

Litigator



COMPETITION LAW REVIEW

Top stories

Hard time for hard core cartels

In 2009, the Parliament passed the most significant amendments to the *Competition Act* in a generation.

The most important of these, implementing a “dual track” criminal/civil regime for conspiracies, came into force on March 12, 2010. Agreements among competitors or potential competitors to fix prices, allocate markets, or control production of a product, are now “per se” criminal offences, punishable by up to 14 years in jail and fines of up to \$25m. Other agreements among competitors, such as joint ventures, fall under the civil regime. The Competition Tribunal can now terminate agreements between competitors that lessen or prevent competition substantially, but cannot order fines or other penalties.

The amendments that came into force in 2009 include:

- Price maintenance was decriminalized. The Tribunal can prohibit price maintenance when it harms competition.
- Dominant firms that engage in anti-competitive conduct can be fined up to \$10m for a first offence.
- Fines for deceptive marketing practices were increased.
- A US-style pre-merger notification process was adopted and wait times were increased.

Class action requirements loosened

Courts in Ontario and British Columbia have made it much easier for plaintiffs to certify class actions seeking damages for price fixing conspiracies. In two cases, the courts relied on the aggregate damages provisions of class action statutes to certify actions on behalf of direct and indirect purchasers for alleged conspiracies to fix prices for **hydrogen peroxide** and **DRAM** memory chips. Both decisions avoided the statutory requirement that liability must be established before damages can be assessed in the aggregate.

In hydrogen peroxide, the Ontario court held that only “potential liability” needs to be established before the aggregate damages provisions can be relied upon. It is not necessary to show that every class member suffered a loss, the court held.

In DRAM, the BC court focused on the restitutionary claims for unjust enrichment and held that a finding of liability is not necessary to trigger the aggregate damages provision because proof of wrongful conduct and the resulting gain is sufficient. The court went further, holding that aggregate damages can be used to establish liability. This decision overrides the statutory requirement that an aggregate assessment of damages is only possible once liability is proven.

These decisions significantly widen the availability of class actions in price fixing cases. They possibly also change the substantive law by eliminating the statutory requirement that in order to recover damages, plaintiffs must demonstrate a loss.

The defendants are seeking to appeal both decisions.

Suncor - Petro-Canada merger gets green light


Suncor and **Petro-Canada** merged, creating a company worth \$43.3b. The Bureau allowed the merger after the parties agreed to sell 104 retail gas stations in southern Ontario and to provide storage and distribution capacity for gasoline in the GTA for 10 years, thereby allaying concerns that the merger would reduce competition in retail and wholesale gasoline markets in Ontario.

Ultramar is buying the storage and distribution capacity and **Husky** is buying 98 gas stations as part of the agreement.

Nadeau's feathers ruffled by Tribunal

New Brunswick chicken processor **Nadeau Poultry Farm Limited** failed in its bid to force **Groupe Westco Inc.** to continue to sell its chickens when the Tribunal dismissed its application under the refusal to deal provisions. Westco, which supplied 75% of Nadeau's chickens for processing, cut Nadeau off after Nadeau refused to sell out to Westco.

The Tribunal found that it was chicken quotas set by marketing boards, not collusion or insufficient competition, which ultimately prevented Nadeau from obtaining adequate supplies of chickens. Westco's refusal to supply Nadeau was unlikely to have an adverse effect on competition because the market would not become more concentrated and Nadeau would not be put out of business.



Proof of individual franchisee losses or damage is not required to establish price maintenance...

Mergers

Canadian and US competition authorities approved of the merger between the world's largest ticketing services supplier, **Ticketmaster**, and the world's largest promoter of live events, **Live Nation**. In order to gain approval, Ticketmaster agreed to sell its ticketing software subsidiary, **Paciolan**, to either **Comcast-Spectacor** or another buyer, and to license its ticketing system for use by **Anschutz Entertainment**, the second largest promoter of live events in Canada and the US.

Dow Chemical agreed to divest a number of its plastics subsidiaries in the Americas in order to gain clearance from Canadian and US competition authorities to buy fellow chemical company **Rohm and Haas**. The Bureau was concerned the merger would likely result in higher prices for the supply of certain plastic products.

The Bureau allowed **Merck** and **Schering-Plough** to merge after they agreed to divest a drug being developed to treat side effects from chemotherapy to **OPK Health** and Merck's interest in the animal health business **Merial Limited**, to Merck's joint venture partner, **Sanofi-Aventis**.

Specialty chemical producers **BASF** and **Ciba** gained approval of their merger in Canada, the US and Europe by agreeing to divest Ciba's indanthrone blue and bismuth vanadate paint pigments.

In order to acquire **CF Industries**, **Agrium** agreed to sell half of its nitrogen-based fertilizer production facility in Alberta to **Terra Industries**, a new fertilizer company in Western Canada.

The **Labatt-Lakeport** saga ended when the Bureau announced on a Friday afternoon that there was insufficient evidence to challenge the merger.

The Bureau is not challenging **XL Foods'** acquisition of the meat packing plant operated by Lakeside, the Canadian subsidiary of **Tyson Foods**.

Pfizer Inc. agreed to sell certain animal pharmaceutical and vaccine products to **Boehringer** in order to gain approval of its acquisition of **Wyeth**.

Criminal

Air France, **KLM** and **Martinair** pleaded guilty and were fined a total of \$10m, **Qantas** pleaded guilty and was fined \$155,000 and **British Airways** pleaded guilty and was fined \$4.5m for price-fixing in an alleged air cargo cartel.

The Bureau's **Quebec retail gas** investigation resulted in guilty pleas from seven more individuals and three more companies. Total fines are now over \$2.7m with jail terms totalling 54 months.

In February, charges were laid against 14 people and seven companies accused of rigging bids to obtain federal government contracts. Several IT service providers allegedly coordinated bids to win and divide government contracts. Two individuals have pleaded guilty thus far.

A prohibition order against 14 companies and 18 individuals operating school buses in Newfoundland requires them to implement a compliance program. The Bureau accused them of rigging bids, fixing prices and allocating markets for **school bus services**.

Private Actions

Rogers was denied an injunction to prevent **Shaw** from acquiring **Mountain Cablevision**, a Hamilton broadband cable business. Rogers alleged that Shaw breached an agreement to refrain from entering the cable market in Ontario, Quebec and Atlantic Canada. Rogers was unable to demonstrate that it would suffer irreparable harm without the injunction.

An Ontario appeal court certified a class proceeding against **Quizno's**, claiming damages for price maintenance and breach of contract. Proof of individual franchisee losses or damage is not required to establish price maintenance, the court held, and thus did not constitute a prerequisite to class certification. The court found that the plaintiffs may rely on an aggregate assessment of damages for the breach of contract claims.

The Saskatchewan Court of Appeal de-certified a class proceeding claiming damages for patients who took **Merck's** anti-inflammatory, **Vioxx**, on the basis of alleged criminal misrepresentations about the health risks. However, the complexity of the claim and the divisions between the class members, meant that a class proceeding was not the fairest and most efficient vehicle for advancing the claim, the court held. The Supreme Court of Canada refused leave to appeal.

A class action on behalf of **gasoline purchasers** was certified after the Bureau announced it had discovered a cartel engaged in gas and diesel price fixing in 4 different regions of Quebec.

Cadbury and **ITWAL**, a retail and foodservice wholesaler, paid \$5.7m to settle a class action seeking damages for fixing chocolate prices.

This is the first time that the Bureau has applied a joint dominance theory to two independent companies that were acting independently.



After twelve years of defending patent infringement litigation, **Apotex's** allegation that **Eli Lilly** and **Shionogi** unlawfully conspired or arranged to allow Eli Lilly to acquire patents for the antibiotic cefaclor failed when the Federal Court held that Apotex's counterclaim came too late and Apotex was unable to prove that it suffered a loss.

The Federal Court of Appeal upheld a finding that **Apotex** had infringed a patent owned by **ADIR** and licensed to **Servier Canada Inc.** over the heart drug perindopril. The court rejected Apotex's defence that the settlement of previous litigation between ADIR and Servier, which resulted in ADIR owning the patent, offended the conspiracy provisions of the *Competition Act*. The settlement did not go beyond mere assertion of patent rights, and thus did not unduly impair competition.

Ice company **Arctic Glacier** lost its appeal of a judgement awarding \$50,000 in damages to its competitor **Polar Ice Express**. Arctic threatened and bribed Polar's customers to stop doing business with Polar.

Reviewable Matters

Waste Services (CA) and **Waste Management of Canada** agreed to restrictions on their contracting practices for commercial garbage collection on Vancouver Island, including maximum terms of two years, maximum one-year renewal terms, no limitation on the right to decline to renew, no right of first refusal or meet or release clauses, and limits on early termination penalties. The Bureau determined that the two companies' market share added up to over 80%, and that they were both employing "similar anti-competitive contracting practices". However the Bureau cited no evidence of coordinated behaviour. This is the first time that the Bureau has applied a joint dominance theory to two independent companies that were acting independently.

The Bureau is challenging the rules governing The Canadian Real Estate Association's **Multiple Listing Service (MLS)** under the abuse of dominance provisions. The Bureau claims that minimum service requirements imposed on real estate brokers who use MLS prevent entry and impede expansion by competitive business models that provide unbundled real estate brokerage services.

Marketing Practices

Rogers agreed to change parts of its "speeds you can count on" advertising campaign in response to a lawsuit by Bell. As a result, Bell was denied an injunction against Rogers. **TELUS**

obtained an injunction preventing Rogers from claiming to be "Canada's most reliable network" as damages would be insufficient to compensate for the harm caused by the continued publication of the ads. The BC Court of Appeal maintained the injunction.

Cogeco clarified its claims that its internet was the "fastest" to resolve Bureau concerns that the ads did not give consumers enough information.

In addition to complaining to the Bureau and suing, plucky Vancouver independent cable, internet and telephone provider **Novus Entertainment** launched an internet and social media campaign accusing **Shaw** of abuse of dominant position and predatory pricing. Shaw, in turn, sued Novus, alleging defamation.

David Stucky pleaded guilty to charges alleging a lottery ticket scam and a sweepstakes look-alike scam targeting persons outside Canada after the Ontario Court of Appeal held that "public" includes people outside of Canada for purposes of the misleading advertising provisions. He was fined \$2m, placed on probation for 18 months, and banned from engaging in any mass marketing for 10 years.

The Federal Court of Appeal held that one-on-one representations made in private to potential customers may be representations made "to the public" for the purposes of the deceptive marketing practices provisions.

The Brick furniture store cancelled an advertising campaign and agreed to compensate customers who received an \$80 mail-in rebate on art purchases. The Brick had not disclosed that the "rebate" was in fact a Brick gift certificate.

Moores Clothing agreed to amend two-for-one designer suit ads that did not adequately disclose that the offer was only valid for specific suits.

Curry's Art Store agreed to pay a \$60,000 penalty for exaggerating discounts. Its price tags showed a "manufacturer's suggested retail" price and a lower "Curry's price", but it never sold products at the higher price.

The Nova Scotia Court of Appeal upheld a lower court ruling that **Go Travel Direct.Com** had engaged in false advertising by running a print ad comparing its temporarily lowered prices with those of **Maritime Travel**.

Seven hot tub retailers agreed to stop suggesting that **Dynasty Spa** products are Energy Star certified, when the products were ineligible for certification.

BioEnergy Wellness agreed to stop making unproven claims that its treatments and products sold at **Energyworks Wellness Centre** in Edmonton could cure or prevent cancer.

Time share operator **Elkhorn Ranch** agreed to pay \$170,000 in fines for misleading participants about the prizes and odds of winning promotional contests.

After a Bureau investigation into misrepresentations over hidden fees, higher rates and talk times, **Phonetime** agreed to refund customers who purchased pre-paid phone cards, and pay \$300,000 in penalties.

Numerous companies and individuals were convicted for business directory and employment opportunity scams and fined a total of \$15.8m. Two individuals received prison sentences. Eight individuals were charged with conducting fraudulent cheque scams targeting the US.

The Long Arm of US Antitrust

Six electronics companies, including **LG, Sharp, Epson Imaging Devices Corporation** and **Chi Mei Optoelectronics** have pleaded guilty and paid fines totalling US\$862m. Nine executives have been charged as a result of the DOJ's investigation into an alleged conspiracy to fix prices for TFT-LCD display panels. TFT-LCDs are used in laptops, computer monitors, televisions, mobile phones, and other electronic devices.

Intel and **AMD** settled their long-running dispute. AMD sued Intel for abusing its monopoly and in turn, Intel sued AMD for licensing and patent infringements. Intel agreed to pay AMD \$1.25b, and the two signed a five-year cross-licensing agreement.

The **Federal Trade Commission** then sued **Intel** for abuse of its dominant market position claiming that the computer chip manufacturer "waged a systematic campaign" to cut off rivals' access to the marketplace.

Packaged ice suppliers, including **Arctic Glacier**, paid fines of US\$18m for price fixing.

Across the Pond

The European Commission fined **Intel** €1.06b in May for abusing its dominant provision by offering hidden rebates to computer manufacturers that bought most of their x86 CPUs from Intel, and direct payments to computer manufacturers to stop or delay the launch of competing x86 CPUs.

Five companies, including **Bridgestone** and **Dunlop Oil & Marine/Continental** paid fines of €131.5m for participating over 20 years in a cartel to fix prices for marine hoses. Guilty pleas in this cartel began in the US as early as 2008 and a consultant and two senior executives were sentenced to jail terms in the UK in 2007.

Microsoft agreed to allow European users a choice among different web browsers, to resolve the Commission's concerns that it was tying Internet Explorer to its operating system.

The Commission also obtained huge fines of €553m each from two participants in a gas cartel that allocated markets over 30 years.

The UK Office of Fair Trading fined 103 construction companies a total of £113m for bid rigging.



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Affleck Greene McMurtry LLP practises competition law and all types of commercial litigation. We act for clients in criminal and civil proceedings and investigations, merger reviews, and provide advice about business practices.

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