Cassels

Canadian Competition Law

TRENDS AND DEVELOPMENTS

MAY 2020

Trends

COVID-19

COLLABORATING TO COMBAT COVID-19

IT'S THE DIGITAL ECONOMY

COVID-19

Just as COVID-19 upset business and personal plans around the world, it will undoubtedly also affect competition law enforcement, at least in the short term. Thus, while the Competition Bureau began 2020 reiterating its focus on the digital economy (see below), it was soon forced to pivot to dealing with the impact of COVID-19 on its enforcement priorities as well as its own operations.

In April, the Bureau advised that competitors forming short-term business collaborations that are legitimately aimed at responding to the COVID-19 pandemic will "generally not face scrutiny under the *Competition Act*." The Bureau also formed a team to provide specific guidance on proposed COVID-19-related collaborations. (See our Comment.)

Previously, in March, the Bureau warned that it was watching for evidence of companies taking advantage of consumers by making false or misleading claims about a product's ability to combat COVID-19 or engaging in price-fixing. The Bureau added that "Canada's competition laws accommodate pro-competitive collaborations between companies to support the delivery of affordable goods and services to meet the needs of Canadians." (See our Comment.)

Competition authorities in other jurisdictions focused on providing substantive guidance to companies that need to collaborate with competitors in order to deliver essential goods and services. The US Department of Justice and Federal Trade Commission issued a joint statement providing detailed guidance on competitor collaborations during the COVID-19 crisis. The UK announced that it would relax competition laws so that supermarkets could work together to ensure supply, and the Competition and Markets Authority added that it had "no intention of taking competition law enforcement action against cooperation between businesses or rationing of products to the extent that this is necessary to protect consumers – for example, by ensuring security of supplies."

COVID-19 has also impacted the Bureau's operations. The Bureau has closed its telephone hotline and advised that merger reviews may take longer because of difficulties reaching market contacts.

COLLABORATING TO COMBAT COVID-19

Businesses can collaborate with competitors to continue to deliver services to their customers, and they should not hesitate to do so where this will improve their ability to serve their customers.

Canada's *Competition Act* contains provisions to distinguish between so-called "naked cartels" and legitimate collaborations. Agreements between competitors to fix prices, allocate markets, or restrict output are criminal offences carrying penalties of fines up to $25 million and 14-years' imprisonment, as well as civil liability for damages.

Legitimate collaborations between competitors, such as joint ventures, are lawful, even if they contain provisions dealing with prices, markets, or output, provided that these provisions are ancillary to the broader agreement and are directly related

to and reasonably necessary for giving effect to the objective of that broader agreement. The broader agreement must not itself be an agreement to fix prices, allocate markets, or restrict output.

Here are some guidelines to reduce the risk that collaborations with competitors will attract Bureau enforcement or civil liability:

Legitimate purpose. The collaboration must have a legitimate purpose, such as improving delivery of products and services to consumers, and not be just a smoke-screen for a conspiracy to fix prices, allocate markets, or restrict output.

Restraints must relate to the object of the agreement. Any restraints in the agreement (such as joint setting of prices, markets, or output) must relate to the subject matter of the agreement itself, and (for example) not extend to products not covered by the agreement.

Restraints must be reasonably necessary to achieving the object of the agreement. The question to ask is: can the object of the agreement be achieved without the restraints. If the question is yes, the restraints probably are not necessary.

Time-limited. Restraints that are necessary to achieve an objective during a time of crisis might not be necessary when the crisis is over. Accordingly, collaborations formed to respond to the COVID-19 crisis should have a clear end date or event.

Write it down. You do not need to wait for lawyers to draft lengthy contracts, but you should commit the purpose and scope of your collaboration to writing, even if you do this in an email.

Be careful about expanding the collaboration. Once you define the purpose and scope of a collaboration, do not expand the collaboration without considering whether the expanded collaboration is lawful.

Don't create a habit. Collaboration can be habit-forming. Make sure that collaborations undertaken to respond to the present crisis are ended when the need for them has passed and ensure that your business gets back to competing vigorously.

Get legal advice. This publication cannot replace advice from a competition lawyer based on the facts of your situation. The Competition & Foreign Investment Group at Cassels has the experience to provide this advice quickly.

It's the Digital Economy

In its 2020-2024 strategic vision, titled *Competition in the Digital Age*, the Competition Bureau revealed that the digital economy will become their main focus over the next few years. The strategic vision identifies three main areas of activity: enforcement, promotion of competition, and "investing in our organization."

The strategic vision is long on trendy buzz-words – the word "digital" appears 41 times in the ten-page document – but short on specifics.

The Bureau says that "active enforcement" will be its main focus over the next four years. The Bureau will focus these enforcement activities in the online marketing, telecommunications, financial services, health, and infrastructure sectors. The Bureau plans to make increasing use of administrative monetary penalties, restitution, and interim injunctions.

Tough talk like this has been coming out of the Bureau for at least the last year. While the Bureau has never been shy about collecting administrative monetary penalties (fines by another name), they have been collected almost exclusively in deceptive marketing practices cases. The Bureau has only sought fines in abuse of dominance cases twice, in parallel cases alleging egregious behaviour by two water heater rental companies (and where one of the two had previously agreed to a consent order dealing with the same type of conduct).

Competition authorities have traditionally recognized that the line between vigorous competition and anti-competitive behaviour is extremely hard to draw, and that overly-aggressive enforcement of abuse of dominance provisions chill competition. Lately, however, Bureau officials have been talking about conduct "violating" the abuse of dominance provision (despite the fact that this provision does not prohibit any conduct and thus cannot be violated). This language suggests that the Bureau may become more aggressive in challenging mergers and other conduct it views as anti-competitive. Accordingly, businesses (especially those with a significant market position) should review their sales and contracting practices so that they have good responses should the Bureau start asking questions.

The Bureau has also embraced a tougher approach in conducting its investigations. It used formal powers in one merger inquiry, requiring executives of two merging cheese companies to be interviewed under oath. The Bureau also obtained a temporary consent agreement – effectively an injunction – from Flighthub, while it continues an investigation into Flighthub's marketing practices.

In addition, the Bureau is looking towards "new and innovative tools" to process data and digital evidence, as well as intelligence gathering tools such as advanced analytical models, algorithms, and even artificial intelligence to detect anti-competitive activity.

The Bureau plans to continue to promote competition using its traditional mix of advice to regulators, relationships with other enforcement agencies and regulators in Canada and abroad, guidance on enforcement policies, and outreach to business and consumers. Many of these activities will be aimed at challenges created by the digital economy. In line with this, the Bureau challenged a software merger during 2019. (See next article.)

Finally, the Bureau plans to broaden the skills within its own organization to deal with the digital economy. It also plans to form a Digital Enforcement Office.

While the Bureau's focus on the digital economy is in line with the approach taken by regulators around the world, it is unclear whether this focus will reduce its enforcement activities in relation to the "traditional" economy – particularly in light of the Bureau's continued resource limitations.

Developments

COMMON CONTROL CHALLENGE

AIRPORT CASE CRASHES

AIRLINE MERGER FACES HEADWINDS

PLAINTIFFS SCORE PYRRHIC VICTORY IN PRICE-FIXING CLASS ACTION

DIFFERENT APPROACH TO NO-POACH

SERVICE FEES LEAD TO PENALTIES

Common Control Challenge

The Bureau challenged the acquisition by private equity firm Thoma Bravo of Aucerna, a Calgary-based supplier of oil and gas reserve software, after the deal closed.

Thoma Bravo already owned the only other Canadian reserve software supplier, Quorum. The Bureau alleged the acquisition was a merger to monopoly because it placed the only two Canadian reserve software suppliers under common control.

The Bureau was concerned that the merged firm would have fewer incentives to improve its software or even keep it updated to reflect regulatory changes. The Bureau contended that reserve software from foreign suppliers was not sufficiently tailored for Canadian customers.

The matter was quickly settled when Thoma Bravo agreed to divest Quorom.

It is not clear from the public materials whether the transaction was notifiable or not. Regardless, the Bureau's increased willingness to challenge mergers means that parties to non-notifiable mergers where there is competitive overlap must consider the likelihood of the Bureau detecting and challenging the merger. Where there is a high risk that the Bureau will challenge a merger, merging parties should consider how to deal with this risk. This is especially so for mergers in the digital economy, given the concerns expressed in other jurisdictions about large technology companies making "killer acquisitions" to pre-empt competition by smaller innovation firms.

MERGERS & FOREIGN INVESTMENT

GRAIN ELEVATORS

After buying a grain elevator from Louis Dreyfus Company, Parrish & Heimbecker controlled the only grain elevators along a 180km stretch of the TransCanada Highway near Virden, Manitoba and Moosomin, Saskatchewan. Prior to the acquisition, the two elevators closely monitored each others' prices. In an ongoing application challenging the merger, the Bureau alleges that this rivalry has now been eliminated.

KEEP ON TRUCKIN'

CN Rail's acquisition of H&R Transport was given a green light after the Bureau concluded that efficiencies gained from the transaction would outweigh its anti-competitive impact. According to the Bureau, the acquisition would decrease competition for full truckload refrigerated intermodal services in eight markets in Canada, enabling CB to charge higher prices and lower service quality.

NO CUTS TO CHEESE MERGER

The Bureau obtained a court order requiring executives of Kraft Heinz Canada ULS and Parmalat S.p.A. to be interviewed under oath as part of its investigation into the proposed sale of Kraft's natural cheese business to Parmalat. The Bureau ultimately allowed the merger to proceed without seeking any remedy.

CLEARED FOR TAKE-OFF

First Air and Canadian North merged after receiving approval from the federal government. The Bureau's review of the merger found that the merger would decrease competition *and* increase prices since it would result in a monopoly for air services to many northern communities that are only accessible by air for part of the year. The merging parties addressed several of the concerns raised by the Bureau by agreeing to significant undertakings – including limiting their ability to increase fares or reduce schedules – in order to obtain approval of the merger under the *Canada Transportation Act*.

NIGHT VISION

Defence technology companies L3 Technologies, Inc. and Harris Corporation completed their merger on July 1, 2019, after reaching a settlement on June 20 with the US Department of Justice to resolve concerns that the merger would eliminate competition for military-grade image intensifier tubes. In the settlement, Harris agreed to sell its night vision business. The Bureau had the same concerns as the DOJ. However, since the settlement in the US resolved those concerns, it issued a no-action letter confirming that it would not challenge the merger, so long as Harris implemented the US settlement.

MILITARY RADIOS

United Technologies Corporation and Raytheon Company can complete their merger following settlements with the US Department of Justice and the European Commission reached in March 2020. The Bureau reviewed the merger in cooperation with the DOJ and the EC. All three agencies concluded that the merger would eliminate competition for military airborne radios and military global positioning systems. UTC and Raytheon agreed to sell Raytheon's military airborne radios business, and UTC's military GPS business, to BAE Systems, Inc. The Bureau's approval of the merger is conditional on the implementation of this settlement.

MERGER REVIEW THRESHOLDS

The transaction-size threshold for pre-merger notification under the *Competition Act* will remain at $96 million for 2020. Mergers must be notified before closing if the combined Canadian assets or revenues of the parties and their affiliates are more than $400 million, and the target's Canadian assets or sales exceed $96 million.

The filing fee for merger reviews has been increased to $75,055.68 for 2020.

Thresholds for review under the *Investment Canada Act* have been raised for 2020:

Investor Type	Direct Acquisition	Indirect Acquisition
Non-WTO investor	$5 million	$50 million
WTO investors	$1.075 billion	Not reviewable
Trade agreement investors	$1.613 billion	Not reviewable
State-owned enterprise WTO investor	$428 million	Not reviewable
Cultural businesses (all investor types)	$5 million	$50 million

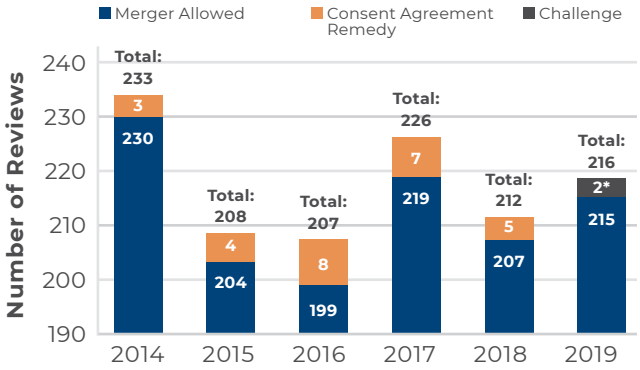
NET BENEFIT REVIEWS DOWN

Rising thresholds for reviews under the *Investment Canada Act* continue to reduce the number of applications for review. In 2018-2019 only nine applications were filed, the same as the year before. Since all investments by non-Canadians must be reported, the number of notifications of transactions below the thresholds has seen a corresponding increase.

SELLING DRUG STORES

After determining that METRO Inc.'s acquisition of The Jean Coutu Group Inc. would likely have led to substantially higher prices or decreases in services for consumers purchasing medications or other pharmacy products in Quebec, the Bureau approved Metro's sale of 10 retail pharmacies to Familiprix Inc. and Corporation Groupe Pharmessor.

Merger Review Outcomes



* one of the two challenges was later resolved by a consent agreement.

NATIONAL SECURITY REVIEWS UP

More transactions are being reviewed under national security provisions of the *Investment Canada Act*. Seven transactions were reviewed in fiscal 2019, bringing the total since 2009 to 28. Only three of the seven were allowed to proceed without conditions.

MERGER INTELLIGENCE

The Bureau announced that it will increase its focus on active intelligence gathering on non-notifiable merger transactions that may raise competition concerns.

Airport Case Crashes

The Bureau's increasingly-stated position that any firm that owns a bottleneck facility must share it with competitors received a major setback when the Competition Tribunal rejected its attempt to force the Vancouver Airport Authority (VAA) to allow more galley handling firms at the airport. The Tribunal's decision will be a blow to any plans the Bureau may have to force owners of digital economy platforms and big data to open their platforms or share data.

In 2016, the Bureau filed an application alleging that VAA's decision not to allow more than two in-flight catering companies to provide galley handling services at the airport restricted competition and constituted an abuse of dominant position.

Galley handling consists of loading and unloading food from aircraft. VAA's control over access to the airport lands gives it control over who can provide galley handling at the airport. Concession fees paid by galley handling companies gave VAA a plausible competitive interest in this downstream market, even though VAA does not itself provide galley handling services.

VAA's refusal to allow more galley handing firms onto the airport was not an anti-competitive act, however, because VAA had a legitimate business justification for this decision. VAA's decision was motivated by its desire to maintain two full-service catering and galley handling firms at the airport. VAA was concerned that allowing a third firm to enter the airport might lead to the exit of one of the two existing full-service firms. This, VAA was concerned, would end competition between two full-service firms, harm its reputation, impair its ability to compete with other airports for new routes, and cause disruption for airlines.

The Tribunal held that these were pro-competitive rationales: VAA "believed that it was preserving competition, choice and reliability for airlines."

The Tribunal also found that VAA's refusal to allow more galley handling firms to operate at the airport did not prevent competition substantially. The Commissioner failed to show that new entrants would likely be successful enough to achieve a scale of operations that would permit them to materially impact price or other dimensions of competition.

The Bureau appears to have its eye on forcing owners of data-driven platforms to grant access to their platforms or share data with their rivals.

The VAA decision, however, does not depart from the generally accepted view that mere refusals to license property, whether intellectual or real property, ought not to be open to challenge under the abuse of dominance provisions. The Tribunal confirmed that "the exercise of pre-existing market power to exclude entry (or even to raise prices) does not necessarily constitute an anticompetitive act." The Tribunal's economist, Donald McFetridge, went further, adding that "any limitation in the supply of licences for airside access by VAA could be construed as the mere exercise of its pre-existing market power in the Airside Access Market."

CARTELS

QUEBEC ENGINEERING COMPANIES AVOID BID-RIGGING CONVICTIONS

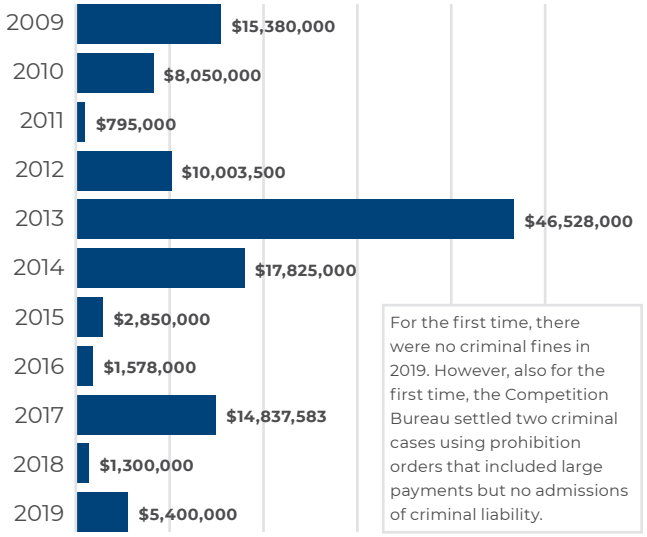
Three Quebec engineering companies, Dessau, Genivar, and Roche (now Norda Stelo), have agreed to prohibition orders that requirement payments to the government to settle charges that they conspired to fix bids for municipal infrastructure contracts in Gatineau. Dessau agreed to pay $1.9 million, Genivar, $4 million, and Roche, $750,000. All three companies participated in the Quebec government's voluntary reimbursement program. Because none of the firms was convicted of an offence, they will not automatically be debarred from bidding on government contracts in the future. This outcome is similar to a remediation agreement (deferred prosecution agreement) under the *Criminal Code*, but represents a major departure from the Bureau's leniency program, which requires that firms plead guilty to a criminal offence to receive leniency.

Four executives from these companies were not so lucky. They pleaded guilty to bid-rigging and were sentenced to a mix of house arrest, curfews, and community service.

IMMUNITY AND LENIENCY PROGRAMS UPDATED

The Competition Bureau and the Public Prosecution Services of Canada updated their Immunity and Leniency Programs to clarify that they consider participants in the programs to be cooperating witnesses, not confidential informers.

Total Cartel Fines



Airline Merger Faces Headwinds

Air Canada's proposed acquisition of Transat will substantially lessen competition for the sale of air travel and vacation packages to Canadians, the Bureau determined in a report delivered to the Minister of Transport.

The merger would produce a monopoly over non-stop service on 22 routes between Canada and Europe and sun destinations such as Mexico and the Caribbean, and substantially lesson competition on another 51 routes, the Bureau found. This would lead to increased prices, decrease in service, and a significant reduction in travel by Canadians, the Bureau concluded.

The Bureau noted that Air Canada and Transat have expressed a willingness to try to resolve the competition concerns and that they may propose measures to address these concerns.

The Bureau's review was based on information that predated the impact of the COVID-19 pandemic on airlines. The pandemic has since led Transat to shut down temporarily and Air Canada to greatly reduce flights. While the Bureau concedes that the impact of the pandemic on the airline industry is likely to be significant in the near term, the extent and duration of these impacts remains unknown.

MONOPOLIZATION

DRUG WARNING

The Bureau warned branded pharmaceutical companies not to block access to samples of brand name drugs by generic drug manufacturers after investigating allegations that Otsuka Canada Pharmaceutical delayed providing samples of its drug Jinarc. Generic drug manufacturers need samples of brand name drugs in order to conduct tests to prove their generic drugs are "bio-equivalent" to brand name drugs. Otsuka cited restrictions on distribution in Jinarc's risk management plan as a reason for not providing samples. But Health Canada issued a notice in July 2019 advising that risk management plans cannot restrict access to samples by generic drug manufacturers. After the Bureau started investigating, Otsuka provided samples to the generic drug manufacturer, and the Bureau discontinued its inquiry.

SECURITY CASE BOUNCED

Former security business owner Luigi Coretti was denied leave to bring a private application against Garda World Security Corporation and Quebec's security business regulator, the Bureau de la Sécurité Privée. Coretti claimed that, after he refused to sell his business to Garda, Garda caused his business to fail and caused the regulator to deny him access to permits and licensing. The Competition Tribunal held that Coretti provided no credible evidence that there was a market restriction as defined in s. 77(3) of the *Competition Act*.

Plaintiffs Score Pyrrhic Victory in Price-Fixing Class Action

Class action plaintiffs do not need to show that every class member suffered a loss in order to certify loss as a common issue in a price-fixing class action, the Supreme Court of Canada has ruled.

However, the victory for the plaintiffs may be more apparent than real, as the SCC went on to emphasize that before a court can award damages on an aggregate basis, plaintiffs must either show that all class members have suffered a loss, or show which of them suffered a loss. The Court reiterated that that class actions are procedural only, and do not change the substantive requirements of a cause of action. Where a cause of action requires proof of loss, only class members who have suffered a loss are entitled to recover.

The decision also resolved a number of long-standing issues:

Umbrella purchasers. The Court held that so-called umbrella purchasers can bring an action under the *Competition Act*'s price-fixing provisions. The theory behind umbrella purchasers is that when some, but not all, manufacturers conspire to raise the price of a product, those manufacturers that are not part of the conspiracy will also raise their prices. The price-fixing conspiracy provides an umbrella which makes this possible. The customers of these non-conspirators may thus overpay for the product because of the conspiracy and are known as umbrella purchasers.

Common law causes of action. The Court held that the *Competition Act* does not preclude plaintiffs from asserting common law causes of action, particularly civil conspiracy, that are predicated upon the same breach of the *Competition Act* as a statutory damages claim. This means that plaintiffs can seek relief that was excluded from the ambit of the statutory cause of action by adding common law causes of action to their claim.

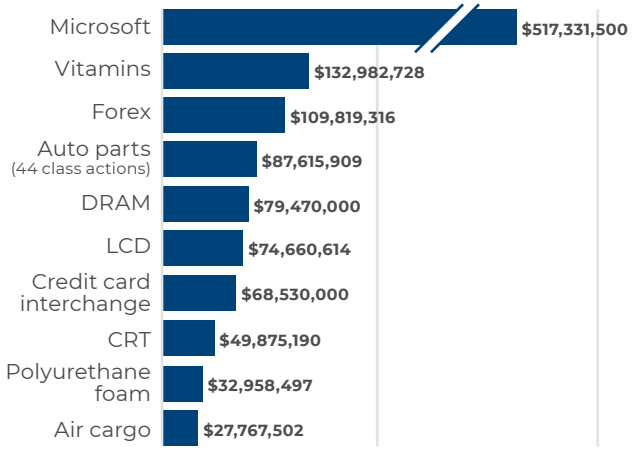
Limitation period. The Court held that the limitation period in the *Competition Act*'s private damages provision only begins to run when the plaintiff discovers the claim. As well, the doctrine of fraudulent concealment can toll this limitation period where it would be unconscionable for the defendant to rely on the advantage gained by having concealed the existence of a cause of action. This means that there is no ultimate limitation period, so long as plaintiffs bring their claim within two years of discovering it.

PRIVATE DAMAGES ACTIONS

CREDIT CARDS AUTHORIZED

A class action alleging a conspiracy among credit card networks and banks to fix interchange fees was authorized by the Quebec Court of Appeal. Courts in BC had dismissed similar allegations that the banks breached s. 45 of the *Competition Act* because the banks were not competitors with respect to the product at issue, namely credit card network services. Section 45 only applies where the conspirators compete in respect of the price-fixed product. The Quebec Court of Appeal refused to follow the BC decisions. The Quebec Court appears to have misread the BC decisions as saying that s. 45 does not apply to a conspiracy that includes competitors and non-competitors, which is not what the BC Court said. Rather, the BC Court emphasized that for s. 45 to apply, there must be an agreement between parties who compete with respect to the product at issue.

Top 10 Class Actions by Total Settlements



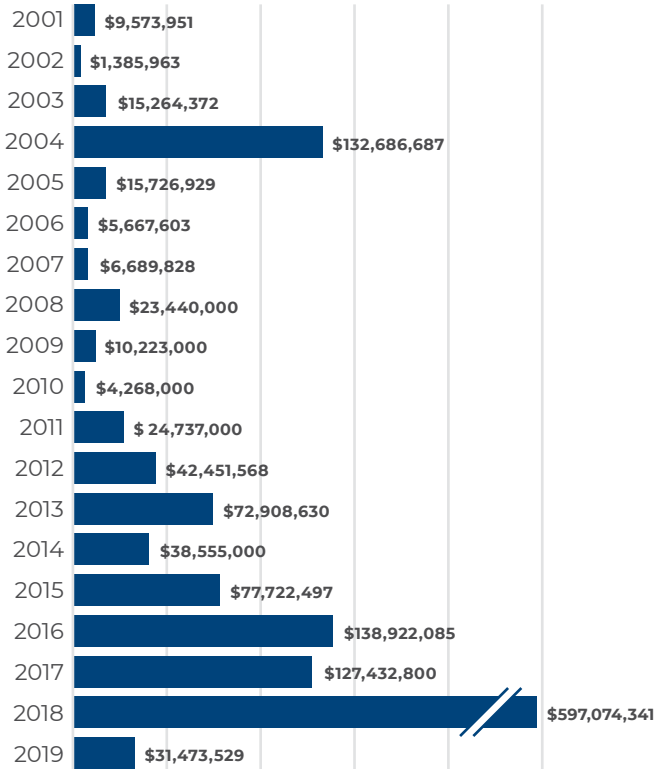
SKUNKED

An agreement between the Liquor Control Board of Ontario and Brewers Retail Inc. that splits the beer market between the two retailers does not violate the *Competition Act* because it is valid under Ontario's *Liquor Control Act*, which exempts it from s. 45 of the *Competition Act*, the Ontario Court of Appeal held. The Court dismissed an appeal by an individual beer drinker and the licensed restaurant he operates.

Total Class Action Settlements in 2019: $31.5 million

Defendant	Class Action(s)	Settlement Amount
Bank of America	SSA Bonds	$750,000
Hitachi	Auto Parts - Shock Absorbers	$1,818,000
HSBC	SSA Bonds	$1,323,529
Maxell	Lithium ion batteries	$393,870
Mitsuba	Auto parts	$9,300,000
Morgan Stanley	Forex	$3,072,110
New NGC	Drywall	$166,400
NGK	Auto Parts - Ceramic Substrates	$2,128,160
Nishikawa	Auto Parts - Body Sealing Parts	$5,750,000
Pabco Building Products	Drywall	$75,000
PLDS (Philips)	ODD	$5,695,000
TK Holdings	Auto Parts - Occupant Safety Systems	$436,700
Toshiba	Lithium ion batteries	$264,760
USG	Drywall	$300,000

Class Action Settlements



Different Approach to No-poach

Agreements between companies not to recruit each other's employees, known as "no-poach" agreements, are a hot topic south of the border, where the US Department of Justice has warned that it may prosecute these agreements as criminal violations of US antitrust law.

No-poach agreements are different from price-fixing agreements. Price-fixing agreements are between suppliers of a product; no-poach agreements are between buyers of a product (in this case, labour).

Under US antitrust law, both supplier-side and buyer-side agreements can be criminal offences under Section 1 of the Sherman Act.

By contrast, Canada's conspiracy provision, s. 45 of the *Competition Act*, targets suppliers, not buyers, of a product. It is unlikely that it could apply to buyer-side agreements such as no-poach agreements. As well, s. 45 only applies to agreements between competitors. Franchise agreements are generally not agreements between competitors. This has not stopped enterprising plaintiffs, however, who have started a class action alleging that clauses that prevent franchisees from hiring each others' employees breach s. 45.

No-poach agreements can be challenged under a civil provision that enables the Bureau to challenge any agreement between competitors that lessens or prevents competition substantially (s. 90.1). No fines or damages are available under this provision.

Canada's different approach to no-poach agreements does not mean that they are a good idea. No-poach agreements provide little benefit but expose parties to the risk of litigation and possible enforcement by the Bureau.

DECEPTIVE MARKETING PRACTICES

DIRTY LAUNDRY

During the course of a fight over the trademark "Speed Queen" between washing machine makers Whirlpool and Alliance, Whirlpool wrote a letter to a distributor about the dispute promising to continue to market Speed Queen products in Canada. Alliance claimed that this letter was false or misleading contrary to s. 52 of the *Competition Act*. The Federal Court disagreed. The Court also held that Whirlpool maintained a common law interest in the trademark, even though its registration had been expunged.

PET INSURANCE

Trupanion's comparisons between its own pet insurance policies and those offered by competitor Petline Insurance Company were not false and misleading, the Federal Court held in denying Petline an injunction.

SLEEP DEPRIVED

The Hudson's Bay Company settled allegations by the Bureau that it falsely inflated mattress prices in order to advertise deep discounts by agreeing to pay a $4 million penalty and $500,000 towards the Bureau's costs. The Bureau also alleged that HBC promoted sleep sets as "clearance" or "end of line" it continued to replenish the stock from manufacturers during these sales.

PRAIRIE CRUZE

A class action alleging that General Motors falsely represented that the Chevrolet Cruze was a safe and reliable automobile, when in fact it suffers from coolant leaks, was certified in Saskatchewan. The plaintiff claims that class members would not have bought the Cruze but for the false representations, and they received less value than they paid for.

WEEDED OUT

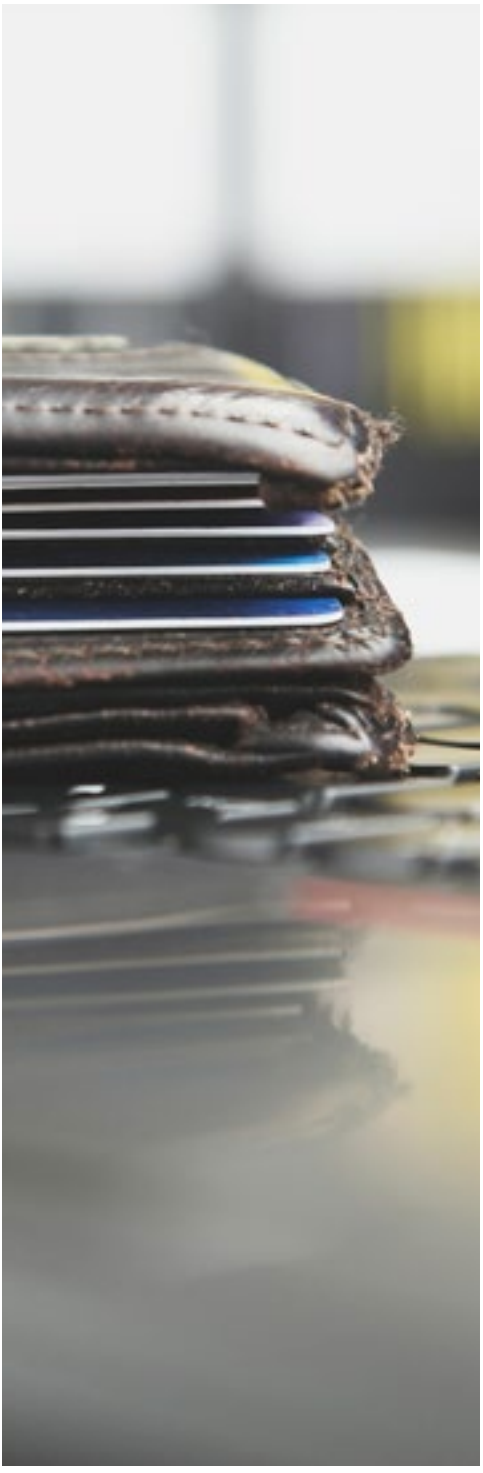
A claim that cannabis supplier Organigram failed to tell the public about health risks from recalled cannabis was an omission, not a "representation," and thus could not support a claim under the *Competition Act*, a Nova Scotia Court held. The plaintiffs also alleged that Organigram made other false or misleading representations, but they failed to plead reliance. The Court allowed the plaintiffs to amend their case to include a reliance claim.

SEAT SELECTION FEES GROUNDED

FlightHub Group Inc., a Montreal-based online travel agency, agreed to make changes to its Flighthub.com and Justfly.com websites in the first ever temporary consent agreement filed under the *Competition Act*. The temporary consent agreement is designed to take the place of a temporary order, or interim injunction, while the Bureau investigates complaints that FlightHub misleads consumers about its seat selection and flight cancellation and rebooking services, as well as the price of flights. According to the Bureau, FlightHub charges consumers a fee for seat selection, yet it does not secure consumers' seat preferences with airlines. Flighthub.com also charges hidden fees for seat selection, the Bureau claims. (See Flighthub Agrees to First Ever Temporary Consent Agreement.)

WEIGHT LOSS IS TEMPORARY

The Bureau is seeking a temporary order to stop Nuvocare Health Sciences Inc. from advertising that its WeightOFF MAX!, Forskolin+, and Foskolin Nx supplements burn fat, cut appetite, and cause weight loss. The Bureau is concerned that these claims are not supported by adequate and proper tests, as required by the *Competition Act*. In March 2019, the Bureau asked Nuvocare to provide test results to substantiate their performance claims. As of March 2020, when the Bureau applied for a temporary order, Nuvocare still had not provided any test results to the Bureau. The application has now been adjourned due to the COVID-19 pandemic.



Service Fees Lead to Penalties

The Bureau has been vigorously challenging so-called "drip-pricing," which is the practice of adding non-optional fees to an advertised price. It maintains that consumers must be able to buy products for the price that is advertised in print or on a webpage, without being forced to pay additional fees.

The most recent drip-pricing enforcement targets were ticket sellers Ticketmaster and StubHub.

Ticketmaster agreed to pay a $4.5 million penalty to resolve allegations that its practice of adding non-optional fees to advertised ticket prices raised prices by 20-65%. The settlement resolves a Tribunal application started by the Bureau in 2018. Ticketmaster has also agreed to stop imposing fees that are not disclosed up front, a practice known as drip-pricing. (See Ticketmaster Pays a Hefty Price for Advertising Unattainably Low Prices.)

StubHub agreed to pay a $1.3 million penalty to resolve similar concerns, although unlike Ticketmaster, StubHub's website allowed consumers to tick a box to see price inclusive of fees. Since the consumer would not see the fee in the initial price without ticking this box, the Bureau concluded that this functionality did not prevent the initial prices from being misleading. StubHub has also agreed to stop drip-pricing.

The Bureau has also pursued drip-pricing cases against rental car companies, furniture stores, and an internet service provider. Including the most recent penalties, the Bureau has collected more than $12 million in penalties for drip-pricing.

Ticketmaster's scalper bots also came under review. The scalper bots can increase prices for consumers, by buying up large amounts of tickets for sporting or entertainment events and causing a perceived scarcity, but, the Bureau concluded, their use does not violate the *Competition Act*.

Class action plaintiffs took a different view, filing claims across the country alleging that claims by Ticketmaster that there are limits on how many tickets a customer can buy are misleading because Ticketmaster facilitates the use of scalper bots.

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Competition & Foreign Investment Group

Our Competition & Foreign Investment Group represents clients in all matters involving the *Competition Act* and the *Investment Canada Act*, including:

- Assisting clients in obtaining clearance of transactions under the *Competition Act* and the *Investment Canada Act*
- Representing clients that are under investigation by the Competition Bureau
- Defending clients in cartel prosecutions and private damages class actions in courts across Canada
- Defending clients in abuse of dominance and other unilateral conduct proceedings in the Competition Tribunal
- Defending clients in misleading advertising and deceptive marketing practices investigations and proceedings under both the *Competition Act* and the *Canadian Code of Advertising Standards*
- Advising clients on all aspects of compliance with the *Competition Act*

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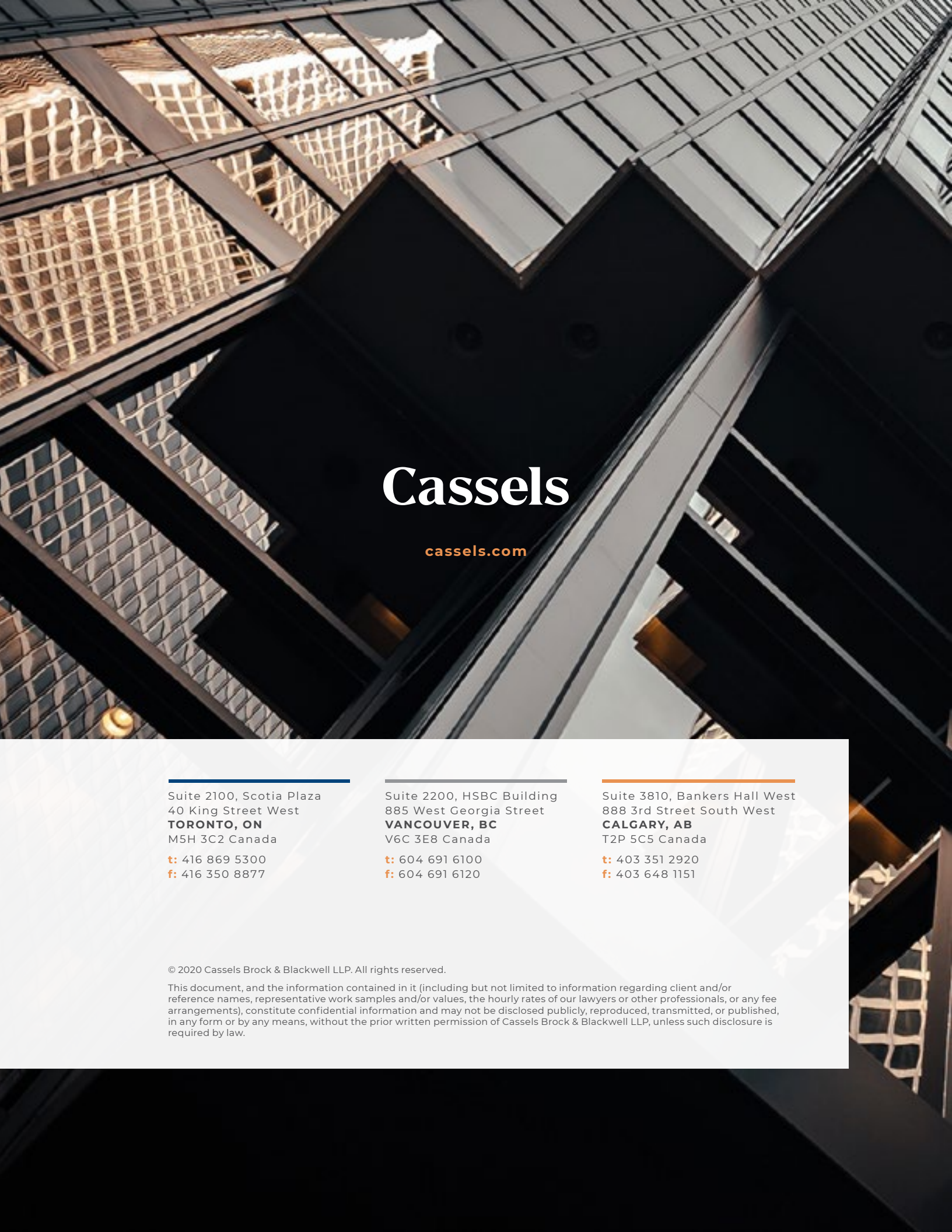

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