BLURRED LINES: HOW *DOW CHEMICAL* AND *ROYAL J&M* MAY CONFUSE REMEDIES UNDER THE *COMPETITION ACT*

James Musgrove and Janine MacNeil,
with assistance from Madeline Klimek

The authors explore the issue of whether conduct alleged to be contrary to the civilly reviewable provisions of the Competition Act can found a cause of action for conspiracy to injure or under the unlawful means tort. The paper reviews the legislative history of the bifurcation of the Canadian Competition Act and contains a comprehensive summary of relevant jurisprudence, which makes it clear that civilly reviewable conduct under the Competition Act can only be sanctioned by the Competition Tribunal, that such conduct is lawful until or unless the Competition Tribunal finds otherwise, and that it cannot be the basis for damages actions. However, two recent cases from the Ontario Superior Court (Royal J & M Distributing Inc v Kimpex Inc) and the Alberta Court of Appeal (Dow Chemicals Canada ULC v NOVA Chemicals Corporation) create some uncertainty for this settled law. The authors conclude that this development represents a potentially serious challenge to the structure and logical operation of the Competition Act.

Dans cet article, les auteurs se demandent si un comportement prétendument contraire aux dispositions de la Loi sur la concurrence susceptibles d'examen au civil peut être un motif d'action pour complot en vue de nuire ou pour délit d'atteinte par un moyen illégal. Ils y présentent le contexte législatif du changement de cap de la Loi sur la concurrence du Canada ainsi qu'un résumé complet de la jurisprudence applicable, démontrant ainsi clairement qu'un tel comportement ne peut être puni que par le Tribunal de la concurrence, qu'il est légal à moins que le Tribunal en décide autrement et qu'il ne peut donner lieu à une action en dommages-intérêts. Or, deux affaires récentes—de la Cour supérieure de justice de l'Ontario (Royal J&M Distributing Inc. v. Kimpex Inc.) et de la Cour d'appel de l'Alberta (Dow Chemicals Canada ULC v. NOVA Chemicals Corporation)—ont ébranlé ce principe juridique établi. Les auteurs estiment que cela pourrait sérieusement remettre en question la structure et l'application logique de la Loi sur la concurrence.

One of the key features of Canada's *Competition Act*[1] (the "*Act*") is its bifurcation between criminal conduct and civilly reviewable conduct. Conduct defined as criminal (such as price fixing and bid rigging) is regarded by the statute as unambiguously harmful. Criminal conduct can be prosecuted and can found damages actions for those injured

under section 36 of the *Act*, without the need to demonstrate competitive harm. Such conduct can also represent the "unlawful conduct" predicate for a conspiracy to injure damages action, under the second branch of the *Canada Cement LaFarge*[2] test.

By contrast, conduct defined by the *Act* as civilly reviewable[3], which may injure competition—but can also be competitively neutral or pro-competitive/efficiency-enhancing, depending on the circumstances[4]—was originally determined by the *Act*'s drafters to be appropriately subject only to challenge by the government rather than private parties. Civilly reviewable conduct was and is subject to the principal remedy of prohibition/cease and desist orders, rather than penalties or damages, although there has been some modification to that approach. The ambiguous economic impact of such conduct was seen not to merit condemnation without detailed factual examination, and consequently should not attract challenge by private parties motivated by their own interests. Further, the potential consequences of challenges to civilly reviewable conduct should not be designed to deter such conduct prior to an inquiry into its economic impact.[5]

This bifurcated structure of the *Act* was recently re-confirmed by the Federal Court of Canada:

> The Act adopts a bifurcated approach to anti-competitive behaviour. On the one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions … Conversely, other types of conduct are considered only potentially anti-competitive, are not treated as crimes and are instead subject to civil review and potential forward-looking prohibition once the impugned conduct has been established to have had, have or be likely to have anti-competitive effects…. These behaviours are not prohibited unless they cause, or are likely to cause, a substantial lessening or prevention of competition or some adverse effects on competition in the relevant market, in which case the Competition Tribunal … can order the conduct to cease.[6]

Section 36 of the *Act* confers a right of private action to any person who has suffered loss or damage as a result of conduct in breach of one of the criminal provisions of the *Act*, or as a result of a failure to comply with an order of the Competition Tribunal ("Tribunal") or another court under the *Act*. Conversely, non-criminal anti-competitive conduct, even one having serious anti-competitive effects, does not give rise to a recourse in damages by private plaintiffs.[7] While the original bifurcation of the *Act* has been subject to some legislative tinkering since then, including the very recent amendment to allow private Tribunal challenges under the abuse of

dominant market position provisions of the *Act*, the structure has stayed broadly the same. However, two recent cases have thrown this balance contained within the *Competition Act* into question.

This paper proceeds as follows. First, it discusses the structure of the *Competition Act*, focusing on the division between criminal and civilly reviewable conduct. Second, it illustrates the implication of this division when there is a claim for damages under a tort theory of harm requiring, as an element of the tort, unlawful conduct. Third, there is an extensive review of the jurisprudence dealing with the issue of the Tribunal's exclusive jurisdiction with respect to reviewable conduct under Part VIII of the *Act*, and such tort challenges followed by a brief summation of the law. Finally, this paper discusses two recent cases that challenge the settled law relating to the bifurcation of the *Act*.

1. Structure of the *Act*

The original structure of the *Competition Act* established a clear division between criminal conduct (challengeable by the government, and by those injured via damages actions); and civilly reviewable conduct (challengeable only by the government and attracting primarily cease and desist remedies). These civil reviewable provisions include the general abuse of dominance/monopolization provision, as well as a number of more specific provisions, such as exclusive dealing, tied selling and market restriction. As noted, the logic of the bifurcation was that only "hard core" agreements between competitors, to fix prices and the like, are to be condemned outright as virtually certain to cause injury. By contrast, reviewable conduct, which is often efficiency enhancing and positive for consumers—such as bundling products together to lower prices (tied selling) or allowing effective distribution systems (exclusive dealing)—is subject to condemnation only after detailed inquiry into its economic effects. In 2002 the structure was adjusted to allow those "directly and substantially affected" by certain types of civilly reviewable conduct to seek leave of the Tribunal to bring an application for an order under section 75 or 77 of the *Act*.[8] Very recently, the government has extended this right of private access to the abuse of dominance provisions as found in sections 78 and 79 of the *Act*. The substantive provisions were also amended to make clear that the available remedies did not include damages.[9]

In 2009, when the *Act* was amended to decriminalize price maintenance and make it a reviewable practice pursuant to section 76, affected persons were given the right to seek leave of the Tribunal to bring a proceeding for a

cease and desist order under section 76.[10] Further, the key civilly reviewable practice—abuse of dominance—was amended to provide for an award of administrative monetary penalties ("AMPs") (but not damages remedies) in appropriate cases, and only at the behest of the government.[11]

The result of these amendments was that the original dichotomy between criminal conduct (which required limited, or no, assessment of the economic implications of the conduct) on the one hand, and civilly reviewable conduct (which required a detailed factual/economic examination to determine the impact of the conduct), on the other, was reduced to some degree. Furthermore, the reviewable conduct provisions which may now be the subject of challenge, with leave of the Tribunal, by those who are affected (sections 75, 76 and 77—and now sections 78 and 79), do not give rise to possible damages awards or payments to those injured—and were adjusted where necessary to make that clear.[12]

Consequently, the *Act* retains a broad statutory bifurcation between criminal matters (such as cartels and bid rigging), which can give rise to criminal penalties and civil damages actions, and civilly reviewable matters, which give rise to a variety of remedies, excluding damages, and in most cases, financial penalties. The primary remedy was, and remains, cease and desist or prohibition orders for civilly reviewable conduct.

Mirroring the bifurcation in the *Act*, jurisdiction over the two types of conduct is divided within Canada's legal system. Criminal conduct is dealt with in the provincial/territorial courts (or the Federal Court). Damages under section 36 of the *Act* can also be sought in the provincial superior courts or in the Federal Court. By contrast, reviewable conduct, is challengeable before the Tribunal—a specialized economic tribunal, consisting of judges of the Federal Court (with considerable expertise in competition law matters) as well as lay members appointed for their expertise in economics and business.[13]

Misleading advertising, also captured by the *Competition Act*, is a special case. It can be challenged criminally, before the provincial/territorial courts or the Federal Court, if the misleading advertising is engaged in "knowingly or recklessly".[14] Like other criminal conduct under the *Act*, it can also be the basis for potential damages actions. However, if the conduct is not undertaken knowingly or recklessly it can be challenged civilly by the Commissioner of Competition. The Commissioner can challenge reviewable

misleading advertising conduct either before the provincial superior court, the Federal Court, or before the Tribunal.[15]

Remedies for civil misleading advertising are varied. They include cease and desist orders, but also AMPs, and, in some cases a requirement to publish corrective notices and/or pay restitution. If a respondent in a civilly reviewable misleading advertising case can show that it used due diligence to avoid the misleading advertising (even though the duly diligent efforts were not successful in preventing the misleading advertising), then, while the advertising is still subject to a cease and desist order, it is not subject to the other remedies (AMPs/restitution orders/corrective notices).[16]

The bifurcation of the *Competition Act*, and of the applicable remedies, was a conscious choice by the statute's drafters.[17] Conduct that is always or almost always economically damaging need not be subject to detailed economic analysis before challenge, nor need there be a concern about chilling such conduct. So neither criminal penalties nor damages actions by those allegedly injured are a concern in that regard. Likewise, there is limited concern that private parties may bring actions strategically, since the criminal conduct is relatively clearly defined, and discouraging such conduct does not damage the economy.

Conversely, if the impact of the conduct is economically ambiguous, and often efficient, as is the case with civilly reviewable conduct, and determining the line between reviewable conduct which damages competition and that which does not is tricky (which it often is), then there is legitimate concern about chilling potentially pro-competitive conduct. Consequently, the conduct should be subject to detailed economic examination to ensure that it is not condemned out of hand and the available remedies designed to avoid over-deterrence of such conduct. In those circumstances, a primary cease and desist order remedy makes sense. As noted, however, Parliament added the possibility of AMPs for abuse of dominance in 2009.[18]

Similarly, if reviewable conduct could give rise to civil damages that would allow challenge by non-government actors the risk of damages actions, perhaps by way of class proceedings, would add a considerable chilling effect. Section 36 of the *Competition Act*[19] provides for damages related to defined criminal conduct—and for breaching a Tribunal order—but not for reviewable conduct unless or until a Tribunal order has been made and breached.

> 36 (1) Any person who has suffered loss or damage as a result of
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> conduct that is contrary to any provision of Part VI, or
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> the failure of any person to comply with an order of the Tribunal or another court under this Act,
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> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

As such, the structure of the *Act* does not provide for damages with respect to reviewable conduct—except after an order of the Tribunal is breached. And as noted, in 2002, when those injured were given the statutory right to seek leave of the Tribunal to bring cases before the Tribunal respecting some of the civilly reviewable matters, the *Act* was amended to make clear that damages were not an available remedy.

Arguably, the bifurcation of the Canadian *Competition Act* is its genius, in that it allows the government to challenge inherently economically ambiguous conduct in circumstances in which it believes that there is an injury to competition, but it does not allow challenges—at least challenges leading to damages actions—by competitors or other persons in the distribution chain seeking to protect their own economic interests. Consequently, firms are more likely to engage in efficiency-enhancing vertical conduct that may injure competitors or others in the distribution chain than they would be in a regime that allowed such firms to seek damages.

2. A twist—Conspiracy to Injure Damages Actions

As noted above, one of the remedies provided for under the *Competition Act* is a right to civil damages actions (generally brought as class actions) for breach of the criminal provisions of the *Act*. However, an action under section 36 of the *Act* is not the only way to sue for damages. If the conduct involves an agreement between two or more persons, a damages action can also be brought for conspiracy to injure, relying on breach of the *Act*'s criminal provisions in order to satisfy the "unlawful conduct" branch of the *Canada Cement LaFarge* test.[20] Actions can also be brought for damages pursuant to the "unlawful means" tort. In the *Canada Cement Lafarge* case the Supreme Court of Canada determined that there were two branches of actionable civil conspiracy. One is a conspiracy with the principal objective

of injuring a person. The second is a conspiracy which injures a person and is effected by unlawful means. An agreement which violates the price fixing provisions of the *Competition Act* meets the second branch of the test. Likewise, as noted, actions can be brought for unlawful interference with economic relations, otherwise known as the "unlawful means" tort, which requires some unlawful conduct to satisfy an element of the tort.[21] Again, the unlawful means could be a breach of the conspiracy provisions of the *Competition Act.* However, insofar as the unlawful conduct element of either tort could be fulfilled by alleging breach of the civilly reviewable provisions of the *Act* (that is, if civilly reviewable conduct could constitute the necessary "unlawful conduct" to found a damages action for conspiracy under the second branch of the *Canada Cement LaFarge* test, or for the unlawful means tort), then the structure of the *Act*, which does not impose damages for reviewable conduct, would be undermined.

For three decades, the courts have found—although not unanimously—that there is nothing improper or unlawful about conduct defined as civilly reviewable in the *Competition Act* unless or until the Tribunal finds there to be a problem. Consequently, without a Tribunal finding such conduct unlawful, it cannot be the basis of a damages action for conspiracy to injure under the second branch of the *Canada Cement LaFarge* test or with respect to the unlawful means tort.

3. A Review of the Cases

This section provides a comprehensive, largely chronological, review of the cases exploring the issue of the Tribunal's exclusive jurisdiction with respect to reviewable conduct under the *Competition Act* (Part VIII), as well as attempts to base damages claims on a 'breach' of those provisions. A brief summation of the cases explored in detail in this section can be found in Section 4.

A) *Pindoff Record Sales Ltd v CBS Music Products Inc* ("*Pindoff*")

The first case to take up the question of whether conduct contrary to the reviewable practices provisions of the *Competition Act* could found a cause of action for damages determined that, at least as a preliminary matter on a motion to strike, such an action should not be struck out. In *Pindoff*,[22] Mr. Justice Montgomery of the Ontario High Court of Justice declined to strike a claim of civil conspiracy which relied, for the tort's 'unlawful means' element, on conduct contrary to the reviewable conduct provisions of the

Act. In this case, CBS refused to sell its audio products to Pindoff, as Pindoff would not agree that such products would not be exported from Canada.

In rendering its decision, the Court relied on two UK cases[23] under the *Restrictive Trade Practices Act* which found that conduct under that Act's reviewable provisions could constitute illegal means to ground civil proceedings. Mr. Justice Montgomery stated that "[i]t should not be the function of the Motions Court Judge at this preliminary stage to make a determination which might restrict this head of the plaintiff's claim, when there are other triable issues to be dealt with."[24]

As will be seen, the initial case did not set a trend.

B) *Travailleurs et Travailleuses Unis De L'Alimentation et DuCommerce Local 500 et al v Corporation D'Acquistion Socanav-Caisse Inc et al* (« *Travailleurs* »)

In this case,[25] private parties, including the relevant union, sought to enjoin a merger involving the Steinberg grocery chain. The court declined to exercise jurisdiction to do so, noting that, under the (then) new *Competition Act*, the power to challenge mergers had been assigned to the Director (now the Commissioner), with a right to apply to the Tribunal. The court concluded:

> The undersigned is persuaded in all of these circumstances, that it ought to refrain from intervention in a matter which, clearly … falls within the purview of Section 92 of the Competition Act …. Where Parliament has decreed that violation of its laws in the area of restriction or elimination of competition in the market place be dealt with by a specialized Tribunal … a Common Law Court of original jurisdiction ought to refrain from intervention….[26]

C) *Procter & Gamble Co v Kimberley-Clark of Canada Ltd* ("*Procter & Gamble*")

In this Federal Court patent case,[27] Procter & Gamble alleged that Kimberly-Clark violated a patent relating to material used in disposable diapers. In addition to denying infringement and validity of the patent, Kimberly-Clark argued Procter & Gamble was estopped from obtaining relief because it had engaged in abuse of dominant position (contrary to section 79 of the *Act*) in the disposable diaper market. Mr. Justice Teitelbaum, who was also a member of the Tribunal, rejected Kimberly-Clark's argument, ruling that the alleged section 79 conduct was neither criminal nor civilly actionable:

> In the case before me, abuse of dominant position in the *Competition Act* is not a criminal or even civil illegality. It is a reviewable practice under Part VIII of the *Act* and any proceedings relating to the practice are conducted before a civil administrative tribunal. There is no improper conduct until such time as the Competition Tribunal so finds.[28]

D) *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* ("*RD Belanger*")

This case[29] involved an action by the catering licensee for the Skydome, alleging breach of the *Competition Act*, tort, and breach of contract in relation to the requirement that the licensee buy all food for the Skydome from Skydome's exclusive supplier. The plaintiff alleged a variety of causes of action, including civil conspiracy to injure. The unlawful means necessary to support such a conspiracy were supposedly contraventions of section 77 (exclusive dealing) and section 79 (abuse of dominant position) of the *Competition Act*. The defendants brought a motion to strike the claim, which the court of first instance granted as follows:

> Alleged contraventions of ss. 77 and 79 of the *Competition Act* may not in the circumstances of the instant motion be the bases for founding a cause of action inasmuch as ss. 77 and 79 do not, prima facie, create a cause of action. Those two sections catalogue conduct which upon application by the "Director" may be reviewed by the "Tribunal". The Tribunal, upon review, may make one of the orders it is authorized to make under the *Competition Act*. It is the failure of a party to comply with such an order made that would bring the impugned conduct within the purview of section 36 of the Act. … The point should be made that under the *Competition Act* reviewable conduct is, *prima facie*, legal until the Tribunal, following a review, determines otherwise. That is in contrast to the British counterpart to the *Competition Act*; *The Restrictive Trade Practices Act*, 1956; which under s. 21 of the Act, deems certain kind of conduct "contrary to the public interest" unless the court is satisfied in respect to any one of a number of circumstances enumerated.[30]

The Court of Appeal ultimately overturned this decision without specifically addressing the plaintiff's reliance on sections 77 and 79 to support its conspiracy claim. However, the Court did cast doubt on that claim's validity, noting that defence counsel had questioned whether section 36 of the *Act* could found a civil cause of action on the facts as pleaded. It then stated:

> All this may well be true. The Statement of Claim does reveal a 'scatter gun' approach to the issues. Portions of the Statement of Claim could well be struck out under Rule 25.11 as frivolous and vexatious, but we are not

> concerned here with niceties of pleading. Given that the basic contractual and tortious reliefs sought are supportable, it will be up to the trial judge to determine what relief, if any, is appropriate.[31]

E) *Chrysler Canada v Canada (Competition Tribunal)* ("*Chrysler*")

In this case,[32] the Tribunal attempted to hold Chrysler in contempt for breach of an order against it pursuant to the *Act*'s refusal to deal provision (section 75). In determining whether the Tribunal had the power to hold entities in contempt for breach of its orders, the Supreme Court of Canada explored the structure of the *Competition Act*, the *Competition Tribunal Act*[33] and the Tribunal's role:

> The *1986 Act* completed the broad division of the *CA* into two substantive parts, one criminal (Part VI) and one civil/administrative in nature (Part VIII), in accordance with proposals put forward as early as in 1969 by the Economic Council of Canada in its *Interim Report on Competition Policy*. Jurisdiction over the criminal part lies with the courts ordinarily dealing with criminal cases, as well as the Federal Court, Trial Division (ss. 67, 73 *CA*). As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) *CTA* confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the *CA* therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the *CA* and the *CTA* that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII *CA*, since it involves complex issues of competition law, such as abuses of dominant position and mergers.[34]

F) *Harbord Insurance Services Ltd v Insurance Corp of British Columbia* ("*Harbord Insurance*")

This British Columbia case[35] further affirmed that reviewable conduct is not illegal. On its facts, a competitor of the Insurance Corporation of British Columbia ("ICBC") brought an action to attempt to prevent ICBC from offering incentives to agents to place as much coverage as possible with ICBC. ICBC typically paid a fixed commission, but announced a plan to implement a sliding commission scale giving a higher commission to an agent dependent on the quantum of ICBC optional insurance placed by that agent. The plaintiff sought an injunction to prevent this sliding commission scale from being introduced, alleging it would drive agents to sell ICBC optional insurance at the expense of its competitors. It was alleged that the proposed scheme by ICBC violated section 77 of the *Competition Act*. This argument was put forth to support a pleading of unlawful interference with

economic relations. The B.C. Supreme Court rejected the claim. Mr. Justice Hutchinson stated:

> The practices of "exclusive dealing", "market restriction" and "tied selling", in the absence of legislation prohibiting them, are legitimate, are lawful and prima facie not contrary to public policy. Were they offences under Part VI and punishable by imprisonment or a fine, then they would be unlawful. However, as they do not attract such sanctions, those practices are not unlawful, and in the absence of some other culpability cannot be the foundation for a finding of unlawful means.[36]

He went on to state:

> The sections under Part VIII of the *Competition Act* deal with matters that are only reviewable by the Tribunal constituted under the *Act* and not by an ordinary court. The complainant, under Part VIII, may file a complaint with the Director of Investigation and Research. The Director then considers the complaint, and if he or she decides to do so, may place the allegations before the Tribunal. It is only the Director who can initiate applications before the Tribunal, not the complainant. If the Tribunal finds the application is well-founded, it may prohibit the practice complained of or make a similar order to attain the objectives specified in the relevant section. The policy set by the Tribunal is dictated by economic and philosophic principles, and is flexible enough to cater to changing circumstances. The Tribunal is a statutory board of people appointed by the Minister to encourage competition in ways defined by the *Act* but according to its own principles.[37]

The Court ultimately concluded that the conduct complained of was "… per se lawful but may be prohibited under Part VIII because it lessens competition or offends against the policy set by the Tribunal to foster competition in the market: that does not make it unlawful."[38]

G) *Polaroid Canada Inc v Continent-Wide Enterprises Ltd* ("*Polaroid*")

The decision in *Polaroid Canada Inc v Continent-Wide Enterprises Ltd*[39] was delivered after a trial, rather than on an interlocutory basis. Polaroid Canada established a mechanism to discourage its dealers from exporting Polaroid's film products out of Canada. The mechanism was a "two-price" policy, whereby purchases for consumption within Canada would be at one price, and purchases for export would be at a higher price. The export price was so high that it effectively prohibited exports that were purchased at the higher price.

Polaroid sued the defendant, Continent-Wide, for the difference between the domestic and export price with respect to purchases made at the domestic price that were actually exported. Continent-Wide counterclaimed for damages for termination of the dealership arrangement, alleging that Polaroid's two-price policy was contrary to public policy. Continent-Wide also sued for damages under the conspiracy and price maintenance provisions of the *Competition Act* pursuant to section 36 of the *Act*, although it ultimately did not argue the conspiracy issue.

The Court found, based on *Tank Lining Corp v Dunlop Industrial Ltd*,[40] that parties seeking to enforce a restraint of trade must demonstrate that the restraint is reasonable in the interests of the parties. That is, the restraint must be intended to protect some legitimate interest of the party seeking to enforce it, and must not go beyond what is adequate to accomplish that end. The Court found that Polaroid's goal was to eliminate or reduce interruptions to and disruption of supply to Canadian customers, and to prevent gray marketing in foreign markets from disrupting prices and distribution in those markets. Consequently, Polaroid had a proper commercial interest in avoiding price increases in Canada, and in defending the viability of its international distribution and pricing policy. Thus, the restraint was reasonable in the interest of the parties.

In response, Continent-Wide argued that the two-price policy was not reasonable in respect of the public interest and in particular, that the two-price policy constituted a 'market restriction' within the definition of that term in subsection 77(1) of the *Act*. The Court accepted this potential characterization, but noted that market restriction was not an offence under the *Act*—rather, it was reviewable conduct. The Court pointed out that unless or until there is an application by the Director to the Tribunal, and an order by the Tribunal, no action may be taken under the *Act* in respect of market restriction.

Continent-Wide also argued that the two-price policy constituted a refusal to deal within the meaning of section 75 of the *Act*, and for that reason, the policy should be found to be unreasonable in respect of the interest of the public. The Court also rejected this argument, noting that for section 75 to apply there must be a finding by the Tribunal with respect to a number of things, including the availability of supply in a market and the lack of sufficient competition in the market. The Court stated that it was not satisfied that it should make a determination on such points in the absence of a finding by the Tribunal: "[t]o do so might be improperly pre-emptive of the jurisdiction of the Tribunal to make such a determination".[41]

The Court also pointed out that in a situation where no Tribunal order has been granted, or no application has been made to the Tribunal, the mere possibility of those outcomes in the future cannot justify a determination that the conduct is contrary to the public interest. The Court noted that the scheme of the *Act* contemplates that the Tribunal may properly decide to make no order. In taking that decision, the Tribunal would be obliged to direct its attention to the purposes section of the *Act*.

H) *Cellular Rental Systems Inc v Bell Mobility Cellular Inc* ("*Cellular Rental*")

This case[42] involved a cell phone agent, Cellular Rental Systems Inc, which brought an action against Bell Mobility. In 1990, the parties entered into a three-year contract renewable upon terms and conditions to be agreed upon by the parties. Bell decided not to continue the agreement, except for a few months past the end of the initial term. Cellular Rental brought an action against Bell, arguing that the agreement had been extended for another three years. In addition to its contract action Cellular Rental also applied, by way of a 'six person' complaint, to the Director of Investigation and Research for an inquiry into Bell, and for the Director to seek an order under section 75 of the *Act* compelling Bell to continue to supply products to Cellular Rental. A mandatory injunction was sought in the civil action to compel Bell to continue to deal with Cellular Rental until the Director determined whether it would bring an Application or until the Tribunal made its ruling.

Before the court of first instance, Cellular Rental pleaded unlawful interference with economic relations. While granting the requested injunction, Mr. Justice Montgomery was only prepared to say that such a pleading might have some bearing on the outcome, noting "[i]f the Tribunal concludes that the conduct of Bell Mobility was in restraint of trade that might constitute the unlawful means of interference."[43]

In allowing Bell's subsequent appeal, the Divisional Court noted with approval the following statement of Mr. Justice White:

> In my opinion, the order of Montgomery J. conflicts with the principle of law stated by Phelan J. in [*Travailleurs*]. That principle is that an allegation pertaining to Part VIII of the *Competition Act*, is within the sole purview of the Director and the Competition Tribunal under the Act, and cannot be the basis of injunction proceedings in a superior court of record.
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> …

> Parliament has bestowed on the Director and the Competition Tribunal under the *Competition Act* full jurisdiction to deal with alleged violation [*sic*] of the *Act*, including the jurisdiction of the Competition Tribunal to entertain and grant applications for interim orders, if sought by the Director, 'having regard to the principles ordinarily considered by superior courts—when granting interlocutory or injunctive relief'. (See s. 104(2) of the Act). It would appear that Montgomery J. has granted the type of relief which Parliament intended should be granted by the Competition Tribunal at the request of the Director.[44]

The Divisional Court further noted that subsection 75(1) of the *Competition Act* did not confer any cause of action which Cellular Rental could enforce against Bell in a court of common law or equity.[45] It stated:

> The effect of the order [granting an injunction] was to provide [Cellular Rental] with the benefit of an order which it hoped would be forthcoming pursuant to s. 75(1), *if* the director saw fit, after completing the inquiry under s. 10, to bring an application to the tribunal under s. 75(1), *and* the Tribunal granted an order favourable to [Cellular Rental]. In my view, in granting the order Montgomery J. misconceived the meaning and purpose s. 75(1) and exceeded the jurisdiction of the Ontario Court of Justice (General Division) by granting an order which, if appropriate, could be granted only by the Tribunal under s. 104 on the application of the director.
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> Montgomery J. was no doubt led astray by the request of [Cellular Rental] for an injunction to restrain Bell 'from violating the provisions of s. 75(1) of the *Act*', because s. 75(1) does not proscribe any conduct and, therefore, can neither be 'breached' nor 'violated'. Nor does s. 75(1) confer a civil right of action. There is a right of action which is derived from non-compliance with an order made under s. 75(1); but that is not this case: s. 36(l)(*b*) …. Section 75(1) does not require the tribunal to determine retrospectively whether the conduct of any supplier has been 'in restraint of trade', as Montgomery J. stated, and, thus 'unlawful'. Rather, its focus is prospective, in that the tribunal must determine whether a person who has been unable to obtain a supply of a product because of insufficient competition in a market should be put on a footing equal to those who are able to obtain the product. The tribunal's discretion to issue such an order is based upon the policy objectives of the Act and the balance of interests of those potentially affected by such an order. Indeed, the individuals who make a request to the director under s. 9(1)(*b*) for an inquiry are not parties to a s. 75(1) application before the Tribunal; the parties are the director and the company in respect of which a complaint was made. Only the director may bring a matter before the Tribunal ….

> Even if the facts and s. 75(1) justified the granting of an order in the terms of the order under appeal, it is my view that, pursuant to s. 104, the tribunal has been given exclusive jurisdiction to grant the order. This follows from the reasons for judgment of Gonthier J., on behalf of a majority of the Supreme Court of Canada, in [*Chrysler*].[46]

Concluding that Justice Montgomery had been without jurisdiction to compel Bell to continue dealing with Cellular Rental, the Divisional Court set the injunction aside on this basis.

I) *Ceminchuk v IBM Canada Ltd* ("*Ceminchuk*")

The *Ceminchuk*[47] case involved a claim against IBM alleging the use of "mainframe software pricing to reduce the price of IBM compatible mainframe hardware."[48] The plaintiff's claim alleged that IBM had engaged in tied selling under section 77 of the *Competition Act*, albeit without specifying any underlying cause of action in tort. IBM brought a motion to strike the claim, which the court granted. It noted, relying on *Procter & Gamble*, *Harbord Insurance*, and *Cellular Rental*, that "… reliance on section 77 of the *Competition Act* as a civil cause of action under which to claim damages is bad at law and cannot succeed."[49]

J) *Visx Inc v Nidex Co* ("*Visx*")

Visx[50] involved a dispute over portions of a statement of defence and counterclaim in a patent infringement suit that alleged the plaintiff was engaging in abuse of dominance. The defendant argued that such conduct, amongst other actions, disentitled the plaintiff to equitable relief because it lacked 'clean hands.' The pleading was rejected on the basis of the *Procter & Gamble* case, noted above.

K) *Eli Lilly & Co v Novapharm Ltd* ("*Eli Lilly*")

In *Eli Lilly*[51] the name brand trademark owner, Lilly, sued Novapharm for passing off, selling generic fluoxetine hydrochloride in a design and get-up that, according to Lilly, infringed its trademarks with respect to Prozac.

Novapharm sought to defend and counterclaim on the basis, amongst others, that the license Lilly gave to Pharmascience to use its trademark was improper because it allowed Pharmascience to launch a 'fighting brand,' contrary to subsection 78(d) of the *Competition Act*. In rejecting the claim the court noted that:

> … the anti-competitive act of fighting brands is a reviewable practice under Part VIII of the *Competition Act*, to be determined by the Competition Tribunal. An application to the Competition Tribunal may only be brought by the Director under the Act … There is no private right of action or defence known as 'use of fighting brands.'[52]

L) *Canada (Director of Investigation and Research) v Southam Inc* ("*Southam*")

Southam[53] involved the appeal of a Tribunal order requiring Southam, pursuant to the merger provisions of the *Competition Act* (which are among the civilly reviewable practices provisions included in Part VIII), to divest one of the community newspapers it had acquired in the Vancouver region. In considering the deference due to the Tribunal's decisions on appeal, the Supreme Court of Canada articulated the statutory logic of the Tribunal's exclusive jurisdiction with respect to Part VIII matters:

> The aims of the Act are more "economic" than they are strictly "legal". The "efficiency and adaptability of the Canadian economy" and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested it with responsibility for the administration of the civil part of the *Competition Act*.
>
> …
>
> Because an appellate court is likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal's decisions and consequently to be less able to secure the fulfilment of the purpose of the *Competition Act* than is the Tribunal, the natural inference is that the purpose of the Act is better served by appellate deference to the Tribunal's decisions.
>
> …
>
> As I have already said, the Tribunal's expertise lies in economics and in commerce. The Tribunal comprises not more than four judicial members, all of whom are judges of the Federal Court—Trial Division, and not more than eight lay members, who are appointed on the advice of a council of persons learned in "economics, industry, commerce or public affairs". See *Competition Tribunal Act*, s. 3. The preponderance of lay members reflects the judgment of Parliament that, for purposes of administering the *Competition Act*, economic or commercial expertise is more desirable and important than legal acumen.[54]

M) *Chadha v Bayer Inc* ("*Chadha*")

Chadha[55] is well known in competition law as a foundational case in regard to class actions and indirect purchaser issues. It involved a claim by a class of homeowners with respect to an alleged conspiracy overcharge for brick pigment. In an interlocutory proceeding, *Chadha* also contributed to the jurisprudence of reviewable conduct liability. One of the causes of action proposed by the plaintiff was civil conspiracy, with the unlawful conduct element alleged to be conduct contrary to section 79 of the *Competition Act* (abuse of dominance). The defendant brought a Rule 21 motion to strike that pleading, amongst others. On that point Mr. Justice Sharpe ruled:

> Section 79 confers jurisdiction on the Competition Tribunal to make an order prohibiting certain activity, after which that prohibited activity is unlawful. However, before any prohibition is made at the Tribunal, the effect of s. 79 is plainly not to make the activity described unlawful.[56]

N) *Belsat Video Marketing Inc v Astral Communications Inc* ("*Belsat*")

In *Belsat*[57] a "rack jobber" (Belsat) that distributed Walt Disney video cassettes pursuant to a contract with Astral (which itself held distribution rights from the relevant Disney affiliate) brought various claims against Astral, Disney, and other defendants when its rack-jobbing contract ended—including an alleged breach of the refusal to deal provision under section 75 of the *Act*. The court rejected the claim:

> An alleged breach of section 75 of the *Competition Act* is a reviewable practice within the jurisdiction of the Tribunal. An alleged breach of the *Competition Act* requires the Tribunal to make an order. An alleged breach of Section 75 of the *Competition Act* does not sustain a civil cause of action.[58]

O) *Carrefour Langelier v Cineplex Odeon Corp* ("*Carrefour*")

Carrefour[59] involved a dispute between a shopping center landlord and Cineplex, together with a company to whom Cineplex had assigned their lease. The assignee agreed to take over Cineplex's obligations under the lease, including taking on Cineplex's booking agreement. The landlord, in seeking to terminate the lease and take enforcement action, argued that the assignment of the booking agreement was contrary to the abuse of dominance provision of the *Competition Act*, and therefore illegal. The court rejected this argument as follows:

> It is settled jurisprudence that the Competition Tribunal, created especially by virtue of the Competition Tribunal Act to hear and determine all applications made under Part VIII of the Competition Act, is a specialized tribunal with exclusive jurisdiction over all civil parts of that statute. The questions [the assignee] now asks the Court to rule upon are therefore within the exclusive province of the Director of Competition, who if he believes there are reasonable grounds to make an order under Part VIII, must cause an inquiry to be made with the view of determining the facts before applying to the Competition Tribunal for an order under section 79. Only the Competition Tribunalis [*sic*] competent to make such an order. Even though the Court is not asked to do that here, it is nonetheless asked by [the assignee] to make findings of illegal behavior (having nothing to do with Carrefour in any case) that would necessarily involve an exercise of jurisdiction that belongs to the Tribunal.[60]

P) *Manos Foods International Inc v Coca-Cola Ltd*[61] ("*Manos Foods*")

Manos Foods International Inc brought proceedings seeking to require Coca-Cola to supply it with product, and Coca-Cola sought to strike out aspects of the claim based on conduct allegedly contrary to the *Competition Act*. The motions judge struck the part of the claim based on breach of the reviewable conduct provisions of the *Act*:

> Section 36 of the Act does not create a civil cause of action based on Reviewable Practices in Part VIII. They cannot form the basis of a civil claim. They cannot be used as a defence. Nor can they form the basis of an "unlawfulness" requirement of a civil tort. Prior to a ruling from the Competition Tribunal, these provisions have no application in a civil proceeding. There is no jurisdiction in the General Division of the Ontario Court of Justice to make any ruling touching upon matters falling within Part VIII.[62]

On appeal, the Ontario Court of Appeal, addressing the issues from a slightly different angle, ruled as follows:

> Although the remedy sought in paragraph 1(b) does not exist in common law, there are statutory remedies in the *Competition Act* available in certain circumstances which may require a supplier of product to sell that product to persons whose businesses would be substantially affected if the supplier did not do so and also which may prevent a supplier of product from limiting the sale of product by its customer (See s. 75 and s. 77 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended). These remedies are within the exclusive jurisdiction of the Competition Tribunal. The respondent has not pursued the relief available under the *Competition Act*.[63]

Q) *Ice Fashionable Accessories v Holt Renfrew & Co* ("*Ice Fashionable Accessories*")

Ice Fashionable Accessories[64] involved a motion by the defendants to strike parts of a statement of claim pleading unlawful interference with economic relations based on an alleged breach of the abuse of dominance provision under the *Act*. The court granted the motion, noting that the *Ceminchuk*, *Chadha* and *Eli Lilly* cases were "consistent in holding that reviewable practices under the *Competition Act* do not constitute criminal offences and therefore any attempt to rely on them as a basis for civil liability must fail."[65]

R) *Tremblay c Acier Leroux inc* (« *Tremblay* »)

This case[66] involved a corporate law oppression claim under the *Canada Business Corporations Act* ("CBCA")[67] by a shareholder who relied, in part, on allegations the respondent company engaged in conduct amounting to market restriction and abuse of dominance under Part VIII of the *Competition Act*. The shareholder (Tremblay) did not allege a right to damages or a remedy for breach of the *Competition Act* itself, but did seek CBCA remedies that relied on the Part VIII allegations.

The respondent apparently did not raise the exclusive jurisdiction of the Tribunal to determine such matters in its written submissions, but did raise the issue in oral argument. In respect of that matter the court stated:

> … the provisions of the *Competition Act* to which Mr. Tremblay has referred in his proceeding are part of the Competition Tribunal's jurisdiction as they are found within Part VIII of that Act. But is that enough to hold that the Superior Court lacks jurisdiction? I do not believe that Parliament could have so intended.
>
> First, the language used in section 8(1) [of the *Competition Tribunal Act*] to grant jurisdiction, which is the only provision in either statute dealing with jurisdiction, is not cast in terms that would suggest that the jurisdiction is an exclusive one. Moreover, the functions of the Competition Tribunal have over time been more regulatory than civil in nature as only the Commissioner had the authority to bring any matter before the Tribunal. Thus, whatever civil recourses that did exist were unavailable to private parties.
>
> …
>
> In any event, even if the amendment [i.e., the then-recent amendment to allow private parties to seek injunctive remedies from the Competition Tribunal with respect to some of the reviewable conduct provisions] had been in force at the relevant time, I am of the opinion that the history of the

> Competition Tribunal as a regulatory tribunal means that it makes sense to understand this recent grant of jurisdiction as one that does not exclude that of provincial superior courts to entertain an oppression remedy that alleges unfair competition, especially where Parliament has provided for a clear grant of jurisdiction to the Superior Court in section 2 defining « court » and in section 241 of the *CBCA*. To hold otherwise would also violate the rule of statutory interpretation to the effect that it is « presumed that the legislature does not intend to alter existing jurisdictions, and particularly to transfer jurisdiction out of superior courts ».
>
> I am also mindful that the Competition Tribunal is composed of both judges of the Trial Division of the Federal Court of Canada as well as members named by the federal Minister of Industry, that they hold office as members of the Tribunal for a seven year mandate which is renewable, and that for the most part, they sit in panels of three or five members, with only Federal Court judges who are members of a panel being able to decide questions of law while the other members who are not judges are able to decide questions of fact as well as mixed questions of fact and law. In my opinion, the composition of the Tribunal with its adjudicative methodology tend to emphasize its essentially regulatory role despite the recent grant of a limited jurisdiction to entertain certain non-regulatory applications. In such circumstances, I do not believe that Parliament intended to have a proceeding that contains allegations and conclusions such as those of Mr. Tremblay decided by the Competition Tribunal.
>
> Accordingly, this argument of Acier Leroux also fails, with the result that I am of the opinion that Mr. Tremblay's proceeding was properly initiated in the Superior Court. [68]

This case is therefore an outlier, although close in some respects to *Dow Chemical*, discussed later. *Tremblay* did not give rise to a damages claim based on "breach" of the civil provisions of the *Competition Act*, but it did, wrongly in our view, allow a claim under another statute based in part on reviewable conduct under the *Competition Act*.

S) *Unilever Canada Inc v Crosslee Trading Co* ("*Unilever*")

In this case[69] the defendant in a trademark infringement action sought leave to amend its pleading to allege that the plaintiff had engaged in anti-competitive conduct contrary to sections 77 and 79 of the *Competition Act*. The prothonotary declined to allow the amendment:

> The plea cannot possibly succeed … based on the reasoning of Justice Marshall Rothstein (as he then was) at page 259 of [*Eli Lilly*]. The anti-competitive acts identified in section 77 of the *Competition Act* confer exclusive

> jurisdiction on the Competition Tribunal to review and determine whether impugned activities are illegal and to impose a remedy. Further, the reviewable practice provisions under Part VIII of the *Competition Act* do not apply, nor do they purport to apply, in private actions. … [L]eave to amend to include allegations of anti competitive conduct contrary to sections 77 and 79 of the *Competition Act* is dismissed.[70]

T) *Pro-Sys Consultants Ltd v Microsoft Corp* ("*Pro-Sys*")

This case[71] involved a long-running, high-profile dispute between Microsoft and a proposed class of direct and indirect purchasers of Microsoft's products in which the purchasers challenged a wide variety of allegedly anti-competitive business practices by Microsoft. The case eventually reached the Supreme Court of Canada on a number of issues, including the availability of claims by indirect purchasers under Canadian competition law. However, the issue of whether reviewable conduct could found a cause of action in tort had been resolved, in favour of the defendants, before the case reached the Supreme Court.

The plaintiffs alleged that Microsoft's conduct constituted unlawful interference with economic relations and that the unlawful means employed included, amongst other things, conduct contrary to the reviewable conduct provisions of the *Competition Act*. The defendant challenged this aspect of the claim, on the basis that reviewable conduct is not illegal and cannot found a cause of action. It relied on the logic of the dichotomy of the *Competition Act*.

The plaintiffs responded by referring to the *Pindoff* and *RD Belanger* decisions. The court then addressed the issue:

> I do not regard either *Pindoff* or *R.D. Belanger* to be contrary to the authorities relied upon by the Defendants. Both of the decisions turned on the fact that the statement of claim disclosed other triable issues, and the Courts held that it was therefore inappropriate to decide the issue of whether conduct of the nature described in Part VIII of the *Competition Act* can be considered unlawful or constitute illegal means for the purposes of the torts of interference with economic relations and conspiracy.
>
> …
>
> The Plaintiffs next say that contrary authority is found in the decisions of *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62 (B.C. C.A.) and *Reach M.D. Inc. v Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30

(Ont. C.A.). The Plaintiffs rely on the following passage from the dissenting judgment of Lambert J.A. in *No. 1 Collision*:

> Lord Denning has defined [in *Torquay Hotel*] the unlawful act for the purposes of the tort [of interference with economic relations] as an act which a person is not at liberty to commit. By that, I understand that what is meant is that the act is one which the law will recognize as being wrong in the sense that the law is capable of granting a remedy of some kind in relation to that wrong, whether the remedy would be granted or not in a particular case. (¶118)

In the case of conduct of the nature described in Part VIII of the Competition Act, however, Parliament decided in s. 36 of the Act that a remedy is available in a court of competent jurisdiction only when the Competition Tribunal has made an order prohibiting the conduct and there has been non-compliance with the order.

The comments of Lambert J.A. cannot properly be interpreted to mean within the context of this action that the second element of the tort is satisfied if the court concludes that the conduct of the defendant is of the nature described in Part VIII. In order to do so, the court would have to trespass upon the exclusive jurisdiction of the Competition Tribunal, which is something it is not entitled to do.

…

Microsoft was at liberty to engage in [conduct described in Part VIII of the *Competition Act*] unless the Competition Tribunal had made an order prohibiting it. This is not affected by the fact that the Commissioner of Competition may have decided to defer to the U.S. authorities and did not make an application to the Competition Tribunal.

I conclude that the fact that the Defendants' alleged conduct was of the nature described in Part VIII of the *Competition Act* does not, in the absence of an order of the Competition Tribunal, make such conduct unlawful for the purposes of the tort of interference with economic relations. Such conduct is not unlawful simply as a result of being of the nature described in Part VIII.

…

My ruling at this stage is that it is plain and obvious that, in the absence of an order of the Competition Tribunal and with no other reason to make it illegal or unlawful, conduct of the nature described in Part VIII of the *Competition Act* does not constitute illegal or unlawful means to satisfy the second element of the tort of interference with economic relations. I order that the portions of the Statement of Claim alleging that conduct of the nature described in Part VIII was illegal or unlawful be struck out.[72]

The British Columbia Court of Appeal subsequently noted that no appeal was taken from this aspect of Mr. Justice Tysoe's decision.[73]

Finally, in the Supreme Court of Canada's decision in the matter, Mr. Justice Rothstein, writing for the Court, touched briefly on the issue of the Tribunal's exclusive jurisdiction over reviewable conduct matters:

> Microsoft made other brief arguments objecting to the cause of action under s. 36. Before Tysoe J., it argued that the Competition Tribunal should have jurisdiction over the enforcement of the competition law. I agree that a number of provisions of the *Competition Act* assign jurisdiction to the Competition Tribunal rather than the courts. However, that is not the case with s. 36, which expressly provides that any person who suffered loss by virtue of a breach of Part VI of the Act may seek to recover that loss. The section expressly confers jurisdiction on the court to entertain such claims.[74]

U) *Novus Entertainment Inc v Shaw Cablesystems Ltd* ("*Novus*")

In *Novus*,[75] Novus sued Shaw with respect to promotions offered by Shaw for various communications services. Novus alleged that Shaw had engaged in abuse of dominance under section 79 of the *Act* by selling at less than acquisition cost (as defined in subsection 78(1)(i)). Shaw brought a motion to strike out aspects of the claim as disclosing no cause of action because the conduct fell within the exclusive jurisdiction of the Tribunal.

The court noted that in the B.C. Supreme Court's initial decision in *Pro-Sys*, Mr. Justice Tysoe found that absent an order of the Tribunal, conduct contrary to the reviewable practices provisions is not unlawful for the purpose of the tort of interference with economic relations.

The plaintiff in *Novus* acknowledged this, but submitted that the addition of the possibility of AMPs to section 79 in 2009 was a "clear indication" Parliament intended to recognize that past conduct under that provision could be unlawful.[76] The court disagreed: "[t]he Tribunal has exclusive jurisdiction under the *Act* to make a determination whether conduct is anti-competitive. Until such determination is made by the Tribunal, it cannot be said a party's conduct is unlawful."[77]

V) *Metropolitan Toronto Apartment Builders' Assn. and Universal Workers Union, Local 183 (Jurisdiction), Re* ("*Metropolitan Toronto*")

This case[78] involved an application for judicial review by the union with respect to an arbitration decision of the Ontario Labour Relations Board in which the arbitrator declined to consider allegations that provisions of a collective agreement constituted breaches of both the civilly reviewable and the criminal provisions of the *Competition Act*. In affirming the arbitrator's decision the Divisional Court concluded as follows:

> The arbitrator's decision to defer these issues for consideration by the Tribunal or the courts was also reasonable. First, only the Competition Tribunal had the economic expertise and the jurisdiction to determine the legality of conduct covered by Part VIII of the *Competition Act*. Second, a decision applying s. 45 of the *Act* would have ramifications beyond the parties to the arbitration. Third, if the applicants want a consideration of the legality of the disputed provisions in the context of the entire *Competition Act*, as apparently they do, it was reasonable to expect them to employ the procedures available through the *Competition Act* and to seek a determination before the one body that can determine all the issues. Fourth, the arbitrator was appointed to determine the terms of new collective agreements and to do so in an expedited process. The issues raised by the applicants would have greatly complicated and prolonged the process of reaching a collective agreement, which this application amply demonstrates, and this would not be fair to the employees nor in the interests of good labour relations.[79]

W) *Maddock v Law Society of British Columbia* ("*Maddock*")

This case[80] involved proceedings by the Law Society seeking to prevent contravention of the *Law Society Act* by a legal consultant (Maddock) who, in response, alleged that the Law Society was acting in breach of section 79 of the *Competition Act*. The Law Society argued that deciding whether conduct falls within section 79 of the *Competition Act* was within the exclusive jurisdiction of the Tribunal, and that conduct is only unlawful under section 79 if and once the Tribunal makes such a finding. In considering the issue the court explored the structure of the *Competition Act*.

> In *Chrysler Canada Ltd. v Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 (S.C.C.), the Court described how the *Competition Act* divides jurisdiction between the provincial Superior Courts, the Federal Court, and the Tribunal:
>
> …

> [The Court quoted the portions of the *Chrysler* decision discussed above, and then noted]
>
> The civil part of the CA therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the CA and the CTA that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII CA, since it involves complex issues of competition law, such as abuses of dominant position and mergers. [Emphasis in original]

This court has confirmed the exclusive jurisdiction of the Competition Tribunal relating to orders under s. 79; *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2006 BCSC 1047 (B.C.S.C.) at paras. 20 and 49, rev'd on other grounds 2011 BCCA 186 (B.C. C.A.), rev'd on other grounds 2013 SCC 57 (S.C.C.) ("*Pro-Sys Consultants Ltd.*"); and *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030 (B.C.S.C.) ("*Novus*") at paras. 27 and 35.

Relying on *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) at 331, Mr. Maddock argues that this court can decide matters under the *Competition Act* that are within the exclusive jurisdiction of the Competition Tribunal if "a remedy could be granted as ancillary to the court's principal determination and in support thereof as a matter of inherent jurisdiction of a superior court of general jurisdiction to ensure the effectiveness of its dispositions."

In this case, Mr. Maddock is asking this Court to make a determination that the injunction sought by the Law Society violates s. 79 of the *Competition Act* and amounts to an abuse of a dominant position in the market, so that he can avoid a statutory injunction being pronounced against him. Mr. Maddock is asking this Court to make a substantive pronouncement of federal competition law as a defence to the unauthorized practice of law. In my view, such an order is not ancillary to the court's principal determination of some other matter; rather, it addresses the central question of whether the injunctive relief should be granted.

The authorities make clear that this Court does not have the jurisdiction to make a s. 79 order in the first instance. Jurisdiction would only arise if the Competition Tribunal ordered that the Law Society's conduct was prohibited, which it has not.

…

Even if Mr. Maddock were to establish that this Court has the jurisdiction to decide the substantive *Competition Act* issue, the remedy he seeks cannot be granted. Section 79(1) provides a means for the Competition Tribunal to make an order prohibiting an abuse of a dominant position. The prohibition order can only be granted once the Tribunal has made its initial determination that the Law Society has abused a dominant position contrary to

subsections 79(1)(a) to (c) of the *Competition Act*: *Pro-Sys Consultants Ltd.* at paras. 33-36, 41, 45-46, and 49; and *Novus* at paras. 27-28, 35-37. No such finding has been made.[81]

4. Summary of the Historical Jurisprudence

The jurisprudence leading up to the two recent decisions which are the impetus for this paper may be fairly summarized as follows:

- Two early cases, *Pindoff* and *RD Belanger*, declined to strike allegations of conspiracy to injure based on breach of the civilly reviewable provisions of the *Act* at an early stage and when there were other triable issues to be heard (although the Court of Appeal in *RD Belanger* expressed doubt about such a cause of action). Mr. Justice Tysoe, in *Pro-Sys*, explicitly distinguished these two cases.

- The overwhelming weight of the cases, and all of those for the last 30 years (*Procter & Gamble*, *Harbord Insurance*, *Polaroid*, *Cellular Rental*, *Ceminchuk*, *Eli Lilly*, *Chadha*, *Belsat*, *Shaw*, *Carrefour*, *Ice Fashionable Accessories*, *Maddock*, *Manos Foods*, *Unilever, Pro-Sys*) have rejected the argument that a claim for conspiracy to injure or other civil torts that require unlawful conduct as an element[82] can be founded (with respect to the necessary "unlawful conduct") on breach of the civilly reviewable provisions of the *Act*, unless and until the Tribunal has made such a finding. When asked to do so, courts have consistently struck such claims. Further, the Federal Court, as recently as late 2021, explicitly articulated and restated the fundamentally bifurcated structure of the *Competition Act*, with the criminal provisions giving rise to potential damages claims by private parties from their breach and the reviewable conduct provisions giving rise to civil review and potential forward-looking prohibitions if they are established to cause anti-competitive effects, but not to a recourse in damages.[83]

- The courts—including the Supreme Court of Canada on two occasions—have also been clear (with the exception of the outlier *Tremblay* case) that the Tribunal has exclusive jurisdiction with respect to the reviewable conduct provisions of the *Competition Act* (*Travailleurs*, *Harbord Insurance*, *Polaroid*, *Cellular Rental*, *Eli Lilly*, *Chadha*, *Belsat*, *Pro-Sys*, *Chrysler, Carrefour, Maddock, Manos Foods, Unilever*). In a third Supreme Court case (*Southam*), the Court explored the logic of this exclusive jurisdiction, given the primarily economic nature of the issues dealt with in the civil provisions of the *Act* and the Tribunal's economic expertise.

In summary, while there were two early outliers refusing to strike pleadings at a preliminary stage, the overwhelming weight of the case law, unanimously for the last 30 years, has been that reviewable conduct under the *Competition Act* cannot be the basis for a civil cause of action. The courts have also been broadly consistent, although not unanimous, that the Tribunal has exclusive jurisdiction to determine the question of reviewable conduct under the *Act*.

5. Two Recent Surprises

Despite this fairly consistent series of cases over more than three decades which made clear that reviewable conduct can only be challenged before the Tribunal, and that such conduct is perfectly lawful until or unless the Tribunal finds otherwise, and that it cannot be the basis for damages actions, either directly or as the requisite "unlawful means" for tort claims, two recent cases have potentially thrown a wrench into the works.

A) *Royal J&M Distributing Inc v Kimpex Inc* ("*Royal J&M*")

Royal J&M[84] was decided, in the first instance, in the spring of 2021. It involved a motion under Ontario Rule 21.01(1)(b)[85] to strike out a claim in tort for conspiracy damages. The essence of the challenged claim was that Kimpex was alleged to have conspired with some of its principals/executives to refuse supply of a product to Royal because Royal refused to abide by Kimpex's Minimum Advertised Price (MAP) policy, allegedly contrary to section 76 of the *Competition Act*—the price maintenance provision. Since 2009, price maintenance, previously criminal conduct under the *Act*, has been a civilly reviewable practice. Section 76 provides, in relevant part:

> 76 (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
>
> a) a person referred to in subsection (3) directly or indirectly
>
> i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
>
> ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

> c) the conduct has had, is having or is likely to have an adverse effect on competition in a market.
>
> (2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.[86]

The defendant brought a motion challenging this aspect of the claim by noting that principals of a corporation cannot conspire with the corporation, and argued that reviewable conduct cannot constitute the unlawful conduct upon which a conspiracy to injure action may be founded. It cited the *Chadha* and *Novus* cases, noted above, as well as, apparently, *Pro-Sys*. However, it appears that much of the other jurisprudence discussed above was not cited to the motions judge.

The motions judge refused to strike the claim. He referred to the *Pindoff* case, and noted:

> I am of the view on authorities cited to me by the parties that the issue is not settled law. A trial judge should be allowed to determine whether the Plaintiff's claim for conspiracy to violate s. 76 without a [*sic*] an order having first been made by the Tribunal is precluded by s. 36, which on its face appears not to apply to an action for civil conspiracy such as the one at bar.[87]

It is submitted that this aspect of the decision is problematic for a number of reasons.

First, there is considerable jurisprudence, noted above, determining that civilly review conduct cannot found a claim for conspiracy to injure. That is, the law appears to be clearly settled.

Second, it is not section 36 of the *Act* (at least not directly) which precludes a claim for conspiracy based on conduct contrary to the civilly reviewable conduct provisions, although the logic of the *Act's* structure, including section 36, may suggest this. Section 36 of the *Act* provides for a cause of action for breach of the criminal provisions of the *Act*, but does not speak to the civilly reviewable provisions. However, the fact that section 36 allows damages claims respecting the criminal provisions of the *Act* but not the civil provisions suggests that one ought not to be able to use a 'back door' route to a damages action related to civilly reviewable conduct.

Third, the pure statutory reason that conduct allegedly contrary to the civilly reviewable provisions of the *Act*, without a finding by the Tribunal,

does not found a cause of action for conspiracy to injure are the various civilly reviewable provisions themselves. They provide that the conduct is challengeable only before the Tribunal, but do not provide that the conduct is unlawful before such a finding. Section 36 grants a cause of action for breach of the criminal provisions but not the civil provisions. If "breach" of the civil provisions could found a cause of action in damages, then private parties would have a collateral basis to attack the conduct, which was not the design of the *Act*. Moreover, the possibility of such collateral attack would chill conduct that is generally not thought to be economically problematic. The drafters of the *Act* only allowed such conduct to be challenged before the Tribunal, and expressly disallowed damages awards to be provided in respect of such challenges.

Finally, section 8 of the *Competition Tribunal Act*, as discussed in *Chrysler*, gives clear jurisdiction to the Tribunal on Part VIII matters:

> 8(1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.[88]

Despite the logic of the *Competition Act*'s approach to civilly reviewable conduct, and the very significant jurisprudence upholding the Tribunal's jurisdiction over such conduct—much of which was cited on appeal to the Ontario Divisional Court in the fall of 2021—the Divisional Court rejected Kimpex's appeal with a ruling of impressive brevity:

> The motion for leave to appeal the order of Bloom J., dated May 3, 2021 … is dismissed. Costs to the responding party fixed at $5,000.00 payable within 30 days.[89]

B) *Dow Chemical Canada ULC v NOVA Chemicals Corporation* ("*Dow Chemical*")

The second case[90] that represents a curveball in relation to the structure of the *Competition Act* is much more substantial than the *Royal J&M* case. It involved two Canadian petrochemical heavyweights, Dow and Nova. It did not involve an interlocutory motion, but rather a long-running battle resulting in a year-long trial and decisions from the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

The case involved a large number of issues in dispute with respect to a joint venture ethylene plant. Amongst the issues was Nova's allegation that Dow was in breach of provisions of an agreement forming part of the

joint venture arrangements that Nova argued restricted Dow from directly buying ethane from third parties in the relevant region. Dow opposed Nova's interpretation, but raised the alternative argument that if Nova's reading were correct, the relevant provisions would be unenforceable for, among other things, being contrary to section 90.1 of the *Competition Act* (as well as section 45, prior to its 2010 amendment). Section 90.1 is another civilly reviewable provision found in Part VIII of the *Act*, reading in relevant part as follows:

> 90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement—whether existing or proposed—between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
>
> a) prohibiting any person—whether or not a party to the agreement or arrangement—from doing anything under the agreement or arrangement; or
>
> b) requiring any person—whether or not a party to the agreement or arrangement—with the consent of that person and the Commissioner, to take any other action.[91]

With respect to the elements of section 90.1, Dow argued that the relevant agreement was between competitors and that it would have, on Nova's interpretation, substantially lessened or prevented competition in the purchase of ethane by eliminating Dow as Nova's only competitor in the purchase of ethane in Alberta (a monopsony concern).

At the time the joint venture agreement was originally entered into, which included the contested ethane restrictions, the parties to the agreement were Nova and Union Carbide. Nova and Union Carbide were not competitors with respect to the purchase of ethane because Union Carbide did not have relevant operations in the geographic market. But, as a result of a subsequent merger between Union Carbide and Dow, Dow inherited the restrictions, which then bound the only two meaningful purchasers of ethane in the region. The trial court noted that the Competition Bureau reviewed and did not challenge the transaction, but that there was no evidence that it gave consideration to the issue of the ethane purchase restrictions, and so drew no conclusions from the Bureau having "cleared" the transaction.

Post-merger it appears that Dow did buy ethane from third parties. Both Dow and Nova appear to have tacitly recognized that the restrictions in the original pre-merger agreement might be problematic after the merger.

However, there was no formal acknowledgement of this issue. Once the parties were in dispute, however, Nova alleged, by way of counterclaim, that Dow was in breach of its obligations to not buy ethane elsewhere. Dow responded that it was not in breach of the agreement, properly construed, and that on Nova's interpretation the ethane restrictions would be illegal and unenforceable for, amongst other things, being contrary to section 90.1 of the *Competition Act* (which itself only came into existence years after the original agreement was entered into), and, prior to that time, contrary to the old section 45 of the *Competition Act*.

In reply to Dow's section 90.1 arguments, Nova argued that Dow could not defend its conduct by challenging the restrictions themselves in court, since only the Tribunal can determine that an agreement substantially lessens or prevents competition under section 90.1.[92] Before the Court of Queen's Bench, Nova apparently cited no authority for this submission.[93]

Ultimately, Madam Justice Romaine accepted Dow's narrower interpretation of the ethane restrictions, concluding that Dow was not in breach.[94] However, she proceeded to consider Dow's alternative *Competition Act* and other enforceability arguments.[95] The key aspect (for our purposes) of the very lengthy trial decision is as follows:

> … Nova submits that the civil conspiracy provisions of the *Competition Act* clearly reserve the determination as to whether an agreement prevents or lessens competition to the Competition Tribunal. It submits that this is quite different from the criminal provision [*sic*] of the *Competition Act* which are within the jurisdiction of the courts and which may be privately enforced through civil action. Nova states that this Court has no jurisdiction to assess whether an agreement violates section 90.1, as only the Competition Tribunal has such jurisdiction.
>
> No authority is cited for this submission, and it is clear that an ouster of the jurisdiction of a provincial superior court must be clear. There is nothing in section 90.1 that indicates such an ouster. The issue of whether the restriction is unenforceable as contrary to section 90.1 is incidental to this Court's determination of a counterclaim in which the plaintiff by counterclaim has asked the Court to enforce the restriction at issue: *Canada (Attorney General) v Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) at paras 40-41; *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 (S.C.C.) at para 43.[96]

Justice Romaine concluded that the contested restrictions would have been contrary to section 90.1 under Nova's interpretation,[97] even though there had been no application by the Commissioner of Competition, and

no finding by the Tribunal with respect to the restrictions. No damages were sought by Dow respecting the alleged breach of section 90.1 (it was alleged as a defense to Nova's breach of contract allegations), so we do not know what the court might have done had there been a damages claim.

In our view, this aspect of the decision is incorrect, for the reasons outlined in some detail above. The considerable jurisprudence states that determining matters under the civilly reviewable provisions of the *Act* is within the exclusive jurisdiction of the Tribunal, and that unless or until such a determination is made, the conduct is lawful.

On appeal, Justice Romaine's finding that Dow had not breached the joint venture agreement's ethane purchase restrictions was overturned by a majority of the Alberta Court of Appeal. However, her subsequent finding that the restrictions violated section 90.1 was upheld. The majority addressed the issue, after noting that the Competition Bureau's clearance of the Dow/Union Carbide merger was "somewhat puzzling" by simply saying, without specific reference to the jurisdiction of the provincial superior courts to decide a matter under section 90.1: "[t]he trial judge concluded that any attempt to enforce the Ethane Pooling covenants against Dow would result in a breach of the *Competition Act* …. This conclusion discloses no reviewable error."[98]

The reasoning in *Dow Chemical* does not address the extensive jurisprudence (noted above) which has held that the civilly reviewable provisions are only subject to challenge before the Tribunal and that there is nothing unlawful unless or until the Tribunal so finds.

6. Conclusion

These two recent cases, both wrongly decided on relevant points in our view (one on an interlocutory motion, and the other as one of literally dozens of complex issues in dispute), taken together, cast some doubt on the propositions that only the Commissioner of Competition can challenge civilly reviewable conduct under section 90.1; that only the Tribunal has jurisdiction to determine whether conduct falls within the civilly reviewable provisions (Part VIII) of the *Competition Act*; that civilly reviewable conduct is lawful unless and until the Tribunal finds otherwise; and that civilly reviewable conduct cannot be the basis for a claim for conspiracy to injure or other civil torts. These two cases may suggest, if upheld, that a cause of action for conspiracy to injure based on 'breach' of one of the civilly reviewable provisions of the *Act*, or the unlawful means tort based on such

conduct, could be advanced, and potentially give rise to damages, with no finding by the Tribunal required.

This development represents a potentially serious challenge to the structure of the *Act*, which was recently and explicitly reconfirmed by the Federal Court of Canada. The overwhelming weight of the jurisprudence, and the logic of the *Act*, suggests that such conduct does not, and should not, give rise to a cause of action for damages—directly or indirectly—and that civilly reviewable conduct, as defined under the *Act*, may only be condemned after a hearing by the Tribunal.

The *Dow Chemical* case, given the way in which the issues arose, does not find otherwise, but does raise the question as to the exclusive jurisdiction to address reviewable conduct, which in another case might be extended to a basis for a damages action. The *Royal J&M* case is a preliminary decision that the matter should go to trial—not a final decision on the merits. Nevertheless, the two cases cause some confusion, and it is to be hoped that the matter will be the basis of a carefully considered appeal decision at some point soon.

ENDNOTES

[1] *Competition Act*, RSC 1985, c C-34 [*Competition Act*].

[2] *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd*, [1983] 1 SCR 452 [*Canada Cement LaFarge*].

[3] Which includes conduct such as tied selling, exclusive dealing, abuse of dominant market position, price maintenance and section 90.1 agreements between competitors.

[4] See G Frank Mathewson & Ralph A Winter, *Competition Policy and Vertical Exchange* (Toronto: University of Toronto Press, 1985); G Lermer "Vertical and Horizontal Arrangements: Is a Counter-Revolution Underway?" (Paper delivered at the Canadian Bar Association Competition Law Annual Conference, 29 September 1995) [unpublished].

[5] See Bruce C McDonald, "Reviewable Marketing Practices in Canada" (1977) 22:4 Antitrust Bull 801.

[6] *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 at para 90 [*Jensen*].

[7] *Ibid* at paras 90–91.

[8] *Competition Act*, *supra* note 1 at s 103.1(7).

[9] *An Act to amend the Competition Act and the Competition Tribunal Act,* SC 2002 c 16 at ss 11.1–11.3; see also *Competition Act*, *supra* note 1 at s 77(3.1).

[10] *Budget Implementation Act, 2009*, SC 2009 c 2 at Part 12 [*Budget Implementation Act*].

[11] *Ibid* at s 428; *Competition Act*, *supra* note 1 at s 79(3.1).

[12] *Competition Act*, *supra* note 1 at ss 75(1), 76(2), 76(8), 77(3.1).

[13] As noted at the time of the original conception: "[u]nder the proposed scheme the substantive jurisdiction of the courts and the Tribunal will be mutually exclusive … Such a basic division of responsibility, which has been advocated before, results from a widespread feeling that institutions of criminal law do not permit sufficient economic sophistication to be brought to bear on decisions concerning a competitive economy" (see Bruce C McDonald, "Canadian Competition Policy: Interim Report of the Economic Council of Canada" (1970) 15:3 Antitrust Bull 521 at 525); see also *House of Commons Debates* 33-1, vol 8 (7 April 1986) at 11928 (Hon Michel Côté, Minister of Consumer and Corporate Affairs): "Typically, the questions concern probable effects—future effects—and implications of various business activities, questions which have to be considered in their full commercial and economic context".

[14] *Competition Act*, *supra* note 1 at s 52(1).

[15] *Ibid*, ss 74.09–74.1(1).

[16] *Ibid*, s 74.1(3).

[17] *House of Commons Debates*, 33-1, vol 10 (5 June 1986) at 14026 (Mr. Bill Domm, Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post); see also, Dr Lawrence A Skeoch & Bruce C McDonald, *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for a Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Canada: Department of Consumer and Corporate Affairs, 1976) at 281–283, 316–333.

[18] *Budget Implementation Act, supra* note 10 at s 428.

[19] *Competition Act*, *supra* note 1 at s 36.

[20] *Watson v Bank of America Corp,* 2015 BCCA 362 at paras 40–41, 58, 135.

[21] See *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 [*AI Enterprises*].

[22] *Pindoff Record Sales Ltd v CBS Music Products Inc*, (1989), 27 CPR (3d) 380, 44 CPC (2d) 308 (Ont H Ct J) [*Pindoff*].

[23] *Daily Mirror Newspapers Ltd v Gardner*, [1968] 2 All ER 163, [1968] 2 QB 762 (CA); *Brekkes Ltd v Cattel*, [1971] 1 All ER 1031, [1972] Ch 105.

[24] *Pindoff*, *supra* note 22 at para 22.

[25] *Traveilleurs et Travilleuses Unis De L'Alimentation et Du Commerce, Local 500 et al v Corporation D'Acquisition Socanav-Caisse Inc et al*, AZ-90021188 (SOQUIJ) (Que Sup Ct) [*Traveilleurs*].

[26] *Ibid* at 16–17.

[27] *Procter & Gamble Co v Kimberley-Clark of Canada Ltd* (1991), 40 CPR (3d) 1, 49 FTR 31 (FCTD) [*Procter & Gamble*].

[28] *Ibid* at para 148.

[29] *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd*, 1991 CarswellOnt 3532, 26 ACWS (3d) 509, [1991] OJ No 538 (Gen Div) [*RD Belanger* Gen Div], rev'd 1991 CarswellOnt 735, 5 OR (3d) 778, 57 OAC 81 (CA) [*RD Belanger* CA].

[30] *RD Belanger* Gen Div, *supra* note 29 at para 25.

[31] *RD Belanger* CA, *supra* note 29 at para 13.

[32] *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 [*Chrysler*].

[33] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) [*Competition Tribunal Act*].
[34] *Chrysler*, *supra* note 32 at 405–06.
[35] *Harbord Insurance Services Ltd v Insurance Corp of British Columbia*, 1993 CarswellBC 526, 9 BLR (2d) 81 (Sup Ct) [*Harbord Insurance*].
[36] *Ibid* at para 12.
[37] *Ibid* at para 13.
[38] *Ibid* at para 16.
[39] *Polaroid Canada Inc v Continent-Wide Enterprises Ltd* (1994) 59 CPR (3d) 257 (Ont Ct J (Gen Div)) [*Polaroid* Gen Div]; additional reasons to *Polaroid Canada Inc v Continent-Wide Enterprises Ltd*, 1998 CarswellOnt 5074 (Ct J (Gen Div)), aff'd 2000 CarswellOnt. 2039, 7 CPR (4th) 73 (CA).
[40] *Tank Lining Corp v Dunlop Industries Ltd* (1982), 40 OR (2d) 219, 68 CPR (2d) 162, 140 DLR (3d) 659 (CA).
[41] *Polaroid* Gen Div, *supra* note 39 at para 78.
[42] *Cellular Rental Systems Inc v Bell Mobility Cellular Inc* (1994), 56 CPR (3d) 251; 48 ACWS (3d) 409 (Ont Ct (Gen Div)) [*Cellular Rental* Gen Div]; rev'd (1995), 61 CPR (3d) 204 (Ont Ct J (Gen Div) Div Ct) [*Cellular Rental* Div Ct].
[43] *Cellular Rental* Gen Div, *supra* note 42 at para 44.
[44] *Cellular Rental* Div Ct, *supra* note 42 at para 16.
[45] *Ibid* at para 17.
[46] *Ibid* at paras 22–24.
[47] *Ceminchuk v IBM Canada Ltd* (1995), 62 CPR (3d) 546 (FCTD) [*Ceminchuk*].
[48] *Ibid* at para 5.
[49] *Ibid* at para 10.
[50] *Visx Inc v Nidex Co* (1994), 58 CPR (3d) 51 (FCTD), aff'd 1996 CarswellNat 2475, 72 CPR (3d) 19 (FCA).
[51] *Eli Lilly & Co v Novapharm Ltd* (1996), 68 CPR (3d) 254 (FCTD) [*Eli Lilly* FCTD], aff'd 1996 CarswellNat 1558, 66 ACWS (3d) 433 (FCA).
[52] *Eli Lilly* FCTD, *supra* note 51 at para 15.
[53] *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 [*Southam*].
[54] *Ibid* at paras 48–51.
[55] *Chadha v Bayer Inc*, 1998 CanLII 14791 (Ont Sup Ct) [*Chadha*].
[56] *Ibid* at para 14.
[57] *Belsat Video Marketing Inc v Astral Communications Inc*, (1998), 81 CPR (3d) 1 (Ont Ct J (Gen Div)) [*Belsat* Gen Div], aff'd (1999), 86 CPR (3d) 413 (Ont CA).
[58] *Belsat* Gen Div, *supra* note 57 at para 65.
[59] *Carrefour Langelier v Cineplex Odeon Corp*, 1999 Carswell Que 3546 (Sup Ct) [*Carrefour*].
[60] *Ibid* at para 30.
[61] *Manos Foods International Inc v Coca-Cola Ltd*, 1998 CarswellOnt 5824 (Ct J (Gen Div)) [*Manos Foods* Gen Div], rev'd 1999 CarswellOnt 3088 (CA) [*Manos Foods* CA].
[62] *Manos Foods* Gen Div, *supra* note 61 at para 4.

[63] *Manos Foods* CA, *supra* note 61 at para 10.
[64] *Ice Fashionable Accessories Inc v Holt Renfrew & Co*, 2001 CarswellOnt 1320 (Sup Ct) [*Ice Fashionable Accessories* Sup Ct], rev'd in part 2002 CarswellOnt 337 (CA).
[65] *Ice Fashionable Accessories* Sup Ct, *supra* note 64 at para 18.
[66] *Tremblay c Acier Leroux Inc*, 2004 CarswellQue 449 (CA) [*Tremblay*].
[67] *Canada Business Corporations Act*, RSC 1985, c C-44.
[68] *Tremblay*, *supra* note 66 at paras 60–65.
[69] *Unilever Canada Inc v Crosslee Trading Co*, 2006 CarswellNat 4893 (FC) [*Unilever*].
[70] *Ibid* at para 7.
[71] *Pro-Sys Consultants Ltd v Microsoft Corp,* 2006 BCSC 1047 [*Pro-Sys* BCSC]; rev'd on other grounds 2011 BCCA 186 [*Pro-Sys* BCCA], rev'd on other grounds 2013 SCC 57 [*Pro-Sys* SCC].
[72] *Pro-Sys* BCSC, *supra* note 71 at paras 32–49.
[73] *Pro-Sys* BCCA, *supra* note 71 at para 17.
[74] *Pro-Sys* SCC, *supra* note 71 at para 70.
[75] *Novus Entertainment Inc v Shaw Cablesystems Inc*, 2010 BCSC 1030 [*Novus*].
[76] *Ibid* at para 32.
[77] *Ibid* at para 35.
[78] *Metropolitan Toronto Apartment Builders' Assn and Universal Workers Union, Local 183 (Jurisdiction), Re*, 2014 ONSC 5775 [*Metropolitan Toronto*].
[79] *Ibid* at para 11.
[80] *Maddock v Law Society of British Columbia,* 2020 BCSC 71 [*Maddock*].
[81] *Ibid* at paras 138–150.
[82] This tort, formerly referred to as unlawful interference with economic or contractual interests, is now simply known as the "unlawful means tort" (see *AI Enterprises*, *supra* note 21).
[83] See *Jensen*, *supra* note 6 at para 91.
[84] *Royal J&M Distributing Inc v Kimpex Inc*, 2021 ONSC 3777 [*Royal J&M* 3777], leave to appeal to Divisional Court refused, 2021 ONSC 6177 [*Royal J&M* 6177].
[85] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.01(1)(b).
[86] *Competition Act*, *supra* note 1 ats 76.
[87] *Royal J&M* 3777, *supra* note 84 at para 14.
[88] *Competition Tribunal Act*, *supra* note 33 at s 8(1).
[89] *Royal J&M* 6177, *supra* note 84 at para 1.
[90] *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2018 ABQB 482 [*Dow Chemical* QB], rev'd *Dow Chemical Canada ULC v Nova Chemical Corporation*, 2020 ABCA 320 [*Dow Chemical* CA].
[91] *Competition Act*, *supra* note 1 at s 90.1.
[92] *Dow Chemical* QB, *supra* note 90 at para 1412.
[93] *Ibid* at para 1413.
[94] *Ibid* at para 1285.
[95] *Ibid* at para 1352.
[96] *Ibid* at paras 1412–1413.

[97] *Ibid* at para 1417.
[98] *Dow Chemical* CA, *supra* note 90 at para 157.