

Competition

2018 YEAR IN REVIEW

TOP STORIES

SCC considers the optics

The Supreme Court of Canada granted leave to appeal in the **optical disc drive** price fixing class action. The ODD case provides the Court an opportunity to clarify certain aspects of its earlier price fixing trilogy of cases, and resolve many of the ongoing debates in Canadian price fixing litigation.

The issues before the Court include: what evidentiary burden do class members face on a certification motion to establish “loss” as a common issue; whether “umbrella purchasers” (consumers who bought products

from non-conspirators that were able to raise prices as a result of a conspiracy) have a cause of action against alleged conspirators; whether class members are restricted to seeking price fixing relief under the *Competition Act*, or whether they can also assert claims under the common law; and whether the principle of discoverability applies to the limitation period contained in the *Competition Act*.

The appeal was argued in December 2018, and a decision is expected sometime in 2019.



End of the road for TREB

The Supreme Court of Canada denied leave to appeal in the Toronto Real Estate Board case, bringing an end to the years-long dispute between the Competition Bureau and TREB. The Federal Court of Appeal’s decision upholding an earlier ruling by the Competition Tribunal is now the last word in the case.

TREB was found to have abused its dominant position in the residential real estate brokerage market by enacting certain rules around online usage of TREB’s data. Among other things, the rules in question prevented online real estate brokerages from displaying historical sold prices on online “Virtual Office Websites”. The Tribunal found that these rules substantially prevented dynamic competition in the Toronto residential real estate market by preventing new forms of competition in the market.



PRIVATE ACTIONS AND CLASS ACTIONS



This Dismissal's For You: The **Beer Store** and the **LCBO** successfully moved to dismiss a class action alleging that they had improperly allocated the **Ontario beer market**. The court agreed that the complained about conduct was authorized by law, and was subject to the regulated conduct defence.*

Money in the Bank: **TD** and **BMO** were added as defendants to the **FX** class action, over their objection the claim was statute barred, after class counsel learned of their involvement in the alleged conspiracy from another settling defendant.*



Raining Batteries: In a prelude to the Supreme Court's upcoming **ODD** decision, the Court of Appeal for Ontario decided that there is, indeed, a cause of action for umbrella purchasers in the **lithium ion batteries** case.

Global Justice: The Supreme Court of Canada denied leave to appeal an Ontario decision in the **air cargo** price fixing class action. The earlier decision permitted absent foreign plaintiffs to be part of an Ontario class action so long as proper procedural safeguards existed to protect the interests of these class members.

Disputed Settlement: **Visa**, **Mastercard**, and **National Bank** obtained court approval for settlements in a class action concerning **Visa and Mastercard's payment rules**. The rules were alleged to be part of an anticompetitive conspiracy. The courts rejected an argument made by certain members of the class that the settlement should be rejected because it could be interpreted as releasing future anti-competitive conduct. The approval is under appeal.

Merchants Examined: The non-settling defendants in the **Visa and Mastercard payment rules** class action were granted leave to discover eight class members in addition to the representative plaintiff because of the differing circumstances faced by different types of class members.

Toxic Clause: A joint venture dispute between **Dow Chemical** and **NOVA Chemicals** included a finding that certain of the provisions of a joint venture agreement were unenforceable for contravening s. 45 and s. 90.1 of the *Competition Act*.

Sea Change in BC: British Columbia's class action regime is now an "opt-out" regime for class members thanks to legislative amendments that came into force in 2018.

REVIEWABLE MATTERS



Dial "s" for s. 79: Despite restrictions in contracts that tied the hands of wireless carriers when selling the popular **iPhone**, the Bureau decided not to proceed with a case for abuse of dominance against **Apple Inc.** because it could not find a significant effect on competition.

Fantastic Voyage: A consent agreement was registered in the Competition Tribunal against **Softvoyage Inc.** concerning exclusionary and restrictive contract terms that increased barriers to entry in the **travel-related software business** relating to all-inclusive vacation packages in Canada.



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Document Dump: The Bureau was ordered to produce 1,200 documents relating to its investigation into the **Vancouver Airport Authority's** alleged anti-competitive limits on the number of in-flight catering operators at the airport after the Federal Court of Appeal found that "public interest privilege" is to be determined on a case-by-case, as opposed to categorical basis.

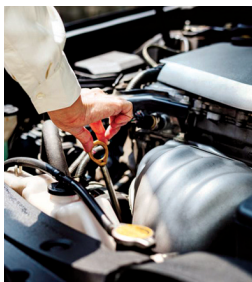
Drug News: The Bureau closed its investigation into the alleged anti-competitive practices of name-brand drug makers **Celgene**, **Pfizer**, and **Sanofi** that restricted generic drug manufacturers from accessing samples of brand name drugs so that they could assure that generic equivalents were safe. The Bureau warned that while there was insufficient evidence to demonstrate that competition had been substantially lessened or prevented, it was going to continue to monitor these practices.

Ebooks Saga: The Bureau reached a settlement with **HarperCollins** to restore price competition for ebooks in Canada following an investigation that found an anti-competitive arrangement between HarperCollins, competing publishers, and **Apple**, which ultimately led to higher prices for Canadian consumers. This settlement followed previous settlements with **Apple**, **Hachette**, **Macmillan**, and **Simon & Schuster** for the same conduct.

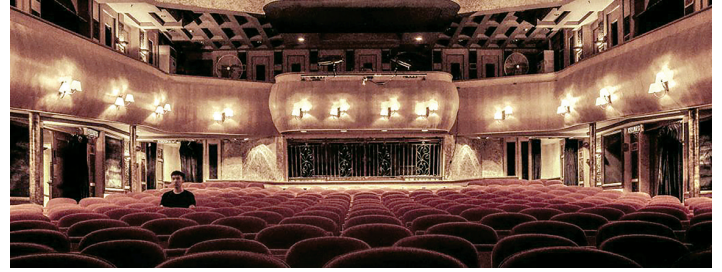
Bad Ending: **Rakuten Kobo Inc.**, an ebook seller, sought to quash the consent agreements noted above, but the Federal Court held that third parties did not have the requisite standing to bring a judicial review application in respect of consent agreements.

Avian Predator?: The Bureau opened an investigation into whether **Westjet's** budget carrier **Swoop** has engaged in predatory pricing of airline tickets.

MARKETING PRACTICES



Emitting Cash: Volkswagen, Audi, and Porsche settled false and misleading advertising claims arising from environmental claims made about certain **diesel engines**. The car makers settled the Canadian class action for \$290.5 million, and agreed to pay an additional \$2.5 million in monetary penalties to the Bureau.



Who Needs Tickets?: The Bureau brought an application against **Ticketmaster** and parent company **Live Nation**, alleging that the advertised price of tickets sold online or through mobile apps were unattainable due to mandatory fees, taxes or charges added later in the purchasing process.*

In the Driver's Seat: The Bureau reached an agreement with rental car companies **Discount** and **Enterprise** to address misleading advertising concerns for car rental prices that the Bureau found to be unattainable due to additional mandatory fees, resulting in consumers paying higher than advertised prices. Discount paid a penalty of \$700,000 and Enterprise paid a penalty of \$1 million.



Couches Away!: Canadian furniture retailers **Leon's** and **The Brick** have agreed to donate \$750,000 in furniture to charities to settle concerns raised by the Bureau about their advertising of "buy now, pay later" financing plans that the Bureau alleged failed to disclose additional fees.*

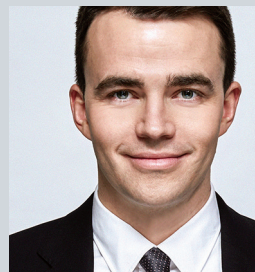
Pump You Up: The Bureau reached an agreement with **Thane Canada Inc.** after an investigation found that claims used to promote electronic muscle stimulation devices were misleading. Thane will pay a \$350,000 administrative penalty and cannot market the devices in Canada for 10 years.

No Relief: The British Columbia Court of Appeal upheld a lower court decision dismissing a misleading advertising claim against **Cold-FX** that alleged it overstated the effectiveness of the product. The class was overbroad and consumers would be unable to determine whether they fell within the class.



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Washed Out: Living Sky Water Solutions Corp failed to maintain a misleading advertising claim against **Soneera Water LLC** and **Soneera Water Canada Ltd.**, as there was no allegation raised that Living Sky had suffered any harm from the alleged conduct.

Short Circuit: Energizer was denied an accounting of profits in its battery advertising case against **Duracell** because there is no such remedy available under s. 52 of the *Competition Act*.

Snake-eyes: The misleading advertising component of a consumer class action concerning video lottery terminals was struck in a claim against the **Atlantic Lottery Corp.** because there were no allegations of loss or damage by class members.

CRIMINAL MATTERS



Read All About It: The Bureau conducted searches at the offices of **Postmedia**, **TorStar**, and **Metroland** in connection with an investigation into alleged anticompetitive conduct regarding local newspapers contrary to the conspiracy and merger provisions of the *Competition Act*.

Wrong Number: An individual was sentenced to two years less a day in jail and three years of probation as part of a Bureau investigation that found that two telemarketing operations in Montreal were using fraudulent tactics.

Crumbling Conspiracy: Criminal charges were laid against four individuals who allegedly conspired to rig bids for 21 City of Gatineau infrastructure contracts between 2004 and 2008.

Hush Hush: On applications by **Sobeys Incorporated** and **Metro Incorporated** for orders requiring the Commissioner of Competition to disclose the identities of certain witnesses in connection with the Bureau's investigation into bread price fixing, the court held the informer privilege continues to protect the identities of the witnesses at this time.

Finish Line: Japanese car parts manufacturer **INOAC Corporation** pleaded guilty for its role in an international bid-rigging conspiracy and was fined \$1.13 million, concluding the Bureau's nine-year investigation into a series of bid-rigging conspiracies among car parts suppliers, which netted a total of 13 guilty pleas and over \$86 million in fines.



MERGERS

It's in the Bag: **Metro Inc.** agreed to sell properties or leases and to terminate franchise, distribution and associated agreements located in certain local markets in Quebec following its acquisition of **The Jean Coutu Group (PJC) Inc.**

You Reap what you Sow: **Bayer AG** got the green light to acquire **Monsanto Company**, a merger valued at over \$60 billion USD. Bayer reached a consent agreement with the Bureau to sell certain of its assets in the canola industry to **BASF SE**.

Change the Channel, Merci: The Bureau denied **BCE Inc.**'s proposed reacquisition of French channels **Historia** and **Séries+** from **Corus**. BCE's 50 percent interest in **Historia** and **Séries+** was divested to **Corus** in 2014 as part of a consent agreement between the Bureau and **BCE** to address competition concerns in the broadcasting industry regarding its acquisition of **Astral Media Inc.** in 2013.

Let It Flow: Calgary-based energy transportation service provider **Pembina Pipeline Corporation** received clearance from the Bureau to acquire **Veresen Inc.**

Big Chem: The Bureau will not challenge the merger between **Linde AG** and **Praxair, Inc.**, both global companies involved in the supply of various industrial gases and related products. **Linde** divested its Canadian business to **Messer Canada Inc.** as part of its deal with global competition authorities.

*Additional analysis; download or subscribe: thelitigator.ca



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MERGERS



La Coop fédérée acquired **Cargill Limited's** Ontario grain business, and as part of an agreement with the Bureau will divest several of Cargill's retail locations in southwest and central Ontario.

The Bureau issued a no action letter in **United Technologies Corporation's** acquisition of **Rockwell Collins, Inc.**

The **transaction size threshold** for pre-merger notifications was increased to \$92 million.

GENERAL

Tip Line Tune-up: The Bureau and the Public Prosecution Service of Canada launched updated **Immunity and Leniency Programs** that set out incentives for parties to come forward to seek immunity or leniency in return for their cooperation in a Competition Bureau Investigation and subsequent prosecution of others involved in unlawful conduct.

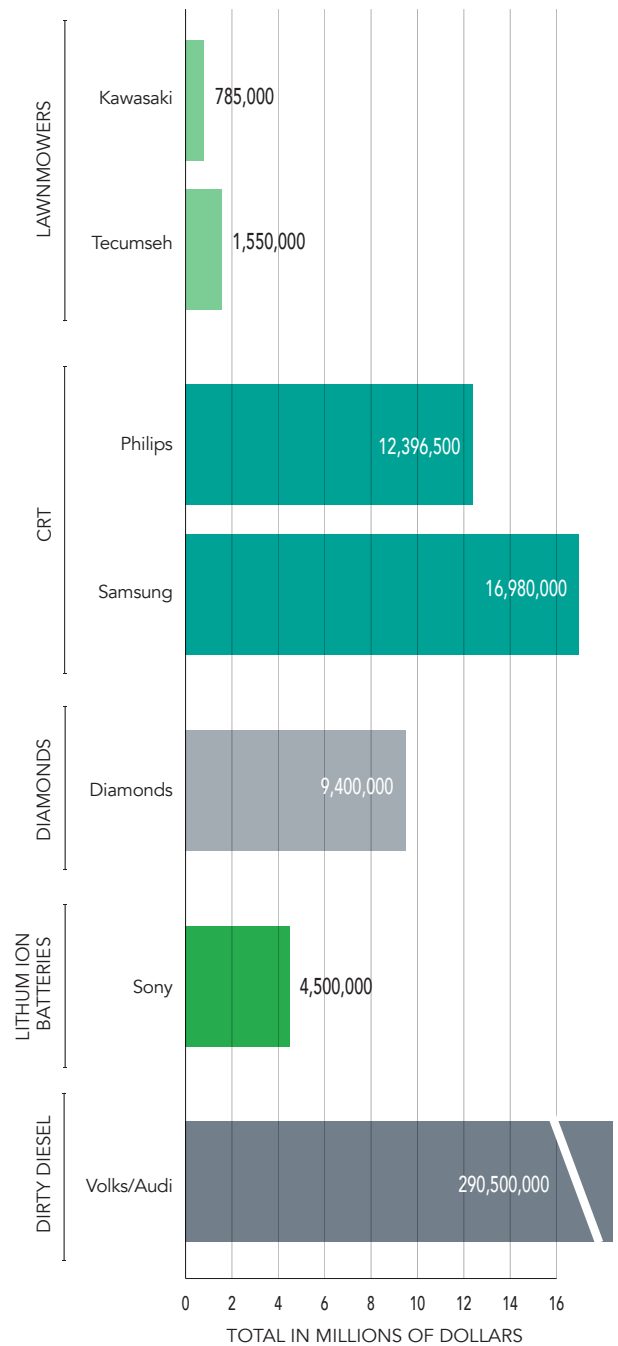
Draft Guidelines Circulated: The Bureau circulated new draft versions of its updated **Abuse of Dominance Enforcement Guidelines** and its updated **Intellectual Property Enforcement Guidelines** for comment within the legal and business communities. Final versions of these guidelines are expected in 2019.

Barrier Busters: The Bureau released an information bulletin explaining how it selects and carries out **market studies**. Market studies involve examining a particular market to identify barriers to competition.

Data Deluge: The Bureau released a report exploring the interplay between competition policy and enforcement and the world of "big data". The report examined the Bureau's approach to big data issues in mergers, monopolistic practices, cartels, and deceptive marketing practices.

*Additional analysis; download or subscribe: thelitigator.ca

CLASS ACTION SETTLEMENTS 2018



CANADA'S COMPETITION LAW

Canada's *Competition Act* applies to all businesses and business activities in Canada. All companies doing business in Canada need to be aware of the Act, as penalties for breach of its provisions can be quite severe.

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