

# Litigator

COMPETITION LAW REVIEW



## Top stories

### Can indirect purchasers sue for price-fixing losses?

Can indirect purchasers sue to recover losses from price-fixing that are passed on to them by direct purchasers? Indirect purchasers are purchasers who buy a product from direct purchasers, who in turn buy it directly from cartel members. In April, the BC Court of Appeal ruled that indirect purchasers cannot sue. Since it is no defence to say that direct purchasers passed on the loss, direct purchasers are entitled to recover the entire overcharge, leaving nothing for indirect purchasers. The court thus refused to certify class actions alleging that producers of high-fructose corn syrup conspired to fix prices, and that Microsoft conspired with computer manufacturers to keep prices high.

Not long after, an Ontario court certified a class action on behalf of direct and indirect purchasers alleging that makers of LCD panels fixed prices, and a Quebec court certified a class action consisting mainly of indirect purchasers alleging that makers of DRAM chips conspired to fix prices. The BC Court of Appeal certified a case alleging that Toyota Canada and its dealers conspired to fix retail car prices and even suggested that it may not be necessary to prove damages. As well, past cases in BC and Ontario have held that indirect purchasers can sue.

The Sun-Rype and Microsoft cases will be heard by the Supreme Court in October 2012.\*

### Bureau reverses the charges on hidden fees

“When a price is offered to consumers, it must be accurate. Including a fine-print disclaimer is no licence to advertise prices that are not available,” Commissioner of Competition Melanie Aitken stated in announcing that Bell Canada had agreed to pay a \$10 million fine to settle the Bureau’s concerns that it was charging higher prices than it advertised for many of its services. Bell hid mandatory fees from consumers in fine-print disclaimers, the Bureau claimed. Bell settled but did not admit liability.

### Court throws the book at Yellow Page business directory scam

The Ontario Superior Court ordered four companies and three individuals to pay over \$9 million in AMPs and about \$7 million in refunds. The companies sent faxes that created the impression that businesses were being asked to update information for Yellow Pages listings, but would bind recipients to a two year contract costing \$2,856. The fact that the fine print disclosed this contract did not matter, the court held.\*

## Criminal

Domfoam International Inc. and Valle Foam Industries (1995) Inc. became the first to be convicted under Canada’s new per se conspiracy provision after pleading guilty to fixing the price for polyurethane foam. They were fined \$12.5 million.★

Gasoline price-fixers sentenced: eleven individuals involved in fixing gas prices in Magog and Thetford Mines, Quebec, pleaded guilty and were sentenced to pay fines. So far 22 individuals and six companies have pleaded guilty and been fined over \$2.8 million. Six individuals have been sentenced to serve a total of 54 months in the community.

Refrigeration conspiracy frozen: Kason Industries Inc. conspired with competitors, including Component Hardware Group Inc. to fix prices and allocate customers for refrigerator components. Kason pleaded guilty and was fined \$250,000 in Canada, after agreeing to pay a \$3.3 million fine in the US in 2010. Kason’s president, Peter Katz, also agreed to plead guilty in the US.

It smells like... bid rigging: six companies and five individuals were charged with rigging bids for government contracts for specialized sewer services in the Montreal area. One company pleaded guilty and was fined \$75,000.

Clearing the air: a contractor pleaded guilty and was fined \$425,000 for rigging bids for contracts to install ventilation systems in residential high-rise buildings in the Montreal area.



## Bell Canada agreed to pay a \$10 million fine to settle the Bureau's concerns that it was charging higher prices than it advertised.

Three contractors pleaded guilty to rigging bids for the expansion of the Chicoutimi Hospital in 2003 and were fined a total of \$75,000.

**TPG Technology Consulting Limited, Spearhead Management Canada Ltd., and Brainhunter Inc.** were committed to stand trial on charges that they rigged bids for federal government contracts for IT services. TPG and its owner are suing the Competition Bureau for defamation, claiming that a Bureau press release went beyond a fair description of the charges.\*

Ontario's top court ruled that when investigators encounter evidence of other crimes during a search of a computer, the "plain view" doctrine applies, and the Crown can use the evidence. Before conducting searches based on such evidence, however, they must get a fresh warrant.

### Reviewable Matters

**Virtual real estate fight:** the Bureau commenced an abuse of dominance application to force the **Toronto Real Estate Board** to allow real estate brokers to make MLS data directly available to their customers through innovative online tools. TREB says that it is merely exercising its copyright over the database, which is exempt from scrutiny.

**Air Canada and United Airlines'** joint venture is a merger that would eliminate competition on routes between Canada and the US, the Bureau alleges in an application to prohibit the tie up. The Bureau also wants to stop the airlines from coordinating transborder business, including pricing, inventory, and yield management.

### Mergers

Google's proposed acquisition of **Motorola** would not change existing market dynamics, the US Department of Justice and the European Commission concluded in allowing the deal to proceed in February 2012. The Bureau issued a "no action letter", but did not comment publicly.

**Canadian Tire's** acquisition of **The Forzani Group** would not enhance Canadian Tire's market power in the retail sporting goods market, the Bureau concluded.

**Bell and Rogers'** bid to buy 37.5% each of **Maple Leaf Sports and Entertainment** is being investigated, the Bureau confirmed. MLSE owns the **Maple Leafs**, the **Raptors**, the **Toronto FC**, the **Marlies** and the **Air Canada Centre**.

The Bureau expressed "serious concerns" in November about **Maple Group's** bid to acquire **TMX Group Inc.**

The Bureau updated its *Merger Enforcement Guidelines*, issued Merger Review Process Guidelines, raised the pre-merger notification transaction-size threshold to \$77 million for 2012, and announced plans to publish public monthly reports of concluded merger reviews. Its first such report, for February 2012, lists 16 transactions.

### Marketing Practices

**The skinny on skin cream:** Claims by makers of **Nivea** that "My Silhouette" skin cream made people slimmer resulted in agreements to pay fines of \$300,000 in Canada and \$900,000 in the US, to recall the product, refund customers, and publish a corrective notice.

Claims by two Alberta spa retailers that their hot tubs complied with the ENERGY STAR Program got them into hot water. They were fined \$130,000.

A Quebec court sentenced four call operators in a telemarketing fraud "boiler room" to community service. The two originators of the scam were extradited to the US and sentenced there to six and eight years' imprisonment. They defrauded about 24,000 victims in the US of about \$7 million by selling worthless pre-approved credit cards and loans.

# Air Canada and United Airlines' joint venture is a merger that would eliminate competition on routes between Canada and the US, the Bureau alleges.



An Alberta court convicted five individuals of fraud and telemarketing offences for falsely telling businesses they had ordered directory listings in order to pressure them to pay.

Montreal-based telemarketers that allegedly made over \$172 million by pressuring targets to buy directory services or office supplies on the pretext of an established supply relationship, or to buy a medical kit ostensibly required by law, were charged with criminal offences.

An Alberta man was charged with breaching a 2006 consent agreement by continuing to operate an online job opportunities scam.

## Private Enforcement

Class action waivers will be enforced unless they are contrary to statute, and claims alleging breaches of the Competition Act are arbitrable, the Federal Court held in staying a proposed class action against **Amway**.\*

A decision by joint operators of an oil field, **Husky Oil Operations Ltd.** and **Mobil Oil Canada**, to sole-source a contract violated the conspiracy provisions, an Alberta court ruled in awarding damages to the company that lost out on the business. The decision is under appeal.\*

Several airlines settled class actions alleging they fixed cargo prices. **SAS** agreed to pay \$300,000; **Qantas**, \$237,000; **Cargolux**, \$1.8 million; and **Singapore Airlines**, \$1 million.

Chicken processor **Nadeau Poultry** lost its appeal from the Competition Tribunal's decision not to force **Groupe Westco** to continue to supply it with chickens for processing.

**Johnson & Johnson**'s subsidiary Lifescan agreed to a \$4 million settlement in a class action arising from two design errors in its "SureStep" blood glucose monitor. No one was hurt by the errors, and Lifescan had recalled and replaced the product. The settlement will provide free blood glucose monitors for diabetics who cannot afford them.\*

The Used Car Dealers Association of Ontario is applying to force the Insurance Bureau of Canada to continue to supply it with claims data. IBC agreed to continue supplying claims data pending the outcome of UCDA's application, but later changed its mind, citing a refusal from one of its members to provide this data.

**Brandon Gray Internet Services Inc.** was denied leave to apply to force the Canadian Internet Registration Authority to renew its certification as a .ca registrar. CIRA said it dropped Brandon Gray because of its association with **Domain Registry of Canada**, which has been accused of sending out misleading renewal notices.

**Rogers** settled a class action alleging that it misled landline customers about its long distance metering practices by agreeing to make a charitable donation and provide certain class members with two days of free landline calls within Canada.

## The Long Arm of US Antitrust

The DOJ obtained over \$748 million in fines from participants in a cartel that fixed prices and rigged bids in the auto parts industry. One of these, **Yazaki Corporation**, paid \$470 million, the second highest fine for price fixing ever. Four Japanese executives have agreed to spend between 15 months and two years in US jails.

A Canadian former **Bennett Environmental Inc.** executive, Robert Griffiths, was sentenced to serve 50 months in a US jail, after pleading guilty to fraud and money laundering in relation to environmental remediation contracts.\*

Clifford Edwards will be extradited to stand trial in the US on charges that he defrauded elderly US residents. Potentially exculpatory evidence he planned to lead at trial was not relevant to whether he should be extradited, the BC Court of Appeal held.

## Contributors



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## Across the Pond

Price-fixers pay: Refrigeration compressor manufacturers were fined €161 million by the European Commission. Cartel members included Danfoss, Panasonic, and Tecumseh. Laundry detergent makers Proctor & Gamble and Unilever were fined €315 million, while Henkel received immunity for being the first to self-report. ArcelorMittal and 16 other producers of prestressing steel were fined nearly €270 million.

The Commission blocked a proposed merger between NYSE Euronext and Deutsche Borse because the merger would have resulted in a quasi-monopoly for trading in European financial derivatives. Commitments offered by the merging parties were not enough. The parties had previously agreed to divestitures to resolve the US DOJ's concerns.

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