

Cassels on Competition: April/May 2023

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In this edition: New criminal no poach and wage fixing prohibitions take effect soon, Competition Bureau commences drip pricing application against Cineplex, Commissioner of Competition continues campaign for sweeping changes to Canada's competition laws and more...

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News You Need to Know

- The new criminal no poach and wage fixing prohibitions of the *Competition Act* take effect in less than a month, on June 23, 2023.
- The Competition Bureau has commenced an application before the Competition Tribunal against Cineplex Inc. for allegedly advertising movie tickets at a lower price than what consumers have to pay. According to the Bureau, Cineplex imposes a mandatory fee which purportedly raises the price paid by consumers for tickets purchased online above their advertised price. Among other relief, the Bureau is seeking orders compelling Cineplex to stop the impugned advertising, pay a fine and provide restitution to affected consumers.
- The Commissioner of Competition (the head of the Competition Bureau) is continuing his campaign for sweeping changes to Canada's competition laws. On May 1, 2023, the *Globe & Mail* newspaper published an opinion by Commissioner Boswell in which he argued that important sectors of the Canadian economy are "increasingly concentrated [and] dominated by giants" and that Canada needs the "better and stronger competition laws" proposed by the Competition Bureau in its March 2023 legislative reform recommendations to the government of Canada. More recently, on May 16, 2023, in a speech titled "Why Canada needs an urgent competition upgrade," the Commissioner pointed to his loss in the Rogers/Shaw litigation and the "unprecedented power [in Canada] and elsewhere" of "[d]igital giants [that] dominate today's global economy" in arguing that Canada must "recalibrate the role of competition in [its] economy."
- The Competition Bureau has announced that the filing fee for merger reviews increased from \$77,452.36 to \$82,719.12. The new filing fee came into effect on April 1, 2023. It applies to entities filing a pre-merger notification and/or requesting an Advance Ruling Certificate.

Bureau Business

- The Competition Bureau has obtained a disclosure order against Dominion Lending Centres Inc. (DLC) in furtherance of its civil investigation into whether DLC (which provides technology solutions and support services to mortgage brokers in Canada) has engaged in conduct that is harming competition in Canada's mortgage brokerage industry.
- The Competition Bureau has published its 2023-2024 Annual Plan, "Driving competition forward for all Canadians," which outlines the Bureau's enforcement and competition promotion priorities. The new plan focuses on affordability for Canadians, including:
 - Cracking down on anticompetitive practices in areas that have the greatest impact on the affordability of daily life for Canadians;
 - Strengthening and expanding the Bureau's capacity to take timely enforcement action in both traditional and digital marketplaces;
 - Publishing the findings of the Bureau's Retail Grocery Market Study with recommendations for improving competition in the grocery sector; and
 - Supporting the Government of Canada's ongoing review of the *Competition Act* and championing the importance of modernized competition laws that benefit all Canadians.

According to the Bureau, these efforts will also advance its goal of becoming a "world-leading competition agency that is at the forefront of the digital economy and champions a culture of competition for Canada."

- The Competition Bureau has issued a position statement relating to its review of Paper Excellence's acquisition of Resolute Forest Products. The Bureau and Domtar Corporation (an affiliate of Paper Excellence) registered a consent agreement in December 2021 to address the Bureau's concerns regarding the merger. The position statement outlines the analysis that led the Competition Bureau to reach its conclusion that the proposed transaction would likely lessen competition substantially in the supply of northern bleached softwood kraft pulp in Eastern and Central Canada and in the purchase of wood fibre from private lands in northwestern Ontario. It also describes the Bureau's rationale for seeking the divestitures that were made pursuant to the consent agreement.
- The acquisition of Sunwing Airlines Ltd. by WestJet Airlines Ltd. has been approved by the federal cabinet. The approval was granted against the backdrop of an October 2022 report from Competition Bureau which concluded that the merger would likely result in a substantial lessening or prevention competition in the provision of vacation packages on 31 routes between Canada and Mexico or the Caribbean, including a merger to monopoly on 16 of those routes. The approval was subject to certain terms and conditions aimed addressing the Competition Bureau's concerns and other public interest concerns of the Minister of Transport relating to the national transportation system.
- The Competition Bureau has released Volume 6 of its *Deceptive Marketing Practices Digest*. The topics addressed in this volume include scarcity cues, drip pricing and the Competition Bureau's recent presidency of the International Consumer Protection and Enforcement Network. Cassels

competition group members, Jennifer McKenzie and Eric Buist, have drafted a comment on the new volume which can be read [here](#).

Competition Litigation Update

- The Federal Court of Appeal has upheld a decision denying certification of a proposed C\$1 billion class action on behalf of all Canadians that purchased dynamic random access memory products from defendant companies between June 2016 and February 2018.
 - The Court of Appeal concluded that the certification motion judge “did not err when he concluded that the amended statement of claim, even if read generously, did not disclose a reasonable cause of action under [the criminal conspiracy provision in] section 45 of the [*Competition*] Act. There is no proper allegation on the main constituent element of a conspiracy, namely the possible existence of an agreement between the respondents. The test for a reasonable cause of action is low, as the Motion Judge acknowledged, but it cannot be so low as to be devoid of any meaning. If the requirement that the pleadings must reveal a reasonable cause of action is to be more than perfunctory, it cannot be satisfied when the main element of an alleged conspiracy is absent.”
 - The appeals court also confirmed that, as applied to the common issues criterion of the class certification test, “the ‘some basis in fact’ test has a dual component: first that the putative class members must have a claim, or at the very least some minimal evidence supporting the existence of a claim, and second some evidence that the common issue is such that its resolution is necessary to the resolution of each class member’s claim.” Writing for the Court, Justice de Montigny added: “I am also in full agreement with the Motion Judge that the two-step approach is the only one consistent with the underlying rationale and the purpose of the certification process. If that process is to be meaningful and to achieve its objective to root out unfounded and frivolous claims, there must be a minimum assessment of the proposed common issue to ensure that it has an air of reality. Otherwise, the certification would not achieve its goal and almost any proposed certified action would have to be certified [...] To quote again from the Motion Judge, '[a] cause of action with no factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or millions' [...] Allowing a common issue lacking a basis in fact to proceed to trial would certainly not promote judicial economy, nor would it promote behaviour modification, or enable access to justice.”
- The Supreme Court of Canada has dismissed an application for leave to appeal by Apotex Inc. from an Ontario Court of Appeal decision rejecting Apotex’s damages claims against Eli Lilly Canada Inc., including under the *Statute of Monopolies*, related to an Eli Lilly olanzapine patent which was found to be invalid in a proceeding brought by another generic drug manufacturer. Apotex claimed that it had been wrongfully delayed in entering the market as a result of Eli Lilly’s actions

in improperly listing the impugned patent on the Patent Register and initiating prohibition proceedings under the *Patented Medicines (Notice of Compliance) Regulations* (PMNOC Regulations). Apotex was forced to attempt to rely on the *Statute of Monopolies* (as well as on the *Trademarks Act* and the common law tort of civil conspiracy) because it was not able to claim statutory damages under section 8 of the PMNOC Regulations. In dismissing Apotex's appeal, the Court of Appeal had held that:

- the PMNOC Regulations and *Patent Act* form a complete code that bar Apotex from seeking relief under the auspices of other statutory and common law claims;
- Eli Lilly was "not liable for actions that it was authorized by law to take (including registering the impugned patent and initiating and prosecuting a prohibition application to prevent Apotex from entering the market) and for harms that were [allegedly] caused [to Apotex] by the operation of the patent regime [...] Absent abuse of process, which was not alleged or found here, Eli Lilly was entitled to pursue the legal process provided for under the [PMNOC] Regulations";
- the exemption from the prohibition on monopolies in the *Statute of Monopolies* "does not distinguish between valid and subsequently invalidated patents";
- there were no misrepresentations (contrary to sections 7(a) and 7(d) of the *Trademarks Act*) by Eli Lilly when it sought to list the impugned patent on the Patent Register; and
- with respect to the alleged civil conspiracy, "there was no evidence to support th[at] claim [...] [T]here was nothing unlawful in Eli Lilly applying for and then protecting a validly registered patent under the *Patent Act* and its Regulations, notwithstanding that the [impugned patent] was later invalidated. Apotex relies on nothing else to support its claim for conspiracy."

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.