DEVELOPMENTS / DÉVELOPPEMENTS

THE YEAR IN REVIEW 2014

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It is trite, but nonetheless true, that competition enforcement, both by the Competition Bureau and class action plaintiffs, continues to be vigorous. This Year in Review summarizes a number of significant recent developments in competition law, including, among others, the Supreme Court's decisions in three major competition cases in the last two years; a pattern of increased criminal, administrative and class action litigation; important pronouncements from the Supreme Court and Ontario Superior Court related to evidentiary issues; additional guidance from the Bureau on corporate compliance programs, price maintenance, and mergers; increased cross-border activity by the Bureau; and an increase in the use of behavioural merger remedies by the Bureau.

Au risque de se répéter, l'application de la loi en matière de concurrence par le Bureau de la concurrence et les demandeurs dans le cadre de recours collectifs se fait de façon toujours aussi vigoureuse. Le présent bilan résume plusieurs récents développements importants en droit de la concurrence, notamment les décisions de la Cour suprême dans trois grandes affaires en matière de concurrence au cours des deux dernières années; la tendance vers une prolifération des litiges en matière criminelle et administrative, ainsi que de plus en plus de recours collectifs; les déclarations importantes de la Cour suprême et de la Cour supérieure de l'Ontario sur certaines questions relatives à la preuve; les lignes directrices supplémentaires de la part du Bureau de la concurrence sur les programmes de conformité des entreprises, le maintien des prix et les fusions; la multiplication des activités transfrontalières du Bureau de la concurrence; et le recours accru aux mesures correctives comportementales en matière de fusions.

INTRODUCTION

It is trite, but nonetheless true, that competition enforcement, both by the Competition Bureau (the "Bureau") and class action plaintiffs, continues to be vigorous.

A number of trends can be discerned from the many cases summarized in this paper:

- **The Supreme Court weighs in**: after going over 15 years without hearing a competition law case, the Supreme Court has heard

and decided three major competition cases in the last two years: the indirect purchaser class action trilogy, in 2013, and two in 2014, a merger case (*Tervita*) and a case on disclosure of wiretap evidence (*Imperial Oil*).

- **Increased litigation**: there has never been more criminal, administrative, and class action litigation. The last two years have seen several criminal trials, including trials on charges of fixing gas prices, rigging bids for federal government contracts, and breaching a consent agreement. The Competition Tribunal (the "Tribunal") has also been busy: its docket has recently included a contested merger (*Tervita*), abuse of dominance claims in the real estate market (*TREB*) and hot water heater market (*Reliance and Direct Energy*), and a challenge to a consent order (*Kobo*). Finally, the indirect purchaser trilogy unblocked a log-jam of price fixing class actions. A number of contested certification hearings have been held, and more are planned.
- **Evidentiary issues**: perhaps as a result of the increased litigation, courts are being asked to pronounce on outstanding evidentiary issues, including whether class action plaintiffs can get wiretap evidence from the Bureau (yes, said the Supreme Court), whether the evidentiary rule in s. 69 offends the *Charter* in criminal cases (yes, said the Ontario Superior Court), whether information divulged to the Bureau at the proffer stage is privileged (no, said the Ontario Superior Court), and what evidence is required to obtain production orders under s. 11.
- **More guidance**: the Bureau has been updating its guidance. It has issued a new *Corporate Compliance Programs Bulletin, Price Maintenance Guidelines*, a white paper on retail mergers, and two pre-merger notification interpretation guidelines. The Bureau is increasingly sending signals to the bar about its enforcement priorities.
- **More cross-border activity**: the Bureau cooperates routinely with other agencies, notably the US Department of Justice and Federal Trade Commission. Courts in both countries have been called in to assist: a US court ordered production of documents to the FTC so that it could give them to the Bureau; and a Canadian court ordered the extradition of a Canadian businessman to face antitrust and fraud charges in the US.
- **More mergers**: 2014 witnessed an uptick in merger filings with the Bureau. In those cases that required remedies (still relatively few), the Bureau showed an increased willingness to rely on behavioural (as opposed to structural) remedies to address the competition issues it had identified. We may also see more

resort to the *Competition Act*'s efficiencies defence as a result of the Supreme Court of Canada's decision in *Tervita*.

CRIMINAL

In 2014, the Bureau continued its focus on cartel enforcement and secured numerous guilty pleas, fines and charges for bid-rigging and price-fixing. The Bureau also made clear its intention to seek jail sentences for individuals in criminal cartel cases, particularly now that amendments to the *Criminal Code*[1] have eliminated the availability of conditional sentences for the bid-rigging, conspiracy and criminal misleading advertising offences under the *Competition Act*.[2]

Price Fixing and Cartel Activities

Following a Bureau investigation which began in 2009, ECU Line Canada Inc. ("ECU"), Overseas Container Forwarding ("OCF"), and two of ECU's executives, pleaded guilty to conspiring to fix ocean freight surcharges for the supply of non-vessel operating common carrier export consolidation services from Canada to foreign destinations.[3] OCF and ECU, which were both cooperating under the Bureau's Leniency Program, were fined $675,000 and $1 million, respectively, and were each required to set up a corporate compliance program under the terms of their prohibition orders. The two executives were each sentenced to two concurrent conditional sentences and community service.

Bid-rigging

The Bureau continued its enforcement actions in the auto parts industry, which is the Bureau's largest bid-rigging investigation to date. Specifically, four Japanese auto parts suppliers, NSK Ltd., DENSO, Panasonic, and Yamashita Rubber, joined the list of those pleading guilty to rigging bids for components sold to Honda and Toyota for cars manufactured in Canada, bringing the total to seven guilty pleas and over $56 million in fines since April 2013,[4] including the highest bid-rigging fine to date.[5] More pleas and fines are likely to follow in 2015.

Microtime Inc., a software developer, and six individuals were charged with rigging bids for IT service contracts with Library and Archives Canada,[6] stemming from of an investigation by the Bureau which began in 2009. The individuals charged include employees of LAC, as well as the owner of Microtime at the time of the offence, who is currently residing in the U.S.

The Bureau laid additional charges alleging a complex bid-rigging

scheme for municipal infrastructure contracts in Saint-Jean-sur-Richelieu, Quebec. Construction Beaudin & Courville, B. Frégeau et Fils and two individuals were charged with rigging bids to ensure preferential treatment for a group of contractors, bringing the total number charged to 13 individuals and 11 companies, and related to contracts worth over $21 million.[7] Eleven individuals and nine companies were charged in connection with this same investigation in 2012.

In addition to fines and other consequences, new federal debarment rules prohibit corporations convicted of any one of a number of prescribed criminal offences (including under the *Competition Act* and *Corruption of Foreign Public Officials Act*[8]) from bidding on most federal government contracts under the *Integrity Framework*[9] administered by Public Works and Government Services Canada for 10 years. The policy also applies to convictions pursuant to plea agreements - for instance, under the Bureau's Leniency Program. In March 2014, the list of disqualifying offences was significantly broadened, including by making "similar foreign offences" among those that result in debarment.

The Bureau discontinued its investigation, which was commenced in 2011, of alleged collusion in the setting of Yen LIBOR rates and their use in pricing interest rate derivative products in early 2014 due to insufficient evidence.[10]

It is expected that enforcement of the *Competition Act*'s criminal conspiracy and bid-rigging provisions will continue to be a mainstay of the Bureau's work program, particularly given the steady pipeline of inquiries that are generated from the Bureau's immunity and leniency processes, and public testimony about allegations of corruption and bid-rigging in Quebec.

Developments in Constitutional and Evidentiary Principles

The Supreme Court of Canada ruled that the *Competition Act* does not protect wiretap intercepts as confidential information under s. 29 of the Act, and that privacy concerns can be addressed through conditions imposed by the court on disclosure, as well as the duty of confidentiality imposed on parties. Specifically, the court ruled that wiretap evidence from the Bureau's criminal price-fixing investigation of gas stations in Quebec must be disclosed to civil plaintiffs in a parallel class action.[11]

More recently, in early 2015, the Ontario Superior Court of Justice in *R. v. Nestlé Canada Inc.*[12] held that information received by the Bureau at the proffer stage of its Immunity and Leniency Programs is

not protected from disclosure to other accused persons by settlement privilege.

In *R v. Durward*,[13] an Ontario court held that an evidentiary shortcut that imputes knowledge of documents to an accused runs contrary to the presumption of innocence and is unconstitutional. Specifically, the court held that section 69(2) of the Act is unconstitutional and of no force and effect in criminal proceedings brought against corporations or individuals because section 69(2) creates an evidentiary presumption that actions taken by an agent of a participant, or records (such as emails and other electronic documents) found to be in the possession of a participant, are *prima facie* attributable to that participant. The Court found that the presumptions in section 69(2) reverse the onus of proof onto the accused with respect to essential elements of an offence. As such, the provision breaches the presumption of innocence and is of no force and effect with respect to a criminal proceeding. However, the Court expressly noted that its decision does not prevent the use of section 69(2) in a civil proceeding before the Tribunal. After initially indicating it intended to appeal the ruling, the Public Prosecution Service of Canada (PPSC) announced in early 2015 that it would not appeal. Meanwhile the jury returned a verdict of acquittal against all defendants in early 2015, and the PPSC dropped the remaining prosecutions in this case.

The Quebec Court of Appeal confirmed that a stay of proceedings of price-fixing charges was the appropriate remedy to avoid irreparable harm to the fairness of the trial process. In *R. v. Couche-Tard Inc.*,[14] the Court of Appeal upheld the Superior Court's decision that although the repudiation by the PPSC of a plea agreement does not generally constitute an abuse of process, in this case it caused irreparable harm to the fairness of the trial process, which justified a stay of proceedings. The PPSC had made a plea agreement pursuant to which the accused corporation's counsel had disclosed their defence strategy. The Quebec Court of Appeal concluded there was a presumption that the disclosure of defence strategy would cause an irreparable harm to the fairness of the trial process, which justified a stay of proceedings.

Compliance Programs

The Competition Bureau released a revised version of its *Corporate Compliance Programs Bulletin* in June, 2015.[15] An important update in the Bulletin is the addition of an incentive program for companies that qualify for leniency under the Bureau's Leniency Program and can demonstrate that their compliance program was credible and effective. These companies may receive a discretionary reduction in fines. Section 718.21 of the *Criminal Code*, enacted in 2003, requires the court

to take into consideration "any measures that the organization has taken to reduce the likelihood of its committing a subsequent offence."

Mergers

Supreme Court Decision on Prevention of Competition and Efficiencies Defence

On January 22, 2015, the Supreme Court of Canada released its long awaited decision in *Tervita Corp. v. Canada (Commissioner of Competition)*.[16] The Supreme Court allowed Tervita Corporation's ("Tervita") appeal and set aside the divestiture order made by the Tribunal,[17] and upheld by the Federal Court of Appeal (FCA).[18] The Supreme Court agreed with the FCA's conclusion that the merger would likely result in a substantial prevention of competition, but overruled the conclusions of the Tribunal and the FCA that the merger was not saved by the efficiencies defence.

This case stems from Tervita's acquisition of Complete Environmental Inc. ("Complete") which held a permit to develop a landfill for the disposal of hazardous waste in northeastern British Columbia. Tervita already owned and operated two hazardous waste landfills. Although the transaction was below the merger notification threshold, following a complaint by a competitor the Commissioner of Competition brought an application after the transaction had closed, on the ground that it substantially prevented competition by eliminating the only potential competitor for secure landfill services. The FCA had upheld the Tribunal's ruling ordering Tervita to divest Complete on the basis that its acquisition was likely to prevent competition substantially. The FCA also upheld the Tribunal's decision that the efficiencies defence in section 96 of the Act was not available to Tervita because the efficiencies of the transaction did not offset its anti-competitive effects.

This is the first Supreme Court decision on the prevention of competition test. The Supreme Court held that the timeframe to determine whether one of the merging parties would, "but for" the merger, be likely to enter the market must be discernible. The Supreme Court warned against looking too far in the future, but indicated that the inherent time delay to enter an industry because of barriers to entry is an important consideration. The Supreme Court agreed with the Tribunal's conclusion that there was sufficient evidence to support a finding of a substantial prevention of competition as a result of the merger.

The decision mostly attracted attention with respect to the efficiencies defence. The Supreme Court concluded that the Commissioner did not meet her burden of quantifying the quantifiable anti-competitive

effects of the merger, and did not prove any qualitative anti-competitive effects of the merger. As such, the anti-competitive effects raised by the Commissioner were assigned no weight by the Supreme Court and, by default, were offset by the modest overhead efficiency gains proven by Tervita.

The Supreme Court also has made it very clear that in contested merger litigation the burden of proving anti-competitive effects rests with the Commissioner. Although the Bureau has not yet indicated how it will modify its practices in light of *Tervita*, the decision might have an impact on the scope of information requests in the context of merger review, with a corresponding increase in the time required to clear complex transactions.

Legislative Developments

The *Price Transparency Act*,[19] discussed in more details in the pricing practices section [above/below], includes proposed amendments that expand the concept of affiliation to include a broader range of organizations, such as trusts. These proposed amendments would increase the situations in which a pre-merger notification is required.

Merger Policy Guidance

In the fall of 2014, the Bureau released a white paper on its approach to retail mergers.[20] Given the Bureau's recent review of several high-profile retail mergers, the Bureau's white paper is timely. The white paper discusses some of the economic tools used by the Bureau to investigate retail mergers, and provides its approach to analyzing the downstream and upstream portions of a retail merger.

The Bureau published two pre-merger notification interpretation guidelines on the requirement to submit a new notification where a transaction is amended,[21] and the deduction of amounts representing duplication arising from transactions between affiliates for purposes of determining whether the party-size and transaction-size thresholds are exceeded.[22]

In February 2014, the Bureau made submissions to the OECD Competition Committee regarding the review of consummated and non-notifiable mergers.[23] According to the Bureau, parties to non-notifiable transactions may be more likely to engage in strategic behaviour to avoid detection, since the time period for the Commissioner to challenge a transaction after it has closed was reduced from three years to one year in 2009. The Bureau indicates that non-notifiable transactions are detected mainly through complaints

from competitors, customers and other market stakeholders, as well as market monitoring. The submissions indicate that parties to non-notifiable mergers that wish to close their transaction before the Bureau completes its analysis may enter into a timing agreement, and that the Bureau may also, more rarely, enter into a preservation agreement or hold separate agreement. With respect to mergers that should have been notified but were not, the submissions indicate that such instances are rare and that, in such circumstances, parties tend to co-operate in order to expedite the review.

The Bureau also made submissions to the OECD Competition Committee in June 2014, about the airline industry.[24] Although not specific to merger review, these submissions summarize the Bureau's views on product market and geographic market definition in the airline industry, as well as relevant barriers to entry. More specifically with respect to mergers, the Bureau indicates that it generally focuses on unilateral theories of harm, but that it will also consider competition on routes where one of the merging parties competes with an alliance partner of the other merging party. The Bureau also refers to econometric analyses and other tools used in analysing airline mergers.

Increased Merger Review Threshold

The pre-merger notification "transaction-size threshold" for 2015 increased to $86 million from the 2014 threshold of $82 million. The party size threshold remains $400 million.[25]

Behavioural Remedies

The Competition Bureau has demonstrated an increasing willingness to accept behavioural remedies, in lieu or together with structural divestitures, in merger matters. In the past, the Bureau has been reluctant to accept behavioural remedies (preferring structural remedies, such as divestment).[26]

As part of Loblaws' acquisition of Shoppers Drug Mart in the grocery and drugstore space, Loblaws entered into a Consent Agreement with the Bureau in March 2014. The Consent Agreement required the divestiture of a number of retail stores. In addition, to address the Bureau's vertical concerns with Loblaw's supply practices, Loblaws agreed not to engage in certain contracting practices which, in the Bureau's view, forced suppliers to provide financial compensation to Loblaws, allowing it to maintain profit margins in the face of price competition.[27]

In the armoured car services industry, GardaWorld Security acquired G4S Cash Solutions. In order to obtain clearance from the Bureau,

GardaWorld committed to modifying its contracting practices and not enforcing certain terms in its existing customer contracts for three years. As a result, among other things, the contracts are limited to two years and are easier for customers to terminate.[28]

In the pharmacy management services segment, TELUS Health acquired XD3 Solutions. This was a non-notifiable transaction brought to the Bureau's attention via complaints. TELUS Health committed to changing certain contracting practices for five years. Among these commitments, TELUS Health agreed not to include terms that make it difficult for pharmacists to switch service providers.[29]

Review of non-notifiable transactions

The *Tervita* case (discussed above), is a recent example of the Bureau exercising its jurisdiction to challenge non-notifiable transactions. In 2014, in addition to the TELUS Health/XD3 Solutions transaction mentioned above, the Bureau reported two other non-notifiable transactions which were brought to its attention via complaints. First, Bragg Communications (Eastlink) decided not to proceed with its proposed acquisition of Bruce Telecom after the Bureau informed the parties that it would challenge the transaction on the ground that the acquisition would likely have substantially lessened competition for telecommunications services in two rural Ontario communities.[30]

With respect to its acquisition of O.N. Tel (Ontera), Bell Aliant agreed to lease facilities along a significant portion of Ontera's network to a third party, Bragg Communications, for a period of 20 years. The Bureau's had concerns on lessening or prevention of competition in the sale of wireline telecommunications services in a number of Northern Ontario communities.[31]

Other Cases

Two newspaper mergers in 2014 raise questions as to whether the Bureau's approach in merger review may be impacted by changes in the industry, such as the decline of print media.

First, pursuant to a Consent Agreement with the Bureau, Transcontinental agreed to divest 34 local community newspapers (later reduced to 33) in order to acquire Québecor's community newspapers in Quebec.[32] The aim of the Consent Agreement was to preserve competition in the sale of advertising in community newspapers in several areas in Quebec. However, no buyers could be found for 19 of the newspapers, resulting in Transcontinental keeping one and closing the others. Of the 14 newspapers for which buyers could be found, only

three will continue as papers, with the remaining 11 to be published online-only.[33]

Later in 2014, a second newspaper merger was announced: Postmedia's acquisition of Québecor's 175 daily newspapers, specialty publications and digital properties. This transaction will be closely watched in 2015.

In line with its *Action Plan on Transparency*, the Bureau published a total of 16 merger position statements in 2014, up from 11 in 2013. In addition to the cases mentioned above, position statements were published with respect to the following transaction:

- Canadian Tire's acquisition of Pro Hockey Life;[34]
- Saputo's acquisition of Scotsburn Co-operative;[35]
- Transforce's acquisitions of Vitran[36] and Contrans;[37]
- CHS' acquisition of agri-product retail outlets and anhydrous ammonia businesses from Agrium;[38]
- Essilor's acquisition of Coastal Contacts;[39]
- Reynolds' acquisition of Novelis' North American foil products business;[40] and
- TVA's acquisition of Vision Globale, which includes an analysis of vertical effects in the television production industry.[41]

Foreign Investment Review

There were no headline-grabbing developments in the area of foreign investment review in 2014. That said, the trend towards increased rigour of enforcement continued, as evidenced by the increase in the length of reviews and the scale and scope of written undertakings that foreign investors have been required to give the Minister of Industry to secure approval under the *Investment Canada Act* ("ICA").[42] This was especially true of high-profile transactions that potentially involved a significant impact on Canadian employment, state-owned enterprise ("SOE") investors or national security issues for Canada or its close allies. In those instances, there appears to have been an increased level of Cabinet and prime ministerial involvement and control over ICA reviews, which has made the regulatory approval calculus more challenging for foreign investors subject to review.

The ICA's shadowy national security review process remained a particular area of potential concern. Despite the fact that the national security regime was created in 2009 and the first known rejection under the new regime occurred in 2013,[43] the Canadian government

has provided limited guidance on the scope and nature of national security reviews or disclosure of other national security reviews that were ordered. Yet it is also clear that, if anything, the government has increased its focus on acquisitions of Canadian businesses by foreign investors which give rise to national security concerns. For example, according to media reports in 2014, the government established a secret committee to review foreign investment for national-security risks.[44] It is apparent that the importance of the national security dimension of a transaction cannot be underestimated.

Perhaps in response to the complaints about lack of transparency, the government enacted amendments to the ICA in 2014 which allow for increased disclosure of information relating to national security reviews.[45] The changes allow the government to disclose any information contained in (i) notices that are sent to the foreign investor which relate to the national security review process and (ii) orders that are made under the national security review process, unless the Minister of Industry is satisfied that disclosure would be prejudicial to the foreign investor or target. It remains to be seen how the government will utilize these new disclosure powers and whether they will provide meaningful guidance on the national security review regime without prejudicing the parties whose information is disclosed.

In addition, amendments to the ICA came into force in 2015, which changed the "net benefit" review threshold from an asset value test to an enterprise value test, and increased the threshold from C$369 million to C$600 million for most investors. While the increased threshold makes it easier for many transactions to escape a lengthy review process, further amendments impose invasive and burdensome new disclosure obligations for investments that fall short of the review threshold, by requiring, among other things, personal information about the investor's directors, highest-paid officers and significant investors.[46] Lastly, changes to the ICA's national security regulations, extend various national security timelines, providing the government with more time to decide whether to initiate a national security review, and more time to complete national security reviews.[47]

REVIEWABLE MATTERS

Abuse of Dominance

There were a number of developments in abuse of dominance in 2014, some of which may set new paths for enforcement in 2015 and beyond.

Most notably, in February 2014, the Federal Court of Appeal sent the

Commissioner's abuse of dominance application against the Toronto Real Estate Board ("TREB") back to the Tribunal for redetermination, having concluded that the Tribunal erred in dismissing the case.[48]

The Commissioner alleged in its application that TREB's rules relating to the use of the Multiple Listing Service ("MLS®") information negatively impacted the ability of certain brokers, who are members of TREB, to compete in the market for real estate services. The Tribunal dismissed the Commissioner's application, without considering the merits, on the basis that the abuse of dominance provisions cannot apply to TREB (a trade association) because TREB does not compete with its members. The Tribunal concluded that since TREB does not compete with its members, its rules cannot have an intended negative effect on a "competitor" as required by the FCA's decision in *Canada Pipe*.[49] The FCA disagreed with the Tribunal's application of *Canada Pipe*, and held that TREB may not necessarily be immune from prosecution under the abuse of dominance provisions merely because TREB does not itself compete in that market, if its conduct affects a competitor in that market. In July 2014, the Supreme Court of Canada denied TREB's application for leave to appeal the FCA decision.

The FCA decision in TREB casts some uncertainty over who can be the subject of an abuse of dominance application by the Commissioner. At a minimum, it suggests, that trade associations can be investigated for abuse of dominance. A broader interpretation of the decision may find any upstream supplier the subject of an abuse application if that supplier has the ability to impact competition in the downstream market. This uncertainly is particularly troubling in light of the fact that administrative monetary penalties ("AMPs") of up to $10 million are now available in abuse of dominance cases.

The Tribunal's redetermination of the Bureau's application against TREB, set to be heard in the fall of 2015, may redefine the scope of abuse of dominance, making an already nebulous area of the law potentially more uncertain.

The Bureau also continued to pursue several other abuse of dominance investigations and litigation. In November 2014, the Bureau secured its first-ever monetary penalty under the abuse of dominance provisions against Reliance Comfort Limited Partnership, concerning water heater return policies and procedures that were allegedly aimed at preventing consumers from switching to competitors in the residential water heater industry. As part of the settlement, Reliance agreed to pay $5 million in penalties, and agreed to make it easier for customers to switch to competitors.[50]

A parallel abuse of dominance application against Direct Energy Marketing Limited, which was purchased by EnerCare, for similar historical conduct in the residential water heater industry will continue before the Tribunal. In that case, the Bureau is seeking an order for, among other things, payment of $15 million in penalties. The Tribunal held that the case against Direct Energy can continue even though it is now owned by EnerCare, who made written commitments not to continue Direct Energy's allegedly anticompetitive practices.[51]

The Bureau also has ongoing investigations regarding supplier practices by potentially dominant companies. Following its review of the Loblaw/Shoppers merger in 2014, the Bureau commenced an inquiry into Loblaw's pricing practices with respect to its suppliers, including some contracting practices between Loblaw and its suppliers that reference competing retailer pricing (*e.g.*, requiring a supplier to compensate Loblaw for lower retail prices charged for that supplier's products by competing retailers). To date, the Bureau has obtained numerous court orders compelling some of Loblaw's suppliers to disclose information relevant to the investigation,[52] and recently obtained a court order against Loblaw's related to an inquiry into allegations of restrictive trade practices engaged in by Loblaw's.[53]

Similarly, the Bureau has an ongoing investigation into potentially anti-competitive clauses in agreements between Apple Canada Inc. and Canadian wireless carriers that impose obligations on the wireless carriers regarding the sale and marketing of iPhones. The Bureau alleges that such practices may increase the prices that Canadian consumers pay for handsets and wireless services. In December 2014, the Commissioner obtained an order compelling Apple Canada Inc. to provide records for the investigation.[54]

In 2014, the Bureau discontinued its abuse investigation into Alcon Canada for allegedly product switching (or "product hopping") to intentionally disrupt the supplies of the anti-allergy drug Patanol in order to limit or prevent competition from generic drug companies. Alcon ceased engaging in this conduct and began to resupply Patanol after the Bureau began its investigation. The Bureau has since reported that, as a result, there has been subsequent entry by competing generic drug companies into the market and competitive dynamics appear to have been restored.[55]

The Bureau also discontinued its investigation of Canadian National Railway (CN) for allegedly implementing a rail pricing strategy for "transloading" of lumber into ocean shipping containers in Vancouver that would make it commercially unprofitable to ship to competitors' and price its transloading competitors out of the marketplace.[56]

Consent Agreements and Production Orders: Key Developments

The Bureau regularly resolves certain concerns via negotiated consent agreements with market participants.[57] These agreements have the same force and effect as an order of the Tribunal. In 2014, there were several important developments relating to consent agreements.

For the first time, an individual was sentenced to 15 months in jail for breaching a 10-year consent agreement for operating an online job opportunities scam (as well as an additional 15 months in jail for criminal misleading or false representations).[58] The Bureau said that it had been investigating this matter as part of its broader monitoring program regarding compliance with court orders, including registered consent agreements.

Following a Bureau investigation and allegations that certain ebook publishers, in particular, Hachette Book Group, HarperCollins, Macmillan and Simon & Schuster, contravened the Act's civil competitor collaboration provision (section 90.1) by reducing competition in ebooks, these publishers entered into a consent agreement with the Bureau. Under the consent agreement, the publishers agreed to amend or remove clauses in their distribution agreements with individual ebook retailers, which the Bureau alleges have the effect of restricting retail price competition.[59]

Kobo, an ebook retailer, attempted to challenge the factual basis underpinning the consent agreement between the Commissioner and ebook publishers, but was unsuccessful. In *Kobo Inc. v. The Commissioner of Competition*,[60] the Tribunal rejected Kobo's challenge and clarified the limits of a third party's ability to challenge a consent agreement. The court held that challenges from a third party are restricted to challenges on the basis that the terms of the consent agreement go beyond the type of orders that the Tribunal can issue, whether it alleges the substantive elements of the relevant Act provisions, and whether its terms are unenforceable, for example, because they are too vague. At the time of writing, the decision was under appeal.

In a related decision, the Federal Court, in granting production orders against Pearson Canada Inc. and Penguin Canada Books Inc., clarified the obligations on the Commissioner when applying for such orders. Specifically, in *The Commissioner of Competition v. Pearson Canada Inc.*, the court held that the Commissioner does not have to lead evidence to prove that his inquiry is *bona fide*, the Commissioner must make full and frank disclosure, and show that the information sought is relevant and that the order is not excessive, disproportionate or unnecessarily burdensome.[61]

PRICING PRACTICES

Federal Government Targets "Unjustified" Cross-Border Price Discrimination

The Canadian government introduced amendments to the Act in Bill C-49 in December 2014. The bill, called the *Price Transparency Act* , purports to target "unjustified" price discrimination between Canada and the U.S. for identical goods.[62] The proposed law is not intended to set or regulate prices in Canada, nor does it provide for penalties or other remedies. Instead, the Commissioner of Competition would be given powers and tools to investigate and "expose" gaps between U.S. and Canadian selling prices and the reasons for that difference. After receiving information for the inquiry, the Commissioner must issue within a year a public report setting out the conclusions of the inquiry. The proposed amendments raise concerns for targeted companies that would be exposed to the time and expense of responding to the Bureau's inquiries. Those companies would also have to contend with the reputational risk associated with the Bureau's inquiry and public report.

At the time of writing, Bill C-49 had not progressed beyond First Reading, which makes it unlikely that it will be enacted before the writ is dropped for the upcoming federal election. If that happens, it will die on the order paper.

Revised Price Maintenance Guidelines

The Bureau released its revised *Price Maintenance Guidelines* in the fall of 2014.[63] The new guidelines reflect the 2009 amendments to the *Competition Act* which decriminalized price maintenance and introduced a competitive effects requirement. As such, they provide welcome guidance for companies seeking to participate in permissible price maintenance. Among other things, the guidelines discuss the circumstances in which price maintenance can be pro-competitive or anti-competitive. The key consideration in determining whether price maintenance poses competition risk is market power. In its guidelines, the Bureau says that price maintenance conduct is a concern only where it is likely to create, preserve or enhance market power.

The new guidelines refer to the *Visa/MasterCard* case,[64] in which the Tribunal held that there was no price maintenance because the credit card issuers and acquirers were not reselling a substantially similar product to the product they purchased from Visa or MasterCard. The Tribunal concluded that the product being resold "should be identical or substantially similar" to the product originally sold in order to

constitute price maintenance. Interestingly, the Bureau takes the view in its guidelines that *Visa/MasterCard* stands for the proposition that the product a retailer resells need not be identical to the product supplied to it by the supplier or even in the same product market as the product supplied. Two notable epilogues to *Visa/MasterCard* are that a class action against Visa and MasterCard, as well as other financial institutions, based on similar facts to the Bureau litigation was certified in 2014,[65] and a year after the Tribunal's decision was rendered, Visa and MasterCard unilaterally agreed to lower their interchange fees, which was the focus of that case.[66]

INTELLECTUAL PROPERTY AND PHARMACEUTICAL INDUSTRY

The Bureau was very active in 2014 on various intellectual property-related issues, mostly on the policy side and with respect to the pharmaceutical industry.

The Bureau first released updated intellectual property enforcement guidelines (IPEGs) clarifying, among others, the Bureau's approach to patent pooling agreements and circumstances when the non-use of an intellectual property right could be reviewed.[67] The Bureau has announced that it plans for a second stage of updates, which will add guidance about patent litigation settlements, product life-cycle management strategies and other patent issues. The Bureau also entered into a memorandum of understanding with the Canadian Intellectual Property Office (CIPO) which mandates closer cooperation, consultation and information sharing between the Bureau and CIPO for matters that straddle intellectual property and competition law.[68]

In relation to the pharmaceutical industry, the Bureau issued its preliminary views on how Canadian competition law could apply to pharmaceutical patent litigation settlements in its white paper entitled *Patent Litigation Settlement Agreements: A Canadian Perspective*.[69] The white paper focuses on so-called "pay for delay" settlements where a brand name drug company settles patent infringement litigation with a generic on terms which include a payment to the generic. Notwithstanding the 2013 decision of the U.S. Supreme Court in Actavis that a "rule of reason" approach is appropriate in these cases, the Bureau has indicated that it may review and prosecute a patent litigation settlement under the per se criminal conspiracy provision of the Act. However, the Bureau has provided limited guidance on at least some of the circumstances that could attract criminal review. The white paper suggests that Canada should adopt a system of mandatory notification of pharmaceutical patent settlement agreements.

The Bureau also provided a submission to the OECD Competition

Committee on the Canadian pharmaceutical industry,[70] and conducted a workshop on competition law issues in the pharmaceutical industry.[71]

In terms of enforcement action, as indicated above, the Bureau discontinued in May 2014 its investigation of Alcon under the abuse of dominance provisions of the Act for alleged "product hopping", after Alcon voluntarily resumed supply of its Patanol prescription anti-allergy drug.[72]

CROSS-BORDER COOPERATION

The general trend toward increased international cooperation between the Bureau and other competition enforcement agencies continued in 2014, spurred by the Commissioner's commitment to strengthening relations with foreign counterparts.

Cross-Border Mergers

In 2014, the Bureau continued and expanded its collaboration and cooperation with antitrust regulatory agencies around the world. In particular, ties between the Bureau, the U.S. Department of Justice (U.S. DOJ) and the U.S. Federal Trade Commission (FTC) were further strengthened with the release of a joint publication on best practices for cooperation in cross-border merger investigations.[73] Moreover, this co-operation manifested itself in the review and resolution of the following cross-border mergers in 2014:

- The Louisiana-Pacific/Ainsworth Lumber transaction involved significant collaboration, and resulted in the Bureau and the U.S. DOJ presenting a united front to the parties, who eventually abandoned the transaction.[74]
- Covidien's acquisition of Medtronic: given the global nature of the parties' businesses, the Bureau worked closely with foreign agencies, especially the FTC, in reviewing the transaction. As the divesture assets served both the U.S. and Canadian markets, the Bureau coordinated with the FTC on remedies. The two agencies entered into parallel consent agreements with Covidien and appointed a joint monitor to ensure Covidien's compliance with its divestiture obligations.[75]
- The Bureau worked closely with the U.S. DOJ and the Mexican Federal Competition Commission in reviewing Continental AG's acquisition of Veyance Technologies. The parties' settlement with the U.S. DOJ was sufficient to address the Bureau's concerns. The Bureau cleared the transaction without requiring further remedies in Canada.[76]

Cross-Border Investigations

In July 2014, the U.S. District Court of Maryland ordered a company located in the United States to produce documents to the U.S. Federal Trade Commission (FTC) on behalf of the Bureau.[77] These documents related to the ongoing civil proceedings in Canada against wireless telecommunications carriers and their industry association in respect of alleged deceptive representations by third-party content providers regarding the marketing of premium text messaging services. The U.S. company was required to produce the documents in accordance with provisions under the United States Code permitting U.S. courts to assist litigants before foreign tribunals. This is the first time a U.S. court has granted this kind of investigative assistance to obtain information for the Bureau in a civil case. The decision to seek information in this way signals that the Bureau is prepared to bypass direct evidence-gathering mechanisms, including discovery in Canadian civil proceedings, that involve oversight by Canadian courts and standing for investigated parties.

The Bureau's evidence-gathering powers under domestic Canadian law may also expand if proposed amendments to the Act contained in the proposed *Price Transparency Act* are passed.[78] These proposed amendments would broaden the Bureau's ability to directly compel the production of information from foreign affiliates of entities operating in Canada by allowing the Commissioner to seek court orders to require:

- a person located outside Canada to attend an examination, produce documents or deliver written information where the person has or is likely to have information that is relevant to the Commissioner's inquiry,[79] and
- affiliates (located in or outside Canada) of a person (located in or outside Canada) to produce documents or deliver written information to the Commissioner where the affiliate has or is likely to have information that is relevant to the Commissioner's inquiry.[80] In this regard, the definition of affiliate has been expanded.

Empowering a Canadian court to issue orders compelling information from persons outside Canada is an extraordinary measure. The legality and enforceability of such orders will undoubtedly be challenged before the courts. Developments in this area will be closely watched especially in light of the fact that the Bureau's first course of action to obtain information from targets of an investigation (with the exception of merger cases), will be to obtain a legally binding production order from a court under section 11 of the Act.[81] Recent high profile examples in which the Bureau used court orders to compel

information include its investigations into a cell phone provider's contracts with wireless carriers,[82] a grocery chain's programs with its suppliers,[83] and the ebook industry.[84]

First extradition on antitrust charges

For the first time, a Canadian has been extradited to the U.S. on antitrust charges. In November 2014, John Bennett was extradited from Canada to the U.S. on a charge of participating in a conspiracy to pay kickbacks and commit fraud with respect to work on an environmental cleanup project in New Jersey, which carries a penalty of up to five years in jail and a $250,000 fine.[85] Mr. Bennett was also charged with a related count for major fraud regarding contracts obtained in respect of the project, which carries a penalty of up to 10 years in jail and a $1 million criminal fine. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine. Mr. Bennett lost his fight against extradition on October 30, 2014 when the Supreme Court of Canada dismissed his application for leave to appeal an order of the British Columbia Court of Appeal ordering his extradition to the U.S.[86]

In 2008, the company Mr. Bennett founded, Bennett Environmental Inc., pleaded guilty to one count of conspiracy to defraud the US Environmental Protection Agency and was fined $1 million. Two of its executives have also pleaded guilty. In 2011, one of them was sentenced to serve 50 months in a US jail, after pleading guilty to participating in fraud and money laundering conspiracies.

The former project manager, Gordon McDonald, who participated in the scheme and received the kick-backs, was convicted in September 2013, and sentenced in March 2014, to 14 years in prison. This is the longest sentence ever imposed in the US for an antitrust crime.

Relations with other agencies

The Bureau signed a memorandum of understanding with the Competition Commission of India to facilitate communication and collaboration between the agencies[87] and met with Chinese competition authorities to advance inter-agency cooperation.[88]

PRIVATE ACTIONS

Class action certifications and Settlements

At the end of 2013, the Supreme Court of Canada released an important trilogy of decisions recognizing the right of indirect purchasers

(such as retailers and consumers) to assert competition claims and decreased the evidentiary burden on plaintiffs at class certification, setting a relatively low bar for certification of such actions.[89] Since the issuance of the trilogy, Canadian courts have certified a number of competition law class action proceedings.

For example, the Ontario Superior Court certified a class action brought on behalf of direct purchasers against Dow Chemical Company and its Canadian affiliate face, alleging that they participated in a conspiracy to fix prices for polyether polyol.[90] The same court also certified a class action alleging that Telus and Bell failed to disclose that they rounded time up to the nearest minute when billing for mobile telephone calls.[91]

Class action plaintiffs in British Columbia were successful in certifying an action alleging HSBC's mortgage arm and Household Trust Company did not disclose that part of the title insurance premiums paid to First Canadian Title were for legal fees, thus breaching the Act's misleading advertising provisions, as well as various provincial consumer protection laws.[92]

The Quebec Superior Court refused to authorize a class action against Coca Cola, finding that there was no *prima facie* evidence that Coca Cola misled consumers into purchasing Vitaminwater by misrepresenting its sugar content and health benefits.[93] The court also held that the Petitioner could not adequately represent the class.

In one of the trilogy cases which dealt with alleged international price-fixing of dynamic random access memory (DRAM), the plaintiffs secured approval of settlements with the remaining defendants,[94] bringing the total recovery to nearly $80 million which remain to be distributed to class members.[95] The DRAM settlement is the second-largest recovery for a competition class action in Canadian history.

Other notable settlements or awards in 2014 included:

- Honda agreed to cash payments of $100-$200 plus cash rebates of $500-$1,000 to those who owned or leased a Honda Civic Hybrid between 2003 and 2009 to settle a class action alleging that its hybrid models did not achieve the fuel economy that Honda had claimed.[96]
- Class action plaintiffs obtained a $6.5 million default judgment against operators of a pyramid selling scheme in the Federal Court.[97]
- A group of aftermarket filter makers agreed to pay $350,000 to

resolve allegations that they fixed prices for aftermarket oil and air filters for cars and trucks.[98]

- Finally, an Ontario decision provided a good reminder that settlement approval is not an automatic process. The Ontario Superior Court refused to approve a settlement agreement between Quiznos franchisees, the defendant franchisors and food supplier, Good Food Service Inc., finding the scope of the release was too broad given the nominal amount of damages.[99]

Viability of tort and equitable competition claims subject to scrutiny in British Columbia

Throughout 2014 British Columbia courts wrestled with the extent to which plaintiffs are entitled to bring common law and equitable claims based on Act offences, in addition to the statutory cause of action in the Act itself.

The BC Court of Appeal held in *Wakelam v. Wyeth Consumer Healthcare/Wyeth*[100] that Parliament intended the *Competition Act* to be a complete code and that the plaintiff could not seek common law remedies that supplement those provided in the Act.

Following the *Wakelam* decision, the BC Supreme Court in *Watson v. Bank of America Corporation*[101] struck the plaintiff's claims of unlawful means conspiracy, unlawful interference with economic interests, and constructive trust, but certified a class action against Visa and MasterCard, major Canadian banks, and other financial institutions, alleging that the credit card interchange fees and rules breach the Act.[102]

However, just months later, in *Pro-sys Consultants Ltd. v. Microsoft Corp.*,[103] Justice Myers of the BC Superior court refused the defendants' motion to strike the plaintiffs' civil conspiracy claims. Myers J. cited the Supreme Court of Canada's comments in *Pro-sys Consultants Ltd. v. Microsoft Corp.*[104] and *A.I. Enterprises Ltd v Bram Enterprises Ltd.*[105] in holding that it was not plain and obvious that the breaches of the Act could not be relied on as the basis for the tort of illegal means conspiracy. Notably, in *Pro-Sys*, the Supreme Court of Canada had the opportunity to, but declined to strike claims for unlawful means conspiracy and intentional interference with economic interests, despite that these claims were based in breaches of the *Competition Act*. In *Bram*, the Supreme Court of Canada considered the elements of the unlawful means tort, and suggested that a breach of statute could constitute "unlawful means" for the purpose of the unlawful means conspiracy tort.

Justice Brown took a similar view in *Fairhurst v. Anglo American PLC*[106] in respect of the claims for unlawful means conspiracy, though

Brown J. accepted the defendants' arguments that the plaintiff's claims for restitution, unjust enrichment and unlawful restraint of trade, to the extent that they are based on breaches of the Act, were not viable.

An appeal of *Watson* was heard in late 2014; the decision is expected to provide clarity on the perceived conflict between *Wakelam* and *Bram*, and give guidance on the extent to which causes of action parasitic on the remedies available under the *Competition Act* are precluded.

Class action plaintiffs can obtain wiretap evidence

The Supreme Court of Canada held that class-action plaintiffs can obtain disclosure of wiretap evidence obtained by the Bureau.[107]

In *Imperial Oil v. Jacques*, counsel to the claimants in a follow-on class action, sought to obtain the recordings and transcripts of wiretaps that had been disclosed to the defendants as part of ongoing criminal cartel proceedings relating to a gasoline price fixing case. The Supreme Court of Canada confirmed a Quebec Superior Court decision permitting the disclosure of the recordings and transcripts to counsel in the civil litigation, with some restrictions to protect the rights of third parties not involved in the proceedings.

The Supreme Court of Canada ruled that private litigants may be permitted to access wiretap recordings gathered as part of a criminal investigation by the Bureau, and that the Act's confidentiality protections does not protect wiretap intercepts as confidential information and did not apply to prevent such access. The court also held that privacy concerns can be addressed through conditions imposed by the court on disclosure, as well as the duty of confidentiality imposed on parties by discovery rules.

DECEPTIVE MARKETING PRACTICES

The Bureau continued to actively pursue misleading advertising investigations and obtain large AMPs. The *Chatr/Rogers* decision, released in 2014, provides guidance on factors that are considered when determining the quantum of an AMP. Also, new amendments to the *Competition Act* (introduced under Canada's Anti-Spam Legislation or CASL) imposing serious consequences for false or misleading electronic messages came into force.

In February 2014, Chatr/Rogers (Chatr is a wireless cellular brand owned by Rogers) was ordered to pay a $500,000 AMP for having failed to conduct adequate and proper testing prior to launching an ad campaign about having fewer dropped calls than new wireless carriers.[108] In its decision to order the $500,000 AMP instead of the $5

to $7 million sought by the Commissioner, the Court discussed the application of number of factors in determining the amount of an AMP enumerated in s. 74.1(5) of the Act. Particularly persuasive to the court was that Chatr's conduct was not found to be false or misleading (the Bureau's misleading advertising claim against Rogers was dismissed by the Ontario Superior Court in 2013), and that Chatr's claim had been substantiated in subsequent testing.

In early 2015, Rogers signed a consent agreement to refund over $5 million to customers that were billed for certain premium text message services, such as trivia questions and ringtones, in order to settle the Bureau's 2012 allegations that it failed to disclose that these services were not free.[109] The proceedings against Bell and Telus will continue, however.

In another performance claim matter, Bauer, a hockey equipment manufacturer, entered into a consent agreement with the Bureau to stop making claims that the Bureau alleged created the impression that RE-AKT helmets protected from concussions. As part of the agreement Bauer also agreed it would donate $500,000 of equipment, pay investigation costs of $40,000, implement an enhanced compliance program and ensure retailers do not make the impugned performance claims.[110]

The water heater industry continued to be the subject of scrutiny by the Bureau. Mere weeks after the Bureau cleared National Energy Corporation's takeover by Reliance Home Comfort, National agreed to pay $7 million to settle allegations that its door-to-door salespeople misled consumers by telling them they needed access to their water heaters for safety reasons, legal requirements, or potential upgrades. As part of the agreement, National also agreed to implement a compliance program which includes an independent compliance monitor.[111] Earlier in 2014, the Ontario Court of Appeal upheld a finding that National made misleading statements about another competitor, Direct Energy.[112]

At the Bureau's request, home retailer JYSK Canada recalled two duvet brands after testing arranged by the Bureau detected insufficient "down" and "bird of origin" content to qualify for "down" or "goose down" marketing standards.[113]

Following a Bureau investigation and charges against four companies and four individuals in 2012, the former co-owner of Corporation Oxford-Data and Sapphire Media Group was sentenced to 18 months in prison after pleading guilty to eight charges of misleading advertising and deceptive telemarketing. In particular, the telemarketer demanded payment for non-existent business directory listings relating to online

business directory listings that targeted organizations in Canada and the U.S.[114]

In Alberta, an online scammer was sentenced to 2 ½ years in jail for making false representations on an online job opportunities service. The individual was also ordered to pay $185,000 in restitution to his victims, plus a $164,000 fine.[115]

Anti-spam legislation creates serious consequences for misleading electronic messages

On July 1, 2014, new provisions in the Act, introduced through Canada's Anti-Spam Legislation (CASL), came into force. The new provisions specifically prohibit, under both civil and criminal penalty, false or misleading representations in electronic messages or in the locator (e.g. URL, metadata), including false or misleading sender or subject matter information. Consequences for contravening the new provisions can be severe. Violation of the criminal provisions is punishable by a fine at the discretion of the court and/or imprisonment of up to 14 years. Under the civil provisions, the Bureau can apply to a court for an order to stop the conduct, publish corrective notices, refund consumers and impose an AMP of up to $10 million for a first offence, and up to $15 million for each subsequent offence.[116]

Price Related Representations

The Bureau reported in 2014 that it is receiving more complaints related to "ordinary selling price" investigations and that this may result in rejuvenated enforcement efforts in this area.[117] The Bureau has also acknowledged ongoing investigations into false online endorsements or testimonials. The focus on deceptive online or digital marketing is in keeping with the Bureau's stated concerns about representations made over digital platforms, particularly in relation to privacy, advertising aimed at children and representations viewed on mobile devices (given the limitations of this medium and how they may affect a consumer's general impression of the messages being conveyed).

Moving into 2015, the Bureau will continue its ongoing contested proceedings regarding "drip-pricing" alleged to have been engaged in by certain furniture retailers.[118] The Bureau alleges that advertising campaigns by the companies convey the general impression that no payment is required at the time of purchase, despite the existence of certain charges that are disclosed to the consumer only during the purchase process, rather than at the outset.

Endnotes

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[9] Public Works and Government Services Canada, "PWGSC's Integrity Framework," http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html. After writing, on July 3, 2015, the Government announced a new government-wide Integrity Regime for procurement and real property transactions. These changes will be discussed in next year's Review.
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[11] *Imperial Oil v Jacques*, 2014 SCC 66, [2014] 3 SCR 287.
[12] *R v Nestlé Canada Inc.* 2015 ONSC 810, 120 WCB (2d) 44.
[13] *R v Durward*, 2014 ONSC 4194, 116 WCB (2d) 241. The *Durward* case involves the same requests for proposals as *R v Dowdall* (2013 ONCA 196). In *Dowdall*, the Ontario Court of Appeal, in dismissing an appeal by the defendants to avoid commitment for trial, found that there was sufficient evidence for a trier of fact to conclude that a "call or request for bids or tenders" had been made, which is a required element of the bid-rigging offence.
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[15] Canada, Competition Bureau, *Corporate Compliance Programs Bulletin* (Gatineau: Competition Bureau, 3 June 2015). http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html.
[16] 2015 SCC 3: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14603/index.do.
[17] *Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14.
[18] *Tervita Corp v Commissioner of Competition*, 2013 FCA 28 (CanLII): http://www.canlii.org/en/ca/fca/doc/2013/2013fca28/2013fca28.html.

[19] Available at: http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Language=E&Mode=1&billId=6822185.
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[43] Accelero's attempted $520 million acquisition of telecommunications company Allstream was blocked by the Minister of Industry in October 2013.
[44] It has been reported in the media that the secret committee is composed of the Public Safety Deputy Minister Francois Guimont (the chairman of the committee), the heads of the Canadian Security Intelligence Service and the Communications Security Establishment Canada (Canada's two spy agencies), and Stephen Rigby, Prime Minister Stephen Harper's National Security Adviser.
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[47] *National Security Review of Investments Regulations*, SOR/2009-271.
[48] *The Commissioner of Competition v The Toronto Real Estate Board*, 2014 FCA 29.
[49] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, 268 DLR (4th) 193.
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[72] Competition Bureau, *supra* note 55.
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[74] Canada, Competition Bureau, "Louisiana Pacific and Ainsworth Abandon Proposed Acquisition of OSB Mills: Competition Preserved for the Supply of OSB" (14 May 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03724.html.
[75] Canada, Competition Bureau, "Competition Bureau statement regarding the acquisition by Medtronic of Covidien" (26 November 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03848.html.
[76] Canada, Competition Bureau, "Competition Bureau statement regarding the acquisition by Continental of Veyance" (11 December 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03861.html.
[77] *In re Application of the Federal Trade Commission for an Order Pursuant to 28 USC 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings*, United States District Court, D Maryland, August 4, 2014., Case No MJG-13-mc-524.
[78] Bill C-49, *supra* note 19.
[79] *Ibid*, proposed section 11(2.1) of the Act.
[80] *Ibid*, proposed section 11(2) and 11(2.1) of the Act.
[81] The Bureau's approach has recently shifted from relying on voluntary requests for information to seeking court orders compelling information for inquiries in non-merger cases "for ALL but exceptional cases." *Remarks by John Pecman, Interim Commissioner of Competition* (7 February 2013), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03529.html.
[82] Federal Court (Canada), T-2503-14.
[83] The Bureau obtained section 11 production orders against 12 suppliers of the grocery retailer. For example, *Competition Act v Smucker Foods of Canada*, Federal Court (Canada), T-2346-14.
[84] Canada, Competition Bureau, "Clarification on the Bureau's ongoing investigation into alleged anti-competitive behaviour in the Canadian ebooks industry" (20 January 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03869.html.
[85] US Department of Justice Press Release, "Canadian Executive Extradited on Major Fraud Charges Involving a New Jersey Environmental Protection

Agency Superfund Site" (17 November 2014), http://www.justice.gov/atr/public/press_releases/2014/309928.html.
[86] *United States v Bennett*, 2014 BCCA 145, 113 WCB (2d) 662.
[87] Canada, Competition Bureau, "Memorandum of Understanding Between the Commissioner of Competition, Competition Bureau Canada and the Competition Commission of India on Cooperation in the Application of Competition Laws" (1 December 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03852.html.
[88] Canada, Competition Bureau, "Competition Bureau Meets with China's Commission for State-owned Enterprises" (17 April 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03723.html.
[89] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, 364 DLR (4th) 573; *Sun-Rype Products Limited v Archer Daniels Midland Company*, 2013 SCC 58, 364 DLR (4th) 626; *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59, [2013] ACS no 59.
[90] *Crosslink v BASF Canada*, 2014 ONSC 1682, 54 CPC (7th) 111.
[91] *Wellman and Corless v TELUS and Bell*, 2014 ONSC 3318, 63 CPC (7th) 50.
[92] *Sandhu v HSBC Finance Mortgages Inc*, 2014 BCSC 2041, 41 CCLI (5th) 63.
[93] *Wilkinson c Coca-Cola Ltd*, 2014 QCCS 2631, 244 ACWS (3d) 783.
[94] Infineon Technologies AG, Mitsubishi Electronic Corporation, Toshiba Corporation, and Winbond Electronics Corporation.
[95] *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082, 246 ACWS (3d) 730.
[96] *Courtemanche c Honda Motor Co Ltd*, 2014 QCCS 5478.
[97] *Cuzzeto v Business In Motion International Corporation*, 2014 FC 17, 120 CPR (4th) 327.
[98] *Urlin Rent-A-Car Ltd v Champion Laboratories et al*, 2014 ONSC 577, 237 ACWS (3d) 73.
[99] *2038724 Ontario Ltd v Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812, 244 ACWS (3d) 539.
[100] *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*, 2014 BCCA 36.
[101] *Watson v Bank of America Corporation, supra* note 65.
[102] In addition, the court held that the plaintiffs' claims based on breaches of the criminal price maintenance provisions were statute-barred, as these provisions were repealed more than two years before the action was launched.
[103] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2014 BCSC 1280, 242 ACWS (3d) 499.
[104] *Pro Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, 19 BLR (5th) 177.
[105] *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12, 48 CPC (7th) 227.
[106] *Fairhurst v Anglo American PLC*, 2014 BCSC 2270, 247 ACWS (3d) 510.
[107] *Imperial Oil v Jacques, supra* note 11.
[108] *Commissioner of Competition v Chatr Wireless Inc and Rogers Communications Inc*, 2014 ONSC 1146, 238 ACWS (3d) 334.
[109] *The Commissioner of Competition v Rogers Communications Inc*, (16 March 2015), CT-2015-002, online: Competition Tribunal, http://www.ct-tc.gc.ca/CMFiles/CT-2015-002_Registered%20Consent%20Agreement_2_38_3-16-2015_4749.pdf.

[110] Canada, Competition Bureau, "Bauer Ceases Certain RE-AKT Hockey Helmet Performance Claims"(13 November 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03839.html.
[111] Canada, Competition Bureau, "National Home Services to pay $7 million for misleading door-to-door water heater promotions" (24 November 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03849.html.
[112] *Direct Energy Marketing Limited v National Energy Corporation*, 2014 ONCA 105, 237 ACWS (3d) 474.
[113] Canada, Competition Bureau, "JYSK Canada Recalls Down Duvets at Competition Bureau's Request" (1 May 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03733.html.
[114] Canada, Competition Bureau, "Deceptive telemarketer receives 18-month prison sentence" (27 May 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03722.html.
[115] Canada, Competition Bureau, "Alberta Man Sentenced to Jail in Online Job Opportunities Scam" (7 February 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03660.html.
[116] Competition Bureau Frequently Asked Questions, "Frequently Asked Questions about Canada's Anti-Spam Legislation." See Bureau press release for further detail on the applicable of the CASLL: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03765.html.
[117] Matthew Boswell, "Role of Competition", Remark, (28 November 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03856.html.
[118] *Ibid.*