investment dealers, which it would then aggregate and sell. However, the TMX Group prohibits investment dealers from sharing the data from their trades on its exchanges.

The Bureau found that Aequis faced a number of additional impediments to launching its product. In fact, the Bureau concluded that it was unlikely that Aequis would launch a competing product even without the TMX Group's restrictions. Accordingly, the Bureau closed its inquiry because an essential element of abuse of dominance was missing.

BUREAU ENDS INQUIRY INTO GOOGLE'S ADVERTISING BUSINESSES

The Bureau ended its investigation into Google's online businesses relating to (i) how it displays search results, (ii) advertising related to internet searches, and (iii) advertising displayed on websites.⁸¹ With the exception of a former practice⁸², which Google committed not to reintroduce, the Bureau concluded that Google's conduct did not constitute an abuse of dominance.

With respect to the display of Google search results, the Bureau found that Google ranks search results to improve the consumer experience, although it does prominently display its own services. Prominently displaying its own services can be beneficial to consumers (e.g., by providing accurate factual information). The Bureau did not find sufficient evidence of harm resulting from Google's practices.

With respect to advertising related to internet searches, Google's syndication agreements with third party websites to insert Google search functionality into those websites and to customize advertising on those websites based on consumers' search terms did not result in a substantial prevention or lessening of competition. The Bureau came to the same conclusion with respect to Google's distribution agreements with hardware manufacturers and software developers to set Google as the default search engine. The Bureau did take issue with Google hindering advertisers who advertised in Google search results from advertising in the results of other search engines. However, the Bureau was satisfied with Google's commitment not to reintroduce such restrictions in Canada for five years. It is interesting to note that the Bureau did not insist on entering into a consent agreement, which has the effect of a court order, to formalize Google's commitment.

With respect to advertising displayed on websites, Google operates an exchange for the buying and selling of advertising space, as well as offers services to publishers for selling advertising space and to advertisers for buying advertising space. The Bureau found that allegations of Google mandating exclusivity, bundling or favouring itself were either unfounded or insufficient to cause an exclusionary effect in the marketplace.

This inquiry, which started in 2013, was notable because of its broad scope: the Bureau investigated several of Google's practices, compelled the production of a significant amount of information from Google via court order, consulted multiple stakeholders and experts, and coordinated with international counterparts, including the FTC and the European Commission.

BUREAU ACTION AGAINST VANCOUVER AIRPORT AUTHORITY FOR RESTRICTING IN-FLIGHT CATERING CHOICES

The Bureau in 2017 commenced an abuse application before the Competition Tribunal alleging that the Vancouver Airport Authority controls the market for "galley handling" at the airport and that the Airport Authority's refusal to allow new catering suppliers to operate at the airport constitutes an abuse of dominance, causing "higher prices, dampened innovation and lower service quality".⁸³ It is also alleged that airlines would like to have more choice for in-flight catering suppliers and new suppliers would enter but for the refusal of the Vancouver Airport Authority. The Airport Authority argues that its decision-making furthers the efficient provision of in-flight catering services. Interestingly, the Airport Authority also argues that the abuse of dominance provisions do not apply to it as a not-for-profit entity with a public interest mandate.

In the course of the application, the Commissioner of Competition delivered an affidavit of documents containing thousands of documents, the majority of which were claimed to be protected by public interest class privilege and were withheld. The Airport Authority disputed the privilege claim and moved in the Competition Tribunal to compel production. By the time the

motion was heard, the Commissioner had capitulated on the majority of the documents and only twelve-hundred documents remained in dispute. The Tribunal dismissed the Airport Authority's motion, upholding the Commissioner's class privilege claim. The Airport Authority appealed. The Federal Court of Appeal allowed the appeal and held that the Commissioner can no longer invoke "public interest" privilege on a class-wide basis to prevent access. While the Commissioner can still invoke public interest privilege, he can now only do so document-by-document. For further detail, see our article: [Federal Court of Appeal Eliminates Commissioner of Competition's 'Public Interest' Class Privilege](#).

Private Tribunal Applications (Refusal to Deal, Price Maintenance and Exclusive Dealing)

Private access provisions under the *Competition Act* allow private parties to apply for leave to the Competition Tribunal to make refusal to deal, price maintenance, tied selling, exclusive dealing and market restriction applications. But the Tribunal has, for the most part, shut the door on recent attempts by private parties to access these provisions.⁸⁴ Parties considering this route of competition enforcement should be mindful of the *CarGurus* case discussed below.

TRIBUNAL DENIES LEAVE IN CARGURUS V. AUTO TRADER

CarGurus alleged that Auto Trader's refusal to supply it with vehicle listings data hampered its ability to compete as a low cost alternative in the online marketplace for the sale of cars. CarGurus sought leave to make a price maintenance,⁸⁵ refusal to deal,⁸⁶ or exclusive dealing⁸⁷ application. The Tribunal denied leave for all three sections.⁸⁸ The Federal Court of Appeal upheld the Tribunal's decision.

The Tribunal rejected CarGurus price maintenance leave application because it found that CarGurus did not lead any evidence as to its low pricing policy, which was the grounds for its claim. With respect to CarGurus' claims of refusal to deal and exclusive dealing, the Tribunal found that CarGurus did not adduce sufficient evidence to demonstrate a substantial effect.⁸⁹ This conclusion mirrors the Tribunal's finding in the *Audatex case*, another refusal to deal case where leave was also denied. These decisions cast doubt on the availability of private tribunal applications.

Class Actions

A number of recent court decisions and events will impact the scope of potential liability facing class action defendants. The Ontario Court of Appeal recently held that the “discoverability” principle applies to the limitation period for civil damage claims brought under the Competition Act. On the topic of whether “umbrella plaintiffs” have a cause of action against alleged cartelists, the courts have issued contrasting views.

In other news, the Canadian Government’s recent decision to suspend the coming into force of the private right of action provisions in Canada’s Anti-Spam Legislation (CASL) provides at least some temporary relief to legitimate advertisers who would have been exposed to potentially significant damage claims for immaterial misrepresentations that cause no harm.

The Competition Bureau confirmed in a recently released information bulletin, *Requests for information from private parties in proceedings under section 36 of the Competition Act*, that it will not voluntarily provide information from its investigative files to private litigants.

The Ontario court held that class action plaintiffs improperly circumvented the rules when they obtained an *ex parte* order from a U.S. court compelling a non-party to submit to discovery in the U.S. for purposes of the Ontario proceeding.

LIMITATIONS DEFENCE

Under section 36 of the *Competition Act*, civil damage claims can be brought for conduct contrary to the criminal provisions of the *Competition Act*. The limitation period for this private right of action is the later of the following: (a) two years from the day on which the anti-competitive conduct was engaged in, or (b) the day on which any criminal proceedings are disposed of⁹⁰.

The Courts of Appeal in Ontario and British Columbia⁹¹ have recently addressed whether the “discoverability” principle applies to the limitation period in section 36. The “discoverability” principle provides that a cause of action arises for purposes of a limitation period when the wrongful conduct has been discovered or ought to have been discovered by the plaintiff through the exercise of reasonable diligence. In *Fanshawe College v. AU Optronics*⁹², the Ontario Court of Appeal noted that a statutory limitation period will generally be subject to the discoverability principle when the running of the limitation period is linked either to the plaintiff’s knowledge about an event or to an event related to the plaintiff’s cause of action. It concluded that the limitation period in section 36 is triggered by an event related to the underlying cause of action (conduct contrary to the criminal provisions of the *Competition Act*) and is therefore subject to discoverability. The Ontario Court of Appeal cited the Supreme Court of Canada (SCC) which stated: “*In balancing the defendant’s legitimate interest in respecting limitation periods and the interest of plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration.*” It also noted that the SCC’s statement is particularly applicable “*given that secrecy and deception are invariably elements of anti-competition agreements*” and that any other interpretation of the limitation period in section 36 could “*depriv[e] victims of the chance to make a claim when the conspirators’ concealment has been particularly effective*”.

UMBRELLA PURCHASERS – ARE THEY IN OR OUT?

Impacting the scope of defendant liability, courts in Ontario and British Columbia have issued contrasting decisions as to whether “umbrella purchasers” have a cause of action against alleged cartel members under the *Competition Act*.

Umbrella purchasers are direct or indirect purchasers from non-defendants. The theory of umbrella liability is that a conspiracy to raise prices creates an “umbrella” of supra-competitive prices that enables manufacturers or suppliers who were *not* part of the alleged conspiracy to set their prices higher than they otherwise would have. In doing so, umbrella purchasers are harmed by those artificially inflated prices.

*Shah v. LG Chem, Ltd.*⁹³ is an Ontario case relating to an alleged global price-fixing conspiracy in lithium-ion batteries in which the court concluded that umbrella purchaser claims did not disclose a cause of action. The Divisional Court in *Shah* upheld the certification judge’s decision⁹⁴ to deny certification of umbrella purchaser claims on the basis that the defendants would be exposed to indeterminate liability if umbrella purchasers were included in the class. In the court’s view, the defendants had no control over whether the non-defendant manufacturers chose to match the alleged higher market prices set by the defendants through their alleged conspiracy. Nor did they have any control over the volume of product that the non-defendant manufacturers chose to produce and sell. “Adding in the Umbrella Purchasers greatly expands the members of the class, and does so by adding persons with whom the respondents had no dealings. Indeed, if the Umbrella Purchasers are included in the class, it is not clear how the respondents would even know how many such purchasers they might be found liable to.”

In contrast to the decision in *Shah*, the B.C. court in *Godfrey v. Sony Corp.*⁹⁵ certified the class which includes umbrella purchasers and rejected the argument that umbrella purchaser claims would expose the defendants to indeterminate liability. The court did not think that liability would be “impermissibly indeterminate”.

PRIVATE RIGHT OF ACTION FOR COMPETITION ACT REVIEWABLE CONDUCT SUSPENDED

July 1, 2017 was the date on which the private right of action provisions in Canada’s Anti-Spam Legislation (CASL) were supposed to come into force. However, in response to concerns raised by businesses, charities and the not-for-profit sector, the **Government of Canada has suspended the implementation of the private right of action provisions in CASL.**

The suspended CASL provisions include a change whereby misrepresentations in electronic messages (section 74.011 of the *Competition Act*) would become the *only* reviewable conduct under the *Competition Act* to be subject to private damage claims. At this time, civil damage claims are only available for those who are harmed by conduct that contravenes the criminal provisions of the *Competition Act*.

As discussed in our article, *Misguided Policy: CASL's Private Right of Action for Competition Act Reviewable Conduct*, if section 74.011 of the *Competition Act* is subject to private damage claims, it will expose legitimate advertisers to potentially significant damage claims for immaterial misrepresentations that cause no harm. The suspended CASL private right of action for reviewable conduct under section 74.011 of the *Competition Act* is an aberration, which would be inconsistent with and offensive to the current regime by which the *Competition Act* addresses deceptive marketing practices.

The Government of Canada has said that it will ask a parliamentary committee to review the legislation. For further discussion, see *CASL Private Right of Action delayed and Government to review CASL*.

Competition Bureau Will Resist Information Requests from Private Parties

The Competition Bureau has issued an information bulletin, *Requests for information from private parties in proceedings under section 36 of the Competition Act*, outlining its general position where private parties⁹⁶ seek access to its investigative files. The Bureau confirmed it will not voluntarily provide information to private parties in order to protect the integrity of its investigative process and the confidentiality of information it receives. If served with a subpoena for production of information, the Bureau will inform the information provider so it has knowledge of the subpoena, and an opportunity to intervene. If the Bureau is served with a subpoena, it will, if appropriate, oppose the subpoena if it would potentially interfere with an ongoing investigation or adversely affect the administration or enforcement of the *Competition Act*; if unsuccessful, the Bureau will seek protective court orders to maintain the confidentiality of the information in question. In explaining its position, the Bureau points to the fact that it relies heavily upon voluntarily provided information. Its ability to administer and enforce the Act would be “seriously compromised” if the Bureau cannot assure confidentiality over the information it obtains and the person’s cooperation with the Bureau. The Bureau also cites considerable financial and opportunity costs that would be incurred in order to respond to such information requests, which are typically voluminous (particularly from parties in class proceedings). The Bureau will rely on applicable privileges, including public interest privilege⁹⁷, to protect against disclosure of information gathered during its investigations.

IMPROPER DISCOVERY OF NON-PARTIES

*Mancinelli v. Royal Bank of Canada*⁹⁸ relates to an uncertified Ontario class action that alleges price-fixing by the defendants in the market for foreign exchange instruments. The plaintiffs allege that the defendants carried out their conspiracy through the use of chat rooms at Bloomberg LP, a non-party. The plaintiffs obtained an *ex parte* order from a U.S. court compelling Bloomberg LLP to submit to discovery in the U.S. for purposes of the Ontario proceeding. The defendants sought an order that the plaintiffs (a) not take any step in furtherance of the Bloomberg subpoena, and (b) not take any steps to acquire evidence from non-parties through extra-jurisdictional procedures without further order of the Ontario court. The Ontario court granted the defendants’ order and concluded that the plaintiffs circumvented the rules governing discovery of non-parties, which was improper under class action procedure in Ontario. The plaintiffs have appealed.

CLASS CERTIFICATION DENIED IN “RORO” CASE IN BRITISH COLUMBIA

In a decision which goes against the current trend of Canadian courts to grant certification of class actions alleging price-fixing, a B.C. court denied certification in a case alleging price-fixing in the shipment of vehicles and heavy equipment. It did so on the narrow ground that the plaintiff's economic expert failed to show that the data required to support his opinions was available.⁹⁹

FOR MORE INFORMATION ABOUT OUR FIRM'S COMPETITION AND FOREIGN INVESTMENT EXPERTISE, VISIT OUR [COMPETITION/ANTITRUST](#) AND [FOREIGN INVESTMENT GROUP](#) PAGES.

¹ The Bureau has investigated 80% more digital economy cases compared to previous years. Digital economy cases are defined as those that “support innovation and the competitiveness of the digital economy (including but not limited to e-business, online promotions, sales and transfers, infrastructure support) by deterring anti-competitive conduct such as impeding new entrants, products or services and stopping deceptive marketing practices online including activities that engage the CASL provisions” from [Competition Bureau Year at a Glance, Performance Update for Fiscal Year 2016-2017, May 24, 2017](#).

² The Bureau has referenced innovation as a driving theme in numerous publications and speeches, including the Bureau's last two annual plans: [2017-2018 Annual Plan: Competition is key-Creating the conditions for innovation](#) and [2016-17 Annual Plan: Strengthening Competition to Drive Innovation](#). According to its 2017-2018 Annual Plan, the Bureau has 53 active digital economy enforcement cases.

³ The Bureau recognizes that competition enforcement needs to “strike a balance” that does not stifle innovation driven by the collection and use of data and legitimate competition. The Bureau considers that the existing legislative framework under the Competition Act is largely effective in meeting the new challenges posed by big data. Nonetheless, given that the use of big data is new and developing at a fast pace, the white paper titled “Big data and Innovation: Implications for competition policy in Canada” identifies challenges of analyzing big data cases under the Act. For further detail, see our article: [Competition Bureau Releases Big Data White Paper for Public Comment](#).

⁴ See our article: [Canadian Competition Bureau Releases Final Fintech Report](#).

⁵ The Bureau cites the Canadian Internet Registration Authority's publication, [The state of e-commerce in Canada](#) (March 2016), which says that it is predicted that Canadians will spend \$39 billion online by 2019.

⁶ [2017-2018 Annual Plan: Competition is Key – Creating the conditions for innovation, Draft for Public Consultation – April 18, 2017](#).

⁷ Deceptive telemarketing also ranked in the top 5: [Competition Bureau Performance Measurement & Statistics Report for the period ending June 30, 2017](#).

⁸ In September 2017, an individual was sentenced to 10 months in jail for deceptive marketing relating to a device he claimed could replace cable services and to 18 months for deceiving consumers about advertised delivery times. In another case, an individual was sentenced to 16 months' imprisonment and two years' probation for participating in an illegal telemarketing scheme (October 2016). Prior to this, in 2013, another individual was sentenced to nine months' house arrest, while another received a conditional sentence of two years less a day in 2015. Criminal charges against two others are pending. Charges for all of these individuals are under the [Criminal Code and the Act's criminal misleading advertising provisions](#). The allegations were that these individuals operated two telemarketing businesses whose callers falsely implied that they represented a business that had an existing relationship with the victims or that they represented a government agency. These cases serve as a reminder that criminal sanctions are available for certain deceptive marketing practices.

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- ⁹ The Bureau alleged that the signs gave the false or misleading impression that the proceeds benefitted charities, even though the donations were used for commercial purposes. The Bureau has taken action in similar situations in the past and continues to monitor this issue across the country. *Competition Bureau takes action against donation bin operators*, May 11, 2016.
- ¹⁰ *Amazon changes pricing practices and pays \$1.1 million to settle price advertising case*, January 11, 2017. *Competition Bureau statement regarding its inquiry into Amazon's price advertising in Canada*.
- ¹¹ Sections 74.01(2), (3), (4) and (5) of the Competition Act.
- ¹² Section 74.011(2) of the Competition Act.
- ¹³ Section 74.01(a) of the Competition Act.
- ¹⁴ *Building trust and confidence in the online marketplace*, October 27, 2016.
- ¹⁵ *Avis and Budget to ensure prices advertised are accurate*, June 2, 2016.
- ¹⁶ *Hertz and Dollar Thrifty to pay \$1.25 million penalty for advertising unattainable prices and discounts*, April 24, 2017.
- ¹⁷ Volkswagen and Audi are under common ownership.
- ¹⁸ *Up to \$290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case*, January 12, 2018; *Volkswagen and Audi to pay up to \$2.1 billion to consumers and \$15 million penalty for environmental marketing claims*, December 19, 2016. *Bureau backgrounder -Volkswagen settlement*, December 19, 2016.
- ¹⁹ The first time was the Parkland/Pioneer litigated merger case discussed further below.
- ²⁰ *Competition Bureau resolves Made in Canada advertising concerns with Moose Knuckles*, December 7, 2016.
- ²¹ Section 74.01(1)(a).
- ²² *Competition Bureau takes action against Moose Knuckles for alleged false or misleading 'Made in Canada' claims*, April 27, 2016.
- ²³ *Bureau releases report questioning restrictions on health care advertising*, October 4, 2016. *Bureau report - Advertising Restrictions*, October 4, 2016.
- ²⁴ A consent agreement contains remedial measures to address the Bureau's competitive concerns arising from a proposed merger and has the force and effect of a court order. The Bureau's recently released *template for merger consent agreements* provides some insight into the Bureau's expectations when negotiating merger remedies.
- ²⁵ 2015 Comp. Trib. 4.
- ²⁶ *Competition Bureau and Parkland reach mediated resolution that will see gas stations and assets sold in Ontario and Manitoba*, March 29, 2016.
- ²⁷ For a merger to be notifiable, there are two financial thresholds that must be met: the "size of parties threshold" (where the combined Canadian assets or revenues of the parties and their respective affiliates in, from or into Canada exceed \$400 million) and the "size of transaction threshold" (where the target's assets in Canada or revenues from sales in or from Canada generated from those assets exceed \$92 million (2018)).
- ²⁸ *2017-2018 Annual Plan: Competition is Key – Creating the conditions for innovation – May 18, 2017*.
- ²⁹ The Bureau has indicated that transactions are detected mainly through complaints from market stakeholders or market monitoring.
- ³⁰ *Competition Bureau statement regarding Le Groupe Harnois inc.'s proposed acquisition of Distributions pétrolières Therrien Inc.'s gasoline supply arrangements*, June 23, 2016.
- ³¹ *Competition Bureau statement regarding Couche-Tard's proposed acquisition of retail gasoline sites from Imperial Oil*, September 2016.
- ³² *Competition Bureau statement regarding Couche-Tard's acquisition of CST and divestiture of certain assets to Parkland*, July 6, 2017.
- ³³ *Competition Bureau reaches agreement with propane retailer Superior*, September 27, 2017.
- ³⁴ *Competition Bureau statement regarding McKesson's acquisition of Katz Group's healthcare business*, December 16, 2016.
- ³⁵ VCDs are used for cardiovascular treatment. *Competition Bureau statement regarding the acquisition of St. Jude Medical by Abbott*: December 28, 2016.
- ³⁶ *Competition Bureau reaches agreement with global healthcare company Abbott*, September 28, 2017.

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- 37 To acquire MTS, Bell must sell assets and provide services to Xplornet, February 15, 2017.
- 38 Competition Bureau resolves issues with Sherwin-Williams' acquisition of Valspar, May 26, 2017.
- 39 Strengthening competition: Innovation, collaboration and transparency, Remarks by John Pecman, Commissioner of Competition Canadian Bar Association's Competition Law Fall Conference, October 6, 2016.
- 40 In 2016, only 8 out of 200 concluded merger reviews resulted in a consent agreement.
- 41 Competition Bureau satisfied that proposed sale of RONA will not limit consumer choice, May 12, 2016.
- 42 Competition Bureau satisfied that proposed sale of St-Hubert will not limit consumer choice, May 18, 2016.
- 43 Modular units include office trailers, lavatories and lunch rooms and are typically rented on a project-specific basis by commercial and industrial customers who solicit requests for quotes. See *Competition Bureau does not oppose amalgamation of the two largest Canadian modular space companies*, June 23, 2016.
- 44 Competition Bureau statement regarding the proposed merger between Marriott and Starwood, May 31, 2016.
- 45 The Bureau reviewed a number of car dealership acquisitions in 2016 reflecting an ongoing trend of consolidation in the industry in Canada. The focus of its analysis has been primarily on new vehicle sales given that more competition generally exists for used vehicle sales. Regarding geographic market analysis, the Bureau views competition among new car dealerships as inherently local. However, it is noteworthy that it will consider the extent of price constraints that may exist outside of a local area. Notably, one of the factors includes the effect of increased price transparency online. *Competition Bureau statement regarding the acquisition of Freedom Ford Sales Limited*, May 31, 2016.
- 46 Competition Bureau statement regarding proposed merger between Agrium and Potash Corporation of Saskatchewan, September 11, 2017.
- 47 Competition Bureau statement regarding Anheuser-Busch InBev's proposed acquisition of SABMiller and the concurrent divestiture of certain Miller brands to Molson Coors, May 31, 2016.
- 48 The Bureau cleared the deal on the basis that Hydro One and Great Lakes Power operate transmission assets that are physically connected to different customer locations and facilities, and therefore are not competing against each other for the provision of transmission services. See *Competition Bureau does not oppose Hydro One's acquisition of Great Lakes Power*, July 8, 2016.
- 49 Competition Bureau will not challenge Shaw Communications' acquisition of WIND Mobile, February 4, 2016.
- 50 Competition Bureau Statement Regarding its Investigations into First Air, Canadian North and Calm Air, August 22, 2017.
- 51 As per the indexing mechanism set out in the Competition Act, the pre-merger notification threshold is reviewed annually.
- 52 Since the national security review process was introduced in March 2009, formal national security reviews have been ordered 13 times. The outcomes of these reviews include: investor was directed to not implement the proposed investment (three cases), investor was ordered to divest control of the Canadian business (five cases), investment was authorized with conditions that mitigated the identified national security risks (four cases) and, in one case, the investor withdrew its application prior to a final order being made (*Annual Report, Investment Canada Act, 2016-2017*). Many more investments have been the subject of informal national security review which, for the most part, resulted in clearance.
- 53 The O-Net/ITF Technologies transaction is interesting as it represents the first time that the Investment Canada Act's national security review process was challenged. In 2015, O-Net applied for judicial review of the government's order to divest its investment in ITF Technologies on the basis that the investment would be injurious to national security. O-Net argued that it was not provided with the basis of the decision nor was it provided with an opportunity to respond. It also argued that its investment was not a threat to national security. References to military applications on ITF Technologies' website may provide some insight into the possible cause for the government's national security concern: ITF specializes in high-level solutions for specialized photonic applications such as underwater transmission, military manufacturing and manufacturing systems.
- 54 Competition Bureau invites feedback on revisions to its Immunity Program:
https://www.canada.ca/en/competition-bureau/news/2017/10/competition_bureauinvitesfeedbackonrevisionstoitsimmunityprogram.html.
- 55 R. v. Durward et al (2015), 09-300-68 (Ont. S.C.).
- 56 Final price-fixing charges stayed in chocolate case: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04003.html>.
- 57 R. v. Nestlé Canada Inc., 2015 ONSC 810 (CanLII) - see R. v. Nestle Canada Inc.: Settlement Privilege in Criminal Proceedings: https://www.mccarthy.ca/article_detail.aspx?id=7104.

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- 58 Under subsection 34(2) of the Competition Act, cartel and bid-rigging allegations may be settled by way of prohibition orders issued by a superior court; however, this mechanism has not been used recently to settle criminal investigations.
- 59 Deferred prosecution agreements consultation: Expanding Canada's toolkit to address corporate wrongdoing: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/differee-deferred-eng.html>.
- 60 Integrity Regime consultation: Expanding Canada's toolkit to address corporate wrongdoing: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/integrite-integrity-eng.html>.
- 61 NGK to pay \$550,000 for rigging bids for car parts: https://www.canada.ca/en/competition-bureau/news/2017/12/ngk_to_pay_550_000forriggingbidsforcarparts.html.
- 62 Mitsubishi Electric to pay \$13.4 million for rigging bids for car parts: https://www.canada.ca/en/competition-bureau/news/2017/04/mitsubishi_electrictopay134millionforriggingbidsforcarparts.html.
- 63 Japanese auto parts company fined \$13 million for participating in a bid-rigging conspiracy: <https://www.canada.ca/en/competition-bureau/news/2016/04/japanese-auto-parts-company-fined-13-million-for-participating-in-a-bid-rigging-conspiracy.html>.
- 64 Unprecedented cooperation with US antitrust enforcement authority leads to major cartel crackdown: <https://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html>.
- 65 Shining a light into the shadows: What price-fixing investigations tell Canadians: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04335.html>.
- 66 Irving pleads guilty in Quebec gasoline cartel case: https://www.canada.ca/en/competition-bureau/news/2017/11/irving_pleads_guiltyinquebecgasolinecartelcase.html.
- 67 Seventh guilty plea concludes the Competition Bureau's Quebec sewer services cartel case: https://www.canada.ca/en/competition-bureau/news/2017/11/seventh_guilty_pleaconcludesthecompetitionbureauquebecsewerserv.html.
- 68 Aquaréhab pleads guilty to rigging bids for municipal contracts, pays a \$160,000 fine: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04184.html>.
- 69 Public servants who turn a blind eye to wrongful activities will be held accountable: <https://www.canada.ca/en/competition-bureau/news/2016/12/public-servants-turn-blind-wrongful-activities-will-held-accountable.html>.
- 70 Cardinal Ventilation fined \$375,000 for rigging bids for ventilation contracts in Montréal: https://www.canada.ca/en/competition-bureau/news/2017/10/cardinal_ventilationfined375000forriggingbidsforventilationcontr.html.
- 71 Government of Canada launches tip line to help Canadians report federal contracting fraud: https://www.canada.ca/en/competition-bureau/news/2017/04/government_of_canadalaunchestiplinetohelpcanadiansreportfederalc.html.
- 72 Bid-rigging detection and prevention: ensuring a competitive and innovative procurement process: https://www.canada.ca/en/competition-bureau/news/2017/11/bid-rigging_detectionandpreventionensuringacompetitiveandinnovat.html.
- 73 Competition Bureau and Inspector General of the City of Montreal sign partnership agreement: <https://www.canada.ca/en/competition-bureau/news/2016/09/competition-bureau-inspector-general-city-montreal-sign-partnership-agreement.html>.
- 74 Fintech Regulatory Developments: 2017 Year in Review.
- 75 Commissioner Pecman champions innovation in remaining months of his term, January 19, 2018.
- 76 This abuse of dominance inquiry immediately followed the Bureau's review of Loblaw's acquisition of Shoppers Drug Mart during which the Bureau uncovered evidence that certain policies may have been implemented for an anti-competitive purpose.
- 77 Competition Bureau completes civil investigation into Loblaw, November 21, 2017.
- 78 During the course of the Bureau's investigation Loblaw ended several of these policies.
- 79 Bureau closes Apple iPhone investigation - No abuse of dominance found related to contracts with Canadian wireless carriers, January 6, 2017.
Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by Apple, January 6, 2017.

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- ⁸⁰ *No conclusion of abuse of dominance in securities market data case - Bureau concludes investigation into allegations against TMX Group*, November 21, 2016.
Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by TMX Group Limited, November 21, 2016.
- ⁸¹ *Competition Bureau completes extensive investigation of Google - Bureau continues to monitor competition issues in the digital economy*, April 19, 2016.
Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by Google, April 19, 2016.
- ⁸² The former practice made it difficult for advertisers who advertised in Google search results to also advertise in the results of other search engines. This practice was ended in response to U.S. Federal Trade Commission concerns.
- ⁸³ *Competition Bureau takes action against Vancouver airport authority - Unjustified restrictions harm competition*, September 29, 2016.
- ⁸⁴ Stargrove Entertainment alleged that music publishers had improperly denied it licences for low-cost popular music CDs that it produced, thereby harming competition. Although the Tribunal granted Stargrove leave to make a price maintenance application in 2015, Stargrove discontinued its price maintenance application in 2016. The Tribunal's decision to grant leave was based on evidence that Stargrove was refused licences due to its low pricing policy and that its removal from the marketplace could adversely affect competition. The Tribunal denied Stargrove leave to make a refusal to deal or exclusive dealing application. It followed the Warner Music case (a refusal to deal case) precedent and found that copyright licence-holders have the right to refuse to license. The Tribunal extended the reasoning in Warner Music to include exclusive dealing as well.
- ⁸⁵ Section 76, Competition Act.
- ⁸⁶ Section 75, Competition Act.
- ⁸⁷ Section 77, Competition Act.
- ⁸⁸ *CarGurus, Inc. v. Trader Corporation*, CT-2016-003, Reasons for Order and Order dismissing an Application for Leave, October 14, 2016.
- ⁸⁹ Refusal to deal and exclusive dealing require that the applicant's business be "substantially" affected by the respondent's conduct.
- ⁹⁰ Section 36(4) of the Competition Act.
- ⁹¹ *Godfrey v. Sony Corporation*, 2017 BCCA 302.
- ⁹² *Fanshawe College v. AU Optronics*, 2016 ONCA 621. This case relates to a proposed class action alleging a price-fixing conspiracy in the liquid crystal display industry.
- ⁹³ *Shah v. LG Chem, Ltd.*, 2017 ON SC 2586 (Div. Ct.)
- ⁹⁴ *Shah v. LG Chem, Ltd.*, [2015] O.J. No. 5168 (S.C.J.).
- ⁹⁵ *Godfrey v. Sony Corp.*, [2016] B.C.J. No. 979 (S.C.). An Ontario court followed the decision in *Godfrey* regarding the umbrella purchaser issue and certified a class proceeding that included umbrella purchasers: *Fanshawe College v. Hitachi, Ltd et al.*, [2016] O.J. No. 4266 (S.C.J.), ¶ 30-40.
- ⁹⁶ Under section 36 of the Competition Act, private parties can commence proceedings to recover loss or damage incurred as a result of conduct contrary to the criminal provisions of the Act.
- ⁹⁷ Public interest privilege protects against the disclosure of information possessed by government where such disclosure is not in the public interest. Recently, the Federal Court of Appeal ruled that the Competition Bureau must demonstrate on a document-by-document basis why particular records should be protected from disclosure. In *Commissioner of Competition v. Vancouver Airport Authority* (2018 FCA 24), the Federal Court of Appeal overturned the Competition Tribunal's decision that found that documents and information given to the Bureau during its abuse of dominance investigation into the Vancouver Airport Authority were protected by class privilege. The Federal Court of Appeal determined that recent Supreme Court of Canada jurisprudence "is against recognizing a class privilege in this case."
- ⁹⁸ *Mancinelli v. Royal Bank of Canada*, 2017 OWS 87.
- ⁹⁹ *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357.