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Cartels

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Contributing Editors: **Euan Burrows & Denis Fosselard**

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Canada

Randall Hofley, Cassandra Brown & Gillian Singer
Blake, Cassels & Graydon LLP

Overview of the law and enforcement regime relating to cartels

Statutory regime

Cartel conduct is a serious criminal offence in Canada, attracting the highest penal and financial penalties of any "corporate crime" in Canada. Canada's cartel prohibitions are set out in Part IV of the *Competition Act* (the "**Act**"),[1] which is a federal law of general application that applies to all conduct which either occurred, or has effects, in Canada.[2]

The main prohibition is set out under section 45, which criminalises agreements between competitors or potential competitors to fix or control prices or output, or to allocate sales, territories, customers or markets for the supply of any good or service. Section 45 is a *per se* offence, such that proof of anti-competitive effects is not required to establish culpability. Given the provision's reference to supply, the Canadian Competition Bureau (the "**Bureau**") has indicated in its guidelines that section 45 does not apply to agreements which relate only to the purchase of products, i.e., joint purchasing agreements, which will instead be assessed under the civil competitor collaboration provisions of the Act.[3]

A corporation is also prohibited under section 46 from implementing a "directive, instruction, intimation of policy or other communication" from a person outside of Canada to give effect to a "conspiracy, combination, agreement or arrangement" that would have contravened section 45 had it occurred in Canada. The communication must come from a person who is "in a position to direct or influence the policies of the corporation".

Section 47 criminalises agreements to submit pre-arranged bids or providing that one or more of the parties will not submit a bid or will withdraw a bid, where notice of the joint bid is not provided to the party requesting the bid. As with the conspiracy provision, bid rigging is *per se* a criminal offence. Section 49 prohibits federal financial institutions from entering into certain agreements related to interest rates, loans, and other services.

The Commissioner of Competition (the "**Commissioner**") and his department, the Bureau, are responsible for investigating alleged violations of the Act, including the cartel provisions. They can refer cartel matters to the Public Prosecution Service of Canada (the "**PPSC**") for prosecution.

As with other criminal offences, Canadian constitutional law affords protections to firms and individuals under investigation or being prosecuted for cartel conduct (e.g., the presumption of innocence, the protection against self-incrimination, the right to counsel, etc.).[4]

While cases may be prosecuted in either the provincial superior courts or the Federal Court Trial Division, contested cartel cases in Canada are uncommon and, more typically, prosecutions are resolved by way of a plea agreement submitted to a provincial superior

court.[5] In the case of international cartels, a company typically will enter into a plea agreement in Canada once it has pled guilty to conspiracy in the US, or sometimes elsewhere. While there is no limitation period for the prosecution of cartel conduct in Canada, the Bureau can exercise its discretion to discontinue an investigation and not refer past conduct to the PPSC.[6]

The Bureau has published several guidelines in respect of its enforcement approach to the cartel provisions of the Act. As discussed in greater detail under "Legislative and policy changes" below, in May 2021, the Bureau released a revised version of its *Competitor Collaboration Guidelines*, which describe the Bureau's approach in applying the cartel and competitor collaboration provisions of the Act and outlining the competition issues that may arise from collaborations.[7] The revised guidelines replace the 2009 version and implement a number of changes that seem designed to signal broader enforcement discretion for the Bureau. In 2015, the Bureau published an updated *Corporate Compliance Programs* bulletin, setting out the Bureau's view of the essential components of a credible and effective programme and appending a model compliance programme framework for companies to use, a certification letter for employees, and a due diligence checklist.[8] The Bureau also released its *Competition and Compliance Framework* bulletin in 2015, which explains the outreach, enforcement and advocacy instruments the Bureau utilises to promote compliance with the Act.[9] The Bureau recently updated its Immunity and Leniency Programs to reflect its current approach to the administration of these programmes, which is discussed in greater detail below.[10]

Penalties

The penalties for a violation of the cartel provisions are potentially quite severe. A violation of section 45 (conspiracy) or section 47 (bid rigging) carries a possible term of imprisonment of 14 years. Maximum fines for conspiracy are CAN$25m per count (and a person may be convicted on multiple counts), and there is no maximum fine for bid rigging (or the implementation of a foreign directive). A plea agreement may contemplate sanctions other than those prescribed by the Act, including the disqualification of individuals from holding certain offices within a company or asset forfeiture.

The fundamental principle of sentencing in Canada is that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. The general principles of sentencing law in Canada require that judges consider sentences imposed on similar offenders in similar circumstances; however, there are no formal sentencing guidelines or rules. It is standard practice in Canada for the PPSC to make formal submissions on sentencing to the court considering the plea agreement, if one exists.[11]

The magnitude of the economic harm caused by a cartel goes to the gravity of the offence. The usual notion of "economic harm" from a cartel is the "overcharge". This is the amount paid by victims of the cartel over-and-above what they would have paid for the products in the absence of the conspiracy. The Bureau will normally recommend that the fine be greater than the overcharge to ensure that the fine is not "simply a cost of doing business" and to ensure that an appropriate level of punishment and deterrence is achieved.

In most cases it is difficult to quantify the overcharge resulting from cartel behaviour. In such cases, the Bureau typically will use 20% of the volume of commerce affected in Canada (e.g., the value of the conspirator's sales of the products in Canada over the relevant time period) by the cartel participant as a proxy for the economic harm and as the starting point for its sentencing assessment (provided it is not above the maximum allowable fine); this is said to be made up of 10% for the assumed overcharge and 10% for deterrence.

In a conspiracy matter involving multiple counts, the resulting fines may exceed the statutory maximum for one count. In dealing with multiple counts, the Bureau will consider the

totality of the conduct and surrounding circumstances to arrive at the appropriate sentencing recommendation.

In reasons delivered in *R v. Maxzone Auto Parts (Canada) Corp*,[12] Crampton C.J. emphasised the need for a full evidentiary record and detailed submissions for the court to become satisfied that a sentence arrived at by plea agreement is in the public interest and would not bring the administration of justice into disrepute.[13] The submission should set out the aggravating, mitigating and other sentencing considerations, some of which are not always submitted as a matter of course, including the amount of illegal profits attributable to the conduct, the economic harm attributable to the conduct, and whether the corporate defendant has paid restitution. Additional requirements may need to be met with respect to individual defendants. The Commissioner has stated publicly that despite the greater detail required in sentencing submissions, companies have continued to come forward seeking leniency, and the Bureau and cooperating parties have managed to work with the framework set out by Crampton C.J. Indeed, since the release of the decision, there does not appear to have been a significant change in the number or type of cases resolved by plea in Canada.

In addition to criminal penalties, plaintiffs in third-party civil actions can recover damages, as well as investigation costs and costs to bring the proceeding. Moreover, provincial asset forfeiture statutes allow for the confiscation by the Crown of proceeds of crime as well as offence-related property.[14]

There are business implications to convictions as well. For example, bidders for federal government contracts must comply with the requirements set down by Public Services and Procurement Canada (PSPC), the department that provides procurement services to the Canadian Federal Government.[15] These requirements prohibit any bidder from bidding on a contract where it or its affiliates have been convicted of certain offences, including criminal offences under the Act and even equivalent foreign offences. These requirements are part of the Government of Canada's Integrity Regime, which outlines requirements for suppliers contracting with the Federal Government.[16]

Administrative settlement

Convictions in the context of cartels have, to date, been obtained almost exclusively through the plea bargaining process. In addition to, or *in lieu* of, a plea agreement for criminal conduct, section 34(2) of the Act provides a mechanism whereby a person can consent to a prohibition order. The order may appear very similar to a plea agreement (e.g., include conditions for the payment of a monetary penalty, a prohibition on individuals holding certain offices, etc.), but will not result in a criminal conviction or criminal record. The Bureau typically will not seek prohibition orders *in lieu* of plea agreements. The introduction of remediation agreements in Canada following recent amendments to the *Criminal Code* has resulted in increased attention on the possibility of resolving cartel matters without a guilty plea. Though offences under the Act are not eligible offences under the new remediation agreement regime, in at least one past bid-rigging case, the accused was subject to a prohibition order without pleading guilty.

The Commissioner can also prosecute competitor collaborations under section 90.1 of the Act. Under this section, the Commissioner can apply to a specialised competition court, the Competition Tribunal (the "**Tribunal**"), to prohibit the continuation or entry into an agreement or arrangement between competitors. Responsibility for enforcing section 90.1 lies exclusively with the Commissioner and a decision to commence proceedings under section 90.1 bars the PPSC from prosecuting the conduct criminally.[17] The Tribunal may issue a prohibition order where it finds that an agreement prevents or lessens, or is likely to

prevent or lessen, competition substantially in a market. The Tribunal may not, however, impose other penalties (e.g., fines or imprisonment) and no private right of action for damages currently exists with respect to conduct governed by section 90.1.[18]

Cartel investigations

Fact-gathering tools

Cartel conduct typically will come to the Bureau's attention in a number of ways. Most commonly, a person or firm will approach the Bureau under the Immunity Program (described below) and seek immunity in respect of cartel conduct. Sometimes companies that are affected by a cartel will complain to the Bureau about cartel conduct involving their suppliers or customers. If the Bureau finds the complaint to be credible, it can investigate the complaint using its many information-gathering powers. When cartel investigations in other foreign jurisdictions become public, the Bureau is increasingly pursuing investigations on its own accord. In addition, the Bureau may discover possible cartel conduct in the course of another matter such as a merger review.[19]

The Commissioner also has extensive powers to obtain information through search warrants, orders for the production of data, and records and wiretaps. Search warrants may be obtained by means of an *ex parte* application pursuant to section 15 of the Act. Under this section, the court must be satisfied that there are reasonable grounds to believe a criminal offence has been committed and that relevant evidence is located on the premises to be searched. It is a criminal offence to prevent access to premises in Canada or otherwise obstruct the execution of a search warrant. The Act also provides special procedures for sealing privileged documents and for determining the validity of privilege claims within a certain time frame. The Bureau also has the power to investigate cartel behaviour through wiretaps, although it requires prior judicial authorisation in order to do so.

Warrants are not subject to appeal, but can be reviewed and set aside (quashed) where there has been material non-disclosure or misrepresentation in the affidavit supporting the Commissioner's *ex parte* application. Targets may also request a retention or privilege hearing.

The Bureau can apply to the courts for production orders or orders for oral examination under section 11 of the Act. The Bureau will generally only use section 11 while in the initial fact-gathering stage. If the Bureau has a reasonable belief that a crime has been committed, it will typically obtain a search warrant instead, at least for the initial stage of the investigation.

Section 11(2) of the Act also provides that the Bureau may seek on an *ex parte* basis, and the courts may issue, a production order in respect of a foreign affiliate of a Canadian corporation when: (i) the Bureau has sought a similar order in respect of the domestic subsidiary; and (ii) the Bureau can establish that the foreign affiliate has records that are relevant to an inquiry.

In *Canada (Commissioner of Competition) v. Pearson Canada Inc.*[20] and *Canada (Commissioner of Competition) v. Indigo Books & Music Inc.*,[21] Crampton C.J. provided guidance on the Bureau's burden in obtaining production orders and a respondents' ability to challenge such orders, notably rejecting challenges based on discovery being available in other ongoing proceedings or the existence of other persons who might have relevant information or records. In *Canada (Commissioner of Competition) v. Bell Mobility Inc.*,[22] Crampton C.J. provided further guidance regarding the relevant time period for what constitutes an excessive, disproportionate or unnecessary burden on respondents in relation to a production

order; specifically, he explained that the Commissioner's information requirements should be tailored to the individual investigation and where a "reasonable efforts" standard is feasible (i.e., where a "reliable, representative amount" of information, as opposed to an order to produce all information over a lengthy time period, would be sufficient to prove the Commissioner's case), it should be negotiated by the parties and applied.[23]

Section 29 of the Act protects the identity of informants and requires that the Bureau hold confidential any information provided by informants under the search and seizure powers of the Act.

In international cartel cases, the Bureau will often work closely with other competition agencies either through formal procedures, involving the application of mutual legal assistance treaties ("**MLATs**"), or through reliance on Canada's competition cooperation agreements to obtain information. In September 2020, the Bureau signed the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (the "**MMAC**") with competition authorities from the other "Five Eyes" countries (Australia, New Zealand, the United Kingdom and the United States). The MMAC enables its signatories to cooperate more effectively on investigations and encourages parties to enter into bilateral enforcement cooperation agreements.[24] The MMAC is an addition to the Bureau's existing MLATs and competition cooperation agreements, which it has in place with over 16 jurisdictions, such as Brazil, China, the EU, India, Japan, Mexico and others.

Immunity and Leniency Programs

Canada's Immunity and Leniency Programs are of integral importance to cartel enforcement. Although no statistics are available publicly, it can be safely assumed that the Immunity and Leniency Programs assist the Bureau in the vast majority of its investigations.

In Canada, the Bureau will assign an "immunity marker" to an individual or a company that is "first-in", or first to request immunity, often called the "immunity applicant". Where a party does not qualify for immunity (i.e., the party is not "first-in") but the party cooperates with the Bureau, often called the "leniency applicant", the Bureau typically recommends that the prosecution grant some form of leniency, in the form of a reduced financial penalty and/or deferral of prosecution of any individual related to the leniency applicant.

To obtain immunity or leniency, the requesting party must provide evidence of an offence of which the Bureau is currently unaware, or of which the Bureau is aware but on which the Bureau has not yet obtained enough proof to warrant a criminal referral to the prosecution (a "**proffer**"). The party also must terminate its participation in the illegal activity and must not have coerced others to be a party to the illegal activity. The party must commit to full cooperation throughout the entirety of the Bureau's investigation and the PPSC's prosecution of the case *vis-à-vis* any other party.

Once a party has received a marker and has indicated to the Senior Deputy Commissioner of Competition of Criminal Matters (the "**SDC**") that it wishes to participate in the Immunity or Leniency Program, the SDC will confirm the continuation of the marker, usually for a period of 30 days, in order for the applicant to provide a proffer. If the proffer is not provided on a timely basis, the marker may be lost. Once the Bureau has concluded that the applicant has demonstrated its capacity to provide full cooperation, it will provide the Director of Public Prosecutions (the "**DPP**") with a recommendation regarding the applicant's eligibility. The DPP will then decide whether it wants to grant the applicant a Grant of Interim Immunity (a "**GII**"). The GII is a conditional immunity agreement that sets out the applicant's ongoing obligations it must fulfil before the DPP will finalise an immunity agreement. All identified current directors, officers or employees will be included under the GII if they admit their

knowledge of or participation in the unlawful conduct and provide full cooperation. Former directors, officers and employees may qualify on the same terms, though the Bureau will decide on a case-by-case basis. This is a departure from the previous programme, where all directors, officers and employees received automatic immunity. The DPP may revoke the GII if the applicant does not comply with its terms. Once the applicant has satisfied its obligations under the GII, such that the applicant's assistance is no longer required, the Bureau will make a recommendation for a final grant of immunity. The GII system was added in 2018 and is a departure from the original programme, which involved a single and final grant of immunity.[25]

Participation in the Immunity and Leniency Programs is voluntary, confidential, and on a (as against the participant) "without prejudice" settlement-privileged basis. Applicants should be aware, however, that in 2015, the Ontario Superior Court in *R. v. Nestlé* held that "factual information" disclosed (as opposed to legal arguments or procedural submissions made) by a participant in the Immunity and Leniency Programs is not settlement-privileged and, even if it were settlement-privileged, an exception must be permitted to accommodate the Crown's duty to disclose relevant evidence to a defendant in a criminal proceeding.[26] The 2018 revised Immunity and Leniency Programs also introduced a protocol for identifying, reviewing and adjudicating privilege claims by applicants. After the GII stage, the applicant must provide notice to the Bureau of its privilege claims. The Bureau will then refer the information to the DPP. If the DPP is not persuaded by the applicant's privilege claim, it will either agree to appoint an independent counsel to resolve the claim or ask a court to rule on the matter.

Immunity is granted only to the first participant involved in a conspiracy to come forward. Under the Immunity and Leniency Program, all subsequent leniency applicants are eligible for a cooperation credit for up to a 50% reduction in the fine that would otherwise have been recommended by the Bureau to the prosecution. Rather than providing credit on a first-come, first-served basis, the amount of credit awarded will be based on the value of the applicant's cooperation. This is a significant change from the original programme where only the first leniency applicant received a 50% credit and subsequent applicants would be granted a reduced credit. As with immunity applicants, current directors, officers or employees must admit knowledge of or participation in the unlawful conduct and provide full cooperation to receive the benefit of a company's leniency application. Former directors, officers or employees may also qualify under the same conditions, though the Bureau will decide on a case-by-case basis. In addition, the length of the offence period is typically a matter of negotiation with the authorities where the party cooperates with the investigation; the period determined to be relevant, for example, in US proceedings, can have a bearing on the period used in Canada. In addition, the Bureau may consider (and recommend that the courts consider) the pre-existence of a "credible and effective" compliance programme as a mitigating factor when assessing a fine against a firm charged with a cartel offence.

"Immunity Plus" is available should a company provide the Bureau with probative evidence of a second conspiracy or other criminal conduct unrelated to the Bureau's current investigation, or in respect of products not presently being examined by the Bureau under its current investigation. Immunity Plus status provides immunity with regard to the "additional" conspiracy or criminal conduct, as well as an additional discount (generally in the range of 5% to 10%) for the initial criminal conduct, although this amount may increase depending on the extent of the party's cooperation.

The Bureau typically will not share the identity of an immunity or leniency applicant, or the information provided by the applicant with a foreign law enforcement agency, unless the

applicant provides a waiver giving the Bureau consent to do so or it is required by law to do so. As part of an applicant's ongoing cooperation, under either the Immunity or Leniency Program, the Bureau expects the applicant to provide waivers allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity or leniency. The request for a waiver, however, is typically limited to the jurisdictions which are most relevant to the case in Canada. At times, the Bureau may be willing to accept a limited waiver (e.g., allowing the agencies to discuss only certain information), if legitimate reasons for doing so are provided. Eventually, however, the applicant may be required to provide a full waiver allowing for the sharing of any information the Bureau obtains in the course of cooperation, including documents. As a matter of practice, there tends to be minimal document exchange (the agencies have often received production of the same documents) and moderate oral exchanges between the agencies.

Strict confidentiality as to the identity of informants may reduce potential exposure to civil actions for immunity and leniency applicants; however, once guilty pleas are entered, leniency applicants are readily exposed to third-party actions for damages. The information provided by immunity and leniency applicants is subject to strict confidentiality agreements with the Bureau.[27] Third parties seeking damages cannot require, without a court order which the Bureau will resist, the Bureau to disclose information obtained from leniency and immunity applicants in their investigations, and thus their exposure to damage actions is limited to the material made publicly available.[28] Potential immunity and leniency applicants should be aware that plaintiffs in private actions may rely on the Supreme Court of Canada's (the "**SCC**") decision in *Imperial Oil v. Jacques* (discussed below) to obtain access to certain Bureau files and information obtained during a criminal investigation. However, such access is limited by *Canada (Attorney General) v. Thouin* (discussed below), where the SCC held that in a price-fixing class action in which the Government is not a party, Bureau investigators cannot be compelled to be examined for discovery.

Duration of investigations

The duration of time from the receipt of an immunity marker to the end of the immunity applicant's cooperation obligations is highly case-specific. Indeed, the timing has ranged anywhere from one to 10 years following the initiation of an investigation through, for example, a dawn raid(s). This timing will depend on a number of factors including: the number of participants in the cartel; the duration of the conduct; the affected volume of commerce; the extent to which that commerce directly or indirectly affects Canadian consumers; the jurisdiction where the conduct occurred; the location of the principal witnesses and evidence; and the timing considerations of other enforcement agencies (principally, the US Department of Justice).

Overview of cartel enforcement activity during 2021

Cartel enforcement activity can be measured in terms of new charges laid, convictions obtained, number of investigations under way, and international efforts.

Convictions obtained and charges laid

Based on public information, the PPSC did not obtain any guilty pleas in 2021 against any companies or individuals (in 2020, the PPSC obtained guilty pleas from at least two companies and did not obtain guilty pleas from any individuals). However, the Bureau laid criminal charges against four companies and three individuals in March 2021 in connection with an alleged conspiracy to commit fraud and rig bids for condominium refurbishment services in the Greater Toronto Area.[29] In January 2022, CPL Interiors Ltd.

pled guilty for its role in connection with the conspiracy, though court proceedings remain ongoing against the other accused. CPL Interiors Ltd. received leniency sentencing for its cooperation throughout the Bureau's investigation and for its agreement to testify in resulting prosecutions. As a result, the company was fined CAN$761,967 for its conduct.[30] In June 2021, the Bureau also laid criminal charges against an individual in connection with a bid-rigging conspiracy relating to infrastructure contracts for the City of Gatineau in Québec. These charges follow guilty pleas from four other individuals in 2019 in connection with the same scheme.[31]

Investigations

The Bureau's investigation into price-fixing of fresh commercial bread, which became public in October 2017, remains ongoing.[32] At the time of writing, the PPSC has yet to lay charges. In January 2021, the Bureau also closed its investigation into Postmedia and Torstar following allegations that the parties had contravened criminal conspiracy provisions of the Act when they entered into a swap transaction in 2017. Following closing, the parties shut-down some of the assets they had swapped. In closing its investigation, the Bureau concluded that no further action was warranted.[33]

International efforts

The Bureau served as President of the International Consumer Protection and Enforcement Network ("**ICPEN**") from 1 July 2020 until 30 June 2021.[34] ICPEN is an international organisation made up of consumer protection authorities from over 65 countries that aims to encourage coordination amongst agencies. In November 2021, the Bureau joined its international counterparts from the G7 at an Enforcers Summit hosted by the UK Competition and Markets Authority to discuss opportunities for international cooperation to improve competition in digital markets. Participants collectively published a "compendium of approaches to improving competition in digital markets", which includes information regarding their respective approaches to opening investigations and bringing enforcement action, to further improve coordination between agencies.[35] Finally, in February 2022, the Bureau provided detailed submissions for reform to the *Competition Act* (discussed further below), which suggest that cooperation with international competition authorities should be further deepened, for example, by implementing tools to facilitate information sharing between competition authorities. In its submission, the Bureau specifically notes that Canada has signed several MLATs that facilitate information exchange between agencies in the criminal context, but that Canada has not yet entered into an MLAT for civilly reviewable conduct, which would include competitor collaborations under section 90.1 of the Act.[36]

Private enforcement of cartel laws

The primary cause of action for the private enforcement of cartel laws is found under section 36 of the Act, which confers a private right of action on any person in Canada that has suffered a loss or damage as a result of a breach of one of the criminal provisions of the Act.[37] In addition to damages suffered, plaintiffs can sue to recover investigation costs and costs to bring the proceeding, but unlike the US, a plaintiff is not entitled to treble damages.

Proceedings may be commenced in the provincial courts or the Federal Court and typically arise by way of class action. The SCC recently clarified that limitation periods apply to section 36 actions based on the discoverability principle, such that the limitations clock will not run until the plaintiff knew or ought to have known the facts underlying the cause of action.[38] The lack of a conviction or even the refusal of the Commissioner to investigate a potential violation of the cartel provisions does not bar a third-party action. However, where

there are no guilty pleas, convictions or investigations by the Bureau or other authorities, Canadian courts have recently suggested that it may be difficult for plaintiffs to advance private class actions.[39] That being said, a prior conviction for the offence is, absent evidence to the contrary, proof of liability. As a consequence, once a person or firm admits to cartel conduct as part of the Bureau's Leniency Program, with such conviction, *prima facie* proof is made of the violation of the law. In practice, where an investigation becomes public or a conviction is announced, all potential participants, including an immunity applicant, become the subject of a class action in one (and normally more) provincial court(s) in Canada.

Key issues in Canadian cartel law

In 2019, the SCC released its decision in *Pioneer Corp. v. Godfrey*,[40] which provided important clarifications on several hotly debated issues relating to the private enforcement of cartels under section 36, including (i) the nature of harm that indirect purchasers must demonstrate to be certified as a class, (ii) whether umbrella purchasers are able to bring claims against price-fixing conspirators, (iii) whether the Act is a complete code intended to displace concurrent common law conspiracy causes of action, and (iv) the application of limitations and the discoverability principle to section 36 of the Act. The *Godfrey* decision effectively resolves these issues, which had raised significant confusion in courts across the country for years.

Indirect purchaser actions

In 2013, the SCC issued a trilogy of important decisions regarding competition law-related private actions, which allowed indirect purchasers to bring civil cases against upstream suppliers.[41] In these decisions, the SCC noted that in bringing their actions, indirect purchasers assume the burden of establishing that they have suffered loss. Whether they have met their burden of proof is a factual question to be decided on a case-by-case basis.

In *Godfrey*, the SCC settled an ongoing debate regarding the requirements for establishing common loss at the certification stage. The Court ultimately decided that in order to be certified as a class, plaintiffs are required to present a methodology capable of showing that direct purchasers and indirect purchasers experienced over charges, without having to show loss to each and every class member. Instead, it held that proof of loss to individual class members is a matter reserved for trial. If, after obtaining discovery and proceeding through trial, the plaintiffs ultimately cannot prove that a portion or all members of the class suffered losses, the trial judge can dismiss the claim. As a result, while it is sufficient to show that overcharges were passed on to the indirect purchaser *level* for the purposes of certifying a common issue relating to loss, before damages are awarded to all class members or subsets of class members, plaintiffs will be required to demonstrate actual loss to those class members.[42]

In a recent decision, *Ewert v. Nippon Yusen Kabushiki Kaisha*, the British Columbia Court of Appeal (the "**BCCA**") addressed the requirement to demonstrate a methodology for identifying common harm at the certification stage. The BCCA held that plaintiffs need only show "some basis in fact" that there is a credible or plausible methodology capable of establishing loss on a class-wide basis. It clarified that the plaintiffs need to present a methodology that is "realistic but not compelling", and that they do not need to actually build an economic model or identify specific data that will be required to show common harm.[43] Finally, the court emphasised that the certification stage is not to become a battle of the experts.[44] Together, *Godfrey* and *Ewert* created a low standard for class action certification for indirect purchasers. However, in the 2021 Federal Court decision in *Jensen*

v. Samsung Electronics, a claim on behalf of direct and indirect purchasers, Gascon J held that the obligation for plaintiffs to show "some basis in fact" actually requires that plaintiffs demonstrate a sufficient evidentiary basis to show the existence of common issues, including evidence demonstrating that there is "a colourable claim".[45] The Superior Court of Québec came to a similar conclusion in *Jensen*'s "sister" case, *Hazan v. Micron Technology*, where Bisson J held that absent a guilty plea, he could not infer the existence of a price-fixing conspiracy demonstrating an arguable case justifying authorisation of a class action.[46]

Umbrella purchasers

The SCC in *Godfrey* also confirmed that the ability to bring civil cases under section 36 of the Act extends to so-called "umbrella purchasers", i.e. individuals who did not buy products directly from the defendants but nonetheless claim damages based on the fact that the alleged conspiracy drove market prices up, including the prices they paid to non-conspirators. The SCC interpreted the provision as providing a cause of action to *any* person who suffered a loss as a result of the conduct contrary to section 45, which it held included umbrella purchasers. However, the SCC also emphasised that it is still necessary to prove at trial that umbrella purchasers suffered a loss *as a result of* a proven conspiracy.[47] Moving forward, losses that are too remote will therefore be precluded at trial, rather than at the certification stage.

Though section 36 extends to umbrella purchasers, these plaintiffs are still required to demonstrate commonality of harm in order to be certified as a class. In *Ewert*, the BCCA upheld the trial judge's finding that the scope of the proposed methodology did not extend to umbrella purchasers and therefore concluded that a class proceeding was not the preferable procedure for resolving the claims of the umbrella purchasers in that case.[48] In the 2021 case *David v. Loblaw*, the Ontario Superior Court of Justice similarly declined to extend certification to umbrella purchasers because the claim was not supported by evidence of a methodology capable of dealing with umbrella purchaser claims. The Court held that the while the umbrella purchasers' lawyers and economists could articulate a theory of price increase, the evidentiary record did not provide a basis in fact (a plausible methodology) to suggest the claims could succeed at trial.[49]

Complete code

The *Godfrey* decision also settled an ongoing debate regarding whether the conspiracy provisions of the Act remove the plaintiffs' ability to seek damages under common law for violations of the Act's criminal provisions. At the heart of the debate was whether Parliament intended the Act to be a complete code, ousting other bases of civil liability. In *Godfrey* the SCC decided that the Act was *not* intended to be a complete code, and that section 36 does not bar other common law or equitable claims. In its ruling, the SCC specified that a breach of section 45 of the Act can supply the "unlawful" element required for the tort of civil conspiracy.[50]

Limitations on civil liability

The Act imposes a two-year limitation period for civil actions. It begins from the later of the day on which the conduct was engaged in, or the day on which any criminal proceedings relating thereto were finally disposed of. The way the limitation period is defined has historically produced uncertainty since it is possible for a defendant to be faced with a civil lawsuit more than two years after the infringing conduct has ceased. In practice, however, private antitrust class actions are increasingly commenced at the early stages of related criminal proceedings, thereby reducing some of the uncertainty for defendants.

Most Canadian statutory limitation periods include a "discoverability" provision whereby the limitation period begins to run from the time that the behaviour was discovered by the

plaintiff. The SCC in *Godfrey* held that where a limitation period is linked to an element underlying a cause of action, the discoverability principle will apply, such that the limitations clock will not run until the plaintiff knew or ought to have known the facts underlying the cause of action. The SCC also noted that it would be inconsistent with the overall objects of the Act to promote competition and consumer protection, if section 36(4) were interpreted to bar plaintiffs from recovery where a conspiracy was concealed for longer than two years. To do so would effectively encourage the concealment of conspiracies until the limitations period had expired.[51]

Another point of ambiguity in establishing limitation periods for civil actions under the Act is the concept of "continuing practices". *Garford Pty Ltd v. Dywidag* raised the question of what behaviour constitutes a continuing offence under the Act.[52] The Federal Court held that in order for an offence to be "continuing", such that the limitation period had not yet commenced, ongoing acts in contravention of the statute would be required. A continued lessening of competition due to acts that are no longer occurring would not be sufficient to extend the limitation period.[53] The Alberta Queens Bench (the "**ABQB**") later applied *Garford* in *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*.[54] The court concluded that the agreement in question required ongoing acts by both parties, so an analysis of whether the agreement breached section 45 of the Act was not restricted to the time that the agreement was formed. In that case, the defendant had entered the agreement with another party. The plaintiff (which happened to be the defendant's largest competitor) later purchased the original party to the agreement, such that the agreement became a contract between two competitors. The court ultimately decided that (under the defendant's interpretation of the agreement) certain provisions contravene section 45. Though the agreement was valid when executed, it became illegal following the plaintiff's acquisition.[55] The ABQB's conclusions regarding section 45 of the Act were later upheld on appeal.[56]

Pre-trial delay

In April 2017, the Superior Court of Québec in *Les Industries Garanties limitée c. R*, ruled that a lengthy delay between the laying of bid-rigging charges and the anticipated end of trial does not violate the constitutional right to be tried within a reasonable time.[57] The court permitted the prosecution of a company and its employee to proceed despite a 40-month delay between the laying of charges and the trial, determining that the delay was not unreasonably long in view of the complexity of the case (arising from both the large volume of disclosure and the specific legal and evidentiary issues raised).[58] Importantly, the prosecution was allowed notwithstanding the SCC's ruling in *R. v. Jordan*, which established a ceiling of 30 months for cases going to trial in a superior court, beyond which delay is presumptively unreasonable.[59] The finding that the bid-rigging prosecution was more complex than a typical murder trial suggests that defendants in criminal prosecutions under the Act may face difficulty obtaining Charter relief for lengthy pre-trial delays.

Information flow

Controlling the flow of information to and from the Bureau can have important implications for companies that are involved in a cartel investigation. In addition to raising claims of settlement and work-product privilege, the Bureau and immunity and leniency applicants rely on section 29 of the Act to maintain confidentiality of any information voluntarily disclosed during proffers. That being said, following the *Nestlé* ruling (discussed above), immunity and leniency applicants must be cognisant of the fact that the Bureau may ultimately disclose the information they produce to the accused, notwithstanding the confidentiality assurances that were given when the information was originally provided.[60]

In June 2018, the Bureau released a bulletin on its general approach to requests for access to confidential information in its possession from persons involved in private actions under section 36 of the Act.[61] The bulletin highlights the Bureau's general position not to voluntarily provide information to persons contemplating or taking part in proceedings under section 36 of the Act, noting that opposing the production of such information is important to prevent interference with ongoing examinations, inquiries or enforcement proceedings and maintain the confidentiality of information the Bureau receives. The bulletin also reiterates that the Bureau will rely upon applicable privileges, including public interest privilege, to protect against the disclosure of information in its possession and control.

In the 2017 case *Canada (Attorney General) v. Thouin*, the SCC held that Competition Bureau investigators, in their capacity as representatives of the Crown, could not be compelled to be examined for discovery in an action to which the Government was not a party.[62] The case involved a gasoline price-fixing class action in which the plaintiffs attempted to get an order permitting them to examine the Bureau's chief investigator in its investigation into gasoline price-fixing. The court held that the Crown's immunity from discovery was not lifted in proceedings in which it was not a party, and therefore, the Bureau investigator could rely on the Crown's discovery immunity to refuse to submit to an examination for discovery. At the end of its decision, the SCC noted that the question they considered was different than the one decided in *Imperial Oil v. Jacques*,[63] where the SCC allowed the disclosure of records of private communications intercepted by the Bureau in the course of a criminal investigation into allegations of a conspiracy affecting gasoline pump prices in Québec. In the course of its investigation, the Bureau obtained judicial authorisations from the court in Québec under the *Criminal Code* that enabled it to intercept and record more than 220,000 private wiretapped communications. Plaintiffs who had commenced a class action in the Québec Superior Court sought the disclosure of the recordings that had already been disclosed to the accused in the criminal proceedings. The SCC found that the specific circumstances of this particular case favoured the disclosure of the wiretap evidence. It referenced the rule in the *Québec Code of Civil Procedure* that expressly allows records within the possession of a third party to be produced, but noted that whether records should be produced often involves a number of considerations, such as a determination of relevancy together with the consideration of confidentiality rights, privacy rights and the efficiency of the judicial process as against facilitating the search for truth. The court noted that (at least implicitly) before third-party records are produced, the court should engage in an analysis to ensure there are no factual or legal impediments that should militate against disclosure of the records requested and that courts always have the ability, responsibility and control to impose such measures and conditions on any disclosure as may be appropriate in the circumstances. It should be noted that, while section 29 of the Act prevents the Bureau from disclosing, among other things, information provided to the Bureau on a voluntary basis to third parties except "for the purposes of the administration and enforcement" of the Act, the wiretap evidence in this case was collected under the *Criminal Code* rather than the Act. Hence, section 29 of the Act was held not to apply. This decision should therefore not affect the Bureau's ability to resist third-party discovery efforts of information it obtains under its Immunity and Leniency Programs.

Finally, it is important to note that, where a foreign-incorporated company has a branch office in Canada, the Bureau may invoke its authority under section 11(2) of the Act to issue production orders to the Canadian branch office for records or information, even if those records are in the possession or control of the foreign parent. In addition to the penalties for non-compliance, the issuance of a production order under section 11(2) is a matter of public

record and the accompanying affidavit from the Bureau will set out, typically in great detail, the alleged criminal conduct being investigated and the involvement of the company being investigated. These affidavits have formed a roadmap for class counsel, even if a conviction has yet to be secured from the company.

Legislative and policy changes

Late 2021 and early 2022 brought several important events signalling potentially significant reform to Canadian competition policy. On 7 February 2022, Canada's Minister of Innovation, Science and Industry announced that the Federal Government would be undertaking a comprehensive review of the *Competition Act*.[64] This followed an October 2021 invitation from Canadian Senator, the Honourable Howard Wetston, for public feedback to determine whether Canada's competition policy framework remains appropriate for the digital age.[65] On 8 February 2022, the Bureau released its submission responding to Senator Wetston's invitation, which it said represents an important opportunity to discuss amendments to the Act and to further modernise Canada's competition policy.[66] The submission touches extensively on civilly reviewable competitor collaborations under section 90.1 of the Act and on conspiracy and bid rigging under section 45 of the Act. With regard to section 90.1, the Bureau identified several gaps in coverage and provided corresponding recommendations for legislative change, including: (i) allowing for administrative monetary penalties in response to violations of section 90.1; (ii) expanding section 90.1 to address past agreements that are no longer in effect and past harm to competition that has since ceased; (iii) developing a more workable standard to target agreements that harm emerging businesses, as the standard requiring the Bureau to prove that an agreement "lessens or prevents competition substantially" means the Commissioner must demonstrate that the agreement halted development of a significant competitive force; (iv) establishing a patent settlement notification registry to inform the Bureau of patent-related settlement agreements; and (v) allowing private litigants access to the Competition Tribunal for harmful competitor agreements.

Regarding section 45 of the Act, the Bureau outlined three specific suggestions relating to the Act's cartel framework: (i) that the Act explicitly provide for the criminal prosecution of harmful buy-side agreements, including wage-fixing and no-poaching agreements, highlighting enforcement action by its international counterparts to prevent agreements that unnecessarily restrict job mobility; (ii) further limiting the "made known" defence, which provides that bid rigging is not committed if the person requesting the bids is informed of the agreement before submission; and (iii) ensuring that fines for conspiracy and bid rigging are made consistent across provisions and strengthened to provide an effective deterrent to manifestly harmful cartel behaviour. The Bureau specifically noted that the current level of criminal fines under the Act is out of step with its international counterparts and function as a mere "cost of doing business" for large firms with billions of dollars in revenue.

In May 2021, the Bureau released revised *Competitor Collaboration Guidelines* (the "**Revised Guidelines**"), which replace the previous version from 2009.[67] The Revised Guidelines signal several key changes to the Bureau's enforcement practices for competitor collaborations. Firstly, in a pivot from the draft Revised Guidelines published for consultation in July 2020, the Bureau reaffirmed that joint purchasing agreements among competitors do not violate the criminal competitor collaboration provisions of the Act (though, as noted above, the Bureau has since recommended a legislative reform for certain harmful buy-side agreements). However, the Revised Guidelines specify that where a non-compete agreement between competitors amounts to a standalone restraint, the Bureau may examine

the non-compete under section 45. The Revised Guidelines also specify that consortium bids may be subject to review under the Act's civil competitor collaboration provision even where the party that requested the bid is made aware that it is being made by a consortium. The revisions further specify that an agreement between parties may be subject to review under section 90.1 where the parties are competitors with respect to any product, even if that particular product is not the subject of any collaboration. When determining whether a joint production agreement concerning an intermediate product lessens competition, the Bureau will now consider the markets for both the intermediate product and the final product (whereas previously, the Bureau would only consider the market for the final product). Finally, the Revised Guidelines specify that pricing algorithms can form the basis of a cartel offence under the Act's criminal provisions.

* * *

Endnotes

1. *Competition Act*, RSC 1985, c C-34, as amended.
2. See *Fairhurst v. Anglo American PLC*, 2011 BCSC 705. The British Columbia Supreme Court has reiterated that foreign defendants are subject to the jurisdiction of Canadian courts for cartel conduct where harm is sustained in Canada. The Court found that its jurisdiction extended to a group of foreign defendants in a proposed class action, claiming that the defendants conspired to increase the price of diamonds. It was sufficient that harm was suffered in B.C. and that the defendants knew or should have known the diamonds would be shipped to B.C. in the ordinary course of distribution. See also *Libman v. The Queen*, [1985] 2 SCR 178. The Supreme Court held that in order for an offence to be subject to the jurisdiction of Canadian courts, it is sufficient that there exists a "real and substantial link" between the offence and Canada. See also *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, where the SCC upheld a lower court decision to issue an interlocutory injunction with extraterritorial effect requiring Google to globally deindex certain websites, confirming that even where conduct has effects in Canada, territorial jurisdiction can be established.
3. Competition Bureau, "Competitor Collaboration Guidelines" (6 May 2021) at 21, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04582.html. [*Competitor Collaboration Guidelines*]; Competition Bureau, "Competition Bureau statement on the application of the *Competition Act* to no-poaching, wage-fixing and other buy-side agreements" (27 November 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html. However, note that a purchase side agreement could give rise to a section 45 offence if, for example, the parties enter into the agreement as a sham to control the production of a downstream product. As discussed further below, in February 2022 the Bureau also recommended changes to the *Competition Act* to explicitly criminalise certain harmful buy-side agreements, including certain wage-fixing and no-poaching agreements.
4. For example, prosecutors cannot use admissions made in the context of settlement discussions in future prosecutions against the firm or individuals making the admission.
5. For all convictions obtained under the Act, there is an automatic right of appeal to a Provincial Court of Appeal or to the Federal Court of Appeal, depending on which court tried the indictment. The decision of any court of appeal generally may be brought, by leave, to the Supreme Court of Canada (although there is an automatic right of appeal

when there is a dissenting opinion on the Court of Appeal). Given that convictions for cartel offences in Canada are obtained most often through the plea-bargaining process, appeal courts do not often hear cases concerning matters of cartel enforcement.

6. Competition Bureau, "[t]hirteenth guilty plea concludes auto parts bid rigging investigations with fines totalling over $86 million" (19 October 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/10/thirteenth-guilty-plea-concludes-auto-parts-bid-rigging-investigations-with-fines-totalling-over-86-million.html/.
7. *Competitor Collaboration Guidelines*, *supra* note 3.
8. Competition Bureau, "Corporate Compliance Programs – Bulletin" (3 June 2015), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html.
9. Competition Bureau, "Competition and Compliance Framework – Bulletin" (10 November 2015), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html.
10. Competition Bureau, "Immunity and Leniency Programs under the *Competition Act*" (15 March 2019), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html.
11. See discussion in *R v. Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117, [2012] FCJ No 1206 [*Maxzone*].
12. *Maxzone*, *supra* note 11.
13. *Maxzone*, *supra* note 11 at para. 4.
14. See, e.g., *Civil Remedies Act, 2001*, SO 2001, c 28.
15. SPC, "Government of Canada's Integrity Regime" (11 October 2018), online: https://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html.
16. Similar "debarment" regimes also exist in certain Canadian provinces with respect to procurement by provincial governments. For example, in Québec, since 2013, the *Integrity in Public Contracts Act* has required bidders for government contracts to obtain authorisation from the *Autorité des marchés financiers* ("**AMF**") before entering into provincial government contracts. The AMF can withhold authorisation for entities found guilty of certain offences (including *Competition Act* offences) in the past five years. The AMF's decisions are reviewable by courts and must meet the minimum requirements of procedural fairness, including disclosing the information on which it bases its decisions to allow an applicant to make a defence. See *Terra Location inc. c. Autorité des marchés financiers*, 2015 QCCS 509. In New Brunswick, under the *Procurement Act*, a supplier may be disqualified from provincial procurement for a period of up to five years if convicted of a cartel offence under the *Competition Act* as well as offences under five other federal statutes.
17. *Competition Act*, *supra* note 1, section 45.1.
18. Private parties could try to frame a section 90.1 matter as a conspiracy and seek damages on that basis. As discussed further below, in February 2022 the Bureau recommended legislative changes to the Act, including allowing private parties access to the Competition Tribunal in response to violations of section 90.1.
19. For example, in March 2018 the Competition Bureau initiated an investigation into an alleged conspiracy between newspaper companies Postmedia and Torstar, shortly after a transaction between the companies that was followed by the closing of several community newspapers. However, the Bureau closed the investigation in January 2021 after concluding that no further action was warranted following its investigation. See Competition Bureau, News Release, "Competition Bureau obtains court order to advance ongoing investigation of Postmedia and Torstar" (4 December 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/11/competition-bureau-obtains-court-order-

to-advance-ongoing-investigation-of-postmedia-and-torstar.html; Competition Bureau, News Release, "Competition Bureau closes investigation of Postmedia and Torstar" (7 January 2021), online: https://www.canada.ca/en/competition-bureau/news/2021/01/competition-bureau-closes-investigation-of-postmedia-and-torstar.html [Postmedia and Torstar].

20. *Canada (Commissioner of Competition) v. Pearson Canada Inc*, 2014 FC 376, 119 CPR (4th) 313.
21. *Canada (Commissioner of Competition) v. Indigo Books & Music Inc.*, 2015 FC 256.
22. *Canada (Commissioner of Competition) v. Bell Mobility Inc.*, 2015 FC 990 [*Bell Mobility*].
23. Note that the decision was issued in the context of the Bureau's investigations into reviewable (non-criminal) practices in potential violation of the Act – though the principles articulated may apply for criminal investigations as well since sections 10 and 11 of the Act make no distinction between civil and criminal investigation in terms of enforcement or review standards for production orders. The Federal Court of Canada recently expanded the jurisprudence in *Bell Mobility* in *Canada (Commissioner of Competition) v. Canada Tax Reviews Inc.*, 2021 FC 91 at para. 44, noting that certain information sought by the Commissioner may not be relevant unless and until the Bureau arrives at specific determinations. The court may therefore refuse to order production initially and revisit the issue at a later point in time once such determinations have been made. Note, however, that this decision was made in the context of a misleading advertising claim.
24. Competition Bureau, "Competition Bureau strengthens relationship with five foreign counterparts to enhance cross-border enforcement" (2 September 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/09/competition-bureau-strengthens-relationship-with-five-foreign-counterparts-to-enhance-cross-border-enforcement.html.
25. Immunity and Leniency Program, *supra* note 10.
26. *R. v. Nestlé Canada Inc.*, 2015 ONSC 810 at paras 69, 83 [*Nestlé*].
27. In a recent case relating to the Competition Bureau's investigation into alleged price-fixing for packaged bread, the Ontario Superior Court found that the immunity witnesses in question qualified as confidential informants as the Bureau had represented that their identities would not be disclosed, and ordered a publication ban over any information which could identify them. However, the court found that the witnesses had agreed to a "future waiver" of this privilege at trial, when they would be required to testify. The Competition Bureau has since amended its immunity programme and made public statements that future immunity witnesses should not expect to be treated as confidential informers, which will likely limit the application of this case. See *Re Application by Immunity Applicant Witnesses at First Stage Hearing*, 2018 ONSC 6301.
28. *Middlekamp v. Fraser Valley Real Estate Board*, [1992] BCJ No 1947, 96 DLR (4th) 227.
29. Competition Bureau, "Multiple companies and their owners charged with conspiracy to commit fraud and rig bids for condo refurbishment contracts in the GTA" (29 March 2021), online: https://www.canada.ca/en/competition-bureau/news/2021/03/multiple-companies-and-their-owners-charged-with-conspiracy-to-commit-fraud-and-rig-bids-for-condo-refurbishment-contracts-in-the-gta.html.
30. Competition Bureau, "CPL Interiors fined $761,967 after pleading guilty in GTA condo refurbishment bid-rigging scheme" (17 January 2022), online: https://www.canada.ca/en/competition-bureau/news/2022/01/cpl-interiors-fined-761967-after-pleading-guilty-in-gta-condo-refurbishment-bid-rigging-scheme.html.

31. Competition Bureau, "Fifth engineering executive charged in Gatineau bid-rigging case" (29 June 2021), online: https://www.canada.ca/en/competition-bureau/news/2021/06/fifth-engineering-executive-charged-in-gatineau-bid-rigging-case.html.
32. Globe and Mail, "Court gives go-ahead to class-action lawsuit over bread price fixing" (6 January 2022), online: https://www.theglobeandmail.com/business/article-court-gives-go-ahead-to-class-action-lawsuit-over-bread-price-fixing/.
33. Postmedia and Torstar, *supra* note 19.
34. Competition Bureau, "Canada's 2020-2021 presidency of the International Consumer Protection and Enforcement Network (ICPEN)", online: https://www.canada.ca/en/competition-bureau/news/2020/06/competition-bureau-assuming-the-presidency-of-the-international-consumer-protection-and-enforcement-networkfor-2020-2021.html.
35. Competition Bureau, "Competition Bureau joins international counterparts in G7 Summit on improving competition in digital markets" (29 November 2021), online: https://www.canada.ca/en/competition-bureau/news/2021/11/competition-bureau-joins-international-counterparts-in-g7-summit-on-improving-competition-in-digital-markets.html.
36. Competition Bureau, "Examining the Canadian *Competition Act* in the Digital Era: Submissions by the Competition Bureau" (8 February 2022), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html#sec08_8. [Competition Bureau reform].
37. In the 2021 case *Latifi v. the TDL Group Corp.*, 2021 BCSC 2183, the British Columbia Supreme Court refused to certify a class action in respect of an alleged conspiracy under section 45 of the Act on the basis that section 45 does not apply to buy-side agreements and therefore cannot serve as the basis to a section 36 action. The Federal Court of Canada also came to this conclusion in *Mohr v. National Hockey League*, 2021 FC 488, where it held that a section 45 conspiracy could not be the basis of a class action, as the defendants were not competitors and were purchasing the product in question (hockey player services), rather than producing or supplying it. In the 2015 case of *Airia Brands v. Air Canada*, 2015 ONSC 5332, Justice Leitch considered whether plaintiffs could bring claims for a class including persons residing outside Canada, ultimately finding they could not due to the lack of any jurisdiction of the court over foreign class members not residing in Ontario or consenting to the court's jurisdiction. Justice Leitch held in the alternative that even if such jurisdiction existed, she would stay the claims based on the real and substantial connection test (if applicable) not being met and based on *forum non conveniens*. In the 2020 case of *Ewert v. Höegh Autoliners*, 2020 BCCA 181 at para. 79, the BCCA added that companies that participate in international cartels but do not distribute their product into Canada may nonetheless be found liable under section 36 where the conspiracy caused harm within Canada.
38. *Pioneer Corp. v. Godfrey*, 2019 SCC 42 [*Godfrey*].
39. *Jensen v. Samsung Electronics Co Ltd.*, 2021 FC 1185 at paras 296–297 [*Jensen*]. In Jensen, the Federal Court observed that in virtually all cases involving recourse under section 36 of the Act, the plaintiffs relied either on some express agreement or contract surrounding the conspiracy in question, or on criminal convictions or guilty pleas entered by the defendants in related criminal proceedings or investigations undertaken by the Bureau or by a foreign competition authority. The court held that the alleged conduct in question amounted to a mere "fishing expedition" and refused to certify the action. See also *Jensen*'s sister case, *Hazan c. Micron Technology*, 2021 QCCS 2710 [*Hazan*], where the Québec Superior Court came to a similar conclusion.
40. *Godfrey*, *supra* note 38.

41. *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Ltd v. Archer Daniels Midland Company*, 2013 SCC 58; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.
42. *Godfrey*, *supra* note 38 at paras 107–109 and 118–121.
43. *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 [*Ewert*]. However, in a 2020 Ontario Superior Court decision, *Mancinelli v. Royal Bank of Canada* (a class certification decision regarding an alleged price fixing conspiracy between financial institutions to fix the prices of currency traded on the foreign exchange market) the certification judge refused to certify a class made up of indirect investor purchasers that had purchased an interest in various investment vehicles. The plaintiffs argued that these investors may have been affected by purchases from the defendants on the foreign exchange market, but the judge held that the harm was too remote, referring to the indirect investor purchasers' claim as a "meta-claim, which is to say a claim about somebody else's claim". See *Mancinelli v. Royal Bank of Canada,* 2020 ONSC 1646, at paras 206–208 [*Mancinelli*].
44. *Ewert*, *supra* note 43 at paras 9–10 and 104.
45. *Jensen*, *supra* note 39 at para. 200.
46. *Hazan*, *supra* note 39.
47. *Godfrey*, *supra* note 38 at paras 64 and 74.
48. *Ewert*, *supra* note 43 at paras 137–138. This approach was also taken in *Mancinelli*, where the certification judge refused to certify an action for umbrella purchasers on the basis that the proposed class members could not demonstrate whether individually negotiated transactions with non-defendant financial institutions were impacted by the alleged wrongdoing, particularly because the alleged conduct was "episodic" in nature. See *Mancinelli*, *supra* note 41 at para. 202.
49. *David v. Loblaw*, 2021 ONSC 7331 at para. 100.
50. *Godfrey*, *supra* note 38 at para. 89.
51. *Godfrey*, *supra* note 38 at paras 46–50.
52. *Garford Pty Ltd. v. Dywidag Systems International*, 2010 FC 996 [*Garford*].
53. *Garford*, *supra* note 52 at paras 39–45. See also, *Eli Lilly and Co v. Apotex Inc*, 2009 FC 991 at 736, aff'd 2010 FCA 240, leave to appeal to SCC ref'd [2010] SCCA No 434.
54. *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2018 ABQB 482 [*Dow*].
55. *Dow*, *supra* note 54 at paras 1370–1371.
56. *Dow Chemical Canada ULC v. NOVA Chemicals Corporation,* 2020 ABCA 320.
57. *Industries Garanties limitée c. R.*, 2017 QCCS 1504 [*Industries Garanties*].
58. *Industries Garanties*, *supra* note 57 at paras 78–82.
59. *R. v. Jordan*, 2016 SCC 27 at para. 49.
60. *Nestlé*, *supra* note 26.
61. Competition Bureau, "Requests for information from private parties in proceedings under section 36 of the *Competition Act*" (11 June 2018), online: http://www.competitionbureau.Gc.ca/eic/site/cb-bc.nsf/eng/04314.html.
62. *Canada (Attorney General) v. Thouin*, 2017 SCC 46.
63. *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] SCJ No 66.
64. Innovation, Science and Economic Development Canada, "Minister Champagne maintains the *Competition Act*'s merger notification threshold to support a dynamic, fair and resilient economy" (7 February 2022), online: https://www.canada.ca/en/innovation-science-economic-development/news/2022/02/minister-champagne-maintains-the-competition-acts-merger-notification-threshold-to-support-a-dynamic-fair-and-resilient-economy.html.

65. The Honourable Howard Wetston, Senator for Ontario "Re: Consultation Invitation - *Examining the Canadian Competition Act in the Digital Era*" (27 October 2021), online: https://sencanada.ca/media/368379/letter-pdf.pdf.
66. Competition Bureau reform, *supra* note 36.
67. *Competitor Collaboration Guidelines*, *supra* note 3.

Randall Hofley
Tel: +1 416 863 2387 / Email: randall.hofley@blakes.com

Randall is a trusted advisor and advocate for leading Canadian and global companies on all aspects of competition law and the federal regulation of business, with a focus on contentious matters before the Canadian Competition Bureau and Competition Tribunal, as well as before all levels of Canadian courts and federal administrative tribunals. Randall is one of the most sought-after and experienced competition lawyers in Canada. He brings both private-sector and public-sector experience, most recently serving as General Counsel and Senior Enforcement Advisor, Competition Bureau Legal Services. As General Counsel and Senior Enforcement Advisor over 2018–19, Randall played a lead counsel role in numerous high-profile enforcement matters related to mergers, abuse of dominance, and deceptive marketing, in addition to a senior advisory role in (criminal) cartel matters.

Cassandra Brown
Tel: +1 416 863 2295 / Email: cassandra.brown@blakes.com

Cassandra advises on all aspects of competition law, including mergers and acquisitions, joint ventures, distribution practices, criminal and civil investigations, compliance, as well as foreign investment transactions under the *Investment Canada Act*. Her clients span a variety of industries, including energy, mining, technology, pharmaceutical, consumer products, agricultural, telecommunications, transportation, aviation, financial services, manufacturing, automotive and real estate.

Gillian Singer
Tel: +1 416 863 6273 / Email: gillian.singer@blakes.com

Gillian advises on all aspects of competition law, including merger review, joint ventures and strategic alliances, cartel investigations, unilateral conduct matters and advertising/marketing matters. She also advises on foreign investment merger review under the *Investment Canada Act*.

Blake, Cassels & Graydon LLP

199 Bay Street, Suite 4000, Commerce Court West, Toronto, Ontario M5L 1A9, Canada
Tel: +1 416 863 2400 / Fax: +1 416 863 2653 / URL: www.blakes.com

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