

Canadian Competition Law

2018 in Review

What to Expect in 2019

Cassels





CANADA'S COMPETITION ACT

Canada's *Competition Act* ("the Act") applies to all businesses in Canada. Enforced by the Commissioner of Competition, who leads the Competition Bureau, the Act deals with:

- **Mergers:** Parties to mergers that lessen or prevent competition substantially can be forced to divest assets or be prohibited from closing their merger by the Competition Tribunal. Parties to mergers that exceed certain thresholds must file a notification with the Bureau at least 30 days before closing so that the Bureau can determine whether the merger is likely to harm competition. The *Canada Investment Act* also requires that certain mergers over certain thresholds be approved by the Investment Review Division before the parties can close.
- **Cartels:** The Act makes it a criminal offence for competitors to fix prices or rig bids. Offenders can be fined up to \$25 million or jailed for up to 14 years.
- **Monopolization:** Firms that enjoy market power and use anti-competitive conduct to reduce competition can be forced to stop the conduct and, in some cases, to pay a fine of up to \$10 million.
- **Deceptive marketing practices:** Advertising that is false or misleading can lead to fines of up to \$10 million. There are special rules for performance claims and ordinary price claims.

For a more detailed summary of the *Competition Act*, see the Competition Law chapter of Doing Business In Canada at [cassels.com/DBIC](https://www.cassels.com/DBIC).



WHAT TO EXPECT IN 2019

1. New Commissioner, New Priorities?

The new commissioner, Matthew Boswell, will put his stamp on Competition Bureau priorities.

2. Essential Facilities

The Competition Tribunal will decide to what extent the essential facilities doctrine applies in Canada in a case involving catering facilities at Vancouver airport.

3. What Plaintiffs Have to Prove in Class Actions

The Supreme Court will decide what plaintiffs have to prove to obtain certification of a class action alleging price fixing.

4. Mergers are Global

Global mergers continue to result in increased cooperation among Canada's Competition Bureau and competition enforcers around the world.

5. Cartel Enforcement is Local

The Bureau will likely continue to focus on domestic price fixing and bid-rigging cartels.

2018 BY THE NUMBERS

Merger reviews completed
by Competition Bureau:
212

Fines from price fixing
and bid-rigging cartels:
\$1.3 million

Class action settlements
in price fixing cases:
\$574 million



2018 HIGHLIGHTS

Record Divestiture

Bayer AG agreed to sell a number of businesses in Canada and around the world to resolve concerns that its US\$63 billion acquisition of Monsanto Company would raise prices for seeds and traits and reduce innovation. The global merger was notified in 29 jurisdictions. In settlements reached with competition authorities in Canada, the US, the EU, Australia, Brazil, and elsewhere, Bayer agreed to sell businesses that compete with Monsanto's businesses, including various seeds and traits businesses and its Liberty herbicide business (a competitor of Monsanto's Roundup). These remedies,

worth a record US\$9 billion, came nearly two years after the merger was first announced.

In Canada, canola seeds and traits raised the biggest concerns, since canola is Canada's highest acreage crop. Bayer and Monsanto's herbicide resistance traits account for 95% of the canola seeds sold in Canada.

Bayer sold the businesses it promised to divest to BASF. This deal also raised competition concerns, because of overlaps with BASF's existing herbicide and seed treatment businesses, as well as a herbicide resistant trait for canola known as Clearfield. BASF agreed to divestures to address these concerns.

Microsoft Agrees to Record Settlement

Microsoft agreed to a settlement worth between \$312 and \$517 million, depending on the take-up rate by class members. This is by far the largest settlement ever of a private action under the *Competition Act*.

Microsoft will pay \$13 to consumers who purchased Windows and \$8 to those who purchased Office.

Beginning in 1988, Microsoft engaged in a campaign that "destroyed competitors" of its Windows operating system and Office software, the plaintiffs alleged. The action was initially pleaded as a tort claim based on alleged abuse of

dominance by Microsoft. In 2006 the court held that the plaintiffs could not rely on abuse of dominance allegations because conduct constituting abuse of dominance is not unlawful until after the Competition Tribunal prohibits it. The plaintiffs re-pleaded their case to allege that Microsoft engaged in a criminal conspiracy to limit competition unduly, which allowed them to bring the case under the *Competition Act's* private damages provision.

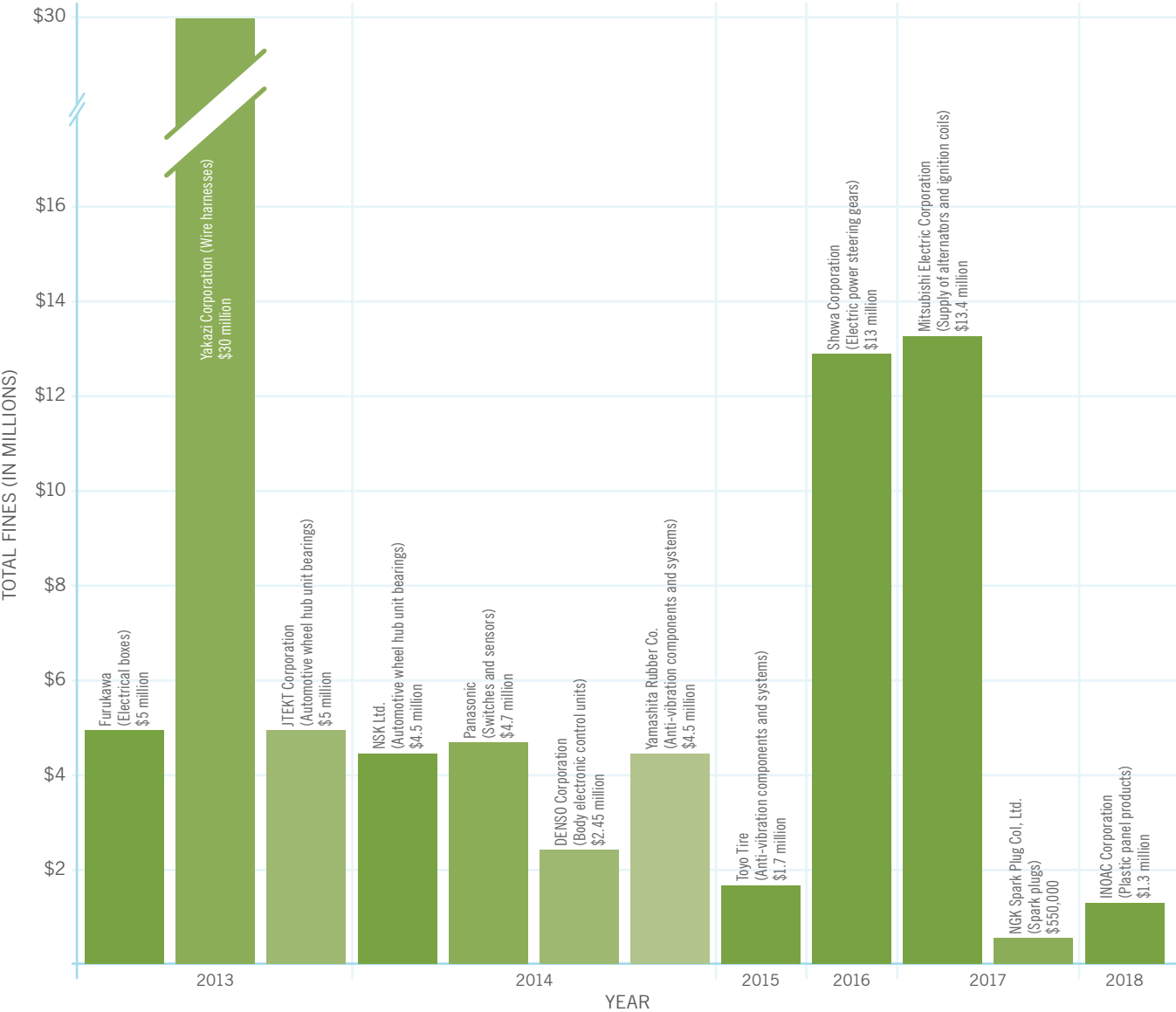
The BC court approved both the settlement and record-breaking fees to class counsel of \$100 million.

End of the Road

Japanese car parts manufacturer INOAC Corporation pleaded guilty to rigging bids for parts for Toyota cars between 2008 and 2014 and agreed to a fine of \$1.3 million. INOAC's fine concludes the auto parts bid rigging investigations. 13 companies have been fined a total of more than \$86 million. Fines include the largest ever fine for bid rigging, \$30 million from Yazaki

Corporation. The case also saw the Competition Bureau decide not to prosecute Nishikawa Rubber Co. because the US fine, of \$130 million, addressed anti-competitive conduct in both the US and Canada. Although the auto-parts investigation was the largest ever international conspiracy investigation to date, it did not beat the record \$95.5 million set by the vitamins case in 1999–2002.

AUTO PARTS — CRIMINAL FINES





Growing Competition

La Coop fédérée’s proposed take-over of some of Cargill Limited’s Ontario business could reduce competition in the sale of fertilizers and crop protection products. La Coop agreed to divest Cargill’s retail locations in four Ontario communities.

Prescription Remedy

Metro’s \$4.5 billion takeover of Québec pharmacy chain Jean Coutu was cleared after Metro agreed to divest pharmacies in eight communities in Québec to resolve concerns Metro could raise upstream prices for goods supplied to pharmacies.

Changing Channels

The Commissioner of Competition refused Bell permission to re-acquire two French language specialty channels, Historia and Séries+. Bell had sold the channels to Corus Entertainment to resolve competition concerns raised by its 2013 acquisition of Astral Media. The consent agreement between Bell and the Commissioner prohibited Bell from re-acquiring any of the divested channels without the Commissioner’s permission.

CURRENT THRESHOLDS FOR MERGER NOTIFICATION:

2019 *Competition Act* deal size notification threshold:
\$96 million

2019 *Investment Canada Act* review threshold:
\$1.045 billion

Competition Bureau filing fee for merger reviews:
\$72,000

Closure?

Tervita Corporation closed its merger with Newalta Corporation even though the Competition Bureau had not finished its review. The Bureau warned that it continued to actively review competition concerns, focusing on the parties' oilfield waste disposal services in Western

Canada. In 2015, the Bureau lost a case challenging a previous Tervita transaction when the Supreme Court of Canada found that the Bureau had failed to quantify quantifiable anti-competitive effects.

Pipeline Coupling

Pembina Pipeline Corporation's acquisition of Veresen Inc. raised competition concerns because both are involved in pipeline processing and transportation of natural gas and natural gas liquids. But after conducting interviews and

collecting documents from over 40 market participants, the Bureau concluded that there was insufficient evidence to challenge the merger.

Cleared for Takeoff

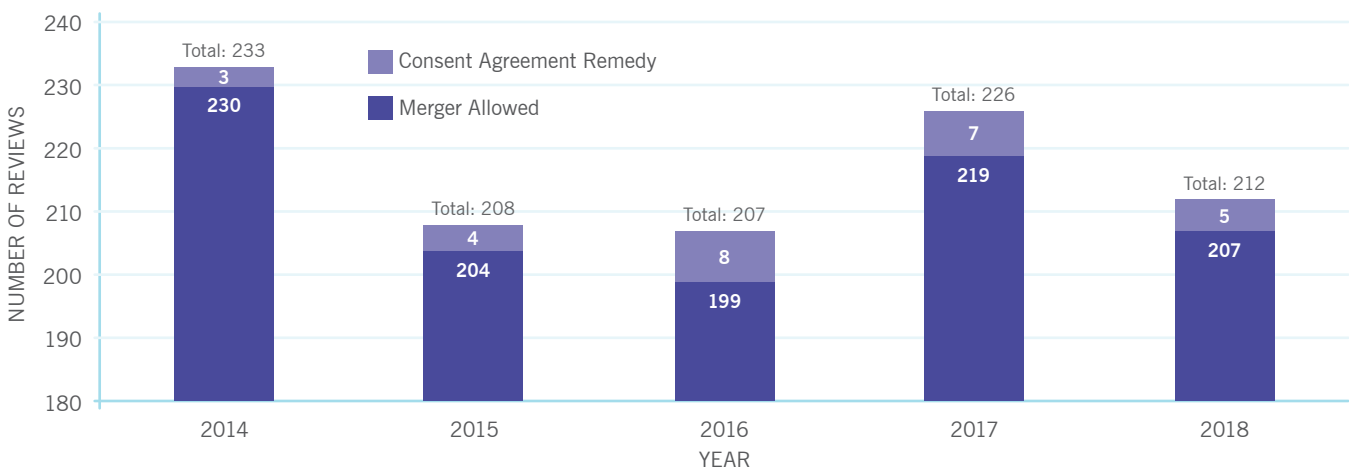
United Technologies Corporation was required to divest two aerospace businesses to gain clearance of its acquisition of Rockwell Collins from the US Department of Justice, namely, Rockwell Collins' pneumatic ice

protection systems and horizontal stabilizer actuator businesses. The Bureau allowed the merger to proceed on the basis of the US divestitures.

Gas Giant

The merger between global industrial gas suppliers Linde AG and Praxair Inc. was allowed to proceed after Praxair agreed to divest Linde's Canadian business.

MERGERS





CARTELS

Criminal Merger?

The Bureau obtained orders to examine five current Torstar employees and one former employee under oath in its investigation into a transaction between Torstar and

Postmedia. In 2017, the two companies swapped 41 community newspapers and then closed 36 of them.

Municipal Infrastructure

Four individuals were charged with rigging bids for infrastructure contracts for the City of Gatineau. The individuals were executives with engineering firms

that allegedly divided contracts among themselves and conspired to fix prices based on a tariff schedule established by their trade association.

Wrong But Not “Fraud”

Bid-rigging is not “fraud” for purposes of provisions of the *Financial Administration Act* that make it a crime for a federal civil servant to “make opportunity for any person to defraud her Majesty,” an Ontario judge held in

acquitting a Library and Archives Canada employee who knew about a teaming arrangement between contractors who provided consultants to the government. The contractors had pleaded guilty to bid-rigging.

Immunity From Publication

Informer privilege applies to witnesses who have received immunity from prosecution for competition offences, an Ontario judge held. They are entitled to remain anonymous until trial, even though they agreed to testify at trial under the terms of the Immunity Program.

An Ontario judge granted an order protecting the identity of “Person X,” a former Canada Bread employee who is

mentioned in materials relied on by the Bureau to obtain search warrants in its investigation into alleged fixing of bread price by supermarket chains and bakeries.

The target of a Bureau investigation was unsuccessful in an attempt to remove redactions from information filed by the Commissioner to obtain a search warrant.

Get Out of Jail Free

The Bureau and the Public Prosecution Service of Canada made major changes to the immunity and leniency programs that increase uncertainty faced by participants. The grant of immunity is delayed until later in the process; directors, officers, and employees are no

longer automatically covered by immunity; and leniency discounts are based on the value of cooperation. See *New Immunity and Leniency Programs: Still the Best Deal in Town?* at competitiveadvantageblog.cassels.com for more details.

Hard Time

In a signal that courts are more willing to impose real jail sentences on white collar offenders, including those convicted of competition offences, a BC court sentenced a Vancouver man to 36 months in prison

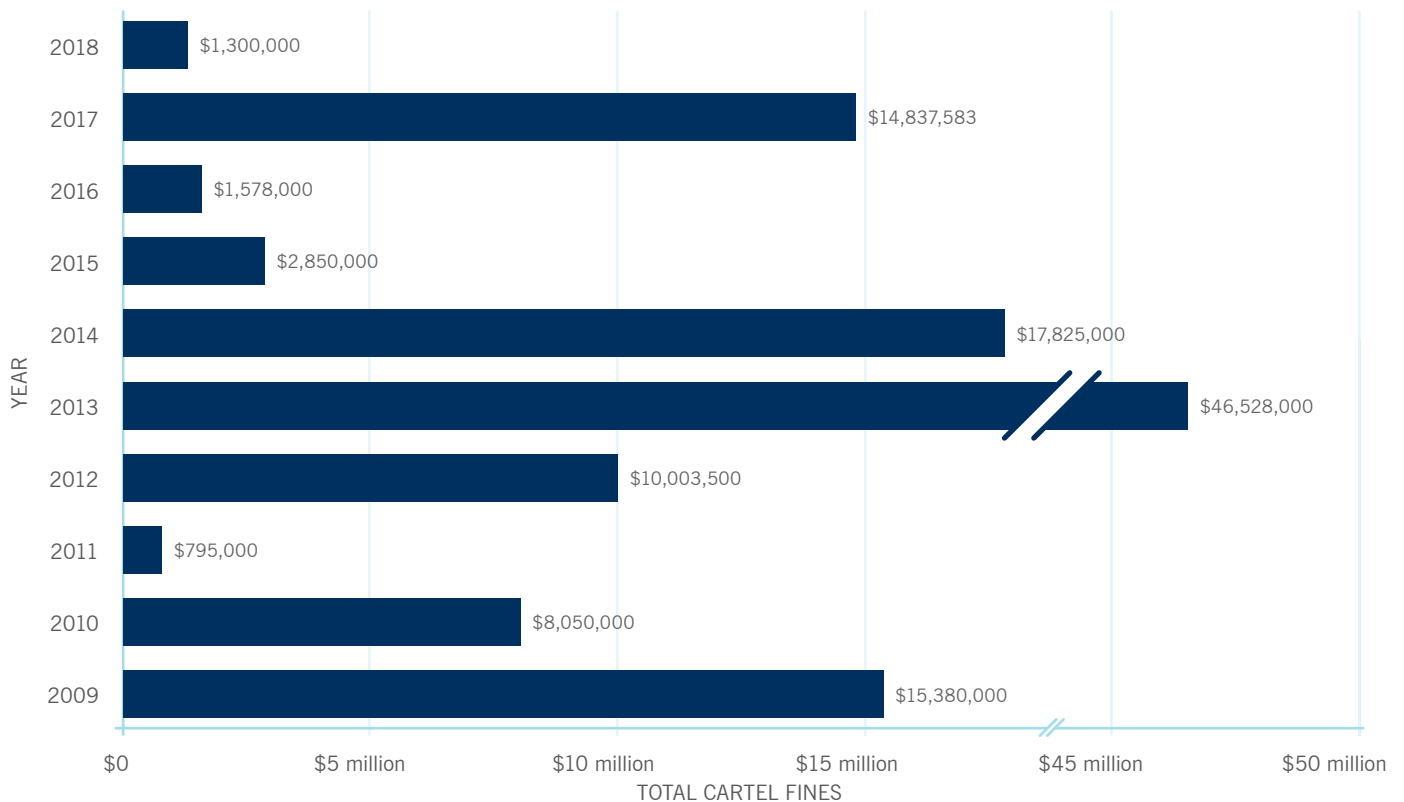
for securities offences. See *Vancouver Provincial Court Sentences Man to 36 Months in Prison for Regulatory Crime* at competitiveadvantageblog.cassels.com for more details.

Taxing Crime

The Canada Revenue Agency and a court-appointed receiver obtained an order that will facilitate obtaining access to documents and electronic devices that were

forfeited to the Crown by two individuals who were convicted of operating an illegal pyramid scheme, contrary to the *Competition Act*.

TOTAL CARTEL FINES 2009–2018





Vacation Intervention

Vacation software provider Softvoyage agreed not to enforce restrictive clauses in its contracts after the Bureau concluded that it was engaging in anti-competitive conduct. Softvoyage controls the markets for content

management and distribution of vacation packages in Canada. It used various restrictive clauses to prevent customers from switching, the Bureau alleged.

Swooping In on the Market

The Bureau is investigating allegations that WestJet's discount carrier Swoop used predatory pricing, with

fares as low as \$39, in competing with rivals such as Flair Air.

Airplane Food

The Competition Tribunal heard the Commissioner's case alleging that the Vancouver Airport Authority abused its

dominant position by refusing to allow more than two catering companies to provide food to airlines at the airport.

Commissioner Loses Privilege

The Commissioner does not enjoy a class privilege over documents he obtains as part of his inquiries, the Federal Court of Appeal held. The Commissioner failed to lead evidence to support his contention that he needs to be able to shield documents in order to protect third parties from reprisals. Recognizing a class privilege would mean that respondents in Tribunal proceedings would only get

such disclosure as the Commissioner deigns to give them, even though parties before the Tribunal are entitled to the highest level of procedural fairness. The Commissioner initially claimed privilege over 9,500 out of 11,500 relevant documents obtained as part of the inquiry into the Vancouver Airport Authority.

Rejected

Applications for judicial review of consent agreements entered into by the Commissioner should only be heard in exceptional circumstances, the Federal Court held in rejecting e-book retailer Rakuten Kobo's challenge to consent agreements with Apple and book publishers Hachette, Macmillan, and Simon & Schuster. The consent agreement process is meant to be a streamlined process, Crampton CJ noted. The *Competition Act* contains a

limited recourse against consent agreements which does not permit some of Kobo's jurisdictional challenges. The consent agreements, filed in 2017, resolved allegations that the book publishers entered into anti-competitive arrangements with Apple that prevented discounting of e-books. A fourth publisher, HarperCollins, entered into a consent agreement in early 2018.

Drug Problem

Branded drug manufacturers Celgene, Pfizer, and Sanofi did not prevent generic drug manufacturers from entering the market by refusing to provide them with samples of drugs needed for bioequivalence testing, the Bureau

found. The Bureau warned that policies that prevent generic drug manufacturers from obtaining samples could be anti-competitive.

Curbed Appeal

The Supreme Court declined to hear the Toronto Real Estate Board's appeal from a Competition Tribunal decision that required it to provide a data feed to enable

innovative real estate brokers to provide information about house listings through virtual office websites.



PRIVATE DAMAGES ACTIONS

Skunked

An Ontario court dismissed a \$1.4 billion class action alleging that an agreement between the Liquor Control Board of Ontario and Brewers Retail (which operates Beer Stores in Ontario) governing the sale of beer by the

LCBO breached the *Competition Act's* criminal conspiracy provisions. Since the agreement was within the powers conferred on the LCBO by provincial legislation, the regulated conduct defence exempted it from the *Competition Act*.

Stay Tuned

The Supreme Court is presently considering arguments about how harm as a component of liability can be proven on a class wide basis, the availability of common law economic torts for breaches of the *Competition Act*, whether “umbrella purchasers” can recover price-fixing

damages, and limitations issues. Most price-fixing class actions have been paused until the Supreme Court issues its decisions. Michael Osborne argued the limitations issues before the court.

Credit Card Bill

Courts across Canada approved settlements in a class action alleging that credit card rules preventing surcharges by merchants breach the *Competition Act*, despite objections from Home Depot and Wal-Mart. Visa and Mastercard agreed to pay \$19.5 million each and allow

merchants to impose surcharges for accepting credit cards. National Bank of Canada agreed to pay \$6 million, bringing the total haul for the plaintiffs to \$68.5 million. The two retailers opposed the settlements because they release claims based on future or continuing conduct.

The Crown

The *Competition Act* does not apply to Crown corporations that enjoy a monopoly, because the provision making the Act binding on the Crown only applies to activities carried

on “in competition,” the Newfoundland Court of Appeal held in striking a proposed class action alleging that video lottery terminals are inherently deceptive.

They Keep Suing and Suing

Energizer is suing The Gillette Company over claims on packaging that its Duracell batteries last up to 20% longer than “the bunny brand.” Energizer advanced claims

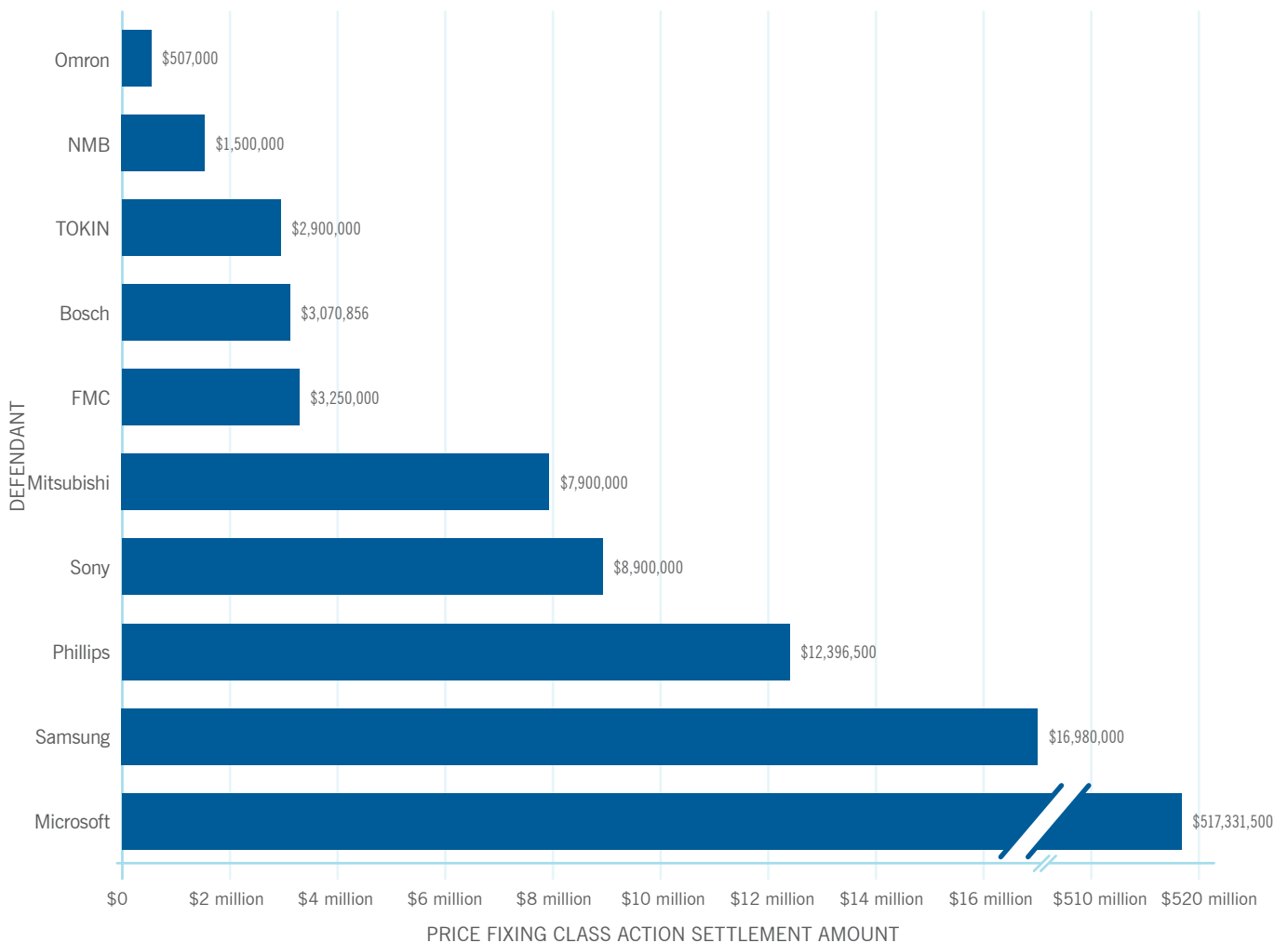
under both the *Trade-mark Act* and the *Competition Act*. The Federal Court held that accounting for profits is not available for its competition claim.

Burning Batteries Claim Not Certified

The Ontario Superior Court refused to certify a class action against Samsung claiming damages for Galaxy Note7 smartphones, whose batteries had an unfortunate tendency to overheat and catch fire. The court found that Samsung’s own compensation scheme was preferable

to a class action. Although mainly a products liability claim, the plaintiffs also made a misleading advertising claim under the *Competition Act*. The court held that the plaintiffs did not provide sufficient particulars to support this claim.

PRICE FIXING CLASS ACTION SETTLEMENTS



Flu Season

An action alleging that makers of the popular cold and flu remedy Cold-FX misrepresented the effectiveness of the drug should not be certified as a class action, the BC Court of Appeal confirmed. The proposed class definition did not distinguish between class members

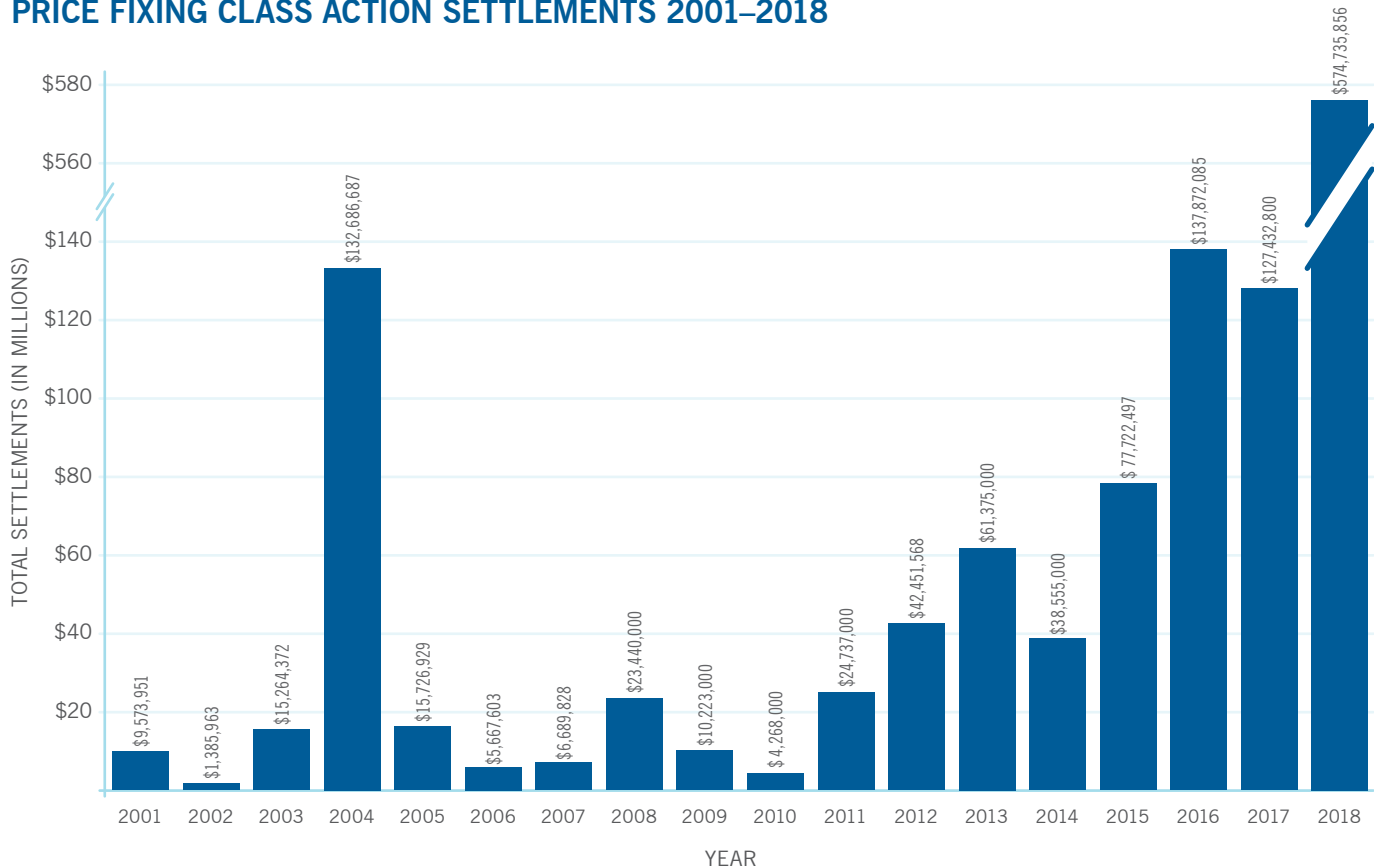
who purchased product with the specific representations complained of, and those who did not. As well, class proceedings are not appropriate where different representations are made to different people in different circumstances.

Commissionaire Competition

Security provider Garda’s claim that the Canadian Corps of Commissionaires was competing unfairly and abusing its dominant position was dismissed by a Québec court. Abuse of dominance is only prohibited after the Tribunal

makes an order; not before. Under Québec law, unfair competition is only unlawful where there is some element of deception or fraud, the court noted.

PRICE FIXING CLASS ACTION SETTLEMENTS 2001–2018





DECEPTIVE MARKETING PRACTICES

Dirty Diesel Done Dirt Cheap?

Volkswagen, Audi, and Porsche agreed to pay a \$2.5 million fine and make restitution payments of up to \$290.5 million to buyers of certain 3.0 litre diesel vehicles to settle allegations that they misled consumers by promoting

diesel engines as clean, when they had used software to cheat on emissions testing. In 2017, VW and Audi agreed to pay \$2.39 billion in compensation to Canadian consumers who purchased vehicles with 2.0 litre engines.

Fixing the Leak

Discount Car & Truck Rentals Ltd. and Enterprise Rent-a-Car settled allegations that they were advertising unattainable prices, a practice known as drip pricing. They agreed to pay \$700,000 and \$1 million in fines, respectively. Avis and Budget paid \$3 million in

2016, followed by Hertz and Dollar Thrifty, who paid \$1.25 million in 2017, to address drip pricing allegations. See *Fixing the Leak: Discount Fined \$700,000 for Drip Pricing* at competitiveadvantageblog.cassels.com for more details

Bad Reviews

Additional fees charged by Ticketmaster often inflate advertised prices by over 20%, and sometimes by over

65%, the Commissioner alleges in an application filed in the Tribunal.

Promote Now, Donate Later

Leon's and The Brick each agreed to donate \$750,000 worth of home furniture to charities to settle proceedings launched by the Bureau alleging that their "buy now, pay later" promotions misled consumers because of up-front

fees that were not properly disclosed. The retailer also agreed to follow Bureau guidelines on disclaimers.

No Weigh to Advertise

Claims that users of the AbTronic X2 and Ab Command iX2 would shed pounds and inches in no time through electronic muscle stimulation were false and misleading, and were not based on adequate and proper testing, the Bureau concluded. As well, they led consumers to think

they did not need to diet or exercise, which was directly contradicted by disclaimers. Thane Canada Inc. agreed to stop marketing the devices in Canada for ten years and to pay a \$350,000 fine.

Call Dropped

Randolph Misiurak, the final accused in the Bureau's investigation into deceptive telemarketing of office supplies and medical kits to Canadian and American businesses, was sentenced to two years less a day in jail and three years of probation. Including Misiurak, five

individuals pleaded guilty to criminal charges. They used fraudulent tactics such as claiming to have an existing relationship with the victim, or pretending that the call was being made on behalf of a government agency.

#InstaAdvice

Influencer marketing is subject to the *Competition Act* like any other advertising, the Bureau warned. Influencers must disclose their relationship with companies whose products they feature in each post and not mislead

consumers. Their opinions must be genuine and based on actual experience. Advertisers must ensure that their influencers follow these rules.



Teamwork

The Bureau entered into agreements with six federal and provincial government agencies:

- With the Investment Review Division (IRD) of Innovation, Science and Economic Development Canada (ISED) to improve communications between them. The IRD reviews filings under the *Canada Investment Act*.
- With the Spectrum and Telecommunications Sector of ISED, to improve cooperation in reviews of spectrum transfers.
- With Defence Construction Canada, a Crown corporation, to collaborate on detecting and addressing cartel activity in defence procurements.
- With Consumer Protection BC, to enhance cooperation in consumer protection enforcement.
- With the Ontario Energy Board, to facilitate collaboration on educational initiatives and information exchanges.
- With the Ontario's Independent Electricity System Operator, to improve cooperation on enforcement activities. The IESO oversees Ontario's wholesale electricity market, including compliance with Ontario Market Rules.

Market Studies

The Bureau explained how it conducts market studies in an information bulletin. Market studies typically result in recommendations to regulators and policy makers on reducing impediments to competition. To date, the

Bureau has completed market studies into generic drug competition (2007 and 2008), self-regulated professions (2007 and 2011), beer (2013), and FinTech (2017).



CASSELS IN BRIEF

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Competition, Antitrust & Foreign Investment

Led by Chris Hersh and Michael Osborne, two highly experienced, *Chambers*-ranked competition lawyers, we represent clients seeking clearance of mergers from the Competition Bureau, the Investment Review Division, and Canadian Heritage; defend clients caught up in competition investigations, prosecutions, and private litigation; and provide clients with sound, practical advice on complying with Canada's *Competition Act*.



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Chris provides strategic counsel to clients on all aspects of competition law, including mergers and acquisitions, criminal matters, abuse of dominance, marketing and advertising, as well as pricing and distribution issues. Chris is currently coordinating merger reviews across multiple jurisdictions for both AGT Food and Ingredients Inc. (in its go-private management buyout of the company backed by Fairfax Financial Holdings and Point North Capital) and Goldcorp Inc. (in its \$10 billion sale to Newmont, including providing advice regarding the ongoing review under the *Investment Canada Act*).



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Michael advises and defends clients in inquiries and proceedings commenced by the Competition Bureau, including criminal matters, abuse of dominance, mergers, marketing and advertising matters, as well as in class actions and other private proceedings under the *Competition Act*. In 2018, Michael argued an appeal in the Supreme Court of Canada in a class action alleging price fixing of optical disc drives.



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