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Canadian Competition Law

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Canadian Competition Law

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This InfoPAK[SM] explores Canadian competition law, examining Canada's *Competition Act* and appropriate case law. Canada's *Competition Act* is similar in many respects to its U.S. counterpart, the Sherman Antitrust Act. However, there are important differences that American companies, doing business in Canada, must take into consideration.

This InfoPAK[SM] was developed by Osler, Hoskin & Harcourt, LLP. For more information about the firm, please see the "About the Author" section of this InfoPAK, or visit the firm's website at www.osler.com.

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Contents

I. Introduction

Canada's *Competition Act*, R.S.C., ch. C 34 (1985) ("*Competition Act*" or "the Act") is the federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. While the Canadian law is similar in many respects to its counterpart in the United States (U.S.)—the *Sherman Antitrust Act*, 15 U.S.C. §§ 1-7—it is different in a number of important ways which U.S. firms doing business in Canada should bear in mind. One point to mention at the outset is that Canadians generally use the term *competition law* rather than *antitrust law*, which is more common in the U.S.

A. Historical Development of Competition Law in Canada

Canadian competition law has a venerable heritage, going back more than a century. Indeed, the precursor of the current Act predates the *Sherman Antitrust Act* by one year. However, for a variety of reasons—such as uncertainty about the federal government's constitutional authority to legislate in the area of business competition—the Act's development was hampered for much of this time.

Until the mid-1970s, Canada's competition law was exclusively criminal in nature, meaning that criminal provisions covered even mergers and monopolies. The criminal law requirement of proof beyond a reasonable doubt, which is difficult to achieve in areas such as mergers, abuses of dominance, and distribution practices, resulted in significant enforcement difficulties. Commencing in 1976 the Canadian government replaced certain criminal prohibitions (for example, those relating to mergers and monopolies) with reviewable practice provisions subject to the civil standard (balance of probabilities) of proof and introduced new reviewable practices provisions governing conduct such as tied selling and exclusive dealing and, in 1986, created the Competition Tribunal ("Tribunal"). The government vested the Tribunal with exclusive jurisdiction to hear applications and issue remedial orders related to the civil reviewable matters.

Also, for many years, private parties had no ability to enforce any provisions of the Act. The enforcement authority rested exclusively with the Commissioner of Competition ("Commissioner") and the Attorney General of Canada. Again, legislative changes in more recent times have allowed private enforcement, although in a more limited form than exists in the U.S.

In March 2009 significant amendments were made to the Act which fundamentally restructured the conspiracy provisions and the merger review process, and increased corporate and individual penalties for criminal offences and introduced administrative monetary penalties ("AMPs"), for abuse of dominance. The most notable amendments are set forth below:

- Implementation of a dual-track criminal/civil system for agreements between competitors whereby hard-core cartel agreements are subject to a strict per se criminal prohibition, while all other types of agreements between competitors are subject to review under a civil enforcement framework with a competitive effects test;

- Expansion of the criminal bid-rigging provisions to include arrangements to withdraw bids or tenders;
- Repeal of the criminal price discrimination, promotional allowances and predatory pricing provisions;
- Decriminalization of the price maintenance provision and addition of a new civil price maintenance provision allowing for a right of private access to the Tribunal;
- Increase in the fines and prison terms for criminal offences;
- Increase in AMPs for deceptive marketing practices and misleading advertising and empowering the Tribunal to order AMPs of up to $10 million for violation of the abuse of dominance provision (or $15 million for a subsequent violation); and
- Restructuring of the merger review process to provide for a two-stage review process, similar to the U.S. regime, and reduction of the three year post-close period during which the Commissioner could challenge a completed merger to one year.

B. Overview of the *Competition Act*

The purpose of the Act is to maintain and encourage competition in Canada in order to achieve the following (and sometimes conflicting) objectives:

- Promote the efficiency and adaptability of the Canadian economy;
- Expand opportunities for Canadian participation in world markets, while recognizing the role of foreign competition in Canada;
- Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- Provide consumers with competitive prices and product choices.

Structurally the Act contains provisions establishing and governing criminal conduct and civil reviewable conduct, including a regime governing mergers.

1. Criminal Provisions

The criminal provisions of the Act cover matters such as:

- Conspiracies/cartels;
- Bid-rigging;
- Deceptive telemarketing and certain misleading advertising practices;

- Multi-level marketing plans, pyramid selling, double ticketing and deceptive prize notices;
- Obstruction; and
- Breach of an order of the Tribunal.

Section 36 of the Act allows private parties who have suffered loss or damage as a result of violations of the criminal provisions of the Act to sue for damages on an individual or class basis. There is no requirement that a person be convicted of a criminal offence under the Act before he or she may be the subject of a section 36 private action for damages. Damages are only available to compensate for actual losses arising from a violation of the Act's criminal provisions—i.e., successful parties may only receive single not treble damages. In addition, an unsuccessful party must pay the legal costs of the successful party in litigation. Finally, the rules about class action certification and recovery of indirect purchaser claims differ from those in the U.S.

2. Reviewable Matters Provisions

The reviewable practices provisions of the Act deal with business conduct that is generally legal but may be prohibited in certain circumstances. The following are the principal reviewable matters under the Act:

- Mergers;
- Abuse of dominance;
- Non-criminal agreements or arrangements between competitors;
- Price maintenance;
- Tied selling, refusal to deal, exclusive dealing and market restriction; and
- Certain misleading advertising practices.

The conduct covered by these provisions is not inherently anti-competitive; it can have pro-competitive or anti-competitive effects or can be competitively neutral. The actual impact on competition depends entirely on the specific facts and circumstances of the case. With the exception of misleading advertising practices, the Tribunal has exclusive jurisdiction to hear applications and issue orders under these provisions of the Act.

With the significant exceptions of the abuse of dominance provisions and the misleading advertising provisions (which allow for a broad range of remedies, including the imposition of significant AMPs) as well as the merger review provisions (which allow for a broad range of remedies, including divestiture and dissolution), remedies available under the reviewable matters provisions are designed only to overcome the effects of practices in the market going forward (for example, prohibition orders), and not to penalize parties for conduct in the past. Importantly, damages are not available to private parties who are injured by the practices.

Applications to seek remedial orders from the Tribunal under the abuse of dominance, merger and non-criminal competitor agreement provisions of the Act are the exclusive domain of the Commissioner. However, private parties (in addition to the Commissioner), upon obtaining leave of the Tribunal, may seek remedies under the price maintenance, refusal to deal, tied selling, market restriction, and exclusive dealing provisions of the Act.

C. Key Players

Responsibility for enforcement of the Act rests primarily with four bodies: (i) the Commissioner and the Competition Bureau; (ii) the Director of Public Prosecutions and the Public Prosecution Service of Canada (iii) the Tribunal; and (iv) the Courts. In addition, as discussed above, the Act does create limited private rights of action, thereby vesting some enforcement power with private litigants.

1. Commissioner of Competition and the Competition Bureau

The Commissioner is an independent official appointed by the federal government to administer and enforce the Act; *Consumer Packaging and Labelling Act* (except as it relates to food); *Textile Labelling Act*; and *Precious Metals Marking Act*. The Commissioner heads the Competition Bureau ("Bureau"), a federal agency within Innovation, Science and Economic Development Canada that implements the Commissioner's administrative, investigative, and enforcement powers. The Bureau has four main branches:

- The Mergers and Monopolistic Practices Branch which: (a) reviews proposed mergers to assess whether the transactions are likely to substantially prevent or lessen competition in the marketplace; and (b) investigates business practices that may have a negative impact on competition, such as abuse of dominance, as well as certain types of potentially anti-competitive agreements or arrangements between competitors.
- The Cartels and Deceptive Marketing Practices Branch which: (a) investigates hard core cartels, including conspiracies, agreements or arrangements among competitors and potential competitors to fix prices, rig bids, allocate markets or restrict supply; and (b) investigates false or misleading representations and deceptive marketing practices identified under the Act as well enforcing related legislation including the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Precious Metals Marking Act* and the *Textile Labelling Act*.
- The Competition Promotion Branch which engages in advocacy and outreach activities to encourage the adoption of pro-competition policies and behaviors by businesses, regulators, government and international partners as well as providing economic analysis in support of enforcement.
- The Corporate Services Branch provides advice, planning, and services for the effective operation of the Bureau's financial, asset, information management, and human resource activities, as well as access to information, privacy, values, and ethics, security and procurement matters. The Branch also provides expertise in complaint management and evidence collection and preservation in support of the Bureau's mandate.

The Commissioner has a broad range of investigative powers, including, for example, the ability to seek on an *ex parte* basis search and seizure orders and production orders pursuant to Act and wiretap authorizations pursuant to the *Criminal Code*.

Unlike criminal matters, in the case of reviewable matters the Commissioner acts as both the investigator and as the prosecutor by applying to the Tribunal for a remedial order. The Competition Bureau Legal Services of the Department of Justice is responsible for providing legal services to the Commissioner and for representing the Commissioner on all matters, other than those for which the Public Prosecution Service of Canada is responsible.

Recommending prosecutions to the Director of Public Prosecutions or bringing applications before the Tribunal are not the only means available to the Commissioner for resolving potential contraventions of the Act. The Commissioner may seek to remedy the matter without resorting to litigation. In this regard, among the tools most often used by the Commissioner is the consent agreement registration procedure established by the Act. This procedure allows the Commissioner and a party to file a consent agreement with the Tribunal which, upon registration, has the same effect as if it were an order of the Tribunal but does not require the Tribunal's approval.

2. Director of Public Prosecutions and the Public Prosecution Service of Canada

When the Commissioner believes that there is sufficient evidence to establish that a criminal offence has been committed, the Commissioner refers the matter to the Director of Public Prosecutions ("DPP").

The DPP heads the Public Prosecution Service of Canada ("PPSC"), an independent agency responsible for the assessment and initiation of federal prosecutions, including those under the Act. While the Bureau investigates matters under the criminal provisions of the Act and the Commissioner makes recommendations to the PPSC on matters such as immunity and leniency and charges to be laid, the grants of immunity and leniency and the decision of whether to commence criminal prosecutions, are the sole responsibility of the PPSC. In the case of leniency, the Court has the sole authority to determine an appropriate sentence.

3. Competition Tribunal

The Tribunal has exclusive jurisdiction over the civil reviewable matters provisions of the Act. The Tribunal is comprised of a rotating panel of Federal Court judges and "lay" members being experts in business and economics. Generally sittings of the Tribunal consist of three to five members of whom at least one is a judicial member, and are presided over by one judicial member. Only judicial members may determine questions of law. Matters adjudicated before the Tribunal are determined based on the civil standard of proof (balance of probabilities).

Only the Commissioner may bring applications to seek remedial orders from the Tribunal under the abuse of dominance, merger, and non-criminal competitor agreement provisions of the Act. Private parties (in addition to the Commissioner), upon obtaining leave of the Tribunal, may seek remedial orders from the Tribunal under the price maintenance, refusal to deal, tied selling, market restriction and exclusive dealing provisions of the Act.

Breach of a Tribunal order constitutes a criminal offence.

4. Courts

The Courts plays an important role in enforcing the Act, including:

- Supervising the Commissioner's use of formal investigatory powers;
- Adjudicating criminal matters;
- Adjudicating applications brought under the deceptive marketing practices provisions as the Commissioner has the choice of bringing such applications to the Tribunal or to the Court;
- Adjudicating appeals of final decisions of the Tribunal; and
- Adjudicating private actions for damages (on an individual or class basis) based on an actual or alleged violation of the criminal provisions of the Act.

II. Conspiracy and Bid-Rigging

A. Conspiracy

The cornerstone of the Act is § 45, which applies to prescribed types of inherently anti-competitive agreements among competitors, including international and domestic cartels and other unlawful conspiracies.

The conspiracy provisions of the Act establish a "dual-track" approach to agreements between competitors. Three categories of agreements are subject to a strict per se criminal prohibition (i.e., proof of the illegal agreement is sufficient for conviction), while all other types of agreements between competitors are subject to review under a non-criminal framework. The Bureau has published Competitor Collaboration Guidelines, which provide a measure of guidance as to the manner in which both the criminal and civil provisions of the Act will be interpreted and enforced.

1. The Criminal Track – Section 45

Section 45 is aimed at hard-core cartel behavior and, in this respect, is similar to § 1 of the Sherman Act in the United States. However, unlike the broadly worded § 1 of the Sherman

Act, § 45 is limited to recognized categories of presumptive illegal behavior.

An important difference between Canadian and American law is that in Canada, there is no limitation period for conspiracy prosecutions. However for conduct prior to March 2010 (when the current law came into force), conspiratorial agreements must be shown to have had an undue effect on competition in the relevant market(s).

Per se criminal liability under § 45 applies to agreements between "competitors" that:

- Fix, maintain, increase or control the price for the supply of a product;
- Allocate sales, territories, customers or markets for the production or supply of the product; or
- Fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

The term "competitor" is defined as including "a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreements or arrangement" described above. While it remains to be seen how this provision will apply to parties who are not currently competitors, the Bureau's Competitor Collaboration Guidelines indicate that this definition does not require them to engage in a detailed market definition exercise. However, the Bureau will have to establish on the criminal burden of proof, (i.e., beyond a reasonable doubt) that the parties to the alleged conspiracy are competitors. This may make it difficult for the prosecution to establish that the test is met by two persons who do not actually compete, but who are merely potential competitors. It also may be difficult to establish that suppliers of differentiated products (e.g., baseball tickets and football tickets; pens and pencils) are competitors. Generally speaking this provision will not apply to customer/supplier or franchisor/franchisee (i.e., vertical as opposed to horizontal) agreements.[1] However, in a non-criminal abuse of dominance case, the Federal Court of Appeal found that a party did not have to directly compete in the market to commit an anticompetitive act in that market. The actions of an association representing its members, who did compete in the market, were found to be reviewable as anti-competitive.[2]

The term "price" is defined broadly to include "any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product."

There are two statutory defences to the *per se* criminal provisions: an "ancillary restraints defence" and a "regulated conduct defence." The ancillary restraints defence applies where the defendant can establish, on a balance of probabilities, that the agreement is:

- Ancillary to a broader or separate agreement or arrangement that includes the same parties; and
- Directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement.

In addition, it would have to be established that the broader or separate agreement, considered alone, does not itself fall within the scope of any of the three categories of *per se* liability. Although it is clear that the ancillary restraints defence is aimed at exempting legitimate business arrangements, there is at least some concern about how the defence may be interpreted. If the words "directly related to, and reasonably necessary for giving effect to" are interpreted too narrowly and without due regard to commercial realities, many types of provisions that are commonly included in agreements between competitors, including non-compete provisions in purchase and sale agreements, may not qualify under this exemption.[3]

In this regard it is important to ensure that care is taken in drafting non-compete provisions in purchase and sale agreements to ensure that the subject matter, duration and geographic scope of such provisions are limited to what is reasonably necessary to protect the legitimate business interests of the acquiror and are not a disguised form of market allocation. Additionally, further questions could arise over whether provisions of legitimate joint venture agreements that touch on price, volumes, sales territories, or customers meet the requirements of the ancillary restraints defence, although the limited jurisprudence to date suggests that such arrangements should not be subject to criminal treatment.[4]

The regulated conduct defence provides a defence to conduct that may be otherwise subject to criminal sanction, if such conduct is regulated by another valid federal, provincial or municipal law or legislative regime. The Act attempts to codify permitted behavior, but does not resolve a fundamental question that has been raised in the jurisprudence: will the regulated conduct defence only be available when the statutory provision in question incorporates an "undue lessening of competition" test (i.e., the applicable standard prior to the amendment of the Act in 2010), a "public interest" test, or other "leeway" that is not present in the *per se* liability approach under the current conspiracy provisions.[5]

Section 45 also incorporates a defence for agreements among corporate affiliates and an export cartel defence.

2. Non-Criminal Administrative Track—Section 90.1

Agreements between competitors that do not fall within one of the three prescribed categories of *per se* liability as defined in the new § 45, are not subject to criminal law scrutiny but rather the Commissioner may review such agreements (including strategic alliances and joint ventures) between competitors to determine whether they are likely to prevent or lessen competition to a substantial extent.

The term "competitor" is defined in essentially the same way in the civil provision as in the criminal provision; however, the civil provision omits the requirement that the parties be competitors in respect of the product that is the subject matter of the agreement.

Section 90.1, unlike § 45, can only be applied to agreements and arrangements that are existing or proposed. Agreements that were entered into in the past but are no longer in place cannot be the subject of review under § 90.1.[6]

On application by the Commissioner, the Tribunal may make a remedial order where the Commissioner is able to prove, on a balance of probabilities, that the agreement "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market." The Tribunal's remedial powers are limited to:

- Prohibiting any person, whether or not a party to the agreement or arrangement, from doing anything under the agreement or arrangement; and
- Requiring any person, whether or not a party to the agreement or arrangement, with the consent of that person and the Commissioner, to take any other action.

Importantly, the Tribunal is not authorized to impose any monetary penalty, nor may private parties sue for damages based on a breach of this section.

It should be noted that this provision allows the Commissioner to review and potentially obtain a remedial order with respect to agreements among competitors which would not be reviewable under the substantive merger provisions because they do not involve an acquisition of a significant interest in a business. This civil agreements provision also sets forth essentially the same non-exhaustive list of assessment criteria and efficiency defence that are provided for in the merger provisions of the Act. This is intended to establish a symmetrical substantive analytical approach for reviewing mergers, strategic alliances and other forms of co-operation between competitors, without in any way biasing the regulatory framework based on the particular form of co-operation. The Bureau has indicated in its Competitor Collaboration Guidelines that most collaborations will be assessed under § 90.1 and that only "the most egregious forms of cartel agreements" will be prosecuted under the criminal provisions in § 45.[7]

3. Foreign Directives

The Act also includes an unusual section on foreign directives, which applies only to corporations and not individuals. Section 46 forbids a corporation doing business in Canada from implementing the following:

> [A] Directive, instruction, intimation of policy or other communication to the corporation from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, [when the] communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of § 45.

A firm may contravene § 46 regardless of whether any individuals in Canada were even aware of the conspiracy. Further, no specific Canadian market effects need to be shown. Thus, the Canadian subsidiary of a multinational entity may be subject to prosecution under this section even when it had no knowledge of, or did not participate in, a conspiracy involving the parent company or an affiliate, and whether or not the agreement actually had any effect on the market in Canada.

It is widely believed that § 46 may be vulnerable to constitutional challenge under the Canadian Charter of Rights and Freedoms,[8] since it imposes criminal liability without the necessary fault requirement of criminal law. To date, there have been no fully litigated cases under § 46, although there have been convictions on the basis of uncontested guilty pleas; thus, there has been no opportunity for a court to consider the constitutionality of § 46 in this context.

B. Bid-Rigging

In Canada, bid-rigging is a criminal offence, and is a separate offence from conspiracy. Section 47 of the Act prohibits agreements in which a participant in a formal bidding process agrees not to submit a bid, agrees with another bidder about the contents of a bid, or, agrees to withdraw a bid. Bid-rigging is a *per se* offence; there is no requirement to show competitive injury to the affected market and thus no need to determine market dimensions or to measure the competitive impact on the market. On the other hand, there is no offence when the parties to the agreement disclose their agreement to the tendering organization prior to making a bid. This disclosure defence is important in practice, since it allows for joint tendering in appropriate circumstances. The penalties for bid-rigging offence include up to 14 years imprisonment and fines in the discretion of the court. Negotiated settlements under the bid rigging provisions have resulted in fines as high as $30 million.[9]

C. Individual and Corporate Liability

The party liability provisions of Canada's Criminal Code[10] apply to offences under the Act—that is, both individuals and corporations may be charged either because they (as principals) actually committed the offence or because they (as parties) aided or abetted the commission of an offence by a third party. In the case of a conspiracy, individuals and corporations may be charged as 'aiding and abetting' a conspiracy when they knew its objects, intended to help the conspirators and either did, or failed to do, something that had the effect of helping them. The Bureau has obtained convictions under the Criminal Code provisions, although generally convictions have resulted from guilty pleas.

Under other sections of the Criminal Code, a corporation may be criminally liable for a fault offence (such as a § 45 conspiracy) when one of its senior officers (such as a director, the chief executive officer or the chief financial officer), acting as such, was a party to the offence. The corporation may also be held liable when the senior officer directed the work of other employees so that they committed the act or made the omission specified in the offence, or failed to take reasonable measures to stop another employee from being a party to the offence.

D. Geographic Scope of Application

Common law in Canada requires that an offence be committed within the country's national boundaries. However, typically the key elements of international antitrust conspiracies occur outside of Canada; thus, this territorial link to establish 'subject matter jurisdiction' over the offence is normally absent in Canadian investigations. In *Libman v. The Queen*,[11] (not an antitrust case) the Supreme Court of Canada found that, in order to establish Canadian jurisdiction, the prosecution must show that the conspirators had a "real and substantial link" to Canada.

While it remains unclear whether in a contested case a court would find that mere sales within Canada constitute such a link, the Bureau takes the position that cartelized sales into Canada (including those of products that incorporate cartelized components) will enable subject-matter jurisdiction over the conspiracy offence. A significant number of international cartel cases have been resolved without addressing this issue, on the basis of settlements pursuant to which parties have attorned to Canada's jurisdiction and pled guilty to the conspiracy offence in Canada.[12]

A second issue concerns personal jurisdiction. When a person resides outside of Canada, service of process to establish the court's power to try that person (when the defendant has not otherwise accepted the jurisdiction of the Canadian court) has proven to be difficult on occasion. Service of process through the mail, as allowed under provincial legislation, has been held to be insufficient to establish jurisdiction over a corporation.

However, extradition of individuals to Canada (or from Canada) is available in limited circumstances under Canada's Extradition Act and relevant treaties. In 2014, for the first time, a Canadian national was extradited from Canada to the United States, to face antitrust-related charges.[13]

Importantly, the Bureau has recently expanded its level of cooperation with the Antitrust division of the U.S. Department of Justice. As many conspiracy investigations have a North America-wide impact, the Bureau and U.S. Department of Justice often work together. In a 2016 settlement, a Japanese auto parts manufacturer agreed to pay a US $130 million penalty in the U.S. in respect of sales in both Canada and the U.S.[14]

E. Penalties

Conspiracy offences carry a possible maximum fine of $25 million and a jail term of up to fourteen years. The government may also seek fines in excess of the statutory limits by charging a party with multiple counts of an offence or under other provisions of the Act that have no such limitation as they have done in a number of cases.[15]

To date, fines in the large international cartel cases have been established through negotiated plea agreements. In this regard one judge has remarked, "In the context of competition law, our courts have repeatedly expressed and emphasized that fines must not become merely a licence fee or a cost of doing business…."[16]

Fines in negotiated settlements are typically determined with reference to a percentage of the Canadian sales of the product or service in question over the period of the conspiracy, with the Bureau's starting point or "proxy" for a cartel overcharge being 20%. However, as provided under the Bureau's Immunity and Leniency Programs (discussed below), parties that voluntarily disclose their wrongdoing and who fulfill the cooperation and other requirements under that program may receive reductions of up to 50% of the fine that would normally be imposed.

While the use of imprisonment as a penalty for individuals involved in cartel activities has historically been relatively uncommon, jail sentences have been imposed in certain cases, as have conditional sentences that include a community service component.[17]

The federal government's Integrity Framework (also referred to as the Debarment Policy) also has important implications for entities that are convicted of or plead guilty to certain offences under the Act, including conspiracy and bid-rigging. Under the Debarment Policy guilty parties (including those that plead guilty under the Leniency Policy discussed below) are prohibited from contracting with the federal government for up to 10 years, though this period of debarment can be reduced up to 5 years for cooperation with the investigation. A similar regime also applies in the province of Québec. Accordingly, for parties that derive a significant portion of their revenues from federal government (or Québec) contracts, debarment may be even more economically damaging than the sanctions provided for under the Act.[18]

F. Canada's Immunity and Leniency Programs

The Bureau has an immunity program that is very similar to the U.S. amnesty regime. Through this program, an applicant (most often a corporation but in some instances an individual) may seek immunity from prosecution under the conspiracy and bid-rigging provisions of the Act.

The Bureau's Leniency Program complements its Immunity Program. Together these initiatives aim to create incentives for organizations and individuals to report to the Bureau potential criminal activity prohibited by the Act and to cooperate in the prosecution of such conduct.[19]

The Bureau has published detailed "frequently asked questions" or "FAQs" which highlight the key features of these programs, which include the following:

- Immunity and leniency are available to both organizations and individuals for criminal Act offences, other than single party offences, and including "aiding or abetting" offences. Most importantly, they are available for conspiracy and bid-rigging offences.
- Time is of the essence as immunity from prosecution is only available to the first applicant satisfying the eligibility criteria.
- Immunity from prosecution is not available if the applicant coerced others to participate in the illegal activity or if the Bureau is already aware of the offence.
- Leniency in sentencing may be available to a party that does not qualify for immunity but has come forward to resolve its criminal liability and cooperate with the Bureau's investigation and any subsequent prosecution, among other requirements.
- The immunity/leniency process commences with a statement known as a "proffer." The proffer is generally provided orally on a "without prejudice" basis by the applicant's counsel and describes, in detail, the illegal activity, the applicant's role in such activity and the effect of such activity in Canada, together with an outline of supporting evidence and witnesses.
- The identity of an immunity applicant will typically remain confidential until charges are laid against other participants to the offence, and disclosure of the Crown's case to the accused is required.

- Leniency applicants must plead guilty under a formal plea agreement and file admissions as to facts.
- Fine recommendations for leniency applicants typically start at the higher of 20% of the applicant's volume of commerce and the statutory maximum fine. Up to half of the fine may be discounted for "first-in" leniency applicants (i.e. following the immunity applicant), and up to 30% may be discounted for "second-in" applicants. Eligibility for subsequent leniency applicants depends on when the applicant seeks leniency and the timeliness of its cooperation.
- Directors, officers, and employees of the immunity and leniency applicants may avoid prosecution provided certain cooperation requirements are satisfied.
- A grant of immunity, or leniency, will not protect a party from potential civil liability for damages.

The immunity program has been a useful enforcement tool for the Bureau, generally providing information that leads to the successful prosecution of parties involved in illegal behaviour. However, in some instances the results have been less favourable. In the chocolate price-fixing investigation an immunity applicant provided the Bureau with information that resulted in one accused pleading guilty and paying a $4 million fine. However, the eight-year investigation concluded in 2015 with charges being stayed against the remaining three defendants.[20]

In October 2017, the Bureau released recommendations to revise the immunity program. The recommendations propose to make significant changes to the evidence gathering process including audio-recording proffers, audio and/or video recording witness interviews and requiring immunity applicants to provide the Bureau with details regarding the nature of the items over which privilege has been claimed, and the specific privilege being claimed on each item. The Bureau's recommendations also adds an intermediary stage to the process, referred to as the Interim Grant of Immunity, which would provide applicants with provisional immunity during the investigation period as long as they continue to cooperate with the investigation.

G. Trial and Plea Practices

A comprehensive discussion of Canadian and American trial and plea practices in the area of competition law is beyond the scope of this chapter. However, there are several differences in approach that are worth noting, including the following:

- The unavailability of no contest (*nolo contendere*) pleas in Canada.
- There is no time limitation on the prosecution of cartel cases in Canada.
- There are no corporate jury trials in Canada for anti-competitive offences.
- Canadian judges are not bound by joint plea and sentencing submissions (but in practice are inclined to impose jointly submitted recommendations).
- Plea agreements are not made public in Canada.

- Defendants do not have the substantive right in Canada to withdraw pleas once entered but must seek remedies through the appellate courts.

III. Distribution Practices

Distribution practices break down into price-based and non-price based practices. Price-based practices were historically dealt with as criminal matters. However, in March 2009, Canada's criminal laws respecting price discrimination, geographic price discrimination, promotional allowances and predatory pricing were repealed. Additionally, the criminal offence of price maintenance was repealed and replaced with a civil reviewable practice of price maintenance. Predatory pricing is now dealt with exclusively under the abuse of dominance provision, discussed in Section V, "Abuse of Dominance."

Both price and non-price based practices are dealt with under the reviewable practices provisions of the Act. The principal provisions, aside from abuse of dominance, are those relating to refusal to deal, exclusive dealing, tied selling, market restriction (all non-price distribution practices) and price maintenance (a price-based distribution practice).

The practices these provisions cover are not criminal offences; rather, they are matters for review by the Tribunal. Such practices can have pro-competitive or anti-competitive effects or they can be competitively neutral; they are not regarded as inherently anti-competitive. Their actual impact on competition depends entirely on the specific facts and circumstances of the case.

The Commissioner may apply to the Tribunal for relief with respect to any of these distribution practices. However, a private party may only do so with leave of the Tribunal. In some circumstances the practices being examined under these distribution practices provisions could also be examined under the abuse of dominance provision. However, an alleged abuse of dominance may not be the subject of a private application because there is no private right of action for abuse of dominance.

A common characteristic of the relief available for all such reviewable practices is that, while the Tribunal grants relief when it determines that the conduct contravenes the law, the relief itself only applies prospectively, and largely in the form of prohibition or cease and desist orders. The Tribunal does not have jurisdiction to award damages for distribution practices that are found to be anti-competitive. However, a party that fails to comply with a Tribunal order commits a criminal offence and is then potentially exposed to civil liability.

The Commissioner may enter into a consent agreement with any person alleged to have engaged in reviewable conduct. A consent agreement is a settlement procedure, but it must only include terms that could be the subject of a Tribunal order. A consent agreement may be filed with the Tribunal for immediate registration, thereby investing it with the force of a Tribunal order.

One of the main differences between Canadian and U.S. law as it applies to non-price distribution practices is that in Canada, such practices are dealt with under provisions of a statute, whereas in the United States, they are largely governed by jurisprudence.

Another significant difference relates to the types of remedies that are available. In the U.S., treble or punitive damages are available, as is injunctive relief. In Canada, injunctive relief is available, but as noted, the Tribunal does not have the authority to award damages or to impose fines with regard to any of these practices (although the Tribunal may impose civil penalties for abuse of dominance). The Tribunal is effectively limited to issuing behavioral orders, such as an order to cease a particular activity or to take positive steps to restore competition (e.g., requiring a supplier to supply a particular customer). The Tribunal may also decide not to issue an order in a particular case, notwithstanding that all the necessary elements of the practice have been established. Importantly, complainants are not able to successfully bring a civil action for damages based on the breach of the reviewable trade practice provisions.

A. Refusal to Deal

1. Elements of the Practice

The refusal to deal provision (§ 75 of the Act) allows the Tribunal to order a supplier of a product (which means either articles or services under the Act) to accept a customer on usual trade terms when the customer's business is substantially affected or the customer is precluded from carrying on business because it cannot obtain adequate supplies of the product on usual trade terms, due to insufficient competition among suppliers. The customer must be willing and able to meet the supplier's usual trade terms, and the product must be in ample supply. The Tribunal must also find that the refusal to deal is having, or is likely to have, an adverse effect on competition.

2. Compliance and Enforcement

To avoid concerns under the refusal to deal provision, it is important to bear in mind the following considerations:

- It is important to exercise care when establishing a supply arrangement.
- It is important to ensure that proposed changes in distribution policy take the unique Canadian legal requirements into account.
- It is desirable to ensure that all relevant documents and correspondence accurately reflect the business justification for terminating supply.

3. Relevant Case Law

Prior to 2002, there were only two fully litigated cases in this area, *Chrysler* and *Xerox*, both of which involved situations in which a manufacturer stopped supplying certain customers with proprietary parts needed to repair and service its products.[21] Since 2002 (when the Act was amended to allow private parties to seek relief under the distribution practices provisions with the leave of the Tribunal), there have been a number of applications for leave to commence private applications, several of which have been granted.

The first fully litigated private application [22] was decided in December 2006. This case arose after the Bank of Nova Scotia terminated banking services that B-Filer claimed were essential to its operation of an Internet debit payment service. A second fully litigated case in this area was commenced in March 2008 by Nadeau Poultry Farm, a New Brunswick-based chicken processor. In that case, Nadeau Poultry Farm claimed that the decision of certain live chicken suppliers to stop supplying Nadeau Poultry Farm with live chickens constituted a refusal to deal under the Act. An interim injunction requiring continued supply on usual trade terms was granted in this proceeding in June 2008,[23] however, the case was ultimately dismissed by the Tribunal in June 2009 and the Tribunal's decision was affirmed by the Federal Court of Appeal in 2011.[24]

a. Definition of Markets and the Inadequate Supply of a Product in a Market

One key issue that arises in connection with refusal to deal cases is the definition of markets, since several requirements under the refusal to deal provision must be satisfied in relation to a market, as follows:

- Whether the customer is able to obtain adequate supplies of the product in the relevant market;
- Whether there is insufficient competition among suppliers of the product in the market; and
- Whether, as a result of the refusal, there is, or is likely to be, an adverse effect on competition in the market.

In the refusal to deal cases to date, the Tribunal has defined the relevant product market extremely narrowly. For example, the Tribunal said in *Chrysler* that the ultimate test concerns the effect on the business of the person who was refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of product under § 75 is the buyer's customers.

In *Chrysler*, since the customers specified genuine Chrysler auto parts, the product in question was defined as Chrysler-branded auto parts. In *Xerox*, the product market was defined as Xerox copier parts. In *B-Filer*, the Tribunal agreed with the approach in *Chrysler* and *Xerox* and re-stated the *Chrysler* test as follows: "For the purposes of [paragraph] 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products."

b. Business Substantially Affected

When determining whether a business is substantially affected due to its inability to obtain adequate supplies, the Tribunal has said that it asks the following four questions:

- Does the product account for a large percentage of the overall business?
- Is the product easily replaced by other products the business sells?
- Does the sale of the product use up capacity that could be devoted to other activities?
- Is the product used or sold in conjunction with other articles and services so that the effect on the overall results of the business may be greater than indicated by the volume of the product purchased?

The Tribunal also stated in *Chrysler* that "the effect on the entire activity of which the refused supplies are a part" must be considered when determining whether a business is substantially affected. The Tribunal also found in that case that the customer's business of selling Chrysler Canada auto parts was substantially affected, regardless of the increase in sales and profits in other unrelated parts of its business.

In *Sears Can. Inc. v. Parfums Christian Dior Can. Inc.*,[25] the Tribunal dismissed an application by Sears Canada asking for leave to bring a case under § 75 seeking re-supply of Dior and Givenchy products. Sears' sales of these products represented approximately CAN$16 million annually, in comparison to its total annual revenue from sales of all products of about CAN$6 billion. The Tribunal observed that the case law consistently required that the refusal have a substantial effect measured in the context of the entire business. The CAN$16 million was, therefore, insignificant in the context of Sears' overall business. Even if sales of other products at Sears generated by the Dior and Givenchy products were included, it would not be substantial in the context of the overall business.

The Tribunal has not yet had a fully litigated case in which the customer had never previously been supplied. It is not clear whether or how § 75 would apply in such a circumstance.

c. Insufficient Competition in the Market

The refusal to deal provision requires that the person who has been refused supply of the product be unable to obtain adequate supplies of the product elsewhere, because of insufficient competition among suppliers of the product in the market.

In *Xerox*, the Tribunal stated that "a particular market situation must exist at the time of the refusal, a situation that can fairly be described as insufficient competition among suppliers. How much competition between suppliers is insufficient will depend on the facts of the particular case.[26] "Accordingly, a market with only one supplier is clearly one with insufficient competition, whereas a market in which there are numerous suppliers acting independently, is likely sufficiently competitive. The Tribunal also stated in *Xerox* that insufficient competition in the product market must be the overriding reason that adequate supplies are not available.

A central finding in *Nadeau* was that Nadeau did not establish that live chickens were in ample supply or that the reason it was unable to obtain supply was because of insufficient competition amongst chicken suppliers because of the regulated strict production quota for live chickens under the applicable supply management regime.

d. Business Justification Defence

In *Xerox*, the Tribunal commented that a business justification defence may be used to support a decision to refuse supply. For example, if a manufacturer decides to change its distribution system, "[i]t may very well be that the inability to obtain supply in such circumstances could be related to a legitimate business decision unconnected to anti-competitive factors."[27] However, it is worth noting that the Act does not require the person refusing supply to have an anti- competitive purpose for doing so.

When a business justification defence was raised in *B-Filer*, the Tribunal agreed "as a matter of law, any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason." The Tribunal then accepted the argument that the supplier (a bank) had been put at legal, regulatory and reputational risk due to B-Filer's various actions, which included breaches of the bank's privacy and confidentiality rules.

e. Usual Trade Terms and Ample Supply

Two additional requirements in refusal to deal cases relate, first, to the customer's willingness and ability to meet the supplier's usual trade terms, and, second, to the product being in ample supply. In the B-Filer case, the bank argued that B-Filer was unable to meet the bank's usual trade terms for the services sought. Due to the volume and type of money transfers B-Filer made, the bank argued that B-Filer did not meet the terms that the bank imposed on either small businesses or commercial-sized customers. Also, the bank argued it never would have accepted B-Filer as a customer had it had a proper appreciation of the type of business it conducts (i.e., helping customers make Internet payments to offshore Internet casinos).

In its *B-Filer* decision, the Tribunal discussed the meaning of *usual trade terms*, but did not come to any final conclusion with respect to its limits. It noted that the expression *trade terms* is defined relatively restrictively in subsection 75(3) to mean "terms in respect of payment, units of purchase and reasonable technical and servicing requirements." After reviewing the legislative history of the provision, the Tribunal expressed the view that this restrictive definition is more appropriate when the product at issue is a good, rather than a service.

As noted above, a central finding in *Nadeau* was that Nadeau did not establish that live chickens were in ample supply or that the reason it was unable to obtain supply was because of insufficient competition amongst chicken suppliers because of the strict production quota for live chickens. With respect to the test for determining whether a product is in ample supply, the Federal Court of Appeal held that a product is in ample supply when the producers of that product have the capacity to increase production in a timely way to meet increases in demand for the product. The Federal Court of Appeal held that under the poultry supply management system, producers are unable to increase production to meet new demand and that "a market in which increased demand for a product can only be accommodated by diverting supplies from one customer to another is not a market in which the relevant product is in ample supply."

In *Can. (Dir. of Investigation and Research) v. Warner Music Can. Ltd.*,[28] the Tribunal concluded that licenses are not a product in ample supply for the purposes of § 75, given their exclusive nature. This was reaffirmed by the Tribunal in *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*.[29] Stargrove filed a complaint against the copyright holders of certain musical titles for not issuing mechanical licenses to allow Stagrove to publish the songs on compact discs. The Tribunal denied Stargrove's application, stating that "[r]elief is simply not available under [section 75] where the impugned conduct involves the refusal to grant a license over copyrighted material".

f. Meaning of Adverse Effect on Competition

The requirement that the refusal to deal must have, or be likely to have, an adverse effect on competition in a market was added to the Act in 2002 (paragraph 75(1)(e)). The Tribunal provided its insight into the meaning of this provision in the *B-Filer* case. The Tribunal held that the provision requires a comparative "assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal."[30] Competitiveness is evaluated in relation to the degree of market power that prevails in the market. The question then is whether, as a consequence of the refusal to deal, the remaining market participants are placed in a position of created, enhanced or preserved market power.

The main difference between paragraph 75(1)(e) and other similar sections in the Act, such as § 79 (abuse of dominance) and § 92 (mergers), is that the practice of refusal to deal does not require that the adverse impact be substantial. The Tribunal's only comment in this regard in the *B-Filer* case was that an adverse impact is less than a substantial one.

In *Nadeau*, the Tribunal reaffirmed that its approach to determining whether there has been an "adverse" effect on competition is similar to its approach to assessing whether there has been a substantial prevention or lessening of competition, with the principal difference being that the degree of negative impact on competition necessary to establish an "adverse" effect on competition is lesser. The Tribunal also held that for a refusal to deal to have an adverse effect on the market, remaining market participants in the downstream market in which the compliant sells its product would have to be placed in a position of "created, enhanced or preserved market power" due to the refusal. The Federal Court of Appeal affirmed this approach holding held that the Tribunal did not err in limiting the relevant market to the downstream market.

B. Exclusive Dealing

1. Elements of the Practice

Exclusive dealing, as defined in subsection 77(1) of the Act, occurs when a supplier, by offering more favorable terms or conditions, requires or induces a customer to deal only or primarily in products (which includes goods and services) supplied or designated by the supplier, or to refrain from dealing in a specified class of products, except as supplied by the supplier. For example, a manufacturer could require its distributors to refrain from dealing in competitors' products.

Under subsection 77(2), the Tribunal has authority to order suppliers not to engage in exclusive dealing, but only when it determines that the particular practice is likely to substantially lessen competition. In short, the Tribunal may issue an order when the exclusive dealing:

- Is engaged in by a major supplier of a product in a market or is widespread in a market,
- Is likely to impede the entry or expansion of sales of a firm or product, or is likely to have any other exclusionary effect, and
- Substantially lessens competition.

The Tribunal does not prohibit exclusive dealing when the practice is only engaged in to facilitate entry into a market. Also, exclusive dealing arrangements between affiliated companies are exempt from these provisions.

2. Compliance and Enforcement

To avoid concerns under the exclusive dealing provision, it is important to bear in mind the following considerations:

- Consider whether contractual terms economically induce a customer into an exclusive dealing situation.
- Consider whether there is an argument that, under a realistic market definition, the supplier enjoys a strong market position.
- Consider whether any business justification for engaging in exclusive dealing could fit within applicable statutory defences.

3. Relevant Case Law

The most recent case in which the Tribunal reviewed the practice of exclusive dealing was the *Can. (Comm'r of Competition) v. Can. Pipe Co.* ("*Canada Pipe*") case.[31] While *Canada Pipe* was predominantly about abuse of dominance, the Commissioner also took the position that the company's loyalty-based discount program contravened the exclusive dealing provision of the Act.

The Tribunal concluded that Canada Pipe's discount program constituted a practice of exclusive dealing and, furthermore, that Canada Pipe was a major supplier of the products in the relevant markets. However, the Tribunal dismissed the Commissioner's application because there was insufficient evidence to establish that the discount program in itself had impeded the entry or expansion of firms in the markets, had any other exclusionary effect on the market, or had caused, or was likely to cause, a substantial lessening of competition.

The Federal Court of Appeal, which heard the appeal of *Canada Pipe*, concluded that when determining whether there is a substantial lessening of competition, the Tribunal must consider the "but for" test—that is, whether the relevant markets in the past, present and future would be substantially more competitive but for Canada Pipe's discount program. The court also found that when determining whether there are any exclusionary effects arising from the practice, the Tribunal must examine the purpose or character of the practice by considering the reasonably foreseeable, objective effects of the practice on competitors (not just on consumers), any business justification and any evidence of subjective intent.

C. Tied Selling

1. Elements of the Practice

The practice of tied selling as described in subsection 77(1) of the Act refers to a practice under which a supplier, as a condition of supplying a particular product (good or service) to a customer, requires or induces (by offering more favorable terms or conditions) that customer also to acquire some other product from the supplier or to refrain from using or distributing a competitor's product. For example, as a condition of getting access to a special machine, a customer could be required only to buy its consumable supplies for the machine from approved suppliers.

Under subsection 77(2), the Tribunal has the authority to order suppliers not to engage in tied selling, but only after finding that the particular practice is likely to substantially lessen competition. The Tribunal may issue an order when the tied selling:

- Is engaged in by a major supplier of a product in a market or is widespread in a market,
- Is likely to impede the entry or expansion of sales of a firm or product, or is likely to have any other exclusionary effect, and
- Substantially lessens competition.

The Tribunal may not issue a remedial order when the tied selling is reasonable, given the technological relationship between the products or when it is reasonably necessary for a person in the business of lending money to better secure its loans. As is the case with exclusive dealing, tied selling arrangements between affiliated companies are exempt from the Act.

2. Compliance and Enforcement

To avoid concerns under the tied selling provisions, it is important to bear in mind the following considerations:

- Consider whether contractual terms economically induce a customer into a tied selling situation.
- Consider whether there is an argument that, under a realistic market definition, the supplier enjoys a strong market position.
- Consider whether any business justification for engaging in tied selling could fit within applicable statutory defences.

3. Relevant Case Law

Can. (Dir. of Investigation and Research) v. Tele-Direct (Publications) Inc.[32] is the only case in which the Tribunal has reviewed in any detail the practice of tied selling. In that case, Tele-Direct tied the selling of its telephone directory space and telephone directory advertising services. The Tribunal stated that tied selling does not necessarily mean that the condition tied to the sales has to be a term in an explicit contractual document: "[the conditions] may be economic conditions which have the effect of precluding choice of supplier. Whether customers actually do have an effective choice or not is a question of fact to be determined on the evidence before us, not of the legal nature of the purchase arrangement."

The *Tele-Direct* case also confirmed the need for the practice to involve the selling together of two distinct products. The Tribunal stated that in order to determine whether the two products are in fact separate, two questions must be answered:

- Is there a demand that the two products be offered separately?
- Is it efficient to separate the products, or would doing so only result in higher costs that would outweigh the benefits to those who want them separately?

D. Price Maintenance

1. Elements of the Practice

Historically, price maintenance under § 61 of the Act was a *per se* criminal matter and was actively enforced by the Bureau. The 2009 amendments to the Act replaced the criminal regime with civil price maintenance provisions and this has resulted in a corresponding significant shift in enforcement policy. Manufacturers and wholesalers have substantially more flexibility with respect to pricing programs, including minimum advertising pricing policy, than they had under the old criminal regime.

The provision applies not only to suppliers of products (which the Act defines as comprising both goods and services), but also to credit card lenders, and to holders of intellectual property rights. Under § 76(1)(a)(i), the Commissioner or a private party granted leave may bring an application for relief to the Tribunal if it can be demonstrated that "a person has directly or indirectly by agreement, threat, promise or any like means influenced upward, or discouraged the reduction of, the price at which the person's customer, or any other person to whom the product comes for resale, supplies or offers to supply or advertises a product within Canada, and that the conduct is having or is likely to have an adverse effect on competition".

Importantly the remedies that are available if the Tribunal is satisfied that the price maintenance activity is likely to have an adverse effect on competition in a market are very limited. The Tribunal is permitted, upon application of the Commissioner or a private person with leave, to make an order prohibiting the price maintenance activity or requiring the supplier to supply on usual trade terms. The Tribunal is not empowered to order financial penalties. In addition, no provision is made to allow a private party to sue for damages based on a breach of these provisions.

2. Use of Suggested Retail Prices and Disclaimer Requirements

There is a presumption in § 76 that suggested retail prices constitute price maintenance. However, the Act provides that this presumption can be avoided if the supplier also makes it clear in communications with the customer, including advertising, that the customer is not required to abide by suggested prices and that the relationship with the supplier will not suffer should the customer choose not to do so.

3. Refusals to Supply

Similar to the other price maintenance provisions under the Act, refusals to supply of this kind are subject to review by the Tribunal. The Tribunal may make an order prohibiting a refusal to supply a product to or otherwise discriminate against a person because of that person's low pricing policy, if the refusal is likely to adversely impact competition in a market. This may prevent a supplier from simply cutting off supply to a reseller that sells the supplier's products at a discount in circumstances where the adverse effect on competition test may be met. However, a supplier may refuse to supply or may terminate supply when the supplier is motivated by other reasons, such as having reasonable grounds to believe that the discounting reseller was engaged in one of the following:

- Loss leadering—that is, selling the supplier's products below cost for advertising purposes;
- Bait and switch selling—that is, selling products not for profit but to attract customers in the hope of selling them other products;
- Misleading advertising; or
- Failing to provide reasonable service for the products.

4. Secondary Boycotts

The revised refusal to supply provisions also applies to secondary boycotts. Attempts by threat, promise, or any like means to induce a supplier—as a condition of doing business with that supplier—to refuse to supply a product to another person or class of people because of that person's low pricing policy are subject to review by the Tribunal. This is true whether the supplier is within or outside Canada.

5. Bureau Guidance

In 2014, the Bureau issued long awaited guidelines on its approach to enforcement of the civil price maintenance provision.[33] In its guidelines, the Bureau recognizes that price maintenance can be potentially pro-competitive, even when engaged in by firms with a significant market presence. As a general matter, the Bureau is unlikely to have concerns about price maintenance conduct that is "demand-enhancing." For example, the Bureau has recognized that price maintenance conduct can enhance non-price dimensions of intra-brand competition, such as service and inventory levels, and can correct "free-riding" among retailers. The Bureau also states that price maintenance conduct can stimulate inter-brand competition among competing brands of products, such as by facilitating the entry or expansion of competitors by encouraging retailers to stock and promote the supplier's products, or by encouraging retailers to engage in marketing efforts for a particular product.

Smaller competitors acting independently are not likely to face enforcement action under § 76. The Bureau has indicated it will take enforcement action only if price conduct is likely to "create, preserve or enhance market power."

The guidelines also make clear that price maintenance conduct may potentially raise concerns under other provisions of the Act (e.g., §§ 45 and 79) as well as §76. For example:

- Suppliers may use price maintenance conduct to facilitate less vigorous price competition among them or to help police a price-fixing arrangement among them.
- One or more retailers or franchisees may compel a supplier to adopt price maintenance conduct to facilitate less vigorous price competition among them or to help police a price-fixing arrangement among them.
- An incumbent supplier may use price maintenance conduct to guarantee margins for retailers to make them unwilling to carry the products of rival or new competitors to the supplier.
- A person may compel a supplier to adopt price maintenance conduct with the objective of excluding competition from discount or more efficient retailers.

6. Relevant Case Law

To date there has been only one litigated case under § 76 of the Act, and in that case the Tribunal determined that § 76 was not applicable to the facts at issue. In December 2010, the Commissioner brought an application against Visa and MasterCard before the Tribunal alleging that rules imposed on their customers including relating to prohibiting merchants from imposing surcharges for accepting certain cards and mandating acceptance of all Visa and MasterCard contravened § 76[34]. The Tribunal dismissed the Commissioner's application, finding that as a matter of law, the requirement that a product come for resale to a customer had not been established. The Tribunal held that for § 76 to apply, there must be a resale by a person's customer of the same or a similar product to that sold to the customer. The Tribunal concluded that acquirers obtain credit card network services from Visa and MasterCard but do not resell such services to merchants; rather acquirers provide merchants a different set of services that enable merchants to accept credit cards. The Commissioner had contended that § 76 does not require that a product or service (in this case, credit card networks' services) be resold, but only that the person whose prices are being influenced upward or discouraged from being reduced be a "customer."

Despite concluding that § 76 did not apply, the Tribunal engaged in an alternative analysis in the event it was wrong in its interpretation of section or its application to the facts at issue and concluded that the remaining elements of § 76 would be met, including the adverse effect on competition test. However, the Tribunal members were also unanimous in finding that even if the Commissioner had made out her case, they would have exercised their discretion in order to decline to issue the order sought by the Commissioner because regulation rather than a Tribunal order would be the appropriate mechanism

7. Comparison to U.S. Law

The Canadian treatment of resale price maintenance is similar to the "rule of reason" approach taken by the United States Supreme Court and a rule of reason/market effects based approach has been endorsed by the Bureau in its recently issued guidelines on the provision.[35] However certain judicially developed U.S. doctrines, such as the *Colgate* doctrine, are not part of the applicable law or jurisprudence in Canada. Furthermore, the potential consequences for an adverse finding under § 76 of the Act are much more limited than the potential consequences of being found to engage in resale price maintenance in the U.S.

E. Other Distribution Practices

1. Market Restriction

Market Restriction is defined under subsection 77(1) of the Act as a practice whereby a supplier of a product requires a customer to supply the product only in a defined market or exacts a penalty when the customer supplies the product outside the defined market.

Under subsection 77(3), the Tribunal has the authority to order suppliers not to engage in market restriction, but only when it has determined that the practice, because a major supplier of a product engages it in or because it is widespread in relation to a product, i likely to substantially lessen competition. However, the Tribunal may not make such an order under subsection 77(1) when a company only engages in the practice of market restriction for a reasonable period of time to facilitate entry into a market. Market restriction arrangements between affiliated companies are also exempt from the Act.

Although the Bureau has investigated instances of alleged market restriction (for example, in connection with restrictions on Canadian exports of pharmaceuticals to the U.S.), market restriction has never been the subject of a proceeding before the Tribunal.

2. Delivered Pricing

Delivered pricing, as defined in subsection 80(1) of the Act, refers to the practice of refusing to supply on the same trade terms an actual or potential customer at a location where the supplier supplies another customer. Under § 81 of the Act, the Tribunal may make an order prohibiting any supplier from engaging in delivered pricing when such practice is engaged in by a major supplier of an article in a market or is widespread in a market, with the result that an actual or potential customer is denied an advantage it would otherwise have. Only the Commissioner, and not private parties, may make an application to the Tribunal for relief under this section. Section 81 has never been the subject of a case before the Tribunal.

3. Foreign Refusal to Supply

Under § 84 of the Act, the Tribunal may order any person in Canada, through whom or on whose behalf a foreign person exerts its buying power by requiring a foreign supplier to refuse to supply a product or to otherwise discriminate in the supply of a product to another person in Canada, to do the following:

- Supply that other person with the product at the same laid-down cost in Canada and on the same terms and conditions as the first person obtained the product from the foreign supplier; or
- Not to deal, or to cease to deal, in Canada in the product of the foreign supplier. Section 84 has never been the subject of adjudication by the Tribunal.

IV. Mergers

Mergers are reviewable practices under the Act. The Tribunal may block a merger in its entirety or order divestitures or other remedies (including dissolution) when it finds that a merger substantially prevents or lessens competition. The Commissioner has exclusive jurisdiction to refer mergers to the Tribunal. Private parties may not challenge a merger in Canada.

Two aspects of Canadian merger law—pre-merger notification and merger review—are both potentially relevant to any merger transaction. The parties involved in certain types of transactions that exceed certain financial size thresholds must notify the Bureau of the transactions, whether or not they give rise to any substantive competition concerns.

However, the Commissioner may challenge any proposed merger that raises substantive competition law concerns, regardless of whether it requires notification. The nature of the substantive competition law issues influences both the form and content of any filing the parties may make as well as the nature of the approval or clearance the parties may seek for their transaction. The nature of the potential substantive issues also dictates the time and information the Bureau requires to complete its review.

A. Pre-Merger Notification

Canada has a two-stage merger review process similar to that in the United States. The filing of notification forms triggers an initial review period of 30 days, followed by a discretionary second stage review analogous to a "second request" in the United States.

1. Notification Thresholds

Parties need not notify the Bureau of all mergers. Notification is required only for certain types of transactions (asset and share acquisitions, amalgamations and the creation or acquisition of an interest in a combination), and then only when the transaction exceeds both of the following financial thresholds:

Party size threshold:

- When the parties to the transaction, together with all of their affiliates, have assets in Canada the aggregate book value of which exceeds $400 million; or
- When the parties to the transaction, together with all of their affiliates, have aggregate gross revenues from sales in, from, or into Canada that exceed $400 million.
- Transaction size threshold for major transaction types:
- For an acquisition of assets in Canada of an operating business, when the aggregate book value of those assets, or the gross revenues from sales in or from Canada generated from those assets, exceeds $92 million (in 2018, indexed annually to inflation); or
- For an acquisition of voting shares of a corporation that carries on an operating business (e.g., as a branch in Canada) or controls a corporation that carries on an operating business, when the aggregate value of the assets in Canada of the corporation and corporations controlled by it (other than assets that are shares of any of those corporations), or the gross revenues from sales in or from Canada generated from those assets, exceeds $92 million (in 2018, indexed annually to inflation).

Similar "transaction size" thresholds apply in the case of:

- A proposed acquisition of an interest in a combination that carries on an operating business through an unincorporated entity, and

- A proposed combination of two or more persons to carry on business through an unincorporated entity if one or more of the persons proposes to contribute to the combination assets that form all or part of an operating business carried on by those persons, or corporations controlled by those persons.

However, in the case of a proposed amalgamation of two or more corporations where one or more of those corporations carries on an operating business, or controls a corporation that carries on an operating business, at least two of the amalgamating corporations, together with their affiliates, must each have assets in Canada, or gross revenues from sales in, from or into Canada, in excess of $92 million (in 2018, indexed annually to inflation).

When the transaction is an acquisition of shares, an additional threshold applies, above which notification is required.

For a corporation whose voting shares are publicly traded, notification is required where the person or persons acquiring the shares, together with their affiliates, would own voting shares of the corporation that in the aggregate carry more than 20% or, when the person or persons owns more than 20% before the proposed acquisition, more than 50% of the votes attached to all outstanding voting shares of the corporation. Where the corporation's voting shares are not publicly traded, the initial threshold is 35%, with a filing also required for exceeding 50%.

For an acquisition of an interest in an unincorporated combination, the purchaser and its affiliates must be entitled to more than 35% of profits or assets on dissolution, or if more than 35% is already held, to more than 50% of the profits or assets on dissolution.

A limited number of transactions are exempt from pre-merger notification, including asset securitization transactions, transactions among corporate affiliates, and transactions in which shares are acquired solely for underwriting purposes.

2. Filings and Statutory Waiting Periods

Parties who must notify the Bureau of a transaction must submit a statutory notification and observe the statutory waiting period, and/or request and obtain an advance-ruling certificate ("ARC") (or alternatively a "no action" letter and waiver of the requirement to observe the statutory waiting period). Determining which filing procedure to follow depends on the nature of substantive competition law issues and timing considerations.

An ARC request comprises a written submission (there is no prescribed form) describing the parties and the proposed transaction, and setting out why the transaction will not substantially prevent or lessen competition. The Commissioner only issues an ARC when there are no material competition issues, such as in a merger between parties in unrelated business lines or between competitors whose combined market share is very low. The Bureau typically completes its reviews of such transactions within two to three weeks of filing (although there is no statutory requirement to do so). An ARC provides the highest level of comfort possible that the Commissioner will not challenge the transaction. An ARC also exempts the parties from otherwise notifying the Bureau of the transaction and immunizes the transaction against later challenge, provided that the facts on which the Commissioner decided to issue the ARC were accurate and complete. In circumstances where the Commissioner may decline to issue an ARC, the Commissioner may instead issue a "no action" letter and provide a waiver of the requirement to observe the statutory waiting period. In a no action letter, the Commissioner will advise that he or she does not intend to challenge the merger but expressly reserves the statutory right to do so within one year after closing should he or she subsequently decide that the merger is likely to substantially prevent or lessen competition. As a practical matter, however, a no action letter provides considerable comfort.

Filing the statutory notification triggers a waiting period during which the transaction may not be completed (the filing of a request for an ARC does not, on its own, trigger the statutory waiting period). The waiting period is 30 days, unless the Commissioner extends the waiting period by issuing a supplemental information request ("SIR") requiring the notifying parties to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction. If a SIR is issued, a second stage of merger review is triggered. Upon the issuance of a SIR, the waiting period stops. Once the response to the SIR is submitted, a further 30-day period starts to run. The parties can close their transaction following its expiry unless the Commissioner challenges the transaction or obtains an injunction to prevent or delay the closing.

Special rules apply in a hostile takeover situation. In such a situation, the Commissioner must notify the target as soon as the firm making the takeover bid files its statutory notification. The target is then required to supply its notification within 10 days. The 30-day waiting period begins once the Commissioner receives the acquiring firm's filing. In a hostile scenario, if a SIR is issued with respect to the transaction, the second 30 day waiting period will begin upon the date that the Commissioner receives the requested information from the acquiring party, without reference to the date the target complies with the SIR.

No transaction may be completed during the waiting period or the period in which an ARC request is outstanding. Once the waiting period expires, parties are in a legal position to close the transaction subject to the Commissioner's jurisdiction to challenge the merger for one year post-closing. However, in a very exceptional case, the Commissioner may seek to obtain an order from the Tribunal enjoining the closing for 30 days and, when required, extending the order for another 30 days.

During the period commencing in March 2009 (when the SIR process was enacted) until the end of March 2017, the Bureau issued SIRs in 89 proposed mergers, representing approximately 5% of total mergers reviewed in that time. Recent years have seen an increase the in number of SIRs issued, both in quantity and as a percentage of mergers completed. From March 2016 to March 2017 there were 238 mergers reviewed and SIRs were issued in 21 (or 9%) of them. For transactions involving potentially serious competition concerns, the total time required from the initial filing until the expiry of the additional 30 day statutory waiting period following substantial compliance with the SIR may be several months.

To attempt to avoid SIRs in difficult cases or at least limit the breadth of a SIR, merging parties typically provide the Bureau with a voluntary comprehensive competitive impact statement, which details the reasons why the transaction is not likely to lessen or prevent competition substantially in any relevant market. This statement may be supplemented where necessary by an antitrust economic expert report.

The Act contains remedial powers to deal with actual or likely non-compliance with the statutory waiting periods. These include the power for a court to issue an interim injunction to prohibit the parties from completing the transaction before expiry of the waiting period (so-called "gun-jumping") or, in the case of a completed transaction, the power to:

- Dissolve the merger;
- Divest assets or shares;
- Impose an administrative monetary penalty in an amount not exceeding $10,000 for each day of non-compliance; or
- Grant any other relief considered appropriate.

3. Section 11 Orders

In addition to having the ability to issue a SIR, the Commissioner has the power to seek and obtain from a court an ex parte order under § 11 of the Act requiring the production, under oath and within a specific time period, of records or written responses to information requests, or to be examined under oath by the Commissioner. The target of an ex parte order is not normally given notice of the application and therefore may not appear before the court to contest the order. Complying with a § 11 order may be onerous and involve considerable costs.

The Bureau has indicated that in light of the SIR process, the use of § 11 orders in the merger context will be confined to obtaining information from third parties (e.g., customers, suppliers or competitors to the parties) and obtaining information for non-notifiable transactions. The Bureau uses voluntary information requests rather than § 11 orders against third parties where appropriate.

B. Substantive Merger Review

1. Definition of a Merger

Section 91 of the Act defines a merger as the acquisition of "control over or a significant interest in the whole or a part of a business of a competitor, supplier, customer or other person." Control in this context means voting control; however, the Act does not define *significant interest*. The Bureau's Merger Enforcement Guidelines ("MEGs"), which set out the Bureau's overall framework for merger review, define *significant interest* to mean "the ability to materially influence the economic behaviour of the target business, including but not limited to decisions relating to pricing, purchasing, distribution, marketing, investment, financing or the licensing of intellectual property rights." This may encompass minority-voting interests, with or without board representation, certain interlocking directorates, and may even extend to certain purely contractual arrangements in which one party has the ability to influence management decisions of the other party. While it is difficult to define objective thresholds that could be used to identify an acquisition of a significant interest, the MEGs suggest that "[i]n the absence of other relationships, direct or indirect ownership of less than 10 percent of the voting interests in a business does not generally constitute ownership of a significant interest."

2. The Substantive Merger Law

a. Anti-Competitive Threshold

Section 92 of the Act allows the Tribunal to make an order concerning a merger when it finds that the merger substantially prevents or lessens competition in a relevant market. This test, sometimes called the SPLC test, is the anti-competitive threshold.

In applying the SPLC test, the Act requires the Tribunal to consider the following:

- Whether foreign products or competitors will provide effective competitive discipline to the merging parties;
- Whether the business or part of the business of a party to the merger has failed or is likely to fail;
- The extent to which there are acceptable substitutes for the products of the merging parties;
- Barriers to entry and the effect of the merger on such barriers;
- Whether there will be effective remaining competition following the merger;
- Whether the merger will eliminate a vigorous and effective competitor;
- The nature and extent of change and innovation in the relevant market in which the merging parties operate; and
- Any other factor that the Tribunal deems relevant.

Since there is little case law in the area of mergers, the principal source of guidance to determine when a merger crosses the anti-competitive threshold is the MEGs, which the Tribunal and the Canadian courts have cited with approval.

According to the MEGs, a SPLC results from mergers that are likely to maintain, create or enhance the ability of the merged entity, alone or in concert with other firms, to exercise market power. *Market power* is defined as the ability of a single firm or group of firms to profitably maintain prices above the competitive level for a significant period of time. A firm may also have market power when it is able to decrease non-price dimensions of competition, such as by reducing service, innovation, or product quality or variety.

A merger may *prevent* competition when its enables the merged entity, unilaterally or together with other firms, to sustain higher prices than would exist in the absence of the merger by hindering the development of future competition. This typically occurs when there is little or no direct overlap between the merging parties' current businesses but when direct competition between those businesses would be expected to increase in the absence of the merger. In these circumstances, the Bureau examines the type, scope and timing of the potential entry or expansion by either one of the merging parties. The MEGs list the following as examples of mergers that may prevent competition:

- The acquisition of an increasingly vigorous competitor or a potential or recent entrant;
- The acquisition of a firm by the market leader in that industry, which thereby pre-empts its acquisition by another competitor;
- The acquisition of an existing business by a firm that would likely have entered the market in the absence of the merger;
- An acquisition that prevents expansion by a competitor into new geographic markets in competition with the other merging party;
- An acquisition that prevents the enjoyment of the pro-competitive effects of new capacity; and
- An acquisition that prevents or limits the introduction of new products.

Significantly, in 2011 the Commissioner challenged a non-notifiable merger on the basis that it would prevent future competition; this was the Commissioner's first "prevention of competition" challenge. Both the Tribunal and the Federal Court of Appeal held that the completed merger was likely to substantially prevent competition, and that the efficiencies defence available under § 96 of the Act did not apply. However, on appeal the Supreme Court of Canada held that the efficiencies defence applied and dismissed the Commissioner's application.[36]

A merger may *lessen* competition when the merged entity, either unilaterally or together with other firms, is able to sustain higher prices than would otherwise exist in the absence of the merger, by reducing existing competition. This typically occurs with horizontal mergers where there is a direct or existing overlap between the parties, but may also occur with non-horizontal mergers such as those that foreclosure rivals' access to production inputs.

Generally, the prevention or lessening of competition is considered to be "substantial" in two circumstances:

- The price of the relevant product would likely be materially higher in the relevant market than it would be in the absence of the merger; and
- Sufficient new entry would not occur rapidly enough to either prevent the material price increase or counteract its effects.

The MEGs also set out the Bureau's approach to reviewing a merger of competing buyers that may create or enhance the ability of the merged firm, unilaterally or in coordination with other firms, to exercise buyer power (i.e., monopsony power). The Bureau is generally concerned with monopsony power when a buyer holders market power in the relevant purchasing market, and is therefore able to decrease the price of a relevant product below competitive levels with a corresponding reduction in the overall quantity of the input produced or supplied in a relevant market, or a corresponding reduction in any other dimension of competition.

b. Theories of Competitive Harm

The Bureau applies two broad theories of competitive harm when analyzing a merger. Competitive harm may result when a merged entity exercises market power unilaterally or through coordinated behaviour.

A unilateral exercise of market power occurs when a merger enables the merged entity to profitably sustain higher prices or profitably influence other dimensions of competition on its own. A coordinated exercise of market power occurs when a merger reduces competition because other competitors in the market may be expected to have accommodating responses. For example, the acquisition of a particularly aggressive, maverick competitor by an industry participant may make it easier for the merged entity to coordinate its behaviour with that of its less aggressive competitors.

The coordinated exercise of market power tends to be sustainable when firms are able to coordinate competitive terms, monitor compliance and respond to any deviations from terms of coordination, and when external factors do not undermine coordination (e.g., reactions of existing or potential competitors that are not part of the coordinating group or reactions of customers).

c. Competition Bureau's Analytical Framework

There are several steps in the Bureau's analysis of a merger, as set out below. The exercise generally involves defining the relevant markets, measuring market shares and assessing competitive effects. In practice, these steps may occur more or less in tandem with each other although the MEGs note that merger review is often an iterative process whereby evidence respecting the relevant market and market shares is considered alongside other evidence of competitive effects, with each analysis informing the other. The MEGs comment that market definition is not necessarily the initial step, or a required step, but is generally undertaken. The Bureau's competitive effects analysis considers other market factors that may discipline the conduct of the merged firm, including the effectiveness of remaining competition, entry, the countervailing power of buyers, whether one of the firms is a failing firm, the role of efficiency gains, and the impact of change and innovation in the market, regulation, and any other factor relevant in the circumstances.

d. Market Definition and Market Share

Market definition involves defining the product and geographic markets. Defining the product market market involves examining economic and empirical evidence of the extent to which buyers will, in the event of a price increase, switch to substitutes for the merging parties' products. Geographic market definition depends on buyers' ability or willingness to switch their purchasing in sufficient quantity from one location to another in response to changes in price. Similar to the U.S. Horizontal Merger Guidelines, the MEGs define a relevant market as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area in which a sole profit-maximizing seller (a hypothetical monopolist) could impose and sustain a significant and non-transitory price increase above levels that would likely exist in the absence of the merger. In most cases, the Bureau considers a 5% price increase to be significant and a one-year period to be non-transitory, although market characteristics may support using a different price increase or time period.

The Bureau will often take into account the views, strategies and behaviours of customers as reliable indicators of whether customers would likely switch to other products in response to a price increase. The Bureau will also look to functional indicators in defining both product markets (e.g., end use, physical and technical characteristics, price relationships and relative price levels, buyer switching costs) and geographic markets (e.g., product characteristics, switching costs, transportation costs, price relationships and relative price levels, shipment patterns and foreign competition).

Once the Bureau has defined the markets, it identifies sellers of the relevant products, including firms outside the relevant market that are able to supply the market without making significant sunk investments, to determine market shares and concentration levels. By virtue of subsection 92(2) of the Act, the Tribunal is prevented from concluding that a merger substantially prevents or lessens competition based solely on evidence of concentration or market share. However, in practice, market share is the single most important piece of information the Tribunal considers when assessing the competition risk associated with a merger.

Canada has relatively concentrated markets, particularly when compared to the United States. A typical market in Canada might comprise only four or five firms, in contrast to the typical eight to twelve firms in a similar U.S. market. Consequently, while the Bureau may look to the Herfindahl- Hirschmann Index of concentration to understand changes in market structure, the Bureau does not use Herfindahl- Hirschmann Index levels to delineate safe-harbour thresholds when reviewing mergers. In addition, the Bureau has generally been more tolerant of higher market shares than its U.S. counterparts.

In this regard, the Bureau has established the following market share thresholds to distinguish mergers that are not likely to have anti-competitive consequences from those that require more detailed analysis:

- The Commissioner generally does not challenge a merger on the basis of a unilateral exercise of market power, when the post-merger market share of the merged entity would be less than 35%.
- The Commissioner generally does not challenge a merger on the basis of a coordinated exercise of market power, when the post-merger market share accounted for by the four largest firms in the market would be less than 65%. When that share is 65% or more, the Commissioner generally does not challenge the transaction when the post-merger market share of the merged entity would be less than 10%.

When a merger would exceed one or both of these thresholds, which are known as safe-harbour thresholds, the Bureau examines various factors to determine whether the merger would substantially prevent or lessen competition. Note that in practice, however, the Bureau does tolerate shares considerably greater than these safe-harbour thresholds, as follows:

- Remedies have generally only been required in unilateral effects cases when market shares were greater than 45–50%; many merger challenges have involved shares greater than 60%.
- When remedies have been required to address the coordinated exercise of market power, the merged entity generally held a market share of 25% and often more (well above the 10% safe-harbour), although it is difficult to be definitive about these cases because many coordinated effects cases have also raised unilateral effects issues.

e. Entry

A key component of the Bureau's analysis of competitive effects is whether entry by potential competitors (including expansion by existing competitors) is likely to occur on a sufficient scale and scope, and in a timely manner, to constrain a material price increase in the relevant market.

Barriers to entry may include regulatory barriers, the need to incur sunk costs (i.e., costs that could not be recovered if the firm later decided to leave the market), long-term contracts, economies of scale that necessitate large-scale entry, stable or declining demand, and other factors that confer cost advantages on incumbents.

f. Remaining Competition

The Bureau's analysis also focuses on the identity and effectiveness of the remaining competitors in the market. The Bureau considers whether these competitors will provide sufficient discipline to prevent the merged firm from exercising market power. Relevant considerations will include existing forms of rivalry (e.g., discounting and other pricing strategies, distribution, and marketing service offerings), whether the shares of firms are stable or fluctuate over time and the extent and quality of excess capacity in the market.

g. Countervailing Power

Buyer concentration can prevent a price increase and make it difficult for sellers to exercise market power. Buyers may credibly constrain the ability of a seller to exercise market power when they have comparable buyer power to neutralize the merged firm's own market power. For example, a buyer with power may be able to:

- Refuse to buy other products produced by the seller or refuse to buy the seller's products in other geographic markets where the competitive conditions are different;
- Switch to other suppliers in a reasonable amount of time;
- Vertically integrate their operations into the upstream market to undertake self-supply;

- Induce entry by a potential supplier through the promise of substantial orders; or
- Impose costs on the seller (e.g., giving the seller's products less favourable retail placement).

h. Failing Firm

The Bureau does not attribute loss of the competitive influence of a merging party to a merger when the firm's imminent failure is probable and, in the absence of a merger, the assets of the firm would likely exit the relevant market. A firm is considered to be failing when it is insolvent or likely to become insolvent, it has initiated or is likely to initiate voluntary bankruptcy proceedings or it has been or is likely to be petitioned into bankruptcy or receivership. Before concluding that a merger involving a failing firm or division is not likely to substantially prevent or lessen competition, the Bureau assesses whether any alternatives to the merger would likely result in a materially greater level of competition, such as the acquisition of the failing firm by a competitively preferable purchaser, or the retrenchment/restructuring or liquidation of the otherwise failing firm.

i. The Efficiency Defence

Section 96 of the Act states that the Tribunal may not make an order under § 92 when it finds that the merger or proposed merger is likely to bring about gains in efficiency that would be greater than and offset the anti-competitive effects of the merger and that the gains in efficiency would not likely be attained if an order preventing the merger were made.

The application of the efficiency defence is in effect a balancing exercise that weighs efficiencies against anti-competitive effects. There are different possible methodologies for the balancing exercise, and the Tribunal is to consider all available quantitative and qualitative evidence. Evidence that can be quantified should be quantified, even if only as an estimate.

The efficiency gains that are relevant in merger review include allocative, productive and dynamic efficiency gains. The Bureau does not consider redistributive gains, such as gains from increased bargaining leverage and tax-related gains, or savings resulting from a reduction in output, service, quality or variety.

This exception functions as a defence because parties may only invoke it once the Bureau has found that a merger will or is likely to substantially prevent or lessen competition. Only two firms have successfully invoked the defence in more than two decades, the most recent case being the Supreme Court of Canada decision in *Tervita Corp. v. Canada (Commissioner of Competition)*.[37] In *Tervita*, the Supreme Court held that while the efficiency gains were marginal, the Commissioner failed to meet the burden of quantifying the anti-competitive effects where such effects could be reasonably quantified, and therefore no quantifiable anti-competitive effects were proven. Consequently, the Supreme Court held that the efficiencies defence applied to allow the merger and dismissed the Commissioner's application.

As a result of *Tervita*, merging parties increasingly include expected efficiencies in competition analyses even when they are relatively small, and present a detailed efficiencies analysis in more complicated cases. SIR recipients are also being required to produce documents and evidence to assist the Commissioner in quantifying anti-competitive effects and detailed evidence of the efficiencies claimed to result from the transaction.

j. Other Factors

The Bureau will also consider the role of any industry-specific regulation and the impact of technological change and innovation in the market (e.g., a merger may impede innovation or, alternatively, a market may be so innovative that any material price increase post-merger is unlikely to be sustainable).

In determining whether the merger will result in the removal of a vigorous and effective competitor, the Bureau will consider whether one of the merging parties:

- Has a history of not following price increases, or of leading price reductions;
- Provides unique service, warranty or other terms in the market;
- Has recently expanded capacity or has plans to do so;
- Has recently made gains in market share or is in a position to do so; or
- Has recently acquired intellectual property rights or other inputs, or has developed product features that enhance its ability to compete in the market, or will soon do so.

3. Powers of the Competition Tribunal

a. Interim Orders

Under § 100 of the Act, the Commissioner may apply to the Tribunal for an interim (injunctive) order to prevent a merger from being completed, even when the Commissioner has yet to begin a formal proceeding before the Tribunal to challenge the merger. Before the Tribunal may issue such an order, the Commissioner must:

- certify that an inquiry is under way;
- be of the opinion that more time is needed to complete the inquiry; and
- show that, if the order is not granted, an action is likely to be taken that would substantially impair the Tribunal's ability to remedy the effect of the proposed merger on competition because that action would be difficult to reverse.

Regarding the third requirement, the Tribunal has said that it is not sufficient for the Commissioner to show simply that pre-merger conditions cannot be restored or that allowing the transaction to close deprives the Tribunal of one of its post-merger remedies. Rather the Commissioner must demonstrate that without the order, the Tribunal would not be able to impose an effective remedy after the merger to eliminate the substantial prevention or lessening of competition. The initial duration of such an order is 30 days. The Tribunal may extend the order for 30 additional days when there is a delay beyond the Bureau's control.

Once the Commissioner has commenced a formal proceeding challenging a merger before the Tribunal, he or she may apply, under § 104 of the Act, for an interim order from the Tribunal enjoining the parties from completing or implementing the merger, based on common law rules governing the granting of injunctions. The Tribunal's order under § 104 will specify the period of time for which the order is effective. Such an order may well remain in place until the Tribunal renders its decision on the Commissioner's challenge to the merger.

b. Remedial Powers

When the Commissioner believes that a merger is likely to substantially prevent or lessen competition, he or she can either apply to the Tribunal to challenge it under § 92 of the Act or negotiate a remedy with the merging parties to resolve the competition concerns by consent. When the Commissioner and the merging parties agree to a remedy, they typically document it in a consent agreement that they register with the Tribunal, without the Tribunal having to review it. Upon registration, the consent agreement is deemed to have the same effect as an order of the Tribunal.

Typically, when confronted with the decision to litigate before the Tribunal (which may take many months and often longer) or to negotiate a consent agreement, merging parties choose the latter. As a result, only a handful of mergers have been challenged before the Tribunal in the 30 years since the merger review provisions were added to the Act. The objective of any merger remedy, whether it is the result of contested or consent proceedings, is to reduce any prevention or lessening of competition to the point at which it is no longer substantial, rather than to restore the level of competition to the pre-merger state.

When the Commissioner challenges a merger before the Tribunal, he or she identifies proposed remedies in the application to the Tribunal. The Act is specific about the remedies the Tribunal may impose. For a merger that has closed, the Tribunal may order either that the merger be dissolved or that assets or shares of the merged business be divested. With a proposed merger, the Tribunal may direct that the whole merger or part of it not proceed. The Tribunal may also issue an order prohibiting certain types of conduct by the merging parties in order to preserve competition in the market (for example, by regulating the way the merging parties deal with suppliers or customers). In contrast, the Bureau and the merging parties may consider a wider range of remedies in the context of a consent agreement.

The Bureau has consistently indicated—including in its 2006 Information Bulletin, Merger Remedies in Canada—that it strongly prefers structural remedies (divestitures of shares or assets) to behavioural ones, which attempt to regulate how the merged entity will compete. This is because structural remedies effect a permanent change in the market and there is no need for the Tribunal to monitor the market. Divestitures have been the principal means the

Bureau has required parties to use to address merger issues, although it has accepted behavioural remedies (on their own or together with structural remedies) on occasion.

In a multi-jurisdictional merger, one of the most challenging aspects for merging parties, their counsel, and the reviewing competition authorities is coordinating remedies across the various jurisdictions affected. While consistent and coordinated remedies are desirable, each jurisdiction seeks to ensure that the remedies are sufficient to address the particular competition issues in that jurisdiction. The Bureau generally only relies on the remedies accepted elsewhere when it is satisfied that they are sufficient to resolve the competition issues in Canada.

C. Strategic Alliances – Section 90.1

As discussed in Section II, "Conspiracy and Bid-Rigging," the Act includes the ability for the Bureau to review agreements between competitors, such as strategic alliances and joint ventures, as civilly reviewable trade practices under § 90.1. Parties may seek a written opinion from the Commissioner under § 124.1 of the Act to obtain comfort that a proposed arrangement does not constitute a breach of § 45 (the conspiracy provision) or § 90.1. Provided the parties disclose all material facts, the Commissioner may provide a binding opinion on any such proposed arrangements. However, recent experience is that a written opinion will confirm which provision of the Act would apply, but will not provide a view on whether the conduct would be viewed by the Commissioner as violating the applicable provision. Interestingly, the test for a violation of § 90.1 is the same test employed in the merger review context. In such cases, some parties may elect to treat certain arrangements as a merger to obtain the benefit of a merger clearance.

V. Abuse of Dominance

The Canadian counterpart to the monopolization provisions in § 2 of the *Sherman Act* is § 79 of the Act, governing abuse of dominance. Broadly speaking, in order for the Tribunal to make an order under § 79, the Commissioner must establish that:

- One or more persons substantially or completely control a market in Canada;
- They have engaged in or are engaging in a practice of anti-competitive acts; and
- The practice has had, or is likely to have, the effect of preventing or lessening competition substantially in a market.[38]

A. Differences Between Canadian and U.S. Abuse of Dominance Law

1. Abuse of Dominance is Not a Criminal Matter

In contrast to § 2 of the *Sherman Act*, which declares monopolization and attempted monopolization to be unlawful and potentially subject to criminal penalties, the Act treats abuse of dominance as a civil reviewable matter. As such, the practice of abuse of dominance is not considered to be unlawful until the Tribunal determines that the requirements of § 79 have been met and it issues an order to prevent the practice from continuing.

2. No Offence of Attempted Monopolization

There is no equivalent in Canada to the offence of attempted monopolization. As discussed below, the Tribunal has no jurisdiction to issue an order unless it finds that one or more persons already substantially or completely control a market in Canada.

3. Administrative Monetary Penalties ("AMPs")

Instead of damages, the Tribunal may impose AMPs for abuse of dominance. AMPs are available up to a maximum of $10 million for an initial order and a maximum of $15 million for subsequent orders.[39] In determining the amount of an AMP, the Tribunal must consider evidence relating to the following:

- The effect on competition in the relevant market;
- The gross revenue from sales affected by the practice;
- Any actual or anticipated profits affected by the practice;
- The financial position of the person against whom the order is made;
- The history of compliance with the Act by the person against whom the order is made; and
- Any other relevant factor.[40]

Remedies in addition to AMPs are discussed below.[41]

4. No Private Right of Action

Only the Commissioner may bring an application to the Tribunal for an order under § 79, and only the Tribunal has the power to grant relief. However, a private party may, with leave of the Tribunal, bring an application before the Tribunal to challenge certain distribution practices which substantially lessen competition and which may be considered a form of abuse of dominance including refusals to deal, tied selling and exclusive dealing. A private party may not obtain an award of damages from the Tribunal. See Section III, "Distribution Practices" for more information on these practices, and Section VIII, "Private Competition Litigation" for more information on private actions.

5. Effect on Competition Must be Shown

Even when it is established that a firm substantially or completely controls a market and engaged in a practice of anti-competitive acts, the Tribunal must still be satisfied that the practice has substantially prevented or lessened competition, or is likely to do so.

6. Superior Competitive Performance Must be Considered

Although § 79 does not contemplate a full-blown rule of reason analysis, the Tribunal is directed, when determining whether the practice is or is likely to be substantially preventing or lessening competition in a market, to consider whether the practice is a result of superior competitive performance.[42]

7. Does Not Apply to Mere Exercise of Intellectual Property Rights

Section 79 of the Act provides that merely exercising any right or enjoying any interest derived under the federal laws pertaining to intellectual or industrial property is not, in and of itself, an anti-competitive act.

B. What Is Dominance?

1. Basic Test

The threshold requirement in § 79 is that "one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business". The Tribunal has consistently interpreted the words *substantially or completely control* as being synonymous with market power, namely, "an ability to set prices above competitive levels for a considerable period of time". This position was endorsed by the Federal Court of Appeal in *Canada Pipe*.[43]

The phrases *throughout Canada or any area thereof and class or species of business* are generally considered to mean the geographic and product dimensions, respectively, of the relevant market of which the dominant firm is alleged to have substantial or complete control.

2. Market Share and Concentration Safe Harbours

The Tribunal has observed that a 25 percent market share "falls well short of a level that might be considered to indicate market power"[44] and has suggested that no *prima facie* finding of dominance would arise for a market share below 50 percent.[45]

The Bureau has stated in its Enforcement Guidelines on the Abuse of Dominance Provisions[46] that a "market share of less than 35 percent generally will not prompt further examination" under § 79; a "market share between 35 and 50 percent generally will only prompt further examination if it appears the firm is likely to increase its market share through the alleged anti-competitive conduct within a reasonable period of time;" and a "market share of 50 percent or more will generally prompt further examination". With respect to firms alleged to be jointly dominant, the guidelines indicate that to prompt further investigation the corresponding combined market share threshold is 65 percent.

However, in *Visa/MasterCard*,[47] the Tribunal noted that while market shares below 35 percent "do not normally raise unilateral market power concerns, this does not mean that they can never do so". In that case, which was brought under § 76 of the Act, the Tribunal held that "[t]aking into account MasterCard's pricing discretion, its margins and the very high barriers to entry," MasterCard had market power despite having a market share below 35 percent.

3. The Bottom Line

Accordingly, though the issue is not settled, it would be unusual if the Commissioner brought an abuse case against a firm with a market share of less than 50 percent, or against multiple firms on the basis of their alleged joint dominance where their combined market share was less than 65 percent.

4. Relevant Market

The relevant market does not necessarily have to be the market that the party competes in. This was the finding of the Federal Court of Appeal in the Toronto Real Estate Board (TREB) case.[48] Though TREB itself is not an active competitor in the real estate services market, the restrictions it placed on its members regarding the information they could share restricted the ability of certain innovative brokers to compete effectively in that market.

The Bureau has attempted to expand the principle in the TREB case in an application against the Vancouver Airports Authority (VAA).[49] The Bureau's application alleges that the VAA abused its dominance of the access to the Vancouver International Airport's (VIA) airside for the supply of galley handling Though the VAA itself does not compete in this market, the Bureau alleges that the VAA has abused its dominant position through its ongoing refusal to grant access to the VIA's airside to new-entrant firms for the supply of galley handling at the VIA and its continued tying of access to the VIA airside for the supply of galley handling to the leasing of VIA land from the VAA for the operation of catering kitchen facilities.

5. Joint Dominance

Enforcement action on the basis of joint dominance is more likely where there is evidence of anti-competitive coordination between competitors. In addition, the Commissioner potentially may take enforcement action on the basis of joint dominance in cases where competitors engage in similar conduct with anti-competitive consequences, even in the absence of any agreement or coordination between them. The Tribunal has yet to rule on the requisite elements of joint dominance in a fully contested case.

Alternatively, the Bureau may investigate joint conduct among competitors under § 90.1 of the Act. See Chapter "C. Strategic Alliances – Section 90.1".

C. Measuring Dominance

Only rarely has the Tribunal been able to assess market power using direct evidence of supra-competitive pricing or revenues. More often, the Tribunal and the Bureau have sought to ascertain the existence of market power through indirect means, including evidence of high market share, barriers to entry, limited excess capacity in the hands of competitors, high accounting profits, ability to selectively lower prices, limited penetration of competitors, and limited growth potential of the market.

In most of the cases brought under § 79 to date, high market shares (in each case more than 80%) combined with impediments to entry have provided the principal basis for the Tribunal's conclusion that a firm has market power.

For cases in which market power and barriers to entry are less obvious than in the existing jurisprudence, a rule of thumb is to ask whether prices would likely be substantially lower, or levels of non-price competition substantially higher, in the absence of the impugned practice. If so, then market power may exist.

D. Distinguishing Anti-Competitive Acts from Legitimate Competition

Before the Tribunal can issue an order under § 79, it must find, among other things, that the dominant firm has engaged in or is engaging in a practice of anti-competitive acts.

1. What Constitutes a Practice?

In general, a "practice" consists of more than an isolated act or acts. However, "different individual anti-competitive acts taken together may constitute a practice". The Bureau's Enforcement Guidelines on the Abuse of Dominance Provisions, which have been endorsed in this regard by the Tribunal, add that:

> *While a "practice" normally involves more than one isolated act, the Bureau considers that this element may be satisfied by a single act that is sustained and systemic, or that has had or is having a lasting impact in a market. For example, a long-term exclusionary contract may effectively prevent the entry or expansion of competitors despite the fact that the contract itself could be viewed as a single act.*[50]

2. Subjective and Objective Intent

It is well established that conduct will not be considered to be anti- competitive unless it was for a predatory, exclusionary or disciplinary purpose. In this context, the Tribunal stated in *Tele-Direct* that the word "purpose" is used "in a broader sense than merely subjective intent on the part of the respondent…it might be more apt to speak of the overall character of the act in question". It is also clear that firms are deemed to intend the reasonably foreseeable consequences or effects of their actions, and that the purpose of a particular act may be inferred from the surrounding circumstances. Although evidence of subjective anti-competitive intent is not required, it can suffice and can adversely affect the

Tribunal's overall assessment of a case.

In *Canada Pipe*, the Federal Court of Appeal endorsed this position regarding objective intent and then adopted a competitor-oriented approach to determining whether conduct constitutes a practice of anti-competitive acts, focusing on whether there were (objectively) intended predatory, exclusionary or disciplinary effects on a *competitor*.[51] While *Canada Pipe* seemed to limit the anti-competitive acts to the competitors of the firm in question, in *TREB*,[52] the Federal Court of Appeal held that the conduct does not have to be directed at the firm's competitors but could be directed at any competitor in another market. The Federal Court of Appeal in *TREB* found this to be consistent with its Canada Pipe decision, stating that it does "not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in the market".

3. Legitimate Business Justification

A valid business justification can overcome the deemed anti-competitive intention arising from the actual or foreseeable negative effects of a practice. To be accepted as legitimate, as the court noted in *Canada Pipe*, a business justification must provide a "credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts".[53] Unlike in the U.S., an intention to benefit consumers cannot suffice to establish a legitimate business justification, although it may be relevant when assessing the credibility and weight of a proffered business justification.[54]

For example, in *Canada Pipe*, the Federal Court of Appeal rejected as irrelevant the dominant firm's attempted justification that its fidelity rebate program was adopted to enable it to sell higher volumes of popular products, and thereby enable it to maintain an inventory of less popular products that it may not have otherwise maintained.

4. Types of Anti-Competitive Practices

Section 78 of the Act lists nine types of conduct that are deemed to be anti-competitive. These include such activities as vertical price squeezing, acquiring a supplier or customer, engaging in a practice of freight equalization, using fighting brands, pre-empting scarce resources, adopting product specifications that are incompatible with those of competitors' products, and selling articles for less than the cost of acquiring them, when such actions are for the purpose of impeding or preventing opportunities for competitors. However, significantly, the Tribunal has found many other types of practices, such as exclusivity, loyalty, meet-or-release and most- favoured-nation provisions in contracts, and loyalty rebates, to constitute anti-competitive acts as well, with the result that the category of anti-competitive acts is by no means restricted to those listed in § 78.

5. Targeted Responses

Competitive responses that are targeted at new entrants or other specific competitors are not necessarily anti-competitive. The Tribunal has recognized that an incumbent is expected to behave differently when it faces entry than when it does not and to compete when there is competition. However, the Tribunal would likely weigh the nature and intensity of a reaction to a competitive threat when determining whether a particular targeted response is anti-competitive.

6. No General Requirement to Assist Competitors

The Tribunal said in *Tele-Direct* that, as a "[g]eneral proposition … a firm is not, and should not be, required to 'assist' its competitors".

7. Exercise of Intellectual Property Rights

Subsection 79(5) of the Act states that an act engaged in only to exercise any right or enjoy any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act within the meaning of § 79.

The Tribunal has confirmed that a party's refusal to license its copyright falls squarely within its prerogative as the owner of such intellectual property, and that inherent in the very nature of the right to license a copyright is the right to determine whether, and to whom, to grant a license.[55] The Tribunal also stated in *Tele-Direct* that "selectivity in licensing is fundamental to the rationale behind protecting trade-marks" and that the motivation for a firm's decision to refuse to license a trademark is irrelevant.

In its Intellectual Property Enforcement Guidelines,[56] the Bureau states that the provisions of the Act are only invoked with respect to conduct that involves "something more than the mere exercise of [an intellectual property] right," that an intellectual property owner's use or non-use of the intellectual property is regarded "as being the mere exercise of an [intellectual property] right," and that the "unilateral exercise of the [intellectual property] right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected".

E. Substantially Preventing or Lessening Competition

The third element that the Tribunal must establish before making an order under § 79 is that the practice has substantially prevented or lessened competition, or is likely to do so. In the merger context, this same element has been consistently defined in terms of the ability of the merged firm to exercise materially or significantly greater market power than in the absence of (or "but for") the merger. When assessing whether this is in fact the case, the Tribunal's focus has been on whether prices would likely be significantly higher, or whether non-price dimensions of competition (e.g., service, quality, innovation) would likely be significantly lower, than in the absence of the merger.

By way of example, in 2017, the Bureau announced that it was closing its investigation into the restrictions obligations Apple Inc. placed on wireless carriers that it supplied, including minimum order commitments and most-favoured nation clauses.[57] In doing so, the Bureau noted that, while there was some evidence the obligations affected the way the wireless carriers negotiated with competitors, these effects were minimal and were insufficient for the Bureau to conclude that there would be a meaningful impact on Apple's competitors or, by consequence, consumers. Similarly, when discontinuing its investigation into Google Inc., the Bureau found that the majority of the conduct that was investigated as possibly anti-competitive did not have an exclusionary effect on competitors and did not substantially prevent or lessen competition.[58]

Section 79 may also apply where the dominant firm has subsequently exited the market. For example, in *Direct Energy*[59] the Tribunal held that § 79 still applied to Direct Energy despite it having entered into an acquisition agreement for the sale of its business. According to the Tribunal in that case, otherwise, "[f]irms which substantially lessened or prevented competition in the market for a number of years would be able to sell their business to another firm and not be caught by section 79".

F. Remedial Powers of the Competition Tribunal

In addition to its power to impose AMPs, the Tribunal may issue an order prohibiting the continuation of the practice in question and, if such an order would not restore competition in the market, direct any or all of the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice in the market.

Prior to the introduction of AMPs, the Tribunal noted that it is not part of its role to penalize abuse of dominance. It also observed that simple and clear-cut remedies to address fundamental issues are better than complex and ongoing remedies that may not operate effectively in changed future circumstances. In this regard, the Tribunal has declined to endorse requested pricing remedies, such as prohibiting targeted price cutting in response to localized entry. The Tribunal has no power to issue orders binding on third parties who are not subjects of the proceeding.

In the cases to date, the Tribunal largely focused on prohibiting firms from doing the following for a set period of time:

- Enforcing exclusivity, most-favoured-nation, loyalty, right-of-first-refusal, meet-or- release and onerous termination provisions in contracts, or entering into new contracts containing such provisions;
- Requiring customers to reveal the terms of competing bids;
- Discriminating against or making disparaging comments about other market participants; and
- Acquiring the whole or part of a competitor's business.

In addition, the Tribunal has specifically directed firms to take certain actions, such as requiring them to clearly set out in their contracts the rights of renewal and termination provisions.

Discerning the line between merely aggressive competition and illegal abusive behaviour can be very difficult. The same act by different market participants or in different market situations may be found to be pro-competitive, benign or anti- competitive. The Bureau has acknowledged, for example, that a retailer using hard-bargaining practices with its suppliers could be pro-competitive in that it reduces prices for consumers, but also anti-competitive if it forces the suppliers to raise the prices for the retailer's competitors.[60]

The Tribunal has found AMPs for violations of other civil provisions of the Act to be constitutional. In *Canada (Attorney General) v. United States Steel Corp.*,[61] the Federal Court concluded that very high potential AMPs are not unconstitutional. The constitutionality of AMPs in § 79 has not yet been considered by the Tribunal or a court.

G. Predatory Pricing

1. Predation as an Abusive Practice

Prior to the amendments to the Act in 2009, predatory pricing was addressed by a specific criminal prohibition in the Act as well as by the broader civil abuse of dominance provisions of the statute. With the repeal of the criminal predatory pricing provisions, predation is now considered only as an abuse of dominance under §§ 78 and 79.

Under § 79, predatory pricing is an anti-competitive act that is subject to remedial action when it is carried out by a dominant firm and substantially prevents or lessens competition, or is likely to do so. As a threshold issue, the pricing must be below cost, i.e., any costs that could have been avoided by not offering the product or service in the relevant time frame.

According to the Bureau's Enforcement Guidelines on the Abuse of Dominance Provisions, "The Bureau's view is that average avoidable cost is the most appropriate cost standard to use when determining if a dominant firm's prices are below cost. Avoidable costs refer to all costs that could have been avoided by a firm had it chosen not to sell the product(s) in question during the period of time the policy has been in place. The Bureau will examine whether an alleged predatory price is able to cover the dominant firm's average avoidable cost of supplying the product(s) in question during the time period over which the alleged predation has occurred".

When determining whether below-cost pricing is predatory under § 79, the Tribunal may consider legitimate business justifications, including having to deal with distress situations, needing to sell perishable products, implementing entry pricing and meeting the competition, along with considerations that may apply in certain network industry situations.

In a 2001 application to the Tribunal, the Commissioner sought an order prohibiting Air Canada from operating flights on certain routes at fares that did not cover its avoidable costs of providing that service. In relation to this case, the Bureau stated that it did not consider "reducing fares to levels which match, but do not undercut those of a competitor" to be anti-competitive.

The Tribunal released an interim decision in 2003, dealing with the interpretation of the avoidable cost test as it applied to Air Canada's conduct.[62] In 2004, the Commissioner dropped the case, citing changed circumstances in the airline industry. Air Canada agreed not to appeal the Tribunal's interim decision. Accordingly, there has been no fully litigated predatory pricing case to date under the abuse of dominance provisions.

When the Tribunal finds prices to be below cost and does not find any legitimate business justifications for such below cost pricing, it may find such pricing to constitute a practice of anti-competitive acts. In this instance, the Tribunal will assess whether market conditions enable the alleged predator to recoup any losses incurred during the period of below-cost pricing. If not, the conduct likely would not be considered to have met the requirements of § 79.

2. Current Enforcement Approach

There has been a long period of uncertainty in Canada regarding the basis on which the Bureau will pursue claims of below cost pricing, as well as its approach to determining when pricing is below cost, and when below cost pricing will be considered to be anti, as opposed to pro-competitive. This seems to be because low pricing is more often the hallmark of aggressive competition and taking enforcement action would deny the benefits of low prices to consumers and customers.

VI. Misleading Advertising and Deceptive Marketing Practices

The Act contains provisions governing how Canadian businesses may conduct their advertising and marketing programs. While some provisions of the Act are intuitive (e.g., the general prohibition against making false or misleading representations), others are less so. As a result, businesses may be unaware of restrictions affecting several common advertising and marketing practices. What follows is a summary of the key misleading advertising and deceptive marketing provisions of the Act, as well as some general guidance to help businesses plan and implement Canadian marketing initiatives. Businesses should also be aware that there are other federal and provincial statutes (including, in particular, consumer protection laws), as well as industry- and product-specific regulations, that regulate particular types of advertising and other business practices.

The misleading advertising and deceptive marketing provisions of the Act underwent significant amendment in March 2009. The changes included a more robust regime dealing with misleading advertising matters and more stringent penalties for non-compliance.

A. Misleading Representations

Misleading advertising is treated under the Act as a matter of both criminal law and civil law. Criminal prosecution is possible when there is clear and compelling evidence that the accused knowingly or recklessly made, or permitted to be made, a false or misleading representation to the public. It is the Bureau's practice (as indicated in its 1999 Information Bulletin, Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Act)[63] to enforce the civil law reviewable practices provisions in most instances, reserving the criminal provisions for egregious offences. The two sets of provisions are mutually exclusive. As a result, the Commissioner's decision to move ahead under one precludes proceedings under the other.

The Act also contains a framework for restitution-type monetary orders to compensate those who purchased products based on materially false or misleading representations, and gives courts the power to order interim injunctions against persons who made these representations to ensure enforceability of the restitution-type orders.

1. Key Elements of the Offence

With the exception of the requirement under the criminal regime that the representation in question be made knowingly or recklessly, the criminal and reviewable practices provisions are virtually identical, as follows:

- Purpose requirement:
  - Both the criminal provision, subsection 52(1), and the civil provision, subsection 74.01(1), apply to all persons who make representations for the purpose of promoting, directly or indirectly, the supply or use of a product (which could be a good or a service), or any business interest.
- Representations to the public:
  - While the Act does not define "representation", it is generally accepted that a representation normally takes the form of a statement of fact intended to influence the actions of others. While it is common to think of subsections 52(1) and 74.01(1) applying solely to conventional advertisements, they apply to all statements of fact made to advance business interests, in whatever form, including printed and broadcast advertisements, oral representations (such as those made by salespersons and telemarketers), billboards, press releases, packaging and labelling, online or social media posts and any other materials that are sold, sent, delivered, transmitted or otherwise made available to the public.
  - Although the term "public" is not defined in the Act, existing jurisprudence and Bureau statements on its enforcement policy support the view that a representation to a restricted group (such as shareholders), and perhaps even to just one person, could constitute a representation to the public. Note that it is not necessary to establish that the representation was made in a place accessible to the public or

that any member of the public to whom the representation was made was within Canada. Accordingly, organizations in Canada targeting individuals outside of the country could be liable under the Act, as could companies that have made materially false or misleading representations in publicly inaccessible places (such as on products that are boxed or only available via catalogue or other remote sales methods). What constitutes the "public" in any particular case is determined by the nature of the business interest being promoted, the nature of the representation and the manner in which the representation is made.

- General impression:
  - A representation can contravene the Act even when no one is in fact misled or injured as a result. When determining whether a representation is false or misleading, the Bureau must consider both the general impression and the literal meaning that the representation conveys. When evaluating the general impression of a representation, the Bureau considers not merely what it explicitly states, but also what it implies or neglects to say, and judges it from the perspective of an average member of the target audience, who has no special knowledge. Thus, a representation that is literally true may still be misleading when the general impression the representation gives is likely to mislead the consumer.
- False or misleading in a material respect:
  - Representations must be more than merely false or misleading; the false or misleading nature of the representation must be material. Whether this is the case in any particular instance depends on the degree to which the average viewer of the representation is or is likely to be affected by it when deciding whether to purchase the article or service or to take some other step to his or her detriment or to incur some cost (i.e., visit a sales location to view the product).[64] An insignificant or unimportant representation (that is, one that would not affect the viewer's purchasing decision or other behaviour) is not likely to be regarded as being material. As noted above, however, a representation may be material and may be found to contravene the Act, even when no one is actually misled but the average person to whom the representation is directed would likely be misled.

2. Fines and Other Penalties

Fines may be imposed for both criminal and reviewable misleading representations offences. A private party harmed by the offence may also sue for damages caused by misleading representations that contravene the criminal provisions of the Act where they were knowingly or recklessly made, or were permitted to be made, regardless of whether criminal charges have been laid. Under the reviewable practices provisions, the Commissioner may obtain one or all of the following:

- A prohibition order;
- A fine of not more than $750,000 for an individual for the first order and $1,000,000 for each subsequent order or $10,000,000 for a corporation for the first order and $15,000,000 for each subsequent order; and
- Other remedial relief, such as a requirement to publish corrective notices in the newspapers and other media, to inform the public about the misleading nature of the representation.

In the case of reviewable conduct under paragraph 74.01(1)(a), the Commissioner may apply for an order to distribute a monetary amount, not exceeding the total amount paid for the products in respect of which the conduct was engaged, to those persons who purchased the misrepresented products (excluding wholesalers, retailers, or other distributors to the extent that they have resold or distributed the products) according to any terms the court deems necessary for the order's successful implementation. If the court believes the person is disposing of or is likely to dispose of assets on which the enforceability of the order are substantially dependant, the court may also issue an interim injunction to freeze those assets.

Alternatively, as noted above, criminal prosecution is possible when there is clear and compelling evidence that the accused knowingly or recklessly made, or permitted to be made, a false or misleading representation to the public. Any person found guilty of such a representation is liable upon conviction on an indictment to imprisonment for up to 14 years, a fine at the discretion of the court, or both. If the matter is dealt with summarily, the penalty is a maximum fine of $200,000 or imprisonment for up to one year, or both.

3. Liability for Misleading Representations

A manufacturer or other supplier of a product who made representations may be liable under the Act, even when a third-party intermediary in fact sold the product to consumers who were misled by such representations. When, for example, a manufacturer supplied its product to a retailer and also provided promotional materials intended for the public that contained misleading representations, the manufacturer will be deemed to have made those representations. On the other hand, the retailer will not be considered to have contravened the statute unless the representations were made at its specific request, or the manufacturer is located outside of Canada and the retailer was responsible for importing the product (subsections 52(2.1) and (3), 74.03(2), and (3)). Also, when a retailer adapted a manufacturer's representation into an advertisement of its own, the retailer will also be considered to have made the representation and will be liable when the representation was misleading.

4. Rebate Offers

Offering rebates to consumers can be an effective marketing tool for businesses as consumers are often influenced to buy a product according to its perceived "after rebate" price. Rebates typically take the form of an "instant rebate", which is a discount applied to the purchase price at the time of sale, or a "mail-in rebate", which is a post-purchase refund to the consumer of a portion of the purchase price, provided the consumer submits the rebate claim form to the retailer, manufacturer or service provider. According to the Bureau, however, only one percent of consumers actually redeem their mail-in rebates. Due to concerns about the promotion and administration of rebate offers, the Bureau released enforcement guidelines on rebates (instant and mail-in) that sets out the Bureau's approach to interpreting the false or misleading representation provisions of the Act (and also the *Consumer Packaging and Labelling Act*[65] and the *Textile Labelling Act*[66]) as they apply to rebate offers.

In the enforcement guidelines, the Bureau confirms that the misleading advertising provisions of the Act (subsections 52(1) and 74.01(1)(a)) apply to rebates. The enforcement guidelines provide five examples of when a rebate promotion could be considered to be a false or misleading representation:

- Failure to clearly and conspicuously disclose all conditions, limitations and exclusions with respect to the rebate (disclosure inside a product's packaging, or on the website where a consumer applies for the rebate, is unlikely to constitute adequate disclosure);
- Disguising a rebate as the sale price or regular price (e.g., displaying the "after rebate" price in the largest font in the advertisement or using the term 'save' to give the impression that the price is the result of a sale rather than a rebate);
- Failure to specify the type of rebate such that a mail-in rebate could be disguised as an instant rebate;
- Offering a credit in gift card form to be used on future purchases and advertising the retail price as the regular price minus the value of the credit such that a consumer believes a rebate is offered so that the product can be purchased at the advertised price; and
- Failure to use a transparent and efficient rebate fulfillment method. The Bureau also recommends in the bulletin that manufacturers and retailers take into account the ordinary selling price provisions of the Act when promoting rebates.[67]

The Bureau will consider both the general impression and literal meaning conveyed by a rebate offer in determining whether there has been a false or misleading representation. The enforcement guidelines outline five best practices that manufacturers and retailers should follow to reduce the risk of making a false or misleading representation in connection with a rebate offer:

- Prominently and clearly disclose all conditions, limitations and exclusions that are inconsistent with the consumers' general impression, all in a manner that is likely to come to their attention;
- Show the price that consumers will pay at the time of purchase;
- Clearly indicate the amount of the rebate that may apply;
- Clearly identify whether the rebate is mail-in or instant; and

- Clearly explain, in the case of a mail-in rebate, that if the after-rebate price is stated, this price is subject to conditions, and ensure that this information is prominently disclosed in a manner that is likely to come to consumers' attention.

While enforcement of the false or misleading representation provisions of the Act is a priority for the Bureau, there have been few cases involving rebate promotions. In 2010, the Bureau concluded that appliance manufacturer Whirlpool Canada LP's condition that a rebate offer only applied to "participating" Whirlpool dealers was not clearly disclosed to consumers. Hundreds of consumers were denied their rebate on the stated basis that they purchased appliances at Whirlpool dealers who were not "participating" in the promotion. As a result, Whirlpool agreed to reimburse nearly 400 customers up to $2000 each, depending on their purchases.

In 2009, The Brick Warehouse LP agreed to cancel all advertising featuring an $80 national mail-in rebate that gave the general impression that consumers would receive a cash or cheque rebate as opposed to a gift certificate to be credited towards future purchases at the store. The Brick also agreed to provide an $80 rebate cheque instead of the gift certificate.

In 2007, the Federal Court granted the Bureau default judgment against Polar Spas for failing to adhere to the terms of a 2006 consent agreement whereby Polar Spas agreed to stop making false or misleading representations regarding rebate offers. The company promoted a "cashable vouchers" program in which a consumer would receive a voucher when purchasing of hot tub which was supposedly worth most, or the entire purchase price. The voucher could only be claimed three years after purchase. Polar Spas failed to disclose other stringent conditions that had to be met in order to receive the rebate.

In 2002, the Bureau investigated the provision of rebates by a major electronic retailer following complaints that alleged the retailer prominently displayed the after-rebate price and failed to disclose out-of-pocket expenses related to the products for which the rebate was offered. The Bureau discontinued the inquiry in 2004 when the retailer began to prominently display relevant information pertaining to the rebate promotion.

5. Manufacturing and Country of Origin Claims

Claims related to manufacturing and country of origin can also be reviewable by the Bureau under paragraph 74.01(1)(a). Regarding country of origin claims, the Bureau released guidelines in 2009 prescribing when a product can be marketed as "Made in Canada", which detailing requirements related to the costs of production and appropriate qualifying statements.[68]

In 2016, the Bureau brought an action against Moose International Inc., the manufacturer of the Moose Knuckles brand of winter clothing. The application took issue with the marketing of Moose Knuckles products as "Made in Canada". The Bureau alleged that much of the manufacturing was done in Vietnam and elsewhere in Asia with only finishing touches done in Canada. The matter was resolved on consent following mediation. In the consent agreement registered by the parties, Moose Knuckles agreed to include appropriate qualifiers, make changes to its manufacturing process, commit to compliance, and contribute $750,000 (in cash or merchandise) over 5 years to charitable organizations that support underprivileged children.[69]

6. Performance Claims

The reviewable practices provisions also deal with performance claims. Paragraph 74.01(1)(b) requires that any such claim be based on adequate and proper testing. The testing must be rigorous and repeatable. It also must be performed prior to the performance claim being made. Testing performed after making the representation is not sufficient.

The constitutionality of subparagraph 74.01(1)(b) was questioned in Tribunal cases in 2006 and 2008. In 2013, the constitutionality of this provision was examined and upheld by the Ontario Superior Court in *Canada (Commissioner of Competition) v. Chatr Wireless Inc*. The court found that subsection 74.01(1)(b) is a demonstrably justifiable and reasonable limit on the freedom of expression guaranteed in a free and democratic society.

In 2016, the Bureau reached a consent agreement with Volkswagon Group Canada Inc. and Audi Canada Inc. (together, "VW") for making representations that their 2.0 litre diesel engines produced less emissions and were cleaner than an equivalent gasoline engine. An investigation by Bureau led to the conclusion that the vehicles nitrogen oxide emissions were well in excess of the standards to which they were certified, but the vehicles were able to detect when their emissions were being tested and altered their operations to reduce emissions during that time. The consent agreement required VW to pay a combined penalty of $15 million, over and above the large class action settlement VW had entered into to compensate Canadian consumers for the misrepresentation.

7. Disclaimers and Qualifications

Questions often arise about whether disclaimers or qualifying statements may effectively modify or qualify the principal theme or message (which, by itself, may be misleading) conveyed in a representation. Whether or not this is so depends on the nature of the disclaimer or qualifier, the manner in which it is displayed in the representation and the audience for the representation. Generally speaking, reasonably legible footnotes in printed advertisements or text that appears in television advertisements may be relied upon when it is reasonably prominent and either qualifies or provides additional detail in an advertisement that is not otherwise misleading. However, disclaimers are generally not acceptable when their effect is simply to negate or contradict the false or misleading general impression the main body of the advertisement creates. Material information that is essential to ensuring the audience for the advertisement receives an accurate general impression of the claims being made should not be placed in disclaimers but rather should be in the main body of the advertisement and in close proximity to the statement being qualified.

While the Act does not directly address pricing disclosure, the Bureau has recently focused on the issue of 'drip pricing', specifically in the car rental industry. In March 2015, the Bureau filed an application with the Tribunal alleging false or misleading advertising by Avis and Budget in connection with promotional pricing practices where a promotional price was offered without mandatory fees and charges being disclosed until later in the reservation process. The Application also took issue with the description of mandatory fees. In September 2016, the parties reached a consent agreement pursuant to which Avis and Budget agreed they would not advertise car rentals and associated products at prices that are not attainable due to additional mandatory fees, revise the description of the additional fees to ensure they do not give the misleading impression that governments and agencies require them, pay a $3 million administrative monetary penalty as well as $250,000 towards the Bureau's investigative costs, and implement a corporate compliance program.

While no application was filed in the matter, in April 2017 the Bureau reached a consent agreement with Hertz Canada Limited (Hertz) and Dollar Thrifty Automotive Group Canada Inc. to pay a total of $1.25 million in administrative monetary penalties, ensure their advertising complies with the law and implement new procedures aimed at preventing advertising issues in the future which are similar to those in the Avis Budget consent agreement.

8. Tests and Testimonials

The Act also limits the use of representations about tests to assess the performance, efficacy or length of life of a product, and the use of testimonials about a product. Such tests and testimonials may only be used in the following circumstances:

- When the test or testimonial was previously made or published by the person who conducted the test or gave the testimonial; or
- Prior to the test or testimonial being made or published, the person who conducted the test or gave the testimonial approved it in writing.

In determining whether a person has engaged in reviewable conduct by making a representation relating to product testing or testimonials in contravention of § 74.02, it is not necessary to establish that the representation actually deceived or misled a person or was made to the Canadian public or in a place accessible to the public. The Bureau will take into account both the general impression and literal meaning conveyed by the impugned representation in considering whether the person who made the representation has engaged in reviewable conduct.

Advertisers are under the same onus to show that product testimonials are not materially false or misleading, as if they themselves had made the representation. Accordingly, advertisers must ensure that test results and testimonials are not used out of context.

9. Canada's Anti-Spam Legislation

Canada's Anti-Spam Legislation (CASL) amended the Act in 2014 to prohibit false or misleading representations made in a commercial electronic message, by making it an offence (under § 52.01) and a reviewable practice (under § 74.011) to make:

- Any representation in an electronic message that is false or misleading in a material respect;

- Any false or misleading representation made in a "locator", which is a name or other information used to identify the source of data in a computer system (a URL is an example); or
- Any false or misleading representation in the sender information or subject matter of an electronic message

The first bullet above is merely an application of the current general prohibition on misleading representations to electronic messages. However, the second and third bullets create unique and specific requirements regarding representations made in the locator, sender information and subject matter of an electronic message. Importantly, there is an absence of any materiality threshold in these provisions. This means that any false or misleading representations made in the sender information, subject line or any locator in an electronic message are captured, regardless of its impact on a recipient or the degree of misrepresentation involved.

It is not uncommon to see representations made in the subject line that are intended to be read in context of the body of the email. For example, the subject line may offer free or discounted products or services, and the recipient is often required to open the email to review the full terms and conditions of the offer, which could qualify the representation made in the subject line. This provision creates a standalone prohibition for false or misleading representations in the subject line of an email—with no materiality qualifier—and as such, the subject line might be reviewed by the Bureau in isolation from the body of the email. Without the additional context of the body of the email, the subject line may be seen as false or misleading, and it would therefore be prudent to review electronic messages sent as part of a marketing campaign with additional care.

There has been no litigated case to date under the misleading representation provisions of CASL. The Bureau's above –mentioned application against Avis Budget in 2015 was brought in part under CASL as certain of the allegedly misleading representations were sent via email. As noted, that matter was resolved on consent. .[70]

CASL as passed created a private right of action against those who allegedly violated CASL's provisions, which was to take effect in July 2017. Under the private right of action, organizations (as well as their officers, directors and agents) could be sued by anyone claiming to have been "affected" by an act or omission that violated CASL. Plaintiffs would be able to claim both compensatory damages (for any actual losses or damages they may have suffered) as well as statutory damages, which in some circumstances could be up to $1 million per day, even where no actual harm was proven.

In light of the complexity of complying with CASL and the significant statutory damages available under the private right of action, many businesses and other organizations were concerned that the private right of action would lead to a cottage industry of class actions for non-compliance with CASL. In June 2017, the Canadian federal government announced that it had suspended the coming into force of the private right of action under CASL, originally scheduled to come into force on July 1, 2017. The government's announcement does not indicate if or when the private right of action may take effect in the future, but it does note that a parliamentary committee will be asked to review CASL.[71]

10. The Collection, Storage and Use of Consumer Data

In 2017, the Bureau released a draft white paper, "Big data and Innovation: Implications for competition policy in Canada", which discussed the impact of big data on competition law. The draft paper covers a range of competition law issues impacted by 'big data'. It is noteworthy that the Bureau has indicated that it would apply the deceptive marketing practices provisions of the Act to disclosure regarding the collection, use and maintenance of consumer data.[72]

For example, the Bureau notes that action may be taken where a consumer is enticed to use a product based on deceptive representations regarding how their information will be stored, analyzed or used, or where there is inadequate disclosure about how information collected will be stored, analyzed or used.

B. Pricing

1. Ordinary Price Claims

A frequently used and powerful marketing tool is a claim of financial savings. In a competitive marketplace, suppliers can gain a significant advantage over competitors with claims such as "X% off!" or "Was $X. Is now $Y," due to the attractiveness of such claims to price-sensitive consumers. Recognizing the potential for misleading consumers about actual savings, the Act regulates the calculation of the ordinary selling or reference price on which savings claims are based. A person engages in reviewable conduct under §§ 74.01(2) and 74.01(3) when advertisements refer to regular or ordinary selling prices that do not pass either the volume or the time test. As with the other misleading advertising provisions of the Act, it is not necessary to establish that a person was deceived or misled by the claim or that the claim was made to the Canadian public or in a place accessible to the public. The Bureau will take into account both the general impression and literal meaning conveyed by the impugned claim in considering whether a person has engaged in reviewable conduct.

To meet the volume test, more than 50 percent of a product's sales (which comprise sales of goods and services under the Act) must have been at the reference price or more within 12 months before or after the savings claim is made; however, this period may be shorter when the product has a short life cycle, as many seasonal products do. The time requirement, on the other hand, is generally satisfied when the product has been offered in good faith at the reference price or more for more than 50 percent of the six months before or immediately after the savings claim. Again, this period could be shorter depending on the nature of the product.

The requirement to calculate the ordinary selling price in this way applies whether the savings claim refers to the supplier's own goods or to goods generally available in the relevant geographic market. When the savings are calculated based on the general market, the supplier must be careful to select appropriate products for comparison, appropriate competitors who offer the products and the relevant geographic market.

Enforcement of the ordinary selling price provisions of the Act is a priority for the Bureau.

In 2017, the Bureau filed a notice of application to the Tribunal alleging infringement of §74.01(3) by the Hudson Bay Company relating to mattress sets that were being advertised as heavily discounted but were allegedly rarely, if ever, sold at their ordinary price. In 2015, Michaels of Canada, ULC agreed to a ten year consent agreement and to pay $3.5 million to settle an allegation in connection with advertising for custom and select ready-frames that Michaels did not ensure that such frames were offered for sale in good faith prior to promoting them at substantial discounts. In 2009, Curry's Art Store Limited was fined an administrative monetary penalty of $60,000 for ticketing products both with the manufacturer's suggested retail price and a lower Curry's price on products, implying the difference between the two resulted in a greater discount to consumers, despite the fact that the products were never sold at the suggested price. Curry's also entered into a 10-year consent agreement, pursuant to which Curry's was required to display a corrective notice, make sure that all future price advertising complied with the Act, and create a corporate compliance program to ensure compliance with the Act. In 2006, Grafton-Fraser Inc. and its Chief Executive Officer entered into a 10-year consent agreement with the Bureau that stipulated payment of a $1 million administrative monetary penalty and $200,000 in costs. Grafton-Fraser Inc. had significantly inflated the regular price of certain men's garments that were on sale, resulting in an overstatement of savings to consumers. In 2005, Sears Canada was fined almost $500,000 for its unsubstantiated use of sale prices in the promotion of vehicle tires. The Bureau also entered into consent agreements with two national retailers, Suzy Shier (2003) and the Forzani Group (2004), both of which paid significant fines: $1 million, in the case of Suzy Shier, and $1.2 million plus $500,000 in costs, in the case of Forzani.

Importantly, allegations of misleading consumers with ordinary price claims in an e-commerce setting can lead to investigations not only against the suppliers of the goods but also against the operators of ecommerce platforms through whom the suppliers sell their goods. For example, in 2016 the Bureau entered into a consent agreement with Amazon regarding ordinary price claims made by suppliers who sold their products via Amazon.ca to Canadian consumers. The Bureau found that Amazon had relied on the price lists provided by their suppliers, but did not independently validate these prices. As part of the consent agreement, Amazon agreed to expand its corporate compliance program to increase independent validation of prices, and to pay a $1,000,000 penalty.

Accordingly, while savings claims can be an effective marketing tool, such claims must be carefully scrutinized in advance of launching any advertising materials.

2. Bargain Prices and Bait and Switch Selling

Similar to savings claims, another common marketing practice is the promotion of bargain prices. The Act defines "bargain price" as a price that is less than the ordinary price or is reasonably understood to be less than the ordinary price. This can be so even though there may be no direct mention in the advertisement that the price is a bargain price.

The Act prohibits advertising a product at bargain prices when the product is not available in reasonable quantities—in other words, bait and switch selling. With respect to what constitutes reasonable quantities, consideration must be given to the nature of the market in which the advertiser carries on business, the nature and size of the advertiser's business, as well as the nature of the advertisement itself. Although it is questionable whether advertisers can avoid contravening the Act by using such phrases as "limited quantities available," doing so may reduce the quantity that would otherwise be considered reasonable in the circumstances. Alternatively, advertisers could consider specifically stating the number of products that will be available at the bargain price.

The Act does, however, contemplate unforeseen difficulties in obtaining adequate supply of a product as a legitimate reason for an advertiser's inability to supply an advertised product, including the following:

- The advertiser took reasonable steps to obtain a reasonable quantity of the product but could not, for unanticipated reasons beyond its control.
- The advertiser obtained a reasonable quantity of the product but demand exceeded reasonable expectations.

An advertiser may also avoid liability by providing a rain cheque to customers for the same or an equivalent product of equal or better quality within a reasonable time.

3. Sale Above Advertised Price

It is a reviewable practice to sell a product for more than the advertised price. This is to prevent suppliers from advertising low prices to attract consumers and then demanding a higher price once the consumer is in the store. This provision may also apply when the sale price of the product was the same as that advertised, but the supplier charged additional fees that effectively raised the price of the product above that advertised. The provision is, however, limited to the market to which the advertisement relates and for the period during which the price was advertised. Suppliers may define the relevant market to be narrower than the market to which the advertisement would otherwise reasonably be expected to reach (for example, an advertisement in a local newspaper may state that the offer is restricted to specific store locations).

The Act also recognizes the possibility of errors in advertising. Accordingly, the Act does not apply to advertisements in a catalogue, when the catalogue prominently states that prices are subject to error and it is established that the price was inadvertently wrong. The Act also does not apply to catalogue advertisements containing an incorrect price when the advertiser immediately publishes a correction notice.

The catalogue exception does not apply to newspaper advertisements. Newspapers, unlike catalogues, have short publication lead times and can easily be supplemented or replaced. Accordingly, a disclaimer in a newspaper advertisement that the prices are subject to error is not a way to counter a sale above advertised price. Nonetheless, suppliers should immediately publish a correction notice to reach the same market as any incorrect advertisement.

It is important to bear in mind that it is the advertiser's obligation to ensure that customers are charged the advertised sale price and not a higher price. Customers are under no obligation to point out that a special price has been offered.

4. Double Ticketing

Under subsection 54(1) of the Act, it is a criminal offence to sell a product at a price other than the lowest marked price when there are two or more prices on the product. The prices may be placed on the product, its wrapper or container, on anything attached to, inserted in or accompanying the product, on anything on which the product is mounted for display or sale, or on an in-store or other point-of purchase display or advertisement. Maximum penalties are a fine of $10,000, imprisonment for up to one year or both.

C. Contests

Promotional contests to promote products are regulated not only under the Act but also the *Criminal Code* and, in the case of contests open to residents of Quebec, legislation in that province.

1. *Competition Act* Provisions

The Act regulates the manner in which promotional contests are carried out. The distribution of prizes may not be unduly delayed and must be awarded either on the basis of skill or randomly. The contest rules must be adequately and fairly disclosed in a reasonably conspicuous manner, without the consumer being required to visit the supplier's premises. For example, the rules may be published online or made available through a 1-800 number. All advertising about the contest should include the basic details of the contest and indicate where the consumer can find the full rules.

The Bureau's Information Bulletin, Article 74.06 of the Act—Promotional Contests[73] states that, at a minimum, the contest rules should specify the following:

- The number and nature of the prizes to be awarded;
- The approximate regular market value of the prizes;
- Any regional allocation of prizes;
- Details as to the chances of winning each prize;
- When a series of prizes is being awarded at different times, the number, nature and approximate regular market value of prizes that are still available;
- When early-bird prizes are to be awarded only to the first entrants in a contest, the starting date for the contest;
- The mechanism for awarding the prizes (including any skill-testing question requirement, and whether facsimile entries are acceptable);
- The contest closing day; and
- Any other fact known to the supplier that may materially affect a contestant's chances of winning.

In addition to the general prohibition against false and misleading representations, which also applies to contests, it is an offence under § 53 of the Act to send any form of notice that falsely gives the general impression that the recipient has won or will win a prize or other benefit. Any person found guilty of this offence is liable upon conviction of indictment to imprisonment for up to 14 years, a fine at the discretion of the court, or both. If the matter is dealt with summarily, the penalty is a maximum fine of $200,000 or imprisonment for up to one year, or both. Consequently, any advertising material used in conjunction with a contest should be carefully worded to avoid conveying to consumers false impressions about their chances of winning.

2. Criminal Code Provisions

Under the *Criminal Code*, there are a number of offences relevant to contests/sweepstakes operated in Canada. Specifically, it is an offence to:

- Require award prizes of goods, wares, or merchandise where entrants have paid money or other valuable consideration to participate in a game of chance or a game of mixed chance and skill;
- Operate any "operation of any kind" where any person, on payment of a sum of money shall become entitled under the "operation" to a larger sum of money by reason of the fact that others have similarly participated in the operation; and
- Award property solely on the basis of chance.

Accordingly, contests/sweepstakes incorporate an element of skill (such as a time-limited, mathematical skill-testing question) in order to render them games of at least mixed skill and chance, if not entirely skill. They also typically include a no purchase method of entry for the purposes of enhancing the sponsor's argument that a payment of money was not required to win a prize.

3. Quebec Requirements

Contests open to Quebec residents are also subject to specific legislation in that province. In addition to setting out content requirements for contest rules (which for the most part overlap with the content requirements set out by the Act), the Quebec legislation requires the payment of duties on prizes worth more than $100 and that the provincial government be notified of such contests. As a result of these administrative requirements, it is not uncommon for contest sponsors to exclude Quebec residents from entering their contests.

D. Telemarketing

As the result of telemarketing becoming a widely used and frequently misused promotional practice, the Act includes a provision designed to address certain deceptive telemarketing practices. The provision is broad in scope in that it applies to the use of "interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product [good or service] or … any business interest." As a consequence, in addition to prohibiting deceptive telemarketing activities, this provision could potentially affect a broad range of commercial activities that involve telephone communications, including many legitimate call centre activities. Although the provision itself does not distinguish between voice and non-voice interactive telephonic communications, the Bureau's Information Bulletin, Telemarketing: § 52.1 of the Act,[74] indicates that the Bureau will not apply the provision to non-voice telephone communications, such as facsimile and Internet communications or automated pre-recorded messages. Similarly, the Bulletin also indicates that the provision does not apply to certain customer-initiated calls.

Under this provision, telemarketers have a positive duty to disclose certain prescribed information. It is a criminal offence to engage in interactive telephone communications for a business purpose unless disclosure of certain prescribed information is made in a fair and reasonable manner at the beginning of each telephone call, including the following:

- The identity of the person on whose behalf the communication is being made;
- The nature of the product or business being promoted; and
- The purpose of the communication.

It is also necessary to disclose in a fair, reasonable and timely manner the price of any product whose supply or use is being promoted and any material restrictions or conditions applicable to its delivery, as well as any other information that may be prescribed by regulation.

This provision also prohibits telemarketers from making false or misleading representations and limits the use of prizes, contests, conditional purchases, and certain unfair pricing tactics. Such prohibitions apply not only to commercial activities, but also extend to fundraising for charitable and other not-for-profit purposes.

The telemarketing provision expands the liability of corporations and their directors and officers, since, in the absence of proof of due diligence, a corporation may be liable for acts committed by an employee or agent of the corporation. Officers and directors who are in a position to direct or influence the policies of the corporation in relation to the offensive conduct are also liable to be prosecuted, whether or not the corporation has been prosecuted or convicted.

Any person found guilty of deceptive telemarketing or telemarketing without prescribed disclosures is liable upon conviction of indictment to imprisonment for up to 14 years, a fine at the discretion of the court, or both. If the matter is dealt with summarily, the penalty is a maximum fine of $200,000 or imprisonment for up to one year, or both.

Enforcement of the Act's deceptive telemarketing provisions remains a high priority of the Bureau. In 2009, the Act was amended so that in determining whether a person has engaged in reviewable conduct or has made criminally false or misleading representations, it is no longer necessary to establish that any member of the public to whom the representation was made was in Canada.

Further, with respect to international deceptive telemarketing practices, an investigation by the Bureau in 2008 led to the extradition of three individuals to the U.S. where they were sentenced to imprisonment for terms ranging from 15 to 23 years and were collectively ordered to pay over US$5 million in restitution. The trio operated a telemarketing scheme that generated approximately US$8 million, targeted U.S. residents by offering them a MasterCard or Visa credit card provided they pay a one-time processing fee. In 2015, a Canadian resident was sentenced to 18 months in prison after pleading guilty to eight charges of deceptive telemarketing in the context of an operation where businesses in Canada and the U.S. would be contacted claiming that the businesses had previously ordered an online business directory listing when they had not, in fact, done so. In 2008, the Bureau imposed a two-year conditional sentence on an individual for deceptive telemarketing where telemarketers contacted Canadian and U.S. companies for payment regarding a business directory listing. The telemarketers claimed they had received authorization to update the listing when they had not. Similarly, four men were also convicted of deceptive telemarketing by running a scam whereby telemarketers informed companies they were existing clients and requested payment for a CD directory or stated that the CD was free and subsequently sent an invoice or charged victims for returned CDs.

Developments in telemarketing regulation have also occurred outside of the Act. The Canadian Radio-Television and Telecommunications Commission ("CRTC") established a comprehensive framework for unsolicited telecommunications received by consumers called "The Unsolicited Telecommunications Rules." The framework came into effect on September 30, 2008 and is made up of the Telemarketing Rules, the National Do Not Call List ("DNCL") and the Automatic Dialing-Announcing Device Rules. While consumers may register their telephone numbers with individual telemarketers as part of each telemarketer's mandatory internal do not call list, the DNCL provides consumers with the option of registering their telephone numbers at no charge on a bilingual, central, nationwide list to help prevent unwanted calls and voicemail broadcasts. Registration lasts for three years, at which time the consumer can re-register.

Telemarketers making calls on their own behalf, clients of telemarketers, subscribers of the DNCL and organizations that provide telemarketing related services must register with the DNCL even if they are making calls that are exempt under the National DNCL Rules ("the Rules"). Registration is free and is effective for 12 months. Exemption from the Rules is based on the type of call being made. Calls made by or on behalf of Canadian registered charities, political parties, riding associations, political candidates and general circulation newspapers soliciting new business are exempt. Additionally, businesses can take advantage of the "existing business relationship" and "business-to-business" exemptions. They can also make telemarketing calls to consumers who have provided express oral or written consent to being contacted by the telemarketer, which overrides the consumer's DNCL registration (though the consumer can request to be removed from that telemarketer's list).

When telemarketers and clients of telemarketers make calls that are not exempt under the Rules, they must obtain a subscription to the DNCL. Telemarketers or clients of telemarketers operating outside of Canada who solicit Canadian consumers must also register and subscribe to the DNCL. The CRTC has indicated that if an international telemarketer is found to be in violation of the Rules, it will pursue the Canadian company associated with that telemarketer.

Even where an exemption is available, telemarketers and clients of telemarketers must follow the Telemarketing Rules, which relate to internal do not call lists, telemarketer identification, and calling hours, and the Automatic Dialing-Announcing Device Rules, which regulate devices that store telephone numbers and automatically dial the numbers to deliver outbound pre-recorded or synthesized voice messages.

If the CRTC finds a telemarketer or client of a telemarketer to be in violation of the Unsolicited Telecommunications Rules, the CRTC may impose, per infraction, an administrative monetary penalty of up to $15,000 for corporations and $1,500 for individuals.

E. Pyramid Selling

While multi-level marketing plans are permissible under the Act, pyramid selling is not. The Act defines a multi-level marketing plan as a plan to supply a product under which a participant receives compensation for supplying the product to another participant in the plan who, in turn, receives compensation for supplying the same or another product to other participants. Some of the key triggers for the application of the Act's pyramid-selling provisions are the following:

- Participants giving consideration for the right to receive compensation for recruiting new participants;
- Participants being required to purchase a specified amount of product as a condition of participating in the plan (unless the participant purchases the product at the seller's cost price for the sole purpose of facilitating sales);
- A person knowingly supplying a commercially unreasonable amount of product to participants; or
- Participants not being permitted, or having no knowledge of their right, to return products on reasonable commercial terms.

Multi-level marketing plans must provide fair, reasonable, and timely disclosure to participants regarding actual or likely compensation to be received by typical participants.

The Bureau released an information bulletin entitled the "Multi-level Marketing ("MLM") and Scheme of Pyramid Selling" to provide guidance on the Bureau's interpretation of provisions of the Act relating to multi-level marketing and pyramid selling. In particular, the bulletin outlines the differences between MLM plans and pyramid selling schemes and provides commentary and illustrative examples. Additionally, the bulletin highlights the disclosure responsibilities of MLM plan operators and provides guidance to these operators on commercially reasonable terms relating to the purchase of inventory or sales kits and product return policies. The bulletin also sets out the application requirements for those suppliers wishing to obtain a written opinion on a prospective MLM plan from the Bureau.

VII. Investigatory Powers and Confidentiality of Information

The Commissioner and the staff of the Bureau have significant powers of investigation and inquiry as part of the Commissioner's mandate to administer and enforce the Act.

The Bureau's investigations can run along various tracks. The Bureau may request the voluntary production of information, in the absence of a formal order or legal process. The Bureau may also request or obtain information from third party sources, including customers, competitors or industry data sources. However, when the Bureau decides to use its formal investigatory powers, the Commissioner must launch an inquiry, which may arise in the following circumstances:

- Whenever the Commissioner has reason to believe that a criminal offence under the Act has been or is about to be committed;
- Whenever there are grounds for the Tribunal to issue an order under the reviewable practices provisions of the Act; and
- When a person has contravened an order made under the Act.

The Commissioner is also required to commence an inquiry when any six adult Canadian residents submit a written complaint outlining the grounds upon which an inquiry should be commenced. Finally, the Minister of Innovation, Science and Economic Development may direct the Commissioner to investigate a violation of the criminal provisions of the Act or a possible breach of an order under the Act. In practice, the Commissioner launches most inquiries as a result of an investigation, rather than as the result of a six-resident complaint or a ministerial request.

The courts have determined that the Commissioner's decision to commence an inquiry is purely administrative, because an inquiry is merely an investigation with no determinative impact on rights or liabilities.[75] As a result, the Commissioner's decision to conduct an inquiry (or to refuse to do so) is not subject to judicial review by the Federal Court of Canada, which otherwise may review any judicial or quasi-judicial decisions of a federal administrative agency or tribunal, but not administrative ones.

The Bureau's 2014 Information Bulletin on Communication during Inquiries sets out when and how the Bureau generally communicates with the target of an inquiry, industry participants, complainants and the general public after an inquiry has been commenced.

A. Evidence Gathering

The Commissioner has two principal formal means for obtaining information during the course of an inquiry: invoking the production and examination powers of § 11 of the Act; and utilizing the formal search and seizure powers of §§ 15 and 16 of the Act.

1. Section 11 Orders

Under § 11 of the Act, the Commissioner may, in the course of an inquiry, apply to a court for an order requiring any person who has or is likely to have information relevant to the inquiry to be examined by the Commissioner or an authorized representative on any matter relevant to the inquiry, to produce a record or any other thing specified in the order or to make a written return.

The Commissioner is able to obtain § 11 orders relatively easily, due in part to the procedure for obtaining the order, which involves filing an application *ex parte*. This means that the target of the order is not given notice of the application and therefore may not appear before the court to contest the application. The judicial test for issuing an order requires only that the Commissioner demonstrate that an inquiry has been launched and that the party against whom the order is sought is likely to have information relevant to the inquiry. In 2014, the Federal Court confirmed that the purpose of a § 11 application is not to consider the substantive merits of the Commissioner's inquiry. Rather, the purpose is to obtain information that is relevant to the inquiry and therefore the court's focus must be on satisfying that:

- An inquiry is in fact being made;
- The Commissioner has provided full and frank disclosure;
- The information or records described in the draft order are relevant to the inquiry; and
- The scope of such information or records is not excessive, disproportionate or unnecessarily burdensome.[76]

This is a relatively low hurdle and can be rationalized on the basis that proceedings under § 11 are investigative and not adjudicative in nature and that any material produced is for purposes of the inquiry, and not for prosecuting criminal offences. Thus, for inquiry purposes, no issues of self-incrimination arise. However, the Commissioner may be able to obtain § 11 orders for criminal investigations involving corporate entities, who are not entitled to assert self-incrimination rights in Canada.

Consistent with the requirements of § 13 of the Canadian Charter of Rights and Freedoms ("Charter"), subsection 11(3) of the Act provides a statutory form of use immunity for an individual who is required to respond to the order: information provided in compliance with a § 11 order may not be used against any individual in criminal proceedings, except for instances of potential perjury or giving contradictory evidence. Similar protections may not apply to corporations or other legal persons.

2. Search and Seizure

Section 15 of the Act provides for *ex parte* applications by the Commissioner to a court to obtain a warrant to search and seize evidence related to the criminal or civil provisions of the Act. The application must set out reasonable grounds to enable a court to find that an offence under the Act 'has been or is about to be committed' or that grounds exist for making certain orders, or that a person has contravened certain orders under the Act.

Reasonable grounds are also required to be shown concerning the details of the premises to be searched and the records, things or class of records or things that are the subject of the search. When the warrant is sufficiently specific, searches of computer systems are allowed to recover and reproduce a record. In addition, persons who operate such systems may be ordered to provide access to such a system. However, computer searches are bound by the terms of the warrant, and there are limits to the Bureau's ability to use the warrant to access information outside Canada.

The Bureau most commonly uses search warrants (or 'dawn raids') in criminal investigations where the element of surprise is paramount. In such cases, seeking information voluntarily from a potential target, or even giving the target time to respond to a written § 11 order may be considered to be a less effective approach, given concerns about document movement or destruction. Because any business with offices in Canada may potentially be the target of such a search, it is important that all employees be equipped to respond appropriately if and when Bureau officers arrive at the door.

Warrantless searches and seizures are only permitted in exigent circumstances, namely, when loss or destruction of evidence would be likely during the time it would take to get a warrant. Warrantless searches and seizures should be very rare and would be subject to strict judicial scrutiny if the Bureau were to use the products of such searches as evidence.

There is no appeal from the granting of a search warrant, although freestanding judicial review applications may be made before trial, particularly when the party that was searched needs material returned for use in its continuing operations. However, most challenges to warrants are part of pre-trial proceedings to exclude evidence, similar to suppression hearings in U.S. criminal trials. The duty of the reviewing court when examining a challenge to a search warrant is not to substitute its view of whether the material in support of the initial application provides sufficient grounds to issue a warrant but to decide whether the warrant could have been issued by the initial court. Recent Canadian case law suggests that, even despite deficiencies in obtaining warrants, courts are increasingly admitting evidence seized under defective warrants by looking at the reliability of the resulting evidence such as pre-existing corporate documents, which are typically the products of most antitrust searches and could be considered to be highly reliable as well as being subject to a less stringent application of privacy principles.

In April 2008, the Bureau released its Information Bulletin on §§ 15 and 16 of the Act, which provides important guidance on how the Commissioner exercises his powers of search and seizure under the Act.[77]

B. Interception of Private Communications: Wiretapping

The Bureau has used wiretapping as a tool in its investigations for several years. Part VI of the Criminal Code governs wiretapping in Canada. The offences eligible for wiretapping in Bureau investigations are conspiracy, bid-rigging and deceptive telemarketing. Wiretap orders must not exceed 60 days but may be renewed. Persons whose communications have been lawfully intercepted are required to be notified within 90 days after the period of the order. In exceptional cases, the government may apply for an additional period of up to three years.

Under Canadian law, wiretapping constitutes a search and seizure that is subject to the safeguards and protections of the *Charter*, particularly § 8, which provides a right to be secure against unreasonable search or seizure. Courts have observed that the interception of private communications constitutes a greater invasion of privacy than a regular search warrant and therefore demands a higher constitutional standard for judicial authorization. Thus, the sworn affidavit in support of a wiretap order must scrupulously observe the statutory and case law requirements for full and complete disclosure of the investigation, providing reasonable grounds for the order. When the Bureau is relying on confidential informants to obtain wiretap orders, it must demonstrate sufficient independent factual corroboration through further investigation.

Most challenges to the admissibility of wiretap evidence are now based on *Charter* principles and, as in the case of search warrants, occur through pre-trial hearings. Further non-*Charter* challenges to the admissibility of wiretap evidence could be based on the integrity of the wiretap tapes, accuracy of the transcriptions, continuity of the tapes, and voice identification of the participants. The key issue for any reviewing court on a pre-trial application would be whether there continues to be a basis upon which the authorizing judge could have granted the initial authorization. Even when the authorization is determined to be invalid, evidence of the conversations themselves may still be admitted in evidence as long as such admission would not bring the administration of justice into disrepute.

An application to intercept private communications must carefully guard against any potential violation of solicitor-client privilege. The affidavit in support of the application must fully disclose all circumstances to enable the judge to stipulate terms and conditions to protect such privileged communications, including live monitoring procedures.

C. Confidentiality of Information Obtained During an Investigation

Section 29 of the Act governs the communication of information obtained by the Bureau through either formal powers or voluntary production, as well as information submitted in accordance with the merger notification provisions. In general, such information is protected as confidential and is also exempt from disclosure under the federal *Access to Information Act*. Section 29 of the Act also protects the identity of the person from whom the information was obtained. There are two general exceptions to the Commissioner's obligation to keep information confidential: information may be provided to another Canadian law enforcement agency; and information may be shared with foreign regulators as long as it is for purposes of administering or enforcing the Act.

In September 2013, the Bureau updated its Information Bulletin on the Communication of Confidential Information under the Act, which outlines the Bureau's policies and practice in the area of confidentiality. The Bureau has taken the view that the term "Canadian law enforcement agency" is to be broadly defined to include "in addition to municipal, provincial and federal police forces … any federal or provincial authority that enforces acts or regulations that provide for criminal, civil or administrative sanctions." In the Bureau's view, it may share information when:

- The Bureau believes it is required for the enforcement operations of another agency, where the information reveals an apparent criminal offence, and where there is a threat to public security or safety;
- It is necessary to secure the cooperation or assistance of another agency in the administration or enforcement of the Act;
- A Canadian law enforcement agency has requested it for the purpose of carrying out its mandate; or
- It will facilitate the prevention of mass marketing fraud, deceptive marketing practices, bid-rigging and criminal conspiracies.

The Bureau takes a similarly expansive view of the phrase "…for the purposes of the administration or enforcement of this Act" in § 29, indicating that it would enable, in part, the following:

- Communicating with customers, suppliers or competitors in order to obtain additional information to determine whether the Bureau's or a third party's assessment of a matter is accurate;
- Obtaining enforcement assistance from foreign law enforcement authorities or coordinating such activities with those agencies; and
- Making applications for the use of formal investigative powers under §§ 11 or 15 of the Act and for Part VI Criminal Code wiretap authorizations and production orders.

With respect to foreign authorities, the Bureau observes in its bulletin that many bilateral and multilateral instruments are subject to specific confidentiality safeguards. This includes, for example, the Bureau's 1995 agreement with the United States on applying laws relating to competition and deceptive marketing practices. Provisions of Article III of that agreement indicate that each competition authority will, to the extent compatible with domestic law, provide the other with any "significant information that comes to [its] attention about anti-competitive activities that may be relevant to, or may warrant enforcement activity by the other party's competition authorities." Article X requires each competition authority to maintain the confidentiality of information communicated in confidence and to "oppose to the fullest extent possible consistent with that party's laws, any application by a third party for disclosure of such confidential information."

In criminal matters, formal requests for evidence gathering by investigative agencies outside Canada are governed under the provisions of the *Mutual Legal Assistance in Criminal Matters Act*, or pursuant to similar provisions of the Act for civil matters. As the bulletin points out, the transmission of information under formal treaty requests is conducted according to treaty provisions and the requirements of the legal assistance legislation itself.

In the context of the Bureau's immunity program, both the identity of and information about an immunity applicant is to be kept confidential, except when the person waives confidentiality or when disclosure is otherwise required by law (generally during criminal prosecutions) and in limited circumstances to prevent commission of serious offences.

In recent years, the Bureau has been faced with an increased number of requests for information from private plaintiffs who are pursuing claims under §36 of the Act. In response to the increased frequency of these requests, the Bureau has recently engaged in a public consultation and published formal guidance on its position. In short, the Bureau 's general position is that it will not voluntarily provide information to parties contemplating or pursuing private actions under §36 of the Act. In addition, if served with a subpoena, the Bureau will, if appropriate, oppose the subpoena to produce information when compliance with the subpoena would potentially interfere with an ongoing examination, inquiry or enforcement proceeding under the Act.[78] The Bureau's position has been tested by private claimants, particularly in Quebec, and in two important cases the Supreme Court of Canada has provided some additional guidance in regards to the Bureau's obligations of disclosure. In 2014, the Supreme Court confirmed that electronic surveillance collected by the Bureau in the context of a criminal investigation can be ordered disclosed to a class action plaintiff[79] and, in 2017, the Supreme Court determined that, when the Bureau exerts crown privilege, an investigator for the Bureau cannot be compelled to submit to an examination as part of discovery in a private litigation context.[80]

VIII. Private Competition Litigation

Canadian competition law continues to experience a dramatic increase in private competition litigation. While there has been a private right of action in Canada's Act since the 1970s, private antitrust enforcement only emerged as a significant influence on Canada's competition laws in the 1990s and 2000s, particularly following the gradual adoption of class proceedings legislation across Canada. At the present time, private plaintiffs may pursue two types of private relief under the Act. First, a plaintiff may bring a "private action" before the courts under § 36 of the Act for damages and other relief arising from conduct that contravenes the criminal provisions of the Act. Second, a plaintiff may bring an application for "private access" before the Tribunal under § 103.1(1) of the Act for injunctive and other relief arising from certain types of reviewable practices under the Act. While in recent years applications for "private access" have become somewhat infrequent, "private actions" in the form of competition class actions have established their place as the dominant form of private antitrust enforcement in Canada.

In Canada, private plaintiffs have initiated competition class actions in respect of a wide-range of vertical and horizontal anti-competitive conduct, including both domestic and foreign conduct. However, in most instances, plaintiffs have brought class proceedings on the basis of alleged international price-fixing arrangements, typically on the heels of the announcement of a global price-fixing investigation. In such circumstances, plaintiffs in Canada will frequently work closely with U.S. plaintiffs who have launched parallel cross-border proceedings before the U.S. federal and state courts. In the last several years, there have been a growing number of cases that have proceeded to a contested certification motion, and that have been subject to a certification appeal. As a result, there is now a meaningful body of jurisprudence governing the certification of competition class proceedings in Canada.

The test for class certification in Canada varies by province, but the test is generally similar to the test for certification under Fed. R. Civ. P. 23 ("Federal Rule 23") in the United States, albeit with some important differences. For example, under most certification statutes in Canada, a plaintiff is not required to demonstrate typicality or predominance. In addition, the courts in Canada have underscored the importance of applying the test for certification in a flexible and purposive manner that reflects the underlying goals of class proceedings legislation, including access to justice, judicial economy and behaviour modification.

In spite of this apparent flexibility, in the early jurisprudence, plaintiffs in Canada experienced significant difficulty in seeking to certify competition class actions on a contested basis. In particular, in a leading decision from 2003, the Ontario Court of Appeal declined to certify a competition class action on behalf of indirect purchasers, primarily on the ground that the plaintiffs had failed to demonstrate that the core issues of loss and liability could be ascertained on a class-wide basis.[81]

However, during the past ten years, there has been a significant increase in the number of competition class actions that have proceeded to a contested certification motion. In addition, a number of cases have proceeded to the appellate level, and the appellate courts have provided some important guidance on the principles governing certification of a competition class action in Canada. Most significantly, in 2013, the Supreme of Canada agreed to hear appeals from certification in three pending competition class actions, and in its resulting decisions, the Supreme Court provided important guidance relating to the standard for certification, the right of indirect purchasers to assert claims under the Act, the constitution of classes in competition cases as well as the importance of the ability of class members to self-identify. In this trilogy of decisions, the Supreme Court also rejected the adoption of a U.S. evidentiary standard for certification, and certified two of the three cases on appeal.[82] In a significant ruling, the Court underscored that to obtain class certification, a representative plaintiff bears a significant onus to demonstrate the existence of a "plausible" methodology that offers "a realistic prospect of establishing loss on a class-wide basis" that is "grounded in the facts of the particular case in question".[83]

In reliance on this evolving line of jurisprudence and following the Supreme Court's trilogy, the courts in Canada have now certified a number of competition class actions on behalf of direct as well as indirect purchasers in various jurisdictions in Canada.[84]

To provide an overview of the state of private competition litigation in Canada, this chapter will begin with a brief review of the historical development of private competition litigation in Canada, followed by an introduction to the statutory "private action" under the Act and the test for class certification in Canada. This chapter will then turn to discuss the recent case law on class certification in Canada as it relates to competition class actions. Finally, this chapter will offer a brief review of the availability of "private access" to the Tribunal under the Act.

A. Historical Development of Private Litigation in Canada

Despite the nearly contemporaneous enactment of antitrust legislation in Canada and the United States in the late nineteenth century, Canada has charted a markedly different course with respect to the private enforcement of its antitrust laws. At the time of its adoption in 1890, the Sherman Antitrust Act included a private right of action for treble damages. By contrast, Canada's counterpart competition law statute contained no right to recover any compensatory damages until 1976. In other words, prior to 1976, government authorities in Canada were almost entirely responsible for enforcing competition laws in Canada. Private parties could file complaints with the authorities, and they could rely on a breach of antitrust legislation to the extent that it would help ground a claim in common law, such as the tort of conspiracy. However, a violation of the statute was not in itself actionable under Canadian law.

In the 1970s, the government introduced a number of reforms to modernize Canada's competition legislation, including the creation of a statutory right of action now found in § 36 of the Act. During the years that followed these amendments, there were relatively few private actions, and the plaintiffs that did pursue claims for violations of antitrust law enjoyed little success. Indeed, none of the private damage actions commenced between 1976 and 1993 appears to have resulted in any reported trial judgments in favour of plaintiffs.

Private enforcement has, however, acquired increased significance in Canada as a result of legal developments in the 1990s and 2000s. To begin, the lingering constitutional doubts that surrounded the statutory right of action in the Act were resolved in 1989 as a result of a definitive ruling by the Supreme Court of Canada.[85] In addition, in the years following this decision, the provincial legislatures across Canada gradually adopted class proceeding legislation. At the present time, all of the provinces in Canada (with the exception of Prince Edward Island) have adopted class proceedings legislation for actions before the superior courts, and plaintiffs may also bring class proceedings before the Federal Court of Canada. It is important to note that while Quebec has had a form of class proceeding legislation since 1978, it was only in recent times that the courts have articulated a modern approach to collective relief. In addition, with the gradual arrival of class proceedings legislation, Canadian courts also began to gradually lift their traditional reservations over contingency fees, which created new incentives for plaintiffs who were interested in pursuing private relief for anti-competitive harm. As a result of these changes, Canada witnessed a gradual but steady increase in private antitrust enforcement in the form of competition class actions.

1. Private Actions for Damages

a. Claims Under the Act

Section 36 of the Act creates a statutory right of action for recovery of damages for a person who has suffered "loss or damage" resulting from a breach of the criminal provisions of the Act or a failure to comply with an order made by the Tribunal or a court under the Act. When a plaintiff is able to establish liability under the Act, the plaintiff may recover an amount of damages that reflects the loss suffered plus an amount not greater than the full costs of the investigation of the matter and of proceedings under § 36.[86] In contrast to the right of action under the federal antitrust laws in the United States, a plaintiff in Canada may only seek "single" compensatory damages – there is no right to seek treble damages for violations of the Act.

Claims under the Act may be brought in either the federal or provincial courts in Canada. However, they are typically heard in provincial superior court, in contrast to the practice in the United States. The reluctance of plaintiffs in Canada to use the federal court system stems from the limited jurisdiction of the Federal Court of Canada. Unlike the jurisdiction of provincial superior courts, which is inherently broad, the jurisdiction of the Federal Court is defined by statute and is generally limited to claims that arise strictly under federal law. As a result, the Federal Court has very limited jurisdiction to hear ancillary claims that might arise under provincial law, such as causes of action for the torts of conspiracy and interference with economic relations. Since private plaintiffs will typically assert their statutory claims in conjunction with claims for conspiracy and economic torts at common law, they have a natural preference for asserting their claims before the provincial superior courts.

Canadian courts have generally been willing to assume jurisdiction over competition class actions against foreign defendants based on anti-competitive conduct that occurred abroad, provided that the plaintiff has pleaded a "real and substantial connection" to Canada based on the existence of sales to Canada that resulted in loss or damage to direct or indirect purchasers in Canada. To date, foreign defendants who have manufactured products that were sold in Canada have been largely unsuccessful in challenging the jurisdiction of Canadian courts in competition class actions arising from price-fixing offences. In short, in the case law to date, the courts have generally concluded that "any conspiracy entered into abroad that fixes prices or allocates markets in Canada so as to create losses through artificially higher prices in Canada" has a real and substantial connection with Canada and is actionable as a violation of the civil liability provisions of the Act. However, as was recently held in an Ontario price fixing class action concerning the sale of rechargeable lithium ion batteries in Canada, the Ontario Superior Court of Justice noted that when the court's jurisdiction is challenged by a foreign defendant's evidence denying sales into Canada and participation in a conspiracy to fix prices in Ontario, the plaintiff must put forward some evidence to support its pleading in order to establish a "good arguable case" for the court to assume jurisdiction. The evidentiary threshold the plaintiff must meet to satisfy its burden is low, but not illusory.[87]

b. Civil Liability for Criminal Conduct

The first branch of § 36 only extends civil liability to violations of the criminal provisions of the Act, such as conspiracy, bid-rigging, and specific offences related to misleading advertising and deceptive marketing schemes.[88] There is no civil liability for reviewable practices, such as abuse of dominance, price maintenance, refusal to deal, exclusive dealing, tied selling and market restriction, in contrast to the United States, where, under § 4 of the Clayton Act, parties may be civilly liable for anything prohibited by the country's antitrust laws.

c. Civil Liability for Breach of an Order

Under the second branch of § 36, a plaintiff may recover loss suffered as the result of a breach of an order made by a court or by the Tribunal under the Act. Accordingly, although there is no private damages remedy for breach of the civil reviewable practices provisions, a private party may recover damages that flow from the breach of a Tribunal order in a reviewable practices case, in addition to the breach of a court order in a criminal case.

d. Loss as a Component of Liability

In order to establish liability under § 36, a plaintiff is required to demonstrate that it has suffered a loss. In other words, a plaintiff must establish the existence of a loss or "fact of harm" as an essential component of liability. This requirement has played an important role in the development of competition class action jurisprudence in Canada, since to establish liability as a common issue, the plaintiffs must first demonstrate the existence of some form of methodology for establishing loss or "fact of harm" on a class-wide basis. However, in cases where the product at issue was sold in a complex distribution chain to direct and indirect purchasers, it may be difficult if not impossible to draw any class-wide inference regarding the incidence of loss.

e. Limitation Periods

The limitation provisions for private actions under the Act are somewhat unusual. Under the Act, a party must normally bring an action within two years of the day on which the anti-competitive conduct was engaged in. However, in most cases where the Bureau investigates a matter and the Attorney General of Canada subsequently initiates criminal proceedings, the limitation period is revived or extended. More specifically, in such circumstances, a party must bring an action within two years of the day on which any criminal proceedings were "finally disposed of".

The operation of this statutory limitation period can lead to considerable uncertainty, since there is no limitation period for criminal proceedings under the cornerstone provision of the Act, the conspiracy section. In a number of cases, the Bureau has initiated proceedings under the conspiracy provision well after the two-year civil limitation period, with the consequences of reviving the window for potential civil claims. In addition, in a number of cases, plaintiffs have successfully argued that the initial limitation period must run not from the point when the illegal conduct occurs, but rather from the point when it became reasonably discoverable to a plaintiff.[89] While this question remains unsettled, plaintiffs have invoked this argument to initiate claims well after the occurrence of the material events at issue. Defendants who have advanced limitation period arguments under the Act and at common law at preliminary motions have faced challenges, since Canadian courts have been reluctant to strike a claim under the Act at an early stage on limitation grounds only .[90]

f. Evidentiary Matters

A private party may initiate an action under § 36 in the absence of a criminal conviction. A prior criminal conviction will, however, greatly assist the pursuit of civil claims, since subsection 36(2) allows plaintiffs to use the record of proceeding from a criminal proceeding in which a conviction was obtained and, "in the absence of evidence to the contrary, [as] proof that the person against whom the action is brought engaged in the conduct" that breached the criminal provisions of the Act or an order under the Act.

The burden of proof for establishing civil liability under the Act is the balance of probabilities standard that ordinarily applies in civil cases (even though such civil liability is premised on a violation of one of the Act's criminal provisions).

g. Remedies

A successful plaintiff in Canada is generally only entitled to compensatory damages – that is, damages for the loss suffered plus the plaintiff's costs of investigation and proceeding. Plaintiffs that have asserted claims for other categories of damages, such as punitive and exemplary damages, have not been successful.[91]

Courts have been similarly reluctant to grant injunctive relief to plaintiffs under § 36 of the Act, particularly given that § 36 only speaks of "damages" and makes no reference to injunctive relief. However, in certain cases, courts have granted injunctive relief on the reasoning that they enjoy sufficient authority through the exercise of their inherent jurisdiction.

h. Common Law Claims

Plaintiffs often pursue claims under the Act in conjunction with various common law causes of action. In Quebec, plaintiffs assert equivalent "delictual" claims under the Civil Code of Québec,[92] since the legal system in Quebec is a civil law system. In common law provinces, as discussed above, jurisprudence on the ability of plaintiffs to assert common law claims in parallel to a statutory claim under § 36 of the Act has been mixed. However, a pair of decisions from 2017 out of the Ontario Court of Appeal and BC Court of Appeal have suggested that the Act is not a complete code and therefore does not bar common law claims.[93] Though there remains some uncertainty around the issue, private plaintiffs have relied on this line of jurisprudence to assert the following economic torts in conjunction with a statutory claim under § 36 of the Act.

- **Conspiracy**: The tort of conspiracy consists of two distinct branches. First, a plaintiff may establish liability whether or not the conduct complained of is lawful, when the predominant purpose of the defendants' conduct is to injure the plaintiff. Second and alternatively, a plaintiff may establish liability where the conduct complained of is unlawful and the defendants should have known that injury to the plaintiff was likely to and did result. In the latter case, it is not necessary for the defendants' predominant purpose to have been to injure the plaintiff. As with conspiracy claims under § 36 of the Act, the plaintiff must suffer actual damages from the conspiracy in order to recover damages from the defendants.
- **Interference with economic relations:** A defendant will commit the tort of interference with economic relations when it deliberately damages a plaintiff's business through unlawful means. For conduct to be considered

> unlawful it must give rise to a civil cause of action by a third party, though the third party need not have suffered loss. Consequentially, criminal offences and breaches of statute are not per se actionable.[94] As with claims of conspiracy, the existence of a loss is an essential element of the claim. Courts have observed that "[t]he essence of the tort is deliberate interference with the plaintiff's interests by unlawful means and the intention to injure must be a contributing cause of the plaintiff's loss."[95]

Private plaintiffs will also often bring restitutionary claims, which face challenges similar to other claims brought in common law.

2. Class Actions

a. Overview of Competition Class Actions in Canada

As a result of the general adoption of class proceeding legislation across Canada, the increased availability of contingency fees and the emergence of an active and sophisticated plaintiffs' bar, there has been a significant rise in the number of private actions that have been brought as class proceedings in Canada in recent years. More specifically, in response to a public report of a regulatory investigation in respect of alleged anti-competitive activity in Canada or elsewhere, plaintiffs in Canada will frequently file a civil proceeding under § 36 and for related torts, and they will seek certification of the proceeding under class proceeding legislation to represent a broad class of direct and indirect purchasers in Canada.

In many instances, plaintiffs will file coordinated claims across Canada. Indeed, in an international price-fixing investigation, it is not uncommon for the defendant to face multiple civil proceedings in multiple provinces, including principally Ontario, Quebec, and British Columbia. In contrast to the multi-district litigation system in the United States, there is no ability to consolidate parallel class action proceedings before a single court in Canada as a result of the nature of Canada's federal system.

The underlying test for certification in Canada is broadly similar to the test under U.S. Federal Rule 23, More specifically, the test for certification is similarly anchored in the question of commonality – namely, does the proposed proceeding raise a number of common issues that can be meaningfully tried on a class-wide basis, where success for one class member necessarily translates to success for all. However, in the competition field, the judicial approach to commonality has been shaped by a recognition of the significant evidentiary difficulties involved in assessing whether a particular class member has suffered a "loss", since a direct and/or indirect purchaser may have "passed on" all or part of the alleged price-fixing "overcharge" to other participants in the distribution chain. In short, even in the case of admitted anti-competitive conduct, a proposed class proceeding can be a challenging enterprise, since the impact of the "overcharge" may have been "passed on" through the various levels of the distribution chain and it may be difficult if not impossible to draw any class-wide inferences regarding the impact of "loss".

For instance, in a complex distribution chain, there will frequently be multiple participants who will assert that they have suffered the ultimate damage arising from the anti-competitive conduct. Moreover, in many instances, the economic task associated with untangling these competing claims will require extensive individualized inquiries that may render a proceeding wholly unsuitable for a trial on a representative or class-wide basis. In light of these economic challenges, the courts in Canada and the United States have both struggled with the question of what categories of purchasers have standing to seek recovery of damages for anti-competitive conduct, and whether such purchasers should be permitted to pursue such claims on a representative basis on behalf of other similarly-situated purchasers.

In the United States, the approach of the federal courts to these issues has been shaped by two seminal U.S. Supreme Court decisions. In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, the Court concluded that an antitrust defendant is generally not permitted to assert a passing-on defence in respect of a claim brought by a direct purchaser, on grounds of antitrust policy.[96] In its subsequent decision in *Illinois Brick Co. v. Illinois*, the Court held that there is no right of action on behalf of indirect purchasers under the *Clayton Antitrust Act*, 15 U.S.C. § 12.[97]

In Canada, the Supreme Court of Canada addressed these issues as well as large issues relating to the certification of class actions in an important trilogy of decisions, namely *Sun-Rype Products Ltd. v. Archer Daniels Midland Company (Sun-Rype), Pro-Sys Consultants Ltd. v. Microsoft Corporation (Microsoft)*, and *Option Consommateurs c. Infineon (Option Consommateurs)*(collectively, the *Trilogy*). In the *Trilogy*, the Court generally adopted the principle of *Hanover Shoe,* namely that defendants are precluded from asserting a "passing on" defence. However, the Court adopted a different path relative to its U.S. counterparts in *Illinois Brick*, and accepted the standing of indirect purchasers to assert competition claims in *Microsoft*. In light of the differences in the approach to handling claims brought by indirect purchasers, the courts in Canada have approached the definition of classes and the certification of antitrust class actions in a fundamentally different way relative to their brethren in the United States. In particular, plaintiffs in Canada frequently bring class proceedings on behalf of a proposed consolidated class of direct and indirect purchasers in spite of the potential conflicts.

b. The Certification of Class Actions in Canada

The requirements for the certification of class actions in the common law provinces are broadly similar. In Ontario, for example, the following elements are necessary for an action to be certified as a class action:

- the pleadings must disclose a cause of action;
- there must be a class of two or more identifiable persons;
- the action must raise common issues;
- a class proceeding would be the preferable procedure for the resolution of the common issues; and
- the representative plaintiff must fairly and adequately represent the class, present a plan for the litigation and not have any conflicts with class members on common issues.[98]

The test in Quebec is similar but sets a much lower threshold for the certification (referred to as "authorization" in that province) of a class action:

- The claims of the proposed class members must raise identical, similar or related questions of law or fact.
- The facts alleged must justify the conclusions sought.
- The proposed class must be such that an action by express mandate or joinder would be difficult or impractical.
- The representative must adequately represent the class.[99]

On their face, these certification tests are somewhat less onerous than the certification test under Federal Rule 23 before the U.S. federal courts. For instance, under the Ontario *Class Proceedings Act,* there is no requirement for the plaintiff to demonstrate predominance or typicality. Rather, as an alternative to predominance, provincial class proceedings legislation has generally adopted the requirement that a class action must constitute the "preferable procedure" to warrant certification. In interpreting this concept, the Ontario courts have generally applied a "practical cost-benefit approach" that considers whether the class proceeding is a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures, such as joinder, test cases and consolidation. In addition, the Ontario courts have placed significant emphasis on whether the proposed class proceeding would ultimately advance the three underlying purposes of class proceedings legislation: judicial economy, access to justice, and behaviour modification. The Supreme Court of Canada has recently further clarified the analysis necessary to determine "preferable procedure". The Court specifically addressed the underlying purpose of access to justice, holding that "both substantive and procedural aspects must be assessed in determining whether a class action is the preferable procedure", and that "a class action will serve the goal of access to justice if: (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered".[100]

In applying the commonality and preferability requirements, the courts in Ontario have examined whether the proposed common issues constitute necessary and substantial ingredients of each class member's claim. To establish the requisite degree of commonality, a plaintiff must normally show that, in the context of the entire claim, the resolution of the common issues will significantly advance the action. In that vein, the Ontario Court of Appeal has held that an issue can constitute a substantial ingredient of the plaintiff's claim even when it makes up a very limited aspect of the determination of liability and even when many individual issues remain to be decided after the resolution of the common issues.[101] This has been recognized as a "somewhat more liberal approach" than that which had been taken in earlier case law.[102]

As a general proposition, plaintiffs face a less onerous test in seeking to "authorize" a class proceeding in Quebec relative to Ontario and the other common law provinces as a result of the unique procedural test under Quebec legislation. Unlike Ontario and other North American jurisdictions, a class action in Quebec need not be the preferable procedure in order for certification to be granted. In addition, there is no requirement that the common issues of fact and of law be predominant or substantial ingredients to the underlying claim.

Rather, the only requirement is that the proposed common issues be important and not simply ancillary.

Moreover, there are a number of procedural advantages that make Quebec a very attractive regime for plaintiffs seeking to bring class actions, including the fact that defendants are generally prohibited from adducing their own evidence to contest certification and generally are only permitted to make oral submissions opposing certification assuming that what the plaintiff has pleaded is true.

c. Pre-Certification Issues and Motions

In Quebec, class actions are commenced before a claim is issued by filing a motion for "authorization" to bring a class proceeding. Outside Quebec, class actions are commenced through the issuance of a claim, followed by a formal motion for certification supported by affidavit evidence. One of the first issues to confront defence counsel in the common law provinces is whether to file a defence on the merits before the motion for certification is heard. The typical practice has been to refrain from doing so at this early stage, because plaintiffs frequently narrow and refine their claims through the certification process. In the case law, the courts have observed that "in the preponderance of cases, the statement of defence will not be required for a determination of the certification motion."[103]

In the common law provinces as well as in Quebec, the usual practice is to defer any merits-based discovery until after certification has been determined. However, in certain cases, plaintiffs in Canada have intervened and brought a motion in the United States to obtain access to discovery materials that had been produced by the defendants in parallel U.S. proceedings in spite of the absence of any right to obtain these materials in Canada prior to certification.[104] In spite of the efforts of the defendants in Canada to enjoin this practice, the Canadian courts have been reluctant to do so in the case law to date.

Outside Quebec, class action litigants, including defendants, may bring a variety of motions before, after and at the same time as the motion for certification. These include motions to strike portions of the claim for not disclosing a cause of action, motions for summary judgment, motions challenging jurisdiction, and motions based on limitation period arguments. Initially, following the introduction of class proceeding legislation, preliminary motions were routinely brought before the certification motion was heard on the theory that the resolution of these preliminary matters would simplify the issues at the certification motion hearing. However, in the recent case law, the courts in Canada have been inclined to defer most preliminary motions to the hearing on the motion for class certification. However, in certain circumstances, the courts have indicated that they will be prepared to consider a preliminary motion before a certification motion, when such scheduling makes the litigation more efficient by reducing or eliminating expenditures of resources and time.

d. Common and Individual Issues Trials

Once certified, class actions proceed in a manner similar to other actions, with discovery of the parties and any remaining motions being heard before trial, but with some important differences. The most significant difference associated with a class proceeding is the potential bifurcation of the action into common and individual issues trials. The common issues trial considers the issues that were certified as common at the certification hearing. The judgment on the common issues will specify the common issues, and identify the class members and their claims, and the defences raised to these claims, as well as the relief granted. Individual issues trials occur after the common issues trial and address issues that require individual determinations. Individual issues trials may take the form of subsequent hearings, and the court may also appoint a person to conduct references under a given set of rules and report back to the court or direct that the issues be determined in another manner. The class proceedings legislation in the various provinces also typically includes an aggregate damages provision that allows the court to determine the aggregate liability of a defendant to class members under certain conditions.

e. Settlement of Class Actions and the Uncontested Certification Motion

In circumstances where a defendant has previously pled guilty to a criminal offence in Canada, a defendant may have a strong incentive to settle any outstanding civil proceedings. As a result, in a number of cases where defendants have previously pled guilty to a criminal offence, it is not uncommon for the defendants to negotiate a settlement with class counsel and to consent to certification for the purpose of implementing the class action settlement and binding the class members.[105]

The settlement of a class action in Canada generally proceeds in two stages: a motion for certification and a motion for settlement approval. Similar to the United States, class proceedings legislation in Canada generally requires court approval for a settlement of a class proceeding. The U.S. Supreme Court in *Amchem Products, Inc. v. Windsor*[106] held that a settlement between the representative plaintiff and the defendants does not supersede or modify the requirements for certifying a class action. Canada, however, has taken a different approach. In brief, Canadian courts have been more receptive to certifying a class action where the parties have consented to certification for the purpose of implementing a settlement. In one conspiracy case, the Ontario Superior Court specifically noted that "an issue that would lack commonality in contested proceedings may [nonetheless] be a common issue when certification is requested in a settlement context."[107]

To approve a settlement, the court must find that it is fair, reasonable and in the best interest of the class members. Canadian courts apply a strong initial presumption of fairness when plaintiffs and defendants have negotiated a class action settlement at arm's length. Generally, Canadian courts will only reject a settlement when it does not fall within a range of reasonable outcomes that the parties could agree upon. As in the United States, courts in Canada will normally consider the following factors when assessing the reasonableness of a settlement:

- The likelihood of recovery (or likelihood of success);
- The amount and nature of discovery evidence;
- Settlement terms and conditions;
- Recommendations of experienced counsel;
- Future expense and duration of litigation;
- The recommendation of neutral parties;

- The number and nature of objections; and
- The presence of good faith and the absence of collusion.

Given the possible conflicts of interest that could arise and the fact that the class is not generally "at the table" during settlement negotiations, courts have indicated that some evidence may need to be filed to assure the judge that the settlement amount is fair and falls within a "zone of reasonableness".[108] In defining this zone of reasonableness, courts have accepted a proxy overcharge of 10% as a reasonable benchmark.[109]

f. The Approach to Class Certification of Competition Class Actions

In the traditional case law in Canada, the courts had expressed some reluctance to grant certification of a competition class proceeding. In particular, given the immense evidentiary challenges associated with establishing the incidence of loss across a diverse class of purchasers, the courts had held that a plaintiff was generally expected to demonstrate the existence of a "workable" and rigorous" methodology for trying the core issues of loss and liability on a class-wide basis. In a number of cases, the courts found that the plaintiffs had simply failed to meet this standard, particularly in class proceedings involving a product that was an ingredient of other products or that was distributed through a complex distribution chain.[110]

However, in recent years, a number of courts have begun to chart a different course and they have recently certified a number of significant competition class actions in Canada. In particular, these courts have relied on aggregation methodologies to address the evidentiary challenges associated with ascertaining the incidence of loss, and they appear to have adopted a more relaxed evidentiary standard for certification. Under this line of jurisprudence, the courts have suggested that a plaintiff need only demonstrate a "credible" or "plausible" methodology for assessing loss on a class-wide basis at the certification stage. In the *Trilogy*, the Supreme Court ruled that at the certification stage the methodology put forward by the plaintiff "must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement" and it must "offer a realistic prospect of establishing loss on a class-wide basis." Further, "the methodology must be grounded in the facts of the particular case in question" and "there must be some evidence of the availability of the data to which the methodology is to be applied." The Courts are still interpreting and applying this particular standard, including at the appellate level. However, since the *Trilogy*, the Courts have certified a number of competition class actions, including in high-profile international cartel cases.[111]

The requirement that the class be identifiable may be a challenge to meet in certain cases. In *Sun-Rype*, the Supreme Court held that there was no identifiable class and refused to certify the class action as it related to indirect purchasers. These indirect purchasers of downstream products could not determine if their purchased products contained the price-fixed goods. The majority reasoned that it was not sufficient for the representative plaintiff to prove that the class as a whole had been damaged if no class member knew or could prove that he or she was part of the class. This holding reinforced the fact that the need to establish an identifiable class remains a cornerstone requirement for access to the class action regime in the common law provinces.[112]

There remain some unsettled areas of law with regards to class action certification. One such area is whether umbrella purchasers are entitled to bring a claim under the Act. Umbrella purchasers are purchasers of products from non-defendants that are substitutes for the defendants' products and who may have faced increased prices during the alleged cartel, but who had no commercial relationship with the defendants. The case law on this issue remains divergent. The Ontario Divisional Court recently affirmed a decision that rejected the ability of umbrella purchasers to assert a claim[113], whereas the BC Court of Appeal recently affirmed a decision that allowed a claim by umbrella purchasers to be certified.[114] There remains substantial uncertainty as to how courts in Canada will treat claims from umbrella purchasers going forward.

There has also been a much broader discussion of whether the Act is a complete code with regards to private claims, or if claims can be made in common law in parallel to claims being made under the Act. Again, Canadian courts have produced mixed jurisprudence on this point. Recently, appellate level courts in BC and Ontario have reached similar conclusions, that the Act is not intended to be a complete code and parallel claims in common law can be pursued.[115] However prior jurisprudence, even at the appellate level, is mixed.[116] Private claimants who bring claims under § 36 of the Act and parallel claims in common law will likely continue to face opposition to their common law claims.

g. Conclusions

In summary, in a departure from the early jurisprudence, the courts in Canada have recently demonstrated an increased willingness to certify or authorize competition class across a number of jurisdictions in Canada. However, the courts are continuing to grapple with the meaning of a "credible" or "plausible" methodology in light of conflicting expert evidence on commonality put forward by the parties at the certification stage, and the Supreme Court of Canada's ruling that certification must remain a "meaningful screening device." Furthermore, to date, the courts have not yet conducted a full trial of a competition class action in Canada, and they have yet to apply many of those proposed methodologies and theories on the merits. But in the interim, while the courts continue to explore these issues, competition class actions appear to have become a permanent feature of the private enforcement regime in Canada.

B. Private Applications to the Competition Tribunal

1. Private Actions Related to Reviewable Practices

Until 2002, the Commissioner was the only person with standing at the Tribunal to enforce the reviewable practices set out in Part VIII of the Act. However, with legislative amendments in 2002, Parliament broadened access to the Tribunal. Section 103.1 of the Act now allows private parties (with leave of the Tribunal) to bring disputes to the Tribunal about five reviewable practices: refusal to deal, price maintenance, tied selling, market restriction and exclusive dealing. Remedies are limited to behavioral and injunctive remedies, such as cease and desist orders, and damages are not available for violation of these reviewable practices provisions. Other reviewable practices, such as abuse of dominance and mergers, remain within the exclusive jurisdiction of the Commissioner. Private applications concerning reviewable practices have a limitation period and must be made no more than one year after the practice that is the subject of the application has ceased. In 2005, the Bureau issued the Information Bulletin, Private Access to the Competition Tribunal, on the topic of private applications.

2. Leave Requirement

The application for leave is the first step in the process of seeking relief concerning reviewable practices. The applicant must file its application and supporting affidavit with the Commissioner and the responding party whom the applicant seeks to bind. The supporting affidavit must contain the facts relevant to the reviewable practice. The Commissioner must then advise the Tribunal within 48 hours of whether the application is or has been the subject of an inquiry by the Commissioner. When the complaint is the subject of an existing or prior inquiry, leave will be denied; otherwise, the application will proceed.

The test for granting leave requires the leave application to be "supported by sufficient credible evidence to give rise to a *bona fide* belief [by the Tribunal] that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice could be subject to an order" of the Tribunal. Although the threshold for obtaining leave is low, the applicant must provide evidence with respect to all of the elements of the reviewable practice. The Tribunal will then consider each of these elements individually and whether there is reason to believe that an alleged practice could be the subject of an order.

3. Current Private Enforcement Record

To date, there have been roughly 25 applications for leave to commence a private application before the Tribunal, but leave has only been granted in eight cases.[117] The first fully litigated private application was the *B-Filer* case, decided in December 2006. In this case, *B-Filer* was not successful in its refusal to deal claim against the Bank of Nova Scotia. Similarly, the complainant in the second fully litigated case, *Nadeau Poultry*, was not successful.

Section 103.3 of the Act allows the Tribunal to make an interim order to prevent the allegedly anti- competitive practice from continuing, pending the Tribunal's final decision on the matter. The Tribunal grants an interim order *ex parte*, meaning that the target of the order is not given notice of the application and therefore may not appear before the court to contest the order. The Tribunal issues such orders when it is satisfied that injury to competition is likely to occur that the Tribunal could not adequately remedy, that a competitor is likely to be eliminated or to suffer significant loss of market share or revenue, or that other harm is likely that the Tribunal could not adequately remedy at a later date. The Tribunal initially makes interim orders for 10 days but may extend them twice, for 35 days each time. Once the Commissioner files an application with the Tribunal to challenge the reviewable practice, the Tribunal may decide whether to issue a longer-term interim order that would be in effect until the Tribunal proceeding is complete. To date, interim orders appear to have been relatively effective in resolving complaints, with several parties having settled and reached consent agreements after the Tribunal issued interim orders.

4. Intervention by the Commissioner of Competition

The Commissioner does not generally provide written submissions at the leave stage unless he or she believes that the case has significance beyond the immediate parties or that the application would result in particularly important jurisprudence. Similarly, the Commissioner does not intervene in a private application except in exceptional circumstances, such as when the issues in dispute have an impact on competition beyond the immediate parties, or have a significant impact on consumers, the business community or the Canadian economy, or when the Commissioner is of the view that valuable jurisprudence could result.

IX. About Osler, Hoskin & Harcourt, LLP

A. The Firm

Osler - Leading the way in Canadian business law

Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative "one firm" approach draws on the expertise of over 400 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For over 150 years, we've built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them. It's law that works.

B. Competition/Antitrust & Foreign Investment Group

Osler's Competition and Foreign Investment Group is uniquely qualified to assist Canadian, U.S. and international businesses with their most challenging and innovative initiatives. Leveraging the deep expertise, exceptional insight and unparalleled experience of our team of seasoned professionals, clients can expect to receive the advice they need to take their transactions from inception through to completion while successfully navigating the relevant regulatory processes and the evolving Canadian competition environment. We also specialize in providing practical guidance to clients facing a Bureau investigation or potential prosecution.

X. Additional Resources

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XI. Endnotes

[1] *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 (CanLII) para 632.

[2] *Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29 (CanLII).

[3] *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 (CanLII) para 631.

[4] *Ib.*, also see Competition Bureau, Guidelines, "Competitor Collaboration Guidelines", December 23, 2009, section 2.4, available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf.

[5] *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 629 (Can.).

[6] See *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10, paras 184-185.

[7] Preface of Competitor Collaboration Guidelines, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf

[8] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982, ch. 11 (U.K.), available at http://laws.justice.gc.ca/en/const/index.html.

[9] *See* Competition Bureau website at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html

[10] Criminal Code, R.S.C, ch. C 46 (1985), s.21(1).

[11] *Libman v. The Queen*, [1985] 2 S.C.R. 178 (Can.).

[12] For example see discussion of fines levied against Yazaki Corporation at http://www.osler.com/NewsResources/Competition-Bureau-Imposes-Record-Setting-Bid-Rigging-Fines-but-Jurisdictional-Questions-Remain/.

[13] *See* US DOJ Press Release at http://www.justice.gov/atr/public/press_releases/2014/309928.htm. Previously, in the telemarketing area, Canada has surrendered individuals for prosecution of offences committed in Canada but targeting U.S. citizens; Press Release, Competition Bureau, 15 years in jail for Canadian Extradited to U.S. in Deceptive Telemarketing Case (Dec. 18, 2008), available at http://www.marketwired.com/press-release/15-years-in-jail-for-canadian-extradited-to-us-in-deceptive-telemarketing-case-931609.htm.

[14] Competition Bureau, Press Release, "Unprecedented cooperation with US antitrust enforcement authority leads to major cartel crackdown", July 20, 2016 (published at https://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html)

[15] For example, Yazaki Corporation was fined $30 million for three counts of bid-rigging. See Anthony F. Baldanza, Huy A. Do and Antonio Di Domenico, "Canada: Unprecedented

$30 Million Fine Imposed By Ontario Court For Bid-Rigging Offences" available at http://www.mondaq.com/canada/x/235670/Antitrust+Competition/Unprecedented+30+Million+Fine+Imposed+By+Ontario+Court+For+BidRigging+Offences.

[16] *R. v. Mitsubishi Corp.*, [2005] 40 C.P.R. (4th) 333 (Can.).

[17] *See* Competition Bureau, "Penalties imposed by the courts", available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html.

[18] Peter Franklyn and Kaeleigh Kuzma, "Antitrust Advisory: Revised Integrity Regime for Government Suppliers Addresses Some Issues (and Raises Others)", available at https://www.osler.com/en/resources/critical-situations/2015/antitrust-advisory-revised-integrity-regime-for-g.

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[20] Competition Bureau, Press Release, "Final price-fixing charges stayed in chocolate case", November 18, 2015 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04003.html)

[21] *Can. (Dir. of Investigation and Research) v. Chrysler Can.*, [1989] 27 C.P.R. (3d) 1 (Can.), *aff'd* [1991], 38

C.P.R. (3d) 25 (Can.); *Can. (Dir. of Investigation and Research) v. Xerox Can. Inc.*, [1990] 33 C.P.R. (3d) 83 (Can.).

[22] *B-Filer Inc. v. Bank of N.S.*, [2006] Comp. Trib. 42 (Can.).

[23] *Nadeau Poultry Farm Ltd., v. Group Westco Inc.*, [2008] Comp. Trib. 16 (Can.).

[24] *Nadeau Ferme Avicole Ltée* v. *Groupe Westco Inc.*, 2009 Comp. Trib. 6, 2009 CarswellNat 5934 (Competition Trib.), *aff'd Nadeau Ferme Avicole Ltée/Nadeau Poultry Farm Ltd.* v. *Groupe Westco Inc.*, 2011 FCA 188, 2011 CarswellNat 2032 (Fed. C.A.).

[25] *Sears Can. Inc. v. Parfums Christian Dior Can. Inc.*, [2007] Comp. Trib. 6 (Can.).

[26] *Can. (Dir. of Investigation and Research) v. Xerox Can. Inc.*, [1990] 33 C.P.R. (3d) 83 (Can.).

[27] *Can. (Dir. of Investigation and Research) v. Xerox Can. Inc.*, [1990] 33 C.P.R. (3d) 83 (Can.).

[28] *Can. (Dir. of Investigation and Research) v. Warner Music Can. Ltd.*, [1997] 78 C.P.R. (3d) 321 (Can.).

[29] *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada,* [2015] Comp. Trib. 26 (Can.).

[30] B-Filer Inc., [2006] Comp. Trib. 42.

[31] *Can. (Comm'r of Competition) v. Can. Pipe Co.*, [2005] 40 C.P.R. (4th) 453 (Can.), appeal by Commissioner allowed and returned to Tribunal for rehearing, [2006] 268 D.L.R. (4th) 193 (Can.), and cross-appeal dismissed, [2006] 268 D.L.R. (4th) 238 (Can.). Leave to appeal to the Supreme Court of Canada was denied on May 7, 2007. This case involved both a main appeal and a cross appeal. The case was ultimately settled by way of a registered consent agreement with the Tribunal. *See also Can. (Dir. of Investigation and Research) v. NutraSweet*

Co., [1990] 32 C.P.R. (3d) 1 (Can.) (financial incentives and exclusivity clauses in agreements induced exclusive dealing, but only when it had exclusionary effects in the market).

[32] *Can. (Dir. of Investigation and Research) v. Tele- Direct (Publ'ns) Inc.*, [1997] 73 C.P.R. (3d) 1 (Can.).

[33] Price Maintenance (§ 76 of the *Competition Act* Enforcement Guidelines).

[34] *The Commissioner of Competition v. Visa Canada Corporation,* 2013 Comp. Trib. 10, 2013 CarswellNat 3285 (Competition Trib.)

[35] *Leegin Creative Leather Products v. PSKS Inc.*, 551 U.S. 877 (2007).

[36] *Tervita Corporation et al v. Commissioner of Competition*, 2015 SCC 3.

[37] *Tervita Corporation et al v. Commissioner of Competition*, 2015 SCC 3.

[38] *Competition Act*, § 79(1).

[39] *Competition Act*, § 79(3.1).

[40] *Competition Act*, § 79(3.2).

[41] *See* Section V.F, "Remedial Powers of the Competition Tribunal," for a further discussion of the remedial powers of the Tribunal for abuse of dominance.

[42] Canada, Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions" (September 2012) at 15. This publication replaced the Bureau's "Draft Enforcement Guidelines on Abuse of Dominance in the Airline Industry" (February 2001), "Enforcement Guidelines on the Abuse of Dominance Provisions (§§ 78 and 79 of the *Competition Act*) (July 2001), "The Abuse of Dominance Provisions (§§ 78 and 79 of the *Competition Act*) as Applied to the Grocery Sector" (November 2002), "Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry" (June 2008) and "Predatory Pricing Enforcement Guidelines" (July 2008).

[43] *The Comm'r of Competition v. Can. Pipe Co. Ltd.*, [2006] F.C.A. 233 (Can.).

[44] *Can. (Dir. of Investigation and Research) v. Tele- Direct (Publ'ns) Inc.*, [1997] 73 C.P.R. (3d) 1 (Can.) at para 217.

[45] *Can. (Dir. of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289.

[46] See Section X, "Additional Resources" (note that these were updated in 2012).

[47] *The Comm'r of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 11.

[48] *Canada (Comm'r of Competition) v. Toronto Real Estate Board,* [2014 FCJ No 113, 2014 FCA 29.

[49] *The Comm'r of Competition v. Vancouver Airport Authority*, 2016 Comp. Trib. 5 (Notice of Application).

[50] Enforcement Guidelines on the Abuse of Dominance Provisions at 10.

[51] 32 Can. Pipe Co., [2005] 40 C.P.R. (4th) 453.

[52] *The Comm'r of Competition v. The Toronto Real Estate Board,* 2014 FCA 29.

[53] *Canada Pipe* at para 73.

[54] Paul Crampton, “Abuse of Dominance and Exploitative Conduct – Lessons from the Canadian Experience”, Barry E Hawk, ed, *International Antitrust Law & Policy* (Fordham University, 2008), p 535.

[55] *Director of Investigation and Research v. Warner Music Canada Ltd.*, 1997 CanLII 3725 (CT) (note that this was in the context of a refusal to deal under s.75).

[56] *See* Section X, “Additional Resources”

[57] Canada, Competition Bureau, “Competition Bureau statement regarding its investigation into alleged anti-competitive conduct by Apple”, Press Release (Ottawa: Competition Bureau, 6 January 2017).

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[62] *Can. (Comm'r of Competition) v. Air Can.*, [2003] 26 C.P.R. (4th) 476 (Can.).

[63] Canada, Competition Bureau, “Misleading Representation and Deceptive Marketing Practices: Choice of Criminal or Civil Track Under the *Competition Act*”, Information Bulletin (Hull: Competition Bureau, 20 September 1999).

[64] *Apotex Inc. v. Hoffmann-La Roche Ltd.*, [2000] 9 C.P.R. (4th) 417 (Can.).

[65] Consumer Packaging and Labelling Act, R.S.C, ch. C- 38 (1985).

[66] Textile Labelling Act, R.S.C., ch. T-10 (1985).

[67] *See* § VI.B.1, “Ordinary Price Claims.”

[68] Canada, Competition Bureau, “'Product of Canada' and 'Made in Canada' Claims”, Enforcement Guidelines (Gatineau: Competition Bureau, 22 December 2009).

[69] *The Commissioner of Competition v. Moose International,* 2016 Comp. Trib. 4 (Registered Consent Order).

[70] *The Commissioner of Competition v. Aviscar Inc., Budgetcar Inc. / Budgetauto Inc., Avis Budget Group, Inc. and Avis Budget Car Rental, LLC*, 2015 Comp. Trib. 1 (Notice of Applicaton).

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[72] Canada, Competition Bureau, “Big data and Innovation: Implications for competition policy in Canada”, Draft for Public Consultation (Gatineau: Competition Bureau, 18 September 2017).

[73] Canada, Competition Bureau, “Promotional Contests: Section 74.06 of the *Competition Act*”, Information Bulletin (Gatineau: Competition Bureau, 16 October 2009).

[74] Canada, Competition Bureau, "Telemarketing: Section 52.1 of the *Competition Act*", Information Bulletin (Gatineau: Competition Bureau, 16 October 2009).

[75] *Stevens v. Restrictive Trade Practices Commission*, [1979] 43 C.P.R. (2d) 1 (F.C.T.D.).

[76] *Canada (Commissioner of Competition) v. Pearson Canada Inc.*, [2014] FCJ No. 430, 2014 FC 376.

[77] Canada, Competition Bureau, "Information Bulletin on Sections 15 and 16 of the Competition Act", Information Bulletin (Gatineau: April 25, 2008).

[78] Canada, Competition Bureau, "Information requests from private parties in proceedings for recovery of loss or damages", Information Bulletin (Gatineau: November 20, 2017).

[79] *Imperial Oil v. Jacques*, 2014 SCC 66.

[80] *Canada (Attorney General) v. Thouin*, 2017 SCC 46.

[81] *Chadha v. Bayer Inc.*, [2003] 223 D.L.R. (4th) 158 (Can.), additional reasons at [2003] 170 O.A.C. (Can.), affirming [2001] 54 O.R. (3d) 520 (Can.), reversing [1999] 45 O.R. (3d) 29 (Can.).

[82] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] 3 S.C.R. 545(Can.), (Sun-Rype); *Pro-Sys Consultants Ltd. v. Microsoft Corporatio*n, [2013] 3 S.C.R. 477 (Can.), (Microsoft);Option Consommateurs c. Infineon (Option Consommateurs), [2013] 3 S.C.R. 600 (Can.), (Infineon); (collectively, the Trilogy).

[83] Microsoft, [2013] 3 S.C.R. 477, ¶118 (Can.).

[84] *Crosslink v. BASF Canada,* 2014 ONSC 1682 (CanLII) (Can.)*, Fairhurst v. Anglo American PLC,* 2014 BCSC 2270 (CanLII) (Can.)*, Airia Brands v. Air Canada,* 2015 ONSC 5352*, Shah v. LG Chem, Ltd.,* 2015 ONSC 6148*, Fanshawe College v. Hitachi, Ltd. et al.,* 2016 ONSC 5118*,* and *Godfrey v. Sony Corporation,* 2017 BCCA 302.

[85] *General Motors of Canada Ltd. v. City Nat'l Leasing*, [1989] 1 S.C.R. 641 (Can.).

[86] Amendments to the Act in 2009 decriminalized price maintenance, predatory pricing, and price discrimination with the result that § 36 no longer extends civil liability to such conduct. There is a new civil provision governing price maintenance that can now be found in § 76, but there is no right of private action in respect of this practice.

[87] *Shah v. L.G. Chem, Ltd.* et. al., [2015] O.N.S.C. 776 (Can.).

[88] *Cont'l Ins. Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 170 (Can.). A civil action that depends on proving that a party contravened an underlying offence under the Act will fall within this category. In the absence of a conviction, private plaintiffs seeking to rely on § 26 of the Act must "offer substantial proof that the activity prohibited…has, indeed, taken place." Janelle Pharmacy.

[89] *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation*, 2016 ONCA 621.

[90] *The Fanshawe College of Applied Arts and Technology v. Sony Optiarc, Inc.* et., [2014] O.N.S.C. 2856 (Can); *The Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation* et. al., [2015] O.N.S.C. 2046 (Can).

[91] *Godfrey v. Sony Corporation,* 2016 BCSC 844.

92 Civil Code of Québec, 1991 S.Q., ch. 64 (1991).

93 *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation*, 2016 ONCA 621; and *Godfrey v. Sony Corporation*, 2017 BCCA 302.

94 *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014] 1 S.C.R. 177, ¶45 (Can).

95 *Belsat Video Mktg. Inc. v. Astral Commc'ns Inc.* [1998] 81 C.P.R. (3d) 1, ¶57 (Can.).

96 *Hanover Shoe*, 392 U.S. 481.

97 *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977).

98 Class Proceedings Act, 1992 S.O. 1992, ch. 6 (1992).

99 Code of Civil Procedure, R.S.Q., ch. 25, art. 1003 (2009).

100 *AIC Limited v. Fischer*, [2013] 3 S.C.R, ¶¶25-26 (Can.).

101 *Cloud v. Can*. (AG), [2004] 73 O.R. (3d) 401 (Can.).

102 *Pearson v. Inco Ltd.*, [2005] 78 O.R. (3d) 641 (Can.).

103 *Mangan v. Inco Ltd.*, [1996] 30 O.R. (3d) 90 (Can.).

104 For example, see *VitaPharm Can. Ltd. v. F. Hoffmann-LaRoche Ltd.*, [2005] 74 O.R. (3d) 758 (Can.).

105 *See, e.g.,* VitaPharm Can. Ltd., [2005] 74 O.R. (3d) 758 ; See also Fluet c. Bayer Inc., [2005] J.Q. no 9341 (Can.); *Bona Foods Ltd. v. Ajinmoto USA Inc.*, [2004] 2 C.P.C. (6th) 15 (Can.) [hereinafter "Bona Foods"]; *Chopik v. Mitsubishi Paper Mills Ltd.*, [2003] 29 C.P.C. (5th) 277 (Can.); *Mura v. Archer Daniels Midland Co.*, [2003] B.C.J. No. 1086 (Can.); *Alfresh Beverages Can. Corp. v. Hoescht AG*, [2002] 16 C.P.C. (5th) 301 (Can.); and *Alfresh Beverages Can. Corp. v. Archer Daniels Midland Co.*, [2001] O.J. No. 6028 (Can.).

106 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

107 *Bona Foods Ltd.*, [2004] 2 C.P.C. (6th) 15, ¶11.

108 *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532.

109 For example, see *Urlin Rent A Car v. Furukawa Electric et al*, 2016 ONSC 5736.

110 For example, see *Chadha v. Bayer Inc.*, 2003 CanLII 35843 (ON CA).

111 *Crosslink v. BASF Canada,* 2014 ONSC 1682 (CanLII) (Can.)*, Fairhurst v. Anglo American PLC,* 2014 BCSC 2270 (CanLII) (Can.)*, Airia Brands v. Air Canada,* 2015 ONSC 5352*, Shah v. LG Chem, Ltd.,* 2015 ONSC 6148*, Fanshawe College v. Hitachi, Ltd. et al.,* 2016 ONSC 5118*,* and *Godfrey v. Sony Corporation*, 2017 BCCA 302.

112 *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] 3 S.C.R. 545(Can.).

113 *Shah v. LG Chem, Ltd.*, 2017 ONSC 2586.

114 *Godfrey v. Sony Corporation*, 2017 BCCA 302.

115 See *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation*, 2016 ONCA 621; and *Godfrey v. Sony Corporation*, 2017 BCCA 302.

116 *Godfrey v. Sony Corporation*, 2017 BCCA 302 and *Watson v. Bank of America Corporation*, 2015 BCCA 362 both found that the Act does not bar parallel claims in common law,

however *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 found that the Act did not allow for parallel claims.

[117] See *CarGurus, Inc v Trader Corporation*, 2016 Comp. Trib. 15; *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28; *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*, 2015 Comp. Trib. 26 (the application was subsequently withdrawn by the applicant); *Safa Enterprises Inc. v. Imperial Tobacco Company Limited*, 2013 Comp. Trib. 19 (Can.); *Used Car Dealers Assn. of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10 (Can.); *Brandon Gray Internet Servs. Inc. v. Canada (Canadian Internet Registration Auth.*), [2011] Comp. Trib. 1 (Can.); *Steven Olah v. Her Majesty the Queen as represented by the Correctional Service of Can. and Gravenhurst Home Hardware*, [2008] Comp. Trib. 29 (Can.); *Swenson Inc. v. Trader Corp.*, [2008] Comp. Trib. 20 (Can.); *Can. Standard Travel Agent Registry v. Int'l Air Transp. Assoc.*, [2008] Comp. Trib. 14 (Can.); *Nadeau Ferme Avicole Limitée / Nadeau Poultry Farm Ltd. v. Group Westco Inc.*, [2008] Comp. Trib. 7 (Can.); *John Guy Annable v. Capital Sports and Entm't Inc.*, [2008] Comp. Trib. 5 (Can.); *Robert Gilles Gauthier c.o.b. as The Nat'l Capital News Can. v. The Honourable Peter Milliken, M.P., Speaker of the House of Commons*, [2007] Comp. Trib. 23 (Can.); *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*, [2007] Comp. Trib. 18 (Can.); *London Drugs Ltd. v. Parfums Givenchy Can. Ltd.*, [2007] (the application was subsequently withdrawn by the applicant); *Sears Can. Inc. v. Parfums Christian Dior Can. Inc.*, [2007] Comp. Trib. 6 (Can.); *B-Filer Inc., B- Filer Inc. doing business as GPay Guaranteed Payment and NPay Inc. v. The Bank of Nova Scotia*, [2005] Comp. Trib. 38 (Can.); *Construx Eng'ring Corp. v. Gen. Motors of Can. Ltd.*, [2005] Comp. Trib. 21 (Can.); *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, [2004] Comp. Trib. 15 (Can.); *Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd.*, [2004] Comp. Trib. 52 (Can.); *1177057 Ontario Inc. c.o.b. as Broadview Pharmacy v. Pfizer Can. Inc.*, [2004] Comp. Trib. 23 (Can.); *1177057 Ontario Inc. c.o.b. as Broadview Pharmacy v. Wyeth Can. Inc.*, [2004] Comp. Trib. 22 (Can.); *Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Can. Inc. /Novartis Can. Inc.*, [2004] Comp. Trib. 21 (Can.); *Mrs. 0's Pharmacy Inc. v. Pfizer Can. Inc.*, [2004] Comp. Trib. 24 (Can.); *Allan Morgan and Sons Ltd. v. La-Z-Boy Can. Ltd.*, [2003] Comp. Trib. 4 (Can.); *Barcode Sys. Inc. v. Symbol Tech. Can. ULC*, [2002] Comp. Trib. 1 (Can.); and *Robert Gilles Gauthier c.o.b. as The Nat'l Capital News Can. v. The Honourable Peter Milliken, M.P.*, Speaker of the House of Commons, [2002] Comp. Trib. 41 (Can.).