Cartels

Enforcement, Appeals and Damages Actions

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Canada

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Overview of the law and enforcement regime relating to cartels

Statutory regime

Cartel conduct is a serious criminal offence in Canada, attracting the highest penal and financial penalties of any "corporate crime" in Canada. Canada's cartel prohibitions are set out in Part IV of the *Competition Act* (the "**Act**"),[1] which is a federal law of general application that applies to all conduct which either occurred in, or has effects in Canada.[2]

The main prohibition is set out under section 45, which criminalises agreements between competitors or potential competitors to fix or control prices or output, or to allocate sales, territories, customers or markets for the supply of any good or service. Section 45 is a *per se* offence, such that proof of anti-competitive effects is not required to establish culpability. Given the provision's reference to supply, the Canadian Competition Bureau (the "**Bureau**") has indicated in its guidelines that section 45 does not apply to agreements which relate only to the purchase of products, i.e., joint purchasing agreements.[3]

A corporation is also prohibited under section 46 from implementing a "directive, instruction, intimation of policy or other communication" from a person outside of Canada to give effect to a "conspiracy, combination, agreement or arrangement" that would have contravened section 45 had it occurred in Canada. The communication must come from a person who is "in a position to direct or influence the policies of the corporation".

Section 47 criminalises agreements to submit pre-arranged bids or providing that one or more of the parties will not submit a bid or will withdraw a bid. As with the conspiracy provision, bid rigging is *per se* a criminal offence. Section 49 prohibits federal financial institutions from entering into certain agreements related to interest rates, loans, and other services.

The Commissioner of Competition (the "**Commissioner**") and his department, the Bureau, are responsible for investigating alleged violations of the Act, including the cartel provisions. They can refer cartel matters to the Public Prosecution Service of Canada (the "**PPSC**") for prosecution.

As with other criminal offences, Canadian constitutional law affords protections to firms and individuals under investigation or being prosecuted for cartel conduct (e.g., the presumption of innocence, the protection against self-incrimination, the right to counsel, etc.).[4]

While cases may be prosecuted in either the provincial superior courts or the Federal Court Trial Division, contested cartel cases in Canada are uncommon and more typically, prosecutions are resolved by way of a plea agreement submitted to a provincial superior

court.[5] In the case of international cartels, a company typically will enter into a plea agreement in Canada once it has pled guilty to conspiracy in the US, or sometimes elsewhere. While there is no limitation period for the prosecution of cartel conduct in Canada, the Bureau can exercise its discretion to discontinue an investigation and not refer past conduct to the PPSC.[6]

The Bureau has published several guidelines in respect of its enforcement approach to the cartel provisions of the Act. In May 2009, the Bureau published its *Competitor Collaboration Guidelines* which describe the Bureau's approach in applying the cartel and competitor collaboration provisions of the Act, and outline the competition issues that may arise from collaborations.[7] In June 2015, the Bureau published an updated *Corporate Compliance Programs* bulletin, setting out the Bureau's view of the essential components of a credible and effective programme and appending a model compliance programme framework for companies to use, a certification letter for employees, and a due diligence checklist.[8] The Bureau also released a final version of its *Competition and Compliance Framework* bulletin in November 2015, which explains the outreach, enforcement and advocacy instruments the Bureau utilises to promote compliance with the Act.[9] The Bureau recently updated its Immunity and Leniency Programs, to reflect the Bureau's current approach to the administration of these programmes. In September 2018, the Bureau released a revised version of its Immunity and Leniency Program bulletin, which is discussed in greater detail below.[10]

Penalties

The penalties for a violation of the cartel provisions are potentially quite severe. A violation of section 45 (conspiracy) or section 47 (bid rigging) carries a possible term of imprisonment of 14 years. Maximum fines for conspiracy are Can$25m per count (and a person may be convicted on multiple counts), and there is no maximum fine for bid rigging (or the implementation of a foreign directive). A plea agreement may contemplate sanctions other than those prescribed by the Act, including the disqualification of individuals from holding certain offices within a company or asset forfeiture.

The fundamental principle of sentencing in Canada is that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. The general principles of sentencing law in Canada require that judges consider sentences imposed on similar offenders in similar circumstances; however, there are no formal sentencing guidelines or rules. It is standard practice in Canada for the PPSC to make formal submissions on sentencing to the court considering the plea agreement, if one exists.[11]

The magnitude of the economic harm caused by a cartel goes to the gravity of the offence. The usual notion of "economic harm" from a cartel is the "overcharge". This is the amount paid by victims of the cartel over-and-above what they would have paid for the products in the absence of the conspiracy. The Bureau will normally recommend that the fine be greater than the overcharge to ensure that the fine is not "simply a cost of doing business" and to ensure that an appropriate level of punishment and deterrence is achieved.

In most cases it is difficult to quantify the overcharge resulting from cartel behaviour. In such cases, the Bureau typically will use 20% of the volume of commerce affected in Canada (e.g., the value of the conspirator's sales of the products in Canada over the relevant time period) by the cartel participant as a proxy for the economic harm and as the starting point for its sentencing assessment (provided it is not above the maximum allowable fine); this is said to be made up of 10% for the assumed overcharge and 10% for deterrence.

In a conspiracy matter involving multiple counts, the resulting fines may exceed the statutory

maximum for one count. In dealing with multiple counts, the Bureau will consider the totality of the conduct and surrounding circumstances to arrive at the appropriate sentencing recommendation.

In reasons delivered in *R v. Maxzone Auto Parts (Canada) Corp*,[12] Crampton C.J. emphasised the need for a full evidentiary record and detailed submissions for the court to become satisfied that a sentence arrived at by plea agreement is in the public interest and would not bring the administration of justice into disrepute.[13] The submission should set out the aggravating, mitigating and other sentencing considerations, some of which are not always submitted as a matter of course, including the amount of illegal profits attributable to the conduct, the economic harm attributable to the conduct, and whether the corporate defendant has paid restitution. Additional requirements may need to be met with respect to individual defendants. The Commissioner has stated publicly that despite the greater detail required in sentencing submissions, companies have continued to come forward seeking leniency, and the Bureau and cooperating parties have managed to work with the framework set out by Crampton C.J. Indeed, since the release of the decision, there does not appear to have been a significant change in the number or type of cases resolved by plea in Canada.

In addition to criminal penalties, plaintiffs in third-party civil actions can recover damages, as well as investigation costs and costs to bring the proceeding. Moreover, provincial asset forfeiture statutes allow for the confiscation by the Crown of proceeds of crime as well as offence-related property.[14]

There are business implications to convictions as well. For example, bidders for federal government contracts must comply with the requirements set down by Public Services and Procurement Canada ("**PSPC**"), the department that provides procurement services to the Canadian Federal Government.[15] These requirements prohibit any bidder from bidding on a contract where it or its affiliates have been convicted of certain offences, including criminal offences under the Act and even equivalent foreign offences. These requirements are part of the Government of Canada's Integrity Regime, which outlines requirements for suppliers contracting with the Federal Government.[16] The regime has been enhanced several times since first published. In the fall of 2018, the Government released a draft updated policy, which was followed by a public consultation.[17] The final enhancements are expected to come into effect in January 2019. The enhancements:

- introduce greater flexibility in debarment decisions (rendering companies ineligible from receiving federal contracts or real property agreements);
- increase the number of triggers that can lead to debarment;
- explore alternative measures to further mitigate the risk of doing business with organised crime; and
- expand the scope of business ethics covered under the regime into key areas such as combatting human trafficking and the protection of labour rights and the environment.

Administrative settlement

Convictions in the context of cartels have to date been obtained almost exclusively through the plea bargaining process. In addition to, or *in lieu* of, a plea agreement for criminal conduct, section 34(2) of the Act provides a mechanism whereby a person can consent to a prohibition order. The order may appear very similar to a plea agreement (e.g., include conditions for the payment of a monetary penalty, a prohibition on individuals holding certain offices, etc.), but will not result in a criminal conviction or criminal record. The Bureau typically will not seek prohibition orders *in lieu* of plea agreements.

Alternative track

The Commissioner can also prosecute competitor collaborations under section 90.1 of the Act. Under this section, the Commissioner can apply to a specialised competition court, the Competition Tribunal (the "**Tribunal**"), to prohibit the continuation or entry into an agreement or arrangement between competitors. Responsibility for enforcing section 90.1 lies exclusively with the Commissioner and a decision to commence proceedings under section 90.1 bars the PPSC from prosecuting the conduct criminally.[18] The Tribunal may issue a prohibition order where it finds that an agreement prevents or lessens, or is likely to prevent or lessen, competition substantially in a market. The Tribunal may not, however, impose other penalties (e.g., fines or imprisonment) and no private right of action for damages exists with respect to conduct governed by section 90.1.[19]

Cartel investigations

Fact-gathering tools

Cartel conduct typically will come to the Bureau's attention in a number of ways. Most commonly, a person or firm will approach the Bureau under the Immunity Program (described below) and seek immunity in respect of cartel conduct. Sometimes companies that are affected by a cartel will complain to the Bureau about cartel conduct involving their suppliers or customers. If the Bureau finds the complaint to be credible, it can investigate the complaint using its many information-gathering powers. When cartel investigations in other foreign jurisdictions become public, the Bureau is increasingly pursuing investigations on its own accord. In addition, the Bureau may discover possible cartel conduct in the course of another matter such as a merger review.[20]

The Commissioner also has extensive powers to obtain information through search warrants, orders for the production of data, and records and wiretaps. Search warrants may be obtained by means of an *ex parte* application pursuant to section 15 of the Act. Under this section, the court must be satisfied that there are reasonable grounds to believe a criminal offence has been committed and that relevant evidence is located on the premises to be searched. It is a criminal offence to prevent access to premises in Canada or otherwise obstruct the execution of a search warrant. The Act also provides special procedures for sealing privileged documents and for determining the validity of privilege claims within a certain time frame. The Bureau also has the power to investigate cartel behaviour through wiretaps, although it requires prior judicial authorisation in order to do so.

Warrants are not subject to appeal, but can be reviewed where there has been material non-disclosure or misrepresentation in the affidavit supporting the Commissioner's *ex parte* application. Targets may also request a retention or privilege hearing.

The Bureau can apply to the courts for production orders or orders for oral examination under section 11 of the Act. The Bureau will generally only use section 11 while in the initial fact-gathering stage. If the Bureau has a reasonable belief that a crime has been committed, it will typically obtain a search warrant instead.

Section 11(2) of the Act also provides that the Bureau may seek on an *ex parte* basis, and the courts may issue, a production order in respect of a foreign affiliate of a Canadian corporation when: (i) the Bureau has sought a similar order in respect of the domestic subsidiary; and (ii) the Bureau can establish that the foreign affiliate has records that are relevant to an inquiry.

In *Canada (Commissioner of Competition) v. Pearson Canada Inc.*[21] and *Canada*

(Commissioner of Competition) v. Indigo Books & Music Inc.,[22] Crampton C.J. provided guidance on the Bureau's burden in obtaining production orders and a respondents' ability to challenge such orders, notably rejecting challenges based on discovery being available in other ongoing proceedings or the existence of other persons who might have relevant information or records. In *Canada (Commissioner of Competition) v. Bell Mobility Inc.*,[23] Crampton C.J. provided further guidance regarding the relevant time period for what constitutes an excessive, disproportionate or unnecessary burden on respondents in relation to a production order; specifically, he explained that the Commissioner's information requirements should be tailored to the individual investigation and where a "reasonable efforts" standard is feasible (i.e., where a "reliable, representative amount" of information, as opposed to an order to produce all information over a lengthy time period, would be sufficient to prove the Commissioner's case), it should be negotiated by the parties and applied.[24]

Section 29 of the Act protects the identity of informants and requires that the Bureau hold confidential any information provided by informants under the search and seizure powers of the Act.

In international cartel cases, the Bureau will often work closely with other competition agencies either through formal procedures, involving the application of mutual legal assistance treaties ("**MLAT**s"), or through reliance on Canada's competition cooperation agreements to obtain information. Currently, Canada has MLATs or competition cooperation agreements with most major jurisdictions including the US, the EU, Japan, Australia, Brazil and others.

Immunity and Leniency Programs

Canada's Immunity and Leniency Programs are of integral importance to cartel enforcement. Although no statistics are available publicly, it can be safely assumed that the Immunity and Leniency Programs assist the Bureau in the vast majority of its investigations.

In Canada, the Bureau will assign an "immunity marker" to an individual or a company that is "first-in", or first to request immunity, often called the "immunity applicant". Where a party does not qualify for immunity (i.e., the party is not "first-in") but the party cooperates with the Bureau, often called the "leniency applicant", the Bureau typically recommends that the prosecution grant some form of leniency, in the form of a reduced financial penalty and/or deferral of prosecution of any individual related to the leniency applicant.

To obtain immunity or leniency, the requesting party must provide evidence of an offence of which the Bureau is currently unaware, or of which the Bureau is aware but on which the Bureau has not yet obtained enough proof to mandate a criminal referral to the prosecution (a "**proffer**"). The party also must terminate its participation in the illegal activity and must not have coerced others to be a party to the illegal activity. The party must commit to full cooperation throughout the entirety of the Bureau's investigation and the PPSC's prosecution of the case *vis-à-vis* any other party.

Once a party has received a marker and has indicated to the Senior Deputy Commissioner of Competition of Criminal Matters (the "**SDC**") that it wishes to participate in the Immunity or Leniency Program, the SDC will confirm the continuation of the marker, usually for a period of 30 days, in order for the applicant to provide a proffer. If the proffer is not provided on a timely basis, the marker may be lost. Once the Bureau has concluded that the applicant has demonstrated its capacity to provide full cooperation, it will provide the Director of Public Prosecutions (the "**DPP**") with a recommendation regarding the applicant's eligibility. Under the new Immunity and Leniency programme released in September 2018, the DPP

will then decide whether it wants to grant the applicant a Grant of Interim Immunity (a "**GII**").[25] The GII is a conditional immunity agreement that sets out the applicant's ongoing obligations it must fulfil before the DPP will finalise an immunity agreement. All identified current directors, officers or employees will be included under the GII if they admit their knowledge of or participation in the unlawful conduct and provide full cooperation. Former directors, officers and employees may qualify on the same terms, though the Bureau will decide on a case-by-case basis. This is a departure from the previous programme, where all directors, officers and employees received automatic immunity. The DPP may revoke the GII if the applicant does not comply with its terms. Once the applicant has satisfied its obligations under the GII, such that the applicant's assistance is no longer required, the Bureau will make a recommendation for a final grant of immunity. The GII system is a departure from the previous programme, which involved a single and final grant of immunity.

Participation in the Immunity and Leniency Programs is voluntary, confidential, and on a (as against the participant) "without prejudice" settlement privileged basis. Applicants should be aware, however, that in 2015, the Ontario Superior Court in *R. v. Nestlé* held that "factual information" disclosed (as opposed to legal arguments or procedural submissions made) by a participant in the Immunity and Leniency Programs is not settlement-privileged and, even if it were settlement-privileged, an exception must be allowed to accommodate the Crown's duty to disclose relevant evidence to a defendant in a criminal proceeding.[26] The new Immunity and Leniency programme also introduces a protocol for identifying, reviewing and adjudicating privilege claims by applicants. After the GII stage, the applicant must provide notice to the Bureau of its privilege claims. The Bureau will then refer the information to the DPP. If the DPP is not persuaded by the applicant's privilege claim, it will either agree to appoint an independent counsel to resolve the claim or ask a court to rule on the matter.

Immunity is granted only to the first participant involved in a conspiracy to come forward. Under the new Immunity and Leniency Program, all subsequent leniency applicants are eligible for a cooperation credit for up to a 50% reduction in the fine that would otherwise have been recommended by the Bureau to the prosecution. Rather than providing credit on a first-come, first-serve basis, under the new programme, the amount of credit awarded will be based on the value of the applicant's cooperation. This is a significant change from the previous programme, where only the first leniency applicant received a 50% credit and subsequent applicants would be granted a reduced credit. As with immunity applicants, current directors, officers or employees must admit knowledge of or participation in the unlawful conduct and provide full cooperation to receive the benefit of a company's leniency application. Former directors, officers or employees may also qualify under the same conditions, though the Bureau will decide on a case-by-case basis. In addition, the length of the offence period is typically a matter of negotiation with the authorities where the party cooperates with the investigation; the period determined to be relevant, for example, in US proceedings, can have a bearing on the period used in Canada. In addition, the Bureau may consider (and recommend that the courts consider) the pre-existence of a "credible and effective" compliance programme as a mitigating factor when assessing a fine against a firm charged with a cartel offence.

"Immunity Plus" is available should a company provide the Bureau with probative evidence of a second conspiracy or other criminal conduct unrelated to the Bureau's current investigation, or in respect of products not presently being examined by the Bureau under its current investigation. Immunity Plus status provides immunity with regard to the "additional" conspiracy or criminal conduct, as well as an additional discount (generally in

the range of 5% to 10%) for the initial criminal conduct, although this amount may increase depending on the extent of the party's cooperation.

The Bureau typically will not share the identity of an immunity or leniency applicant, or the information provided by the applicant with a foreign law enforcement agency, unless the applicant provides a waiver giving the Bureau consent to do so or it is required by law to do so. As part of an applicant's ongoing cooperation, under either the Immunity or Leniency Program, the Bureau expects the applicant to provide waivers allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity or leniency. The request for a waiver, however, is typically limited to the jurisdictions which are most relevant to the case in Canada. At times, the Bureau may be willing to accept a limited waiver (e.g., allowing the agencies to discuss only certain information), if legitimate reasons for doing so are provided. Eventually, however, the applicant may be required to provide a full waiver allowing for the sharing of any information the Bureau obtains in the course of cooperation, including documents. As a matter of practice, there tends to be minimal document exchange (the agencies have often received production of the same documents) and moderate oral exchanges between the agencies.

Strict confidentiality as to the identity of informants may reduce potential exposure to civil actions for immunity and leniency applicants; however, once guilty pleas are entered, leniency applicants are readily exposed to third-party actions for damages. The information provided by immunity and leniency applicants is subject to strict confidentiality agreements with the Bureau. Third parties seeking damages cannot require, without a court order which the Bureau will resist, the Bureau to disclose information obtained from leniency and immunity applicants in their investigations, and thus their exposure to damage actions is limited to the material made publicly available.[27] Potential immunity and leniency applicants should be aware that plaintiffs in private actions may rely on the Supreme Court of Canada's (the "**SCC**") decision in *Imperial Oil v. Jacques* (discussed below) to obtain access to certain Bureau files and information obtained during a criminal investigation. However, such access is limited by *Canada (Attorney General) v. Thouin* (discussed below), where the SCC held that in a price-fixing class action in which the government is not a party, Bureau investigators cannot be compelled to be examined for discovery.

Duration of investigations

The duration of time from the receipt of an immunity marker to the end of the immunity applicant's cooperation obligations is highly case-specific. Indeed, the timing has ranged anywhere from one to 10 years following the initiation of an investigation through, for example, a dawn raid(s).[28] This timing will depend on a number of factors including: the number of participants in the cartel; the duration of the conduct; the affected volume of commerce; the extent to which that commerce directly or indirectly affects Canadian consumers; the jurisdiction where the conduct occurred; the location of the principal witnesses and evidence; and the timing considerations of other enforcement agencies (principally, the US Department of Justice).

Overview of cartel enforcement activity during 2018

Cartel enforcement activity can be measured in terms of new charges laid, convictions obtained, number of investigations under way, and international efforts.

Convictions obtained and charges laid

The PPSC obtained a total of two guilty pleas – one against a company and one against an individual, both in bid rigging cases (compared to a total of eight guilty pleas against one

individual and seven companies in 2018). The company's conviction concluded the Bureau's investigation of a series of international bid rigging conspiracies amongst car part suppliers. The company received a $1.3 million fine.[29] The individual convicted was found guilty of bid rigging contracts for street lights in Québec.[30] The conviction followed an investigation assisted by the Bureau's immunity programme. The Superior Court of Québec also acquitted one individual charged with bid rigging. In the Court's view, the prosecution failed to prove that the alleged bid rigging occurred in the context of a "call or request for bids or tenders", because the invitation for bids did not contain the following essential attributes: (i) a close relationship between the request and the submitted bids; (ii) the project must be defined and sufficiently circumscribed; (iii) the person making the call or request must undertake to treat all bidders fairly; and (iv) there must be an expectation that the call for bids will create a contract between conforming bidders and the person making the call.[31] Finally, in June 2018 four individuals were charged with bid rigging in the engineering industry.[32]

Investigations

In March 2018 the Competition Bureau initiated an investigation into an alleged conspiracy between newspaper companies Postmedia and Torstar. In November 2017, the companies announced the completion of a transaction involving the transfer of 41 community and daily newspapers in the Province of Ontario. The same day, the parties announced that 36 of the 41 newspapers would be closed immediately. In March 2018, the Bureau conducted searches at Postmedia and Torstar's offices. Shortly thereafter it issued a statement confirming that it was investigating an alleged conspiracy and conducting a separate review under the merger provisions of the Act. In December 2018, the Bureau received a court order allowing it to interview several employees under oath in order to advance the investigation. As at the time of writing, no charges have been laid.[33]

The Bureau's investigation into price-fixing of fresh commercial bread, which it initiated in October 2017, remains ongoing.[34] As at the time of writing, the Bureau has yet to lay charges.

International efforts

In 2018, the Bureau advanced its inter-agency cooperation agenda by: (i) reinforcing existing relationships with the Department of Justice's Antitrust Division and the Federal Trade Commission of the United States, the Federal Economic Competition Commission of Mexico and, the European Commission of the European Union and the Vietnam Competition Authority;[35] (ii) participating in an interchange with the Australian Competition and Consumer Commission ("**ACCC**") by welcoming an ACCC staff member to its senior management team as the Senior Deputy Commissioner of the Bureau's Cartels and Deceptive Marketing Practices Branch;[36] and (iii) promoting best practices in international cartel enforcement by participating in the Eurasian Antitrust Forum in Kazakhstan,[37] the International Competition Network's 17th Annual Conference,[38] American Bar Association's International Cartel Workshop,[39] and a workshop by the Asia-Pacific Economic Cooperation's Economic Committee in Vietnam.[40]

Private enforcement of cartel laws

The primary cause of action for the private enforcement of cartel laws is found under section 36 of the Act, which confers a private right of action on any person in Canada that has suffered a loss or damage as a result of a breach of one of the criminal provisions of the Act.[41] In addition to damages suffered, plaintiffs can sue to recover investigation costs and costs to bring the proceeding, but unlike the US, a plaintiff is not entitled to treble damages.

Proceedings may be commenced in the provincial courts or the Federal Court and typically arise by way of class action. Limitation periods apply but case law is not settled on whether the discoverability principle applies to toll the period until concealed conduct is discovered,[42] although the trend is clearly towards the application of this principle. The lack of a conviction or even the refusal of the Commissioner to investigate a potential violation of the cartel provisions does not bar a third-party action. That being said, a prior conviction for the offence is, absent evidence to the contrary, proof of liability. As a consequence, once a person or firm admits to cartel conduct as part of the Bureau's Leniency Program, with such conviction, *prima facie* proof is made of the violation of the law. In practice, where an investigation becomes public or a conviction is announced, all potential participants, including an immunity applicant, become the subject of a class action in one (and normally more) provincial court(s) in Canada.

Key issues in Canadian cartel policy

In 2018, courts continued to confront key issues in Canadian cartel policy, including (i) the nature of harm that indirect purchasers must demonstrate to be certified as a class, (ii) whether umbrella purchasers are able to bring claims against price-fixing conspirators, (iii) whether the Act is a complete code intended to displace concurrent common law conspiracy causes of action, and (iv) the application of limitations and the discoverability principle to s.36 of the Act. These issues came to a head in December 2018, when the Supreme Court heard the *Godfrey* cases (*Pioneer Corp. v. Godfrey*[43] and *Sony Corp v. Godfrey*[44]), which dealt with all four hotly debated competition issues. The Supreme Court is expected to provide additional clarity on these issues in its decisions, which had not been rendered as at the time of writing.

Indirect purchaser actions

In October 2013, the SCC issued its most anticipated decisions regarding competition law related private actions, allowing indirect purchasers to bring civil cases against upstream suppliers. In a trilogy of cases, *Pro-Sys Consultants Ltd v. Microsoft Corporation*, *Sun-Rype Products Ltd v. Archer Daniels Midland Company* and *Infineon Technologies AG v. Option consommateurs*, the SCC held that indirect purchasers are not foreclosed from claiming losses passed on to them, and that the risk of double or multiple recoveries in actions brought by both direct and indirect purchasers could be managed by the courts.[45] However, the SCC noted that in bringing their actions, the indirect purchasers assume the burden of establishing that they have suffered loss. Whether they have met their burden of proof is a factual question to be decided on a case-by-case basis.

The SCC rejected the "robust and rigorous" standard used in the US to establish a common claim of loss at the certification stage and affirmed that the plaintiffs, at least in British Columbia and Ontario, need only advance a "sufficiently credible" methodology to do so. Although plaintiffs can point to multivariate regression as an accepted methodology to establish overcharge, establishing a methodology for pass-through will prove more difficult. In addition, the SCC required that the plaintiffs demonstrate the availability of underlying data to support the methodologies advanced by the certification expert. Such data may not always be in the defendants' possession (and could very well be in the possession of foreign persons/companies), particularly if the defendants are located several levels up the distribution chain. Since the release of the SCC trilogy, the required standard of commonality for indirect purchasers has continued to raise confusion. Most recently, the BCCA in *Godfrey* adopted a broad interpretation of the trilogy, holding that the commonality requirement is

satisfied where the plaintiffs present a plausible method for demonstrating that the overcharge reached the indirect purchaser *level* of the distribution channel (and not each individual within that level).[46] The Supreme Court is expected to address the issue in its decision.

Since the SCC trilogy, courts have certified class actions in cases involving contested issues significantly complicating the determination of commonality of injury, such as network effects and differences in bargaining power.[47] In 2018, courts in British Columbia and Ontario continued to grapple with the issue of whether the ability to bring civil cases extended to so-called "umbrella purchasers", i.e. individuals who did not buy products directly from the defendants but nonetheless claim damages based on the fact that the alleged conspiracy drove market prices up, including the prices they paid to non-conspirators. In 2017, the BCCA held in *Godfrey* that it is not plain and obvious that umbrella purchasers do not have a cause of action under the Act and upheld the certification of a class action including all purchasers, with non-umbrella purchasers as a sub-class.[48] That same year, the Ontario Divisional Court had reached the opposite conclusion when it upheld the decision of a motions judge to deny certification of an umbrella purchaser claim on the basis that it would expose the respondents to indeterminate liability.[49] In December 2018 the Ontario Court of Appeal overturned the Divisional Court and allowed the umbrella purchaser claims to proceed by way of class action.[50]

In the decision *Ewart v. Nippon Yusen Kabushiki Kaisha*, the British Columbia Supreme Court considered both issues – the certification of a class consisting of different levels of indirect purchasers, as well as a claim made on behalf of "umbrella purchasers".[51] The main focus of analysis was on the common issue requirement under section 4(1)(c) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, which the court held is subject to a low threshold for purpose of certification, simply requiring the proposal of a credible and plausible economic model to show harm to the prospective class members (i.e. the indirect purchasers) as a group.[52] Despite noting the low certification threshold, the court declined to certify the indirect purchaser action on the basis that the proper steps had not been taken to show the availability of the data required to apply the econometric methodology proposed by the plaintiff.[53] Further, the court refused to certify the umbrella purchaser claim, finding that the plaintiff and its expert did not provide sufficient evidence of how harm to the umbrella purchasers could be shown.[54] The case has been appealed to the BCCA, though a decision has not yet been released. Depending on the decisions rendered by the SCC in *Godfrey* and the BCCA in *Ewart*, the ongoing uncertainty regarding commonality of harm and umbrella purchaser claims may soon be resolved.

Complete Code

Another area of ongoing debate is whether the conspiracy provisions of the Act remove the plaintiffs' ability to seek damages under common law for violations of the Act's criminal provisions. At the heart of the debate is whether Parliament intended the Act to be a complete code, ousting other bases of civil liability. Most recently, the plaintiffs in *Godfrey* argued that a breach of section 45 of the Act can supply the unlawfulness element required for the common law tort of unlawful means conspiracy. The defendants argued that Parliament intended for the Act to form a complete code, displacing concurrent common law conspiracy causes of action. Bound by precedent, the BCCA ruled that the Act was not a complete code and that section 45 may fulfil the "unlawfulness" requirement under various common law causes of action.[55] The SCC is expected to rule on the issue in the *Godfrey* appeal.

Limitations on civil liability

The Act imposes a two-year limitation period for civil actions. It begins from the later of

the day on which the conduct was engaged in, or the day on which any criminal proceedings relating thereto were finally disposed of. The way the limitation period is defined produces uncertainty since it is possible for a defendant to be faced with a civil lawsuit more than two years after the infringing conduct has ceased. In practice, however, private antitrust class actions are increasingly commenced at the early stages of related criminal proceedings, thereby reducing some of the uncertainty for defendants.

Another point of ambiguity in establishing limitation periods for civil actions under the Act is the concept of "continuing practices". *Garford Pty Ltd v. Dywidag* raised the question of what behaviour constitutes a continuing offence under the Act.[56] The Federal Court held that in order for an offence to be "continuing", such that the limitation period had not yet commenced, ongoing acts in contravention of the statute would be required. A continued lessening of competition due to acts that are no longer occurring would not be sufficient to extend the limitation period.[57] The Alberta Queens Bench ("**ABQB**") recently applied *Garford* in *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*.[58] The court concluded that the agreement in question required ongoing acts by both parties, so an analysis of whether the agreement breached section 45 of the *Competition Act* was not restricted to the time that the agreement was formed. In that case, the defendant had entered the agreement with another party. The plaintiff (which happened to be the defendant's largest competitor) later purchased the original party to the agreement, such that the agreement became a contract between two competitors. The court ultimately decided that (under the defendant's interpretation of the agreement) certain provisions contravene section 45. Though the agreement was valid when executed, it became illegal following the plaintiff's acquisition.[59]

Most Canadian statutory limitation periods include a "discoverability" provision whereby the limitation period begins to run from the time that the behaviour was discovered by the plaintiff. The Canadian courts have provided conflicting jurisprudence on the applicability of the discoverability principle to the Act. Notably in *Garford*, the Federal Court held that discoverability does not apply to actions brought under the Act. Given that section 36(4) of the Act is expressed as running from a particular date (the date of the impugned conduct or of the disposition of criminal proceedings), the court concluded that the limitation period commences on that date, regardless of the plaintiff's knowledge of a potential claim.[60] The SCC's reasons in the indirect purchaser trilogy also seemed to support the view that the limitation period is strict, as it noted, in *obiter*, that the short, two-year limitation period makes the quantification of cartel damages a manageable exercise. In 2016, the Ontario Court of Appeal in *Fanshawe* released a judgment that conflicts with the "strict" limitation period view. In the process of affirming a Superior Court judgment that explicitly rejected the view in *Garford*, the court ruled that the discoverability principle applies to sub-paragraph 36(4)(a)(i) of the Act due to the fact that it expressly links the limitation period to conduct that gives rise to any damage or loss.[61] After noting that sub-section 36(4)(a)(ii) provides an alternative event for the limitation period that is arguably not connected to the plaintiff's cause of action or knowledge, the court acknowledged that it was probably not subject to discoverability, but that this was not necessarily a problem as there is no rule that suggests both limitation periods must operate in the same way.[62] This approach was followed by the BCCA in *Godfrey*, which expressly adopted the ONCA's reasoning in *Fanshawe*.[63] The issue is expected to be addressed once again by the SCC in the *Godfrey* appeal.

Pre-Trial delay

In April 2017, the Superior Court of Québec in *Les Industries Garanties limitée c. R*, ruled that a lengthy delay between the laying of bid rigging charges and the anticipated end of

trial does not violate the constitutional right to be tried within a reasonable time.[64] The court allowed the prosecution of a company and its employee to proceed despite a 40-month delay between the laying of charges and the trial, determining that the delay was not unreasonably long in view of the complexity of the case (arising from both the large volume of disclosure and the specific legal and evidentiary issues raised).[65] Importantly, the prosecution was allowed notwithstanding the SCC's ruling in *R. v. Jordan*, which established a ceiling of 30 months for cases going to trial in a superior court, beyond which delay is presumptively unreasonable.[66] The finding that the bid rigging prosecution was more complex than a typical murder trial suggests that defendants in criminal prosecutions under the Act may face difficulty obtaining Charter relief for lengthy pre-trial delays.

Information flow

Controlling the flow of information to and from the Bureau can have important implications for companies that are involved in a cartel investigation. In addition to raising claims of settlement and work-product privilege, the Bureau and immunity and leniency applicants rely on section 29 of the Act to maintain confidentiality of any information voluntarily disclosed during proffers. That being said, following the *Nestlé* ruling (discussed above), immunity and leniency applicants must be cognisant of the fact that the Bureau may ultimately disclose the information they produce to the accused, notwithstanding the confidentiality assurances that were given when the information was originally provided.[67]

In June 2018, the Bureau released a bulletin on its general approach to requests for access to confidential information in its possession from persons involved in private actions under section 36 of the Act.[68] The bulletin highlights the Bureau's general position to not voluntarily provide information to persons contemplating or taking part in proceedings under section 36 of the Act, noting that opposing the production of such information is important to prevent interference with ongoing examinations, inquiries or enforcement proceedings and maintain the confidentiality of information the Bureau receives. The bulletin also reiterates that the Bureau will rely upon applicable privileges, including public interest privilege, to protect against the disclosure of information in its possession and control.

In September 2017, the SCC in *Canada (Attorney General) v. Thouin* held that Competition Bureau investigators, in their capacity as representatives of the Crown, could not be compelled to be examined for discovery in an action to which the government was not a party.[69] The case involved a gasoline price-fixing class action in which the plaintiffs attempted to get an order permitting them to examine the Bureau's chief investigator in its investigation into gasoline price-fixing. The court held that the Crown's immunity from discovery was not lifted in proceedings in which it was not a party, and therefore, the Bureau investigator could rely on the Crown's discovery immunity to refuse to submit to an examination for discovery. At the end of its decision, the SCC noted that the question they considered was different than the one decided in *Imperial Oil v. Jacques*,[70] where the SCC allowed the disclosure of records of private communications intercepted by the Bureau in the course of a criminal investigation into allegations of a conspiracy affecting gasoline pump prices in Québec. In the course of its investigation, the Bureau obtained judicial authorisations from the court in Québec under the *Criminal Code* that enabled it to intercept and record more than 220,000 private wiretapped communications. Plaintiffs who had commenced a class action in the Québec Superior Court sought the disclosure of the recordings that had already been disclosed to the accused in the criminal proceedings. The SCC found that the specific circumstances of this particular case favoured the disclosure of the wiretap evidence. It referenced the rule in the *Québec Code of Civil Procedure* that

expressly allows records within the possession of a third party to be produced, but noted that whether records should be produced often involves a number of considerations, such as a determination of relevancy together with the consideration of confidentiality rights, privacy rights and the efficiency of the judicial process as against facilitating the search for truth. The court noted that (at least implicitly) before third-party records are produced, the court should engage in an analysis to ensure there are no factual or legal impediments that should militate against disclosure of the records requested and that courts always have the ability, responsibility and control to impose such measures and conditions on any disclosure as may be appropriate in the circumstances. It should be noted that, while section 29 of the Act prevents the Bureau from disclosing, among other things, information provided to the Bureau on a voluntary basis to third parties except "for the purposes of the administration and enforcement" of the Act, the wiretap evidence in this case was collected under the *Criminal Code* rather than the Act. Hence, section 29 of the Act was held not to apply. This decision should therefore not affect the Bureau's ability to resist third-party discovery efforts of information it obtains under its Immunity and Leniency Programs.

Finally, it is important to note that, where a foreign-incorporated company has a branch office in Canada, the Bureau may invoke its authority under section 11(2) of the Act to issue production orders to the Canadian branch office for records or information, even if those records are in the possession or control of the foreign parent. In addition to the penalties for non-compliance, the issuance of a production order under section 11(2) is a matter of public record and the accompanying affidavit from the Bureau will set out, typically in great detail, the alleged criminal conduct being investigated and the involvement of the company being investigated. These affidavits have formed a roadmap for class counsel, even if a conviction has yet to be secured from the company.

Legislative and policy changes

As mentioned, in September 2018 the Bureau implemented a revised Immunity and Leniency Program, which includes significant departures from the previous programme.[71] Most notably, the new programme incorporates the following changes:

- automatic coverage under a corporate immunity agreement for all directors, officers and employees will no longer be provided;
- introduction of the GII process – should the DPP accept a recommendation for immunity status from the Bureau, the applicant will not necessarily receive a final grant of immunity;
- every leniency applicant (not just the first applicant) may now be entitled to a cooperation credit of up to 50% of the fine it would otherwise receive. Credits will now depend on the value of cooperation the applicant provides; and
- the new programme implements a mandatory protocol for identifying, reviewing and adjudicating privilege claims by immunity applicants.

In 2018, the Bureau continued to focus on cartel and competition issues in relation to innovation and Canadian infrastructure. In November the Bureau published a draft version of its revised Intellectual Property Enforcement Guidelines ("**IPEGs**") for comment, which clarify the Bureau's approach to conducting investigations of alleged anti-competitive activities that involve intellectual property.[72] In February the Bureau released a white paper on big data, innovation and competition policy.[73] The white paper touched on the impact of emerging technologies on cartel enforcement, including the potential for technology to facilitate conspiracies by increasing the ease with which competitors can communicate. In

January, the Commissioner of Competition John Pecman delivered a speech at the Vancouver Competition Policy Roundtable on the integral relationship between competition and innovation.[74] In it, he touched on targeting anti-competitive conduct that stifles innovation, including collaborative conduct that reduces the pressure for innovation. With regards to protecting Canadian infrastructure, in May the Bureau released its annual plan for 2018–19, titled "Building Trust to Advance Competition in the Marketplace".[75] In it, the Bureau named safeguarding federal infrastructure investments through detection, prevention and enforcement of bid rigging and price-fixing as a priority. To do so, it committed to strengthening collaboration with domestic partners.

* * *

Endnotes

1. *Competition Act*, RSC 1985, c C-34, as amended.
2. See *Fairhurst v. Anglo American PLC*, 2011 BCSC 705. The British Columbia Supreme Court has reiterated that foreign defendants are subject to the jurisdiction of Canadian courts for cartel conduct where harm is sustained in Canada. The Court found that its jurisdiction extended to a group of foreign defendants in a proposed class action, claiming that the defendants conspired to increase the price of diamonds. It was sufficient that harm was suffered in B.C. and that the defendants knew or should have known the diamonds would be shipped to B.C. in the ordinary course of distribution. *See also Libman v. The Queen*, [1985] 2 SCR 178. The Supreme Court held that in order for an offence to be subject to the jurisdiction of Canadian courts, it is sufficient that there exist a "real and substantial link" between the offence and Canada.
3. Competition Bureau, "Competitor Collaboration Guidelines" (8 May 2009) at 11, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html. A purchase side agreement could give rise to a section 45 offence if, for example, the parties enter into the agreement as a sham to control the production of a downstream product.
4. For example, prosecutors cannot use admissions made in the context of settlement discussions in future prosecutions against the firm or individuals making the admission.
5. For all convictions obtained under the Act, there is an automatic right of appeal to a provincial court of appeal or to the Federal Court of Appeal, depending on which court tried the indictment. The decision of any court of appeal generally may be brought, by leave, to the Supreme Court of Canada (although there is an automatic right of appeal when there is a dissenting opinion on the Court of Appeal). Given that convictions for cartel offences in Canada are obtained most often through the plea bargaining process, appeal courts do not often hear cases concerning matters of cartel enforcement.
6. Competition Bureau, "[t]hirteenth guilty plea concludes auto parts bid rigging investigations with fines totalling over $86 million" (19 October 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/10/thirteenth-guilty-plea-concludes-auto-parts-bid-rigging-investigations-with-fines-totalling-over-86-million.html/.
7. *Supra* note 3.
8. Competition Bureau, "Corporate Compliance Programs – Bulletin" (3 June 2015), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03942.html.

9. Competition Bureau, "Competition and Compliance Framework – Bulletin" (10 November 2015), online: http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/03999.html.
10. Competition Bureau, "Immunity and Leniency Programs under the Competition Act" (27 September 2018), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html.
11. See discussion in *R v. Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117, [2012] FCJ No 1206 [*Maxzone*].
12. *Maxzone*, *supra* note 11.
13. *Maxzone*, *supra* note 11 at para. 4.
14. See, e.g., *Civil Remedies Act, 2001*, SO 2001, c 28.
15. SPC, "Government of Canada's Integrity Regime" (11 October 2018), online: https://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html.
16. Similar "debarment" regimes also exist in certain Canadian provinces with respect to procurement by provincial governments. For example, in Québec since 2013, the *Integrity in Public Contracts Act* has required bidders for government contracts to obtain authorisation from the *Autorité des marchés financiers* ("**AMF**") before entering into provincial government contracts. The AMF can withhold authorisation for entities found guilty of certain offences (including *Competition Act* offences) in the past five years. The AMF's decisions are reviewable by courts and must meet the minimum requirements of procedural fairness, including disclosing the information on which it bases its decisions to allow an applicant to make a defence. See *Terra Location inc. c. Autorité des marchés financiers*, 2015 QCCS 509. In New Brunswick, under the *Procurement Act*, a supplier may be disqualified from provincial procurement for a period of up to five years if convicted of a cartel offence under the *Competition Act* as well as offences under five other federal statutes).
17. PSPC, "Proposed draft: Ineligibility and Suspension Policy for consultation" (11 October 2018–13 November 2018), online: https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html.
18. *Competition Act*, *supra* note 1, section 45.1.
19. Private parties could try to frame a section 90.1 matter as a conspiracy and seek damages on that basis.
20. For example, in March 2018 the Competition Bureau initiated an investigation into an alleged conspiracy between newspaper companies Postmedia and Torstar, shortly after a transaction between the companies that was followed by the closing of several community newspapers. See Competition Bureau, News Release, "Competition Bureau obtains court order to advance ongoing investigation of Postmedia and Torstar" (4 December 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/11/competition-bureau-obtains-court-order-to-advance-ongoing-investigation-of-postmedia-and-torstar.html.
21. *Canada (Commissioner of Competition) v. Pearson Canada Inc*, 2014 FC 376, 119 CPR (4th) 313.
22. *Canada (Commissioner of Competition) v. Indigo Books & Music Inc.*, 2015 FC 256.
23. *Canada (Commissioner of Competition) v. Bell Mobility Inc.*, 2015 FC 990.
24. Note that the decision was issued in the context of the Bureau's investigations into reviewable (non-criminal) practices in potential violation of the Act – though the principles articulated may apply for criminal investigations as well since sections 10

and 11 of the Act make no distinction between civil and criminal investigation in terms of enforcement or review standards for production orders.

25. *Supra* note 10.
26. *R. v. Nestlé Canada Inc.*, 2015 ONSC 810 at paras. 69, 83 [*Nestlé*].
27. *Middlekamp v. Fraser Valley Real Estate Board*, [1992] BCJ No 1947, 96 DLR (4th) 227 (BCCA).
28. Competition Bureau, Press Release, "Embraco North America Inc. Pleads Guilty to Price-Fixing Conspiracy" (27 October 2012), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03307.html; Competition Bureau, Press Release, "SEC Carbon Pleads Guilty to Conspiracy" (9 November 2007), online: http://news.gc.ca/web/article-en.do?crtr.sj1D=&mthd=advSrch&crtr.mnthndVl=&nid=360319&crtr.dpt1D=&crtr.tp1D=&crtr.lc1D=&crtr.yrStrtVl=2008&crtr.kw=&crtr.dyStrtVl=26&crtr.aud1D=&crtr.mnthStrtVl=2&crtr.yrndVl=&crtr.dyndVl=.
29. *Supra* note 6.
30. Competition Bureau, Month in Review – June 2018, "Guilty plea in bid-rigging of provincial street light contracts in Québec" (27 June 2018), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html.
31. *R. c. Rosseau*, 2018 QCCS 640.
32. Competition Bureau, News Release, "Criminal charges laid against four individuals for bid-rigging in engineering industry" (26 June 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/06/criminal-charges-laid-against-four-individuals-for-bid-rigging-in-the-engineering-industry.html.
33. *Supra* note 20.
34. CBC News, "New court docs outline what Competition Bureau says happened in bread price-fixing scheme" (29 June 2018), online: https://www.cbc.ca/news/business/bread-price-fixing-1.4728360.
35. Competition Bureau, Month in Review – March 2018 "Competition Bureau engages with global competition leadership and builds strong relationships in Vietnam" online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html; Competition Bureau, Month in Review – January 2018, "Competition Bureau promotes the use of economics in competition enforcement in the Asia Pacific", online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html; Competition Bureau, News Release, "Competition Bureau meets with U.S. and Mexican competition authorities" (8 November 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/11/competition-bureau-meets-with-us-and-mexican-competition-authorities.html.
36. Competition Bureau, Month in Review – June 2018, "Interchange with Australian Competition and Consumer Commission ends", online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html.
37. Competition Bureau, Month in Review – March 2018, "Sustaining international dialogue on antitrust issues", online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html.
38. Competition Bureau, Month in Review – May 2018, "Competition Bureau fosters exchanges between competition agencies", online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html.

39. Competition Bureau, Month in Review – February 2018, "Competition Bureau advocates for best practices in cartel investigations on the world stage", online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html.
40. Competition Bureau, Month in Review – January 2018, "Competition Bureau promotes the use of economics in competition enforcement in the Asia-Pacific", online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04332.html.
41. In the 2015 case of *Airia Brands v. Air Canada*, Justice Leitch considered whether plaintiffs could bring claims for a class including persons residing outside Canada, ultimately finding they could not due to the lack of any jurisdiction of the court over foreign class members not residing in Ontario or consenting to the court's jurisdiction. Justice Leitch held in the alternative that even if such jurisdiction existed, she would stay the claims based on the real and substantial connection test (if applicable) not being met and based on *forum non conveniens*. *Airia Brands v. Air Canada*, 2015 ONSC 5332.
42. Compare *Garford Pty v. Dywidag Systems International*, 2010 FC 996 at para. 33 [*Garford*] (finding discovery principle does not apply) with *Fanshawe College v. AU Optronics*, 2015 ONSC 2046 at para. 115 [*Fanshawe*], and *Godfrey v. Sony Corporation*, 2017 BCCA 302, at para. 90 [*Godfrey*].
43. *Pioneer Corporation et al. v. Neil Godfrey*, 2018 Carswell BC 1456, Supreme Court of Canada, granting leave to appeal.
44. *Sony Corporation, et. Al v. Neil Godfrey*, [2017] S.C.C.A. No. 408, granting leave to appeal.
45. *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Ltd v. Archer Daniels Midland Company*, 2013 SCC 58; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.
46. *Godfrey*, *supra* note 42 at para. 163.
47. *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 153–173.
48. *Godfrey*, *supra* note 42 at paras. 247–248, 257, aff'g 2016 BCSC 844, appealed to the SCC.
49. *Shah v. LG Chem. Ltd.*, 2017 ONSC 2586 at para. 48, rev'g on other grounds 2016 ONSC 4670.
50. *Shah v. LG Chem. Ltd.*, 2018 ONCA 819, at paras. 52 and 127 [*Shah*].
51. *Ewart v. Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357 [*Ewart*].
52. *Ewart*, *supra* note 51 at para. 34.
53. *Ewart*, *supra* note 51 at paras. 54–55.
54. *Ewart*, *supra* note 51 at para. 60.
55. *Godfrey*, *supra* note 42 at paras 184–185.
56. *Garford*, *supra* note 42.
57. *Garford*, *supra* note 42 at para. 39–45. See also, *Eli Lilly and Co v. Apotex Inc*, 2009 FC 991 at 736, aff'd 2010 FCA 240, leave to appeal to SCC ref'd [2010] SCCA No 434.
58. *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2018 ABQB 482 [*Dow*].

59. *Dow*, *supra* note 58 at paras 1370–1371.
60. See *Garford*, *supra* note 42 at paras. 31–33, following the same conclusion expressed in obiter in *Laboratoires Servier v. Apotex Inc*, 2008 FC 825 at 488, aff'd 2009 FCA 222, leave to appeal to SCC ref'd, [2009] SCCA No 403.
61. *Fanshawe*, *supra* note 42.
62. *Fanshawe*, *supra* note 42 at para. 47.
63. *Godfrey*, *supra* note 42 at paras. 89–90.
64. *Industries Garanties limitée c. R.*, 2017 QCCS 1504 [*Industries Garanties*].
65. *Industries Garanties*, *supra* note 64 at paras. 78–82.
66. *R. v. Jordan*, 2016 SCC 27 at para. 49.
67. *Nestlé*, *supra* note 26.
68. Competition Bureau, "Information requests from private parties in proceedings for recovery of loss or damages" (11 June 2018), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html.
69. *Canada (Attorney General) v. Thouin*, 2017 SCC 46 [*Thouin*].
70. *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] SCJ No 66.
71. *Supra* note 10.
72. Competition Bureau, "Intellectual Property Enforcement Guidelines – Draft for public consultation" (1 November 2018–31 December 2018), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04401.html.
73. Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (19 February 2018), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html.
74. Competition Bureau, "Growing the new economy: the integral relationship between competition and innovation", Speech at Vancouver Competition Policy Roundtable by John Pecman, online: https://www.canada.ca/en/competition-bureau/news/2018/01/growing_the_new_economytheintegralrelationshipbetweencompetition.html.
75. Competition Bureau, "2018–2019 Annual Plan: Building trust to advance competition in the market place" (3 May 2018), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04356.html.

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