2015 REPORT FROM CANADA

COMPETITION, ANTITRUST & FOREIGN INVESTMENT GROUP

Key Trends for 2016 | Enforcement Highlights | Policy Developments
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“For its numbers, clients and caseload, rivals freely admit that Blake Cassels & Graydon houses the top competition practice in Canada.”

*Global Competition Review’s GCR 100 (15th Edition) 2014*
The Blakes Competition, Antitrust & Foreign Investment group 2015 Report from Canada corresponds with a historic moment in Canada for competition law and foreign investment review, as we mark the 30th anniversary of the *Competition Act* and the *Investment Canada Act*. Although Canada’s competition law dates to 1889 and foreign investment review dates to 1973, these areas of the law underwent a transformation in the mid-1980s and have continued to evolve rapidly since then, including important developments this past year.

In this report, we outline the important developments in Canadian competition law and foreign investment review from the past year and forecast the key trends for 2016.

In the area of competition law, we are now witnessing the impact of the Supreme Court of Canada decision in *Tervita Corp. v. Commissioner of Competition*, which upheld the primacy of efficiencies in Canadian merger review. In mergers where the parties are relying on efficiencies to offset potential anti-competitive effects, we have seen more efficiencies analysis in complex cases, and the Commissioner requesting extensive information to fulfil his legal obligation to quantify a merger’s likely competitive effects. Blakes has been at the forefront of these developments.

We are also seeing an expanded scope for the abuse of dominance (monopolization) provisions of the *Competition Act* following the Federal Court of Appeal’s 2014 decision in *Commissioner of Competition v. The Toronto Real Estate Board*. The court expanded the scope of the abuse of dominance provisions to apply to a person or association that controls a market, even if they do not actually participate as sellers. We are seeing the Competition Bureau (Bureau) pursue investigations under the expanded framework and are closely monitoring how the law in this area is unfolding.
The current Commissioner has made competition promotion, compliance and advocacy a central focus of the Bureau’s mandate, including creating a new branch within the Bureau dedicated to this. As part of this effort, the Bureau has been more actively conducting market studies and engaging the public for feedback on various competition law matters.

In foreign investment review, Canada has a new prime minister and a new Liberal government. Blakes has guided hundreds of foreign investors and Canadian companies through the highly political foreign investment review process. Our extensive experience working with the Innovation, Science and Economic Development Department, formerly known as Industry Canada, on foreign investment transactions has allowed us to provide pragmatic advice on how investors can secure timely and creative approvals for their investments.

Other notable developments in Canadian competition law from 2015 are discussed in this report along with forecast trends and policy changes that are anticipated for 2016.

Brian A. Facey
Chair, Competition, Antitrust & Foreign Investment Group
**MERGERS**

Following the landmark 2014 Supreme Court of Canada decision *Tervita Corp. v. Commissioner of Competition*, where the Competition Bureau (Bureau) has concerns about a merger and the parties are relying on the efficiencies defence, merging parties should expect to be asked to provide considerable information about transaction efficiencies to enable the Bureau to determine whether the efficiencies will be greater than, and will offset, the anti-competitive effects of the merger. The Bureau can use its supplementary information request process or even section 11 production orders to obtain relevant information from the parties as well as from customers and other market participants. We also anticipate that the Bureau will continue to challenge transactions that raise issues in either important sectors of the Canadian economy or consumer-facing industries, even where the competition issues are limited to a small number of products or markets.

**FOREIGN INVESTMENT**

The coming year has the potential to be quite important to the development of foreign investment policy in Canada.

While Prime Minister Justin Trudeau has not spoken extensively on foreign investment, he has in the past voiced support for several high-profile transactions that required approval under the *Investment Act Canada*. Recently, he stated that his party is “always open to global investment in a way that respects and defends Canadian interests, and that is the approach we will take on foreign trade and foreign investments.”

The new government can be expected to:

- Apply rigorous scrutiny to investments that potentially raise national security issues
- Continue to encourage foreign investment into Canada but apply scrutiny to large-scale transactions and particularly transactions involving higher-profile Canadian businesses
- Closely monitor investments by state-owned enterprises and sovereign wealth funds, but our expectation is greater openness to investors on a case-by-case basis, especially if jobs and innovation are highlighted.
CARTELS
We anticipate that the Bureau will increase and intensify its scrutiny of Canada’s construction industry in the coming year. The Commissioner of Competition has publicly stated that he will continue to focus on the construction industry as it is “particularly susceptible to cartel activity.” We also anticipate that the Bureau will continue to expand its partnerships with other investigative agencies, highlighted by the memoranda of understanding signed with the Ontario Provincial Police and international antitrust agencies. Approximately one-third of the Bureau’s cartel cases have an international dimension, highlighting the Bureau’s desire for increased cooperation with antitrust and investigative agencies. It will also be interesting to see how the Bureau and the courts will implement the Bureau’s new compliance policy “credit” in an actual case.

PRIVATE ACTIONS
Certification issues will continue to be a hot-button topic as trial courts in provinces across Canada grapple with the Supreme Court of Canada’s new standards. Moreover, two contradictory decisions have followed the British Columbia Court of Appeal’s decision in Wakelam v. Wyeth Consumer Healthcare in which the courts took opposite views as to whether plaintiffs may claim for restitution (disgorgement of profits) as a result of a criminal conspiracy. Since the issue remains unresolved in Canada, we expect it could be the subject of a Supreme Court of Canada decision in the near future.

CONDUCT AND INTELLECTUAL PROPERTY
Updated guidelines on the intersection between competition law and intellectual property law were released this past year. These guidelines include additional guidance related to the Bureau’s enforcement policy concerning pharmaceutical patent litigation settlements and concerning the use of standard essential patents by standard-setting organizations. As a result, we anticipate increased enforcement efforts with respect to the competition/intellectual property interface in the coming year. We also expect the Bureau to carry out further investigations of parties that are not actually competing in a market if they otherwise are found to, in some way, exercise control over that market under the abuse of dominance provision.

ADVERTISING AND MARKETING
In 2016, we expect the Bureau will continue to pursue consumer protection through the enforcement of the misleading advertising provisions of the Competition Act. In particular, companies should be mindful of the Bureau’s willingness to scrutinize the proper disclosure of fees and charges, ordinary selling price claims, and deceptive telemarketing. Using new enforcement powers and under new guidance issued in 2015, companies should anticipate increased enforcement by the Bureau related to online promotions, “astroturfing” and anti-spam, particularly under the new provisions of Canada’s Anti-Spam Legislation.

COMPETITION PROMOTION AND ADVOCACY
We anticipate that the Bureau will continue to dedicate more resources to competition promotion and advocacy in the coming years. The current Commissioner has made competition promotion, compliance and advocacy a central focus on the Bureau’s mandate, including creating a new branch within the Bureau dedicated to this task. Despite questions raised about the Bureau’s statutory authority to conduct market studies, we anticipate the Bureau will continue to conduct such studies and may again seek amendments to the Competition Act to enable it to compel information from market participants for this purpose.
The difference we make.

We are recognized as one of the leading competition practices in Canada.

Over the last five years, the Blakes Competition, Antitrust & Foreign Investment group has been involved with more than 80 international transactions, at a value of over C$450-billion.

We lead the Canadian aspects of the largest global transactions.

We add value throughout the process from initial assessment all the way through the remedies process.

We work with our clients to help them achieve their strategic business objectives.

We are a trusted partner and adviser.

We represent companies from every industry sector.
2015 Highlights

A number of significant developments occurred in 2015, including a rare application by the Commissioner of Competition (Commissioner) to the Competition Tribunal (Tribunal) to enjoin a merger from closing. Following the release of its Best Practices Memorandum with the U.S. antitrust agencies in March 2014, the Bureau continued to coordinate closely with U.S. antitrust authorities on several complex transactions where the competition issues extended beyond Canada’s borders. In transactions that raised competition concerns, the Bureau showed continued openness towards behavioural remedies as a means of resolving those concerns. The Bureau received fewer merger notifications this year compared to recent years and restructured in order to carry out its mandate more efficiently and cost-effectively.

Tribunal Clarifies Test for Obtaining Interim Injunction in a Merger Challenge

On April 30, 2015, the Commissioner filed an application against fuel supplier Parkland Fuel Corporation in respect of its proposed acquisition of 181 Pioneer gas stations and 212 supply agreements. Although Parkland proposed to divest gas stations and make other commitments to address the Commissioner’s concerns in 11 of 14 markets, the Commissioner sought an order prohibiting Parkland and Pioneer from implementing the transaction in all 14 of the problematic markets and sought an interim injunction requiring the parties to hold separate the stations at issue pending the outcome of the substantive merger challenge under section 92 of the Competition Act.

The Tribunal clarified that the test for an interim injunction in a merger case is based on the standard for injunctive relief used by Canada courts in other matters. In particular, the Commissioner must (1) demonstrate that there is a serious issue to be tried;
(2) establish, using “clear and non-speculative” evidence, that irreparable harm will result if the interim relief is not granted; and (3) demonstrate that the balance of convenience supports the granting of relief.

The Tribunal determined that irreparable harm would result in only six of the 14 markets if an interim injunction were not granted. On this basis, the Tribunal ordered that Parkland hold separate gas stations in six markets pending the outcome of the substantive merger proceedings.

The Parkland/Pioneer decision has important implications for parties planning complex mergers. It provides that, among other things, the Commissioner must make out a “non-speculative” case that competition will be harmed in the markets of concern in order to succeed on an interim remedy application. Parties planning complex mergers should, therefore, carefully consider both interim remedies (such as a hold separate or preservation commitment) and final remedies early in the transaction planning stage, as this may prove helpful in closing these transactions. Also of note, the Tribunal accepted a partial “hold separate” over a small portion of the combined parties’ assets to allow the larger merger to close, rather than subject the entire target business to a hold separate.

Close Cooperation in Canada-U.S. Merger Reviews

Following the release of its Best Practices Memorandum with the U.S. antitrust agencies in March 2014, the Bureau liaised closely with its U.S. counterparts in several complex merger cases during 2015 under this new framework.

In Holcim/Lafarge, the Bureau worked closely with the Federal Trade Commission (FTC) to assess the cross-border implications of the proposed transaction. Ultimately, Holcim’s cement plant in Montana was included in the divestiture package because this plant had historically supplied the majority of Holcim’s cement in Alberta. Of note, both the Bureau and the FTC concluded the remedies negotiations within days of each other, coordinated regarding the terms of the remedy and were aligned in respect of the approval of the divestiture buyer.

The Bureau also coordinated closely with its U.S. counterparts in two pharmaceutical industry mergers. In Pfizer/Hospira, following consultations with the FTC, the Bureau imposed a Canadian-specific remedy requiring Pfizer to divest four pharmaceutical products. In contrast, in GlaxoSmithKline/Novartis, the Bureau was satisfied that the matter did not require a standalone Canadian remedy. While the Bureau has stated that its priority is to obtain a remedy that resolves competition concerns in Canada and that is within the Bureau’s power to enforce, it will, in appropriate circumstances, rely on remedies obtained in other jurisdictions provided that such remedies adequately address the Canadian competition issues.
As Holcim/Lafarge, Pfizer/Hospira and GlaxoSmithKline/Novartis demonstrate, parties planning cross-border mergers should expect close collaboration between Canadian and U.S. antitrust agencies, particularly following the March 2014 protocol setting out best practices for cooperation in merger investigations jointly issued by the Bureau, the FTC and the U.S. Department of Justice Antitrust Division.

**Continued Openness to Behavioural Remedies**

In a May 2014 speech, the Commissioner highlighted the Bureau’s openness to using behavioural remedies as a means of addressing competitive concerns in connection with certain mergers. Unlike structural remedies, which seek to impose a permanent change in the relevant industry to alleviate competitive concerns, behavioural remedies involve commitments without a change in ownership of the underlying productive assets.

In one matter, the Bureau accepted a behavioural remedy that required the implementation of administrative firewalls to prevent the sharing of competitively sensitive information, including pricing and promotional offers. These firewalls were necessary from the Bureau’s perspective to ensure that the transaction did not provide the joint owners of the target business with the ability to share confidential information that could have otherwise impacted competition.

**Bureau Restructuring**

Effective April 1, 2015, the Bureau’s eight branches were combined into four: the Mergers and Monopolistic Practices Branch, the Cartels and Deceptive Marketing Practices Branch, the Competition Promotion Branch and the Corporate Services Branch. Jeanne Pratt was appointed Senior Deputy Commissioner of Competition of the Mergers Branch.

The more streamlined organizational structure has been designed to increase collaboration within the Bureau and provide the Bureau with greater flexibility in allocating resources, such as when staffing case teams responsible for the review of complex merger transactions. The reorganization could, in theory, also result in greater collaboration between branches of the Bureau when, during the course of a merger review, evidence of other anti-competitive conduct is uncovered such as price-fixing, abuse of dominance or misleading advertising.

**Fewer but More Complex Mergers Notified to the Bureau**

Last year saw a slight decline in merger notifications compared to previous years. There was an average of approximately 20 pre-merger notifications per month in 2015, below the 24 per month averaged the previous year. However, the transactions notified to the Bureau in 2015 were unusually complex. Typically, approximately 20 per cent of transactions notified to the Bureau are classified as complex, while in 2015, the proportion of transactions receiving this designation was on pace to rise to approximately 33 per cent. Although the higher proportion
of complex mergers could be an anomaly, it could also suggest that the Bureau is seeking
to conduct more in-depth reviews of transactions in furtherance of an active enforcement agenda.

The average review time for non-complex transactions remained constant in 2015 at
approximately 10 days. However, the Bureau is taking more time to review complex
transactions (approximately 44 days in 2015 compared to an average of 33 days in 2014).

TIPS to remember...

Assess, minimize and allocate competition risks early on.
Undertake a competitive analysis of the transaction, consider whether there are ways to mitigate
existing risks and effectively allocate such risks in the transaction agreements. Upfront buyer
agreements and transaction structuring ultimately may provide significant value to merging parties.
However, such agreements should resolve any and all possible competition issues in order to
minimize the length of the review period.

Consider timing strategies for filing.
Strategies will have different advantages depending on the transaction circumstances. Relevant
factors include the complexity of the transaction, whether a supplementary information request is
likely and whether remedies may be required.

Employ proper document management practices.
Avoid creating documents that could be misinterpreted by the Bureau or other competition law
authorities, which may delay or unnecessarily complicate a review. This is relevant not only to the
transaction planning and merger review phases of a deal, but also in the ordinary course of business.
The Bureau places significant weight on documents prepared in the ordinary course of business and
often reviews such documents during a merger review.
2015 Highlights

After 10 years of foreign investment policy under the Conservative government, on October 19, 2015, Canadians elected a Liberal majority government led by Justin Trudeau. Given the political nature of the foreign investment review and approval process in Canada, the new government’s priorities with respect to foreign investment will be of critical importance to non-Canadian investors. More recently, investments with national security implications have been subjected to extended reviews and extensive undertakings.

National Security Reviews

In 2015, the Canadian government adopted new regulations and implementing orders that allow it to take more time to conduct national security reviews under the Investment Canada Act (ICA) and require significant additional information (which is largely designed to identify national security risks) for ICA notifications and applications for review. The new regulations extend the possible timeline for a national security review from 130 days to 200 days, or longer with the consent of the investor or at the discretion of the Minister.

Two major issues garnered public attention in 2015. First, the federal Cabinet reportedly blocked an investment by a Chinese company in Quebec. Beida Jade Bird, a Chinese government-backed company, announced in 2014 its plan to invest C$30-million in a fire alarm manufacturing facility near Montréal, Quebec. The federal Cabinet reportedly blocked Beida Jade Bird’s investment on national security grounds, due to the proposed new facility’s proximity to the headquarters of the Canadian Space Agency. This was the first known occasion on which an investment to establish a new business in Canada was
blocked on national security grounds. As is typical with national security reviews, Cabinet does not issue a public version of its order with reasons setting out why it decided to block the investment and not, at a minimum, require undertakings related to national security. The decision was viewed at the time as a sign of the government’s intention to maintain a stringent review process for investments that raise national security issues even though the investment would have created jobs in Quebec.

Second, a federal Cabinet order-in-council reportedly ordered a Chinese company to divest a company it had recently acquired. O-Net Communications Group Ltd., a Chinese optical networking component developer, acquired ITF Technologies Inc., a firm specializing in fiber components and modules, for C$5-million in 2015. Shortly after this acquisition, another order-in-council was issued on national security grounds, reportedly requiring O-Net Communications Group Ltd. to divest itself of ITF Technologies Inc. within 180 days. Although no reason was provided for this order, it was reported that ITF Technologies Inc.’s sales in the military sector may have played a role. Following the order, O-Net Communications Group Ltd. filed an application for judicial review of the decision, arguing that its right to procedural fairness was breached. The government has indicated that it intends to resist any measures that would force it to reveal information about its reasons for the ordered divestiture.

Net Benefit Review

In 2015, the Canadian government adopted new regulations and implementing orders that significantly altered the review thresholds under the ICA for most investors. In particular, the review threshold for all World Trade Organization investors, other than state-owned enterprises (SOEs) or where the Canadian business involves a cultural business, is now based on the “enterprise value” of the Canadian business being acquired instead of its book value of assets. The initial threshold is C$600-million (up from C$369-million) but will increase further to C$800-million in 2017 and to C$1-billion in 2019. Beginning on January 1, 2021, and for subsequent years, the threshold will be indexed to changes in Canada’s gross domestic product. The threshold may increase further to C$1.5-billion in the near future depending on whether trade agreements with Europe or Pacific nations are ratified.

After several high-profile transactions reviewed under the ICA in 2014, including the acquisition of the iconic Canadian chain Tim Hortons by Burger King and the acquisition of Alberta’s largest electricity transmission company, Alta-Link, by Berkshire Hathaway, foreign investment in 2015 saw fewer high-profile transactions. By the same token, there were fewer investments reported under the ICA for the first eight months of 2015 than during the same period of the previous year.

Foreign investment transactions that do not meet the thresholds for a review and approval requirement under the ICA still require submission of a formal notification to Industry Canada, typically within 30 days after closing. The notification requirements, however, were significantly enhanced in 2015: investors must now submit much more detailed information concerning the transaction, the foreign investor (acquirer) and the Canadian business being acquired.
**SOE Transactions**

Issues surrounding investment by SOEs in Canada first became prominent around a decade ago. In response to rising overseas investments by entities connected with foreign states, the government released guidelines outlining the special considerations that apply in the case of SOE acquisitions of Canadian businesses. SOE investments were further highlighted following the high-profile review of two transactions in 2012 (CNOOC’s acquisition of Nexen and PETRONAS’ acquisition of Progress Energy), which were approved under the ICA but prompted the government to revise its SOE guidelines, place special restrictions on SOE acquisitions of control of Canadian oil sands businesses and pass amendments that give the government greater discretion in determining whether an investment should be treated as an “SOE investment” for the purposes of the ICA.

Oil prices remain depressed in 2015, contributing to not only the devaluation of Canadian oil sands businesses, but also the decline of the Canadian dollar and hence the relative devaluation of a wide range of Canadian public companies, increasing their attractiveness as targets. At the same time, in May 2015, the province of Alberta, home to Canada’s oil sands businesses, elected a left-leaning New Democratic Party government whose view of major SOE investments remains untested. While provincial governments have no formal approval power under the ICA, in practice, they are consulted, and their support (or lack thereof) for a transaction may be determinative of the outcome.

Against this backdrop, and in support of increasing transparency, the newly elected federal Liberal government may feel compelled to clarify its position on SOE investment. Regardless of the position they adopt, it will remain essential to carefully consider the application of the ICA to a transaction where the investor has links to a foreign state.

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**TIPS to remember...**

**Minority investments by SOEs can be reviewable.**

SOE investors should consider carefully whether their minority investments in a Canadian business will give them control over the business, in which case, they may need ministerial approval under the ICA.

**Politics matter.**

Ultimate transaction approval rests with the federal government, which has recently changed following the election of the Liberal party for the first time in a decade. While the ICA process incorporates feedback from provincial and local leaders, as well as other elected and bureaucratic officials, the new federal government’s views will be important in shaping Canada’s foreign investment climate for the coming years.
2015 Highlights

Despite a significant number of convictions and almost C$18-million in fines in 2014, 2015 did not see a significant number of prosecutions or convictions under the cartel provisions of the *Competition Act* (Act). Through the first 10 months of the year only one company and one individual have entered guilty pleas for their involvement in cartel conduct in 2015, resulting in fines of C$1-million for the company and C$23,000 for the individual. Although three companies and four individuals were charged this year with engaging in bid-rigging, it appears as though overall enforcement numbers are down. This downward trend in enforcement figures may be a result of the Competition Bureau’s (Bureau) resources being tied up with ongoing investigations. More significantly, the Bureau also lost a major bid-rigging trial this year, as the Ontario Superior Court acquitted seven individuals and three companies for alleged conduct that stemmed from an inquiry initiated in 2006. While the Bureau’s enforcement numbers have decreased, it has continued to emphasize education and prevention, hosting its second annual Anti-cartel Day in March and publishing videos developed to assist businesses and trade associations to recognize and prevent cartel activity.

Disclosure Rights Affirmed in Important Decision

A recent decision of the Ontario Superior Court will have important implications for companies seeking immunity and leniency under the Act for price-fixing conspiracies. In *R. v. Nestlé Canada Inc.*, the court held that “factual information” provided by a company through the “proffer process” when applying for immunity or leniency must be produced to other accused co-conspirators in criminal proceedings. Neither solicitor-client nor settlement privilege will prevent the disclosure of information provided to the Bureau by applicants under the immunity and leniency programs. The court held that solicitor-client privilege
did not apply to information provided to the Bureau, as the Bureau is an adverse party to the applicant. Also, under the terms of the immunity and leniency programs, applicants necessarily consent to waive any settlement privilege should the Bureau or the public prosecutors proceed with enforcement actions against other parties to the conspiracy.

**New Compliance Policy Credit**

In June 2015, the Bureau revised its *Corporate Compliance Programs* bulletin to provide that the Bureau will take into account the presence of a compliance program when making a recommendation to the Public Prosecution Service of Canada (PPSC) in respect of a criminal matter. In the Bureau’s view, a compliance program must be credible and effective, and the revised bulletin sets out the essential components of such compliance programs. To have a credible compliance program, at minimum, the program must demonstrate the company’s commitment to conducting business in conformity with the Act and other labelling and marking acts. To be effective, a compliance program needs to motivate and inform all those acting for the company about their legal duties, the need for compliance with internal policies and procedures, the potential costs of contravening the acts and the harm to the Canadian economy caused by contraventions of the acts.

This updated bulletin reflects a greater emphasis by the Bureau on competition law advocacy and the Commissioner’s focus on “shared compliance.” The Bureau has committed to implementing an outreach strategy that will actively encourage businesses to adopt rigorous compliance practices, policies and programs as part of its five strategic commitments for 2015-2018. In addition to the bulletin, the Bureau has also established a Compliance Unit and released shorter guidance documents.

**Amended Federal Government Integrity Regime**

Following criticism regarding the strictness of the previous regime related to tenders for federal government contracts implemented in November 2012, the federal government amended the regime to make a number of key changes. The regime now applies to all procurements and real property transactions regardless of dollar value. It also covers subcontractors and affiliates. The 10-year debarment period can be reduced by up to five years if the supplier cooperated with authorities or addressed the causes of the misconduct. One of the more controversial changes concerns the ability of the government to suspend a supplier for up to 18 months or require interim action simply if the supplier has been charged with or admitted guilt to a stipulated offence. If a conviction occurs during the period of a contract, suppliers will have the ability to demonstrate why termination of the contract should not occur and enter into a remedial agreement with the government.

Even with the changes, Canada’s integrity regime remains more punitive than its U.S. and European equivalents. The impact of the debarment rules may potentially deter suppliers from coming forward to report cartel activity if it means that they will lose a significant source of future revenue.
Not-Guilty Verdicts in Bid-Rigging Case

Following a seven-month trial involving 22 witnesses, 60 charges and over one-million pages of disclosure, six individuals and three companies were acquitted in the first-ever jury trial under the bid-rigging provisions of the Act in April 2015. Another individual, who waived his right to a preliminary inquiry and sought an order directing a verdict of acquittal for himself, was acquitted in February 2015.

The Bureau had commenced a criminal inquiry in 2006 into bid-rigging allegations following allegations that the accused had coordinated their bids for information service contracts for the Canada Border Services Agency, worth more than C$60-million. Charges were laid in February 2009. Notably, the defendants had actually submitted the lowest-cost proposals, and the Canada Border Services Agency continued to do business with the accused throughout the legal proceedings. As the jury was not required to provide reasons, it is not clear what prompted their decision to acquit the defendants.

Following the release of the not-guilty verdicts, the Bureau issued a statement indicating that the Crown is considering whether to appeal the verdicts.

Charges Stayed in Price-Fixing Cartel

In the final quarter of 2015, the PPSC entered a stay of proceedings against three companies and three individuals accused of conspiracy for their role in fixing the price of chocolate confectionery products in Canada. These charges stem from an investigation launched in July 2007, when the Bureau was contacted under the Bureau’s Immunity Program, with criminal charges laid against three companies and three individuals in June 2013, more than five years after the alleged conduct ceased. One company cooperated with the Bureau’s investigation, pleaded guilty and received a fine of C$4-million in 2013.

One unusual aspect of this case is that the criminal charges against all of the parties were stayed even though the defendants reached settlements with civil plaintiffs in 2013 and two of the alleged co-conspirators provided information through the Bureau’s immunity and leniency programs.

Convictions and Charges in 2015

One company was found guilty of fixing the price of retail gasoline in three local markets in Quebec and was fined C$1-million. This case was part of a wider Bureau investigation that resulted in charges being laid against 39 individuals and 15 companies in 2008, 2010 and 2012. To date, 33 individuals and eight companies have pleaded or were found guilty in this conspiracy with fines totalling over C$4-million.
Another individual was conditionally sentenced to 18 months of imprisonment, with the first six months to be served under house arrest, for bid-rigging related to the supply of information technology services to Library and Archives Canada. Criminal charges had been laid against one company and six individuals in 2014 for bid-rigging conduct that the Bureau, with the cooperation of a party under the immunity program, began investigating in 2009.

Also, in 2015, criminal charges have been laid against three companies and four individuals accused of rigging bids for the supply of water services to municipalities in Quebec from 2005 to 2011. The Bureau began its investigation in 2011 after being informed of the alleged bid-rigging conspiracy through the immunity and leniency programs. One company has pleaded guilty to nine counts of bid-rigging and was fined C$117,000 for its role in the alleged conspiracy.

**TIPS to remember...**

**Create a compliance program.**
Have in place an effective *Competition Act* compliance program that provides training for company employees, with active support from the company’s senior management.

**Keep the program current.**
Regularly update your company’s compliance program and actively promote it throughout all levels of the company, including senior management.

**Reach out to counsel.**
Immediately contact competition counsel if cartel or bid-rigging conduct is discovered.
2015 Highlights

The law on private actions for competition law claims continues to evolve, as courts across the country apply the standards set out in the 2013 Supreme Court of Canada (SCC) trilogy (Pro-Sys Consultants Ltd. v. Microsoft Corporation, Sun-Rype Products Limited v. Archer Daniels Midland Company and Infineon Technologies AG v. Option consommateurs) and the SCC’s 2014 decision in A.I. Enterprises Ltd. v. Bram Enterprises Ltd. Key developments include (1) a continued judicial debate as to whether the Competition Act (Act) constitutes a “complete code” such that a breach of the Act cannot form the wrongful act necessary to support a claim of unlawful means conspiracy, and (2) decisions outlining the appropriate role of expert evidence in defining an appropriate methodology for proving damages and pass-through.

Competition Act as a Complete Code

Two major cases applied the 2014 Wakelam v. Wyeth Consumer Healthcare (Wakelam) decision of the British Columbia Court of Appeal (BCCA) to clarify the scope of the private right of action in section 36 of the Act. The court in Wakelam found that the private right of action is part of the self-contained scheme set out in the Act and cannot be used to establish the element of the wrong for a restitutionary claim. A restitutionary claim would allow plaintiffs to potentially recover profits associated with the supply of a cartelized product, whereas a damages claim is limited to claims for proven injury to the plaintiffs.

As discussed below, two contradictory decisions have followed Wakelam. Since the issue remains unresolved in Canada, it could likely be the subject of an SCC decision in the near future.

First, in Watson v. Bank of America Corporation (Watson), the BCCA declined to explicitly overrule Wakelam, finding that a claim for restitution cannot lie when based on “non-observance of the Act and nothing else.” However, the court distinguished the holding in
Wakelam to find that the private right of action in section 36 was not a replacement for the common law claim of unlawful means conspiracy and that a claim for unlawful means conspiracy relying upon breach of the Act was a viable cause of action.

In the more recent decision of Shah v. LG Chem, Ltd. (Shah), the Ontario Superior Court of Justice reached the opposite conclusion as the court found in Watson, holding that the Act was a “complete code” with the effect that no remedies beyond those specified in the Act are available for a breach of its criminal provisions. For example, breach of the conspiracy provisions cannot be the wrong or unlawful act used to support the tort of unlawful means conspiracy or restitutionary remedies such as waiver of tort or unjust enrichment.

**Role of Expert Evidence in Class Certification**

In Pro-Sys Consultants Ltd. v. Microsoft Corporation (Pro-Sys), the SCC observed, with respect to the “common issues” prong of the test for class certification, that plausible and credible expert evidence is required to establish a realistic prospect of establishing loss on a class-wide basis. A number of cases have applied and clarified the bounds of the standard to be applied with respect to expert evidence.

In Airia Brands v. Air Canada, the defendants argued that the plaintiffs’ expert failed to establish a sufficiently credible methodology as required by Pro-Sys because the expert methodology was not sufficiently grounded in the relevant facts of the case. The Ontario Superior Court of Justice rejected the defendants’ argument on the basis that it asked the court to investigate and decide the merits of the assumptions (as to market definition, role of competitors, etc.) underlying the plaintiffs’ expert’s methodology, which was not appropriate at the certification stage.

Similarly, in Watson, the BCCA agreed with the defendants that the plaintiffs’ expert did not “extensively” address how “network effects” would impact his method of determining the harm caused by the defendants’ conduct. Nonetheless, the BCCA concluded that the expert’s comments about having to examine the network effects were sufficient to allow the court to find that there was a plausible methodology by which harm could be shown and that the issue was suitable for certification as a common issue.

Finally, in Shah, the Ontario Superior Court of Justice noted that Pro-Sys did not stand for the proposition that a methodology cannot be theoretical or hypothetical, whereas the SCC determined that it cannot be “purely methodology.” The court noted that this qualification was subtle in competition law cases because the facts themselves may be theoretical (i.e., markets, prices and competitive dynamics are human concepts that do not exist in nature). Moreover, the court found that for the purposes of certification, the methodology did not have to prove that each individual member of the class suffered an individual loss. The plaintiffs’ economic evidence must also show some basis in fact for a methodology that loss is common across the indirect purchaser members of the class. In other words, the methodology just needs to show that the loss impacted the indirect purchasers as a group, not individually.
When taken together, the bar for “plausible and credible” evidence is not a high bar for plaintiffs’ experts to clear. Courts will not be tempted to engage in a “battle of the experts” to assess the strength of either party’s expert methodology when determining whether the “common issues” criterion for certification is satisfied.

Rejection of Claims by “Umbrella Purchasers”

An additional development arising from Shah was its treatment of “umbrella purchasers,” or purchasers of similar products sold by non-defendants, not alleged to be co-conspirators. Plaintiffs in Shah argued that umbrella purchasers had a cause of action — that they could claim they were harmed by the conspiracy due to overall price increases in the market caused by the alleged conspirators’ conduct. The Ontario Superior Court of Justice disagreed and ruled that they should be excluded from the class. In reaching this decision, the court found that extending the scope of the conspiracy provisions of the Act to include umbrella purchasers was not supported by restitutionary law as it was not arguable that the defendants “enjoyed any indirect benefit from the harm inflicted on the umbrella purchasers.” Moreover, the court found that allowing the umbrella purchasers’ claim would impose indeterminate liability on the defendants and the claim would be unfair because the law, generally speaking, does not impose liability on one person for the conduct of others. This decision could have immediate wide-ranging effects as a number of competition class actions are proceeding to certification in the coming months, including the auto-parts class actions in which a similar claim has been alleged.

TIPS to remember...

Immediately contact counsel if served with a class claim.
Class action cases can raise a number of complex substantive and procedural issues, and actions may arise in multiple Canadian provinces.

Implement a records retention policy.
Do not engage in the ad hoc destruction of documents after an action has been commenced. Rather, have a policy in place that spells out employee responsibilities regarding the preservation of internal company correspondence and documents.

Promptly consider the establishment of a formal or informal joint defence arrangement.
A joint defence arrangement will allow co-defendants to discuss joint strategy and exchange information without waiving privilege.
2015 Highlights

In 2015, several developments arising from Competition Tribunal (Tribunal) and Federal Court of Appeal (FCA) decisions as well as Competition Bureau (Bureau) investigations will have important implications on the law and policy surrounding conduct matters. These cases involved industries ranging from real estate to medical devices to water heaters. For instance, the Bureau has begun an investigation of a party for conduct affecting participants in another market in which that party does not actually compete. The Tribunal has found that companies cannot escape liability under the *Competition Act* (Act) even if they no longer own the business that allegedly engaged in the conduct at issue. The Bureau disputed a party’s interpretation of a consent agreement and challenged the warranty terms used by manufacturers of medical devices. It also released updated guidelines on the intersection between competition law and intellectual property law this year. These guidelines include additional guidance related to the Bureau’s enforcement policy concerning pharmaceutical patent litigation settlements and concerning the use of standard essential patents by standard-setting organizations. As a result, we anticipate increased enforcement efforts with respect to the competition/intellectual property interface in the coming year.

Implications of the FCA Decision in Commission of Competition v. The Toronto Real Estate Board

On July 29, 2015, the FCA granted an order sought by the Bureau under section 11 of the Act requesting certain information from the Vancouver Airport Authority (VAA) in relation to the Bureau’s ongoing investigation. The Bureau is investigating whether the refusal of the VAA to allow a third-party catering firm to provide in-flight services on flights constituted an abuse of dominance under section 79 of the Act. This is noteworthy because the VAA does not actually provide in-flight catering services itself and operates in a different market from the target of its alleged anti-competitive actions.
Such a situation is a direct consequence of the decision of the FCA on February 3, 2014, in relation to the application by the Commissioner of Competition (Commissioner) against the Toronto Real Estate Board. In that decision, the FCA ruled that “substantial control of a market” under section 79(1)(a) could apply to a person who was not a competitor in that market. Moreover, the FCA held that a person could engage in a “practice of anti-competitive acts” under section 79(1)(b) of the Act even if the alleged conduct was not directed at the person’s own competitor. As a result, parties can be found liable for engaging in abuse of dominance under the Act if they control a market by, for example, controlling access to a market, controlling a significant input for market participants or making rules controlling the business conduct of market participants.

Potential Liability Even After Exiting a Market

On March 26, 2015, the Tribunal held that companies can be prosecuted for abuse of dominance even if they have subsequently left the relevant market. The Bureau filed an application under section 79 on December 20, 2012, alleging that Direct Energy Marketing Limited (Direct Energy) engaged in abuse of dominance by putting in place return policies and procedures aimed at preventing consumers from switching suppliers of natural-gas water heaters in Ontario. The Bureau argued this was done through policies preventing the return of Direct Energy water heaters with the assistance of competitors, complicating the return process at Direct Energy’s return depots and levying unwarranted exit fees and charges. Subsequently, Direct Energy closed the sale of its business unit that included its residential water-heater business to EnerCare Inc. on October 20, 2014, and signed a non-competition agreement agreeing not to re-enter the residential water-heater market in Ontario for a period of eight years.

Direct Energy argued that the abuse of dominance provisions of the Act only applied to businesses that “control” a market at the time the order is being made, and not to companies that previously did so. However, the Tribunal rejected this argument, finding that the law could not let a company shield itself from the Act simply by selling the offending business. Otherwise, dominance could be perpetuated by engaging in a series of divestitures, which the Tribunal found could not have been Parliament’s intention. Following this ruling, the Bureau reached an agreement with Direct Energy under which Direct Energy agreed to pay an administrative monetary penalty of C$1-million and establish a corporate compliance program in the event it re-enters the Ontario residential water-heater market within the next 10 years.

Abuse of Dominance and Warranties

On March 13, 2015, the Bureau announced that it had reached an agreement with Medtronic of Canada Ltd. (Medtronic) requiring the company to amend the warranty terms for its insulin pumps. Medtronic is Canada’s largest supplier of insulin pumps, which are medical devices used by diabetic patients in combination with insulin reservoirs and infusion sets to continuously infuse insulin under a patient’s skin. This avoids the need for people with diabetes to receive multiple daily injections.
The warranty terms for one of Medtronic’s insulin pumps stated that the warranty would be void if non-Medtronic products were used in combination with its insulin pumps. The Bureau carried out an investigation under the abuse of dominance provisions of the Act. It took the position that these warranty terms limited the ability of rival companies to enter the market for insulin reservoir and infusion sets, thereby reducing the choices available to customers. As a result, Medtronic agreed to revise its warranty terms so that a warranty will only be voided if the Medtronic insulin pumps are damaged due to the use of non-Medtronic products in conjunction with the insulin pump.

Consent Agreement Under the Microscope

On April 30, 2015, the Tribunal ruled that the Canadian Real Estate Association (CREA) did not violate a consent agreement when it introduced rule changes for realtors posting properties for sale on Multiple Listing Service (MLS) systems. The consent agreement filed with the Tribunal on October 25, 2010, was reached after the Bureau brought an application under the abuse of dominance provisions of the Act alleging that CREA’s rules prevented the entry and expansion of competing business models by prohibiting unbundled real estate services by realtors. The consent agreement prohibits CREA from adopting, maintaining or enforcing rules that would prevent realtors from offering mere postings on an MLS system if the realtor provided no other services for the seller. It also prohibits CREA from discriminating against realtors who only offer mere postings.

Subsequently, CREA introduced rule changes in 2011 limiting where a seller’s contact information could be listed on a realtor’s own website. Under these rule changes, realtors are prohibited from showing a seller’s contact information or a reference to a private sale on a webpage that is linked directly from CREA’s website to a realtor’s website. The Commissioner argued in part that these rules violated the consent agreement because the consent agreement did not allow CREA to in any way “prevent” the listing of a seller’s contact information on any part of a realtor’s website. However, the Tribunal held that CREA’s rules did not, in fact, ultimately “prevent” or hinder a potential purchaser from finding the contact information for a private seller, since this information was still available on other pages of a realtor’s website. As a result, it found that CREA did not violate the consent agreement.

Signalling a New Approach to Intellectual Property

On June 9, 2015, the Bureau released its new draft Intellectual Property Enforcement Guidelines (Guidelines) for public comment. These Guidelines set out how the Bureau intends to assess conduct concerning intellectual property (IP) under the Act. They are the Bureau’s first major revision to its substantive enforcement policies with respect to IP since 2000 and reflect many of the developments that have occurred in the area of IP and competition law over the past 15 years.

With respect to pharmaceutical patent litigation settlements, the Guidelines provide that “[i]n the vast majority of cases” the Bureau will review pharmaceutical patent litigation
settlements under the civil competitor collaboration section of the Act. Illustrative examples provided in the Guidelines suggest that the Bureau will only review settlements as a criminal matter where, for example, a settlement precludes a generic manufacturer from entering until an additional period after the expiry of the patent, or where the Bureau uncovers convincing documentary evidence that both parties recognized that the patent was not valid. The Guidelines provide a safe-harbour for settlements that do not involve the transfer of value from an innovator manufacturer to a generic manufacturer and that leave the generic free to enter upon the expiry of the patent or at an earlier time. Under the Guidelines, the Bureau will look at the size of any payment by an innovator manufacturer to determine whether a payment was made for the purpose of settling litigation or delaying the generic manufacturer’s entry.

The Guidelines also describe how the Bureau will apply the Act to conduct that takes place within the context of standard-setting organizations (SSOs) and involving standard essential patents (SEPs). The Guidelines recognize that the work of SSOs can be pro-competitive and provide that the Bureau will not investigate, as a criminal matter, any SSOs that obligate their members during the standardization process to disclose ownership of patents that are essential to standard or future maximum royalty rates. Examples in the Guidelines explain how the Act will apply to the licensing of SEPs. For example, the Bureau would review as an abuse of dominance a patent owner’s non-disclosure of patents to an SSO and subsequent requests for licences, breach of a commitment to license at no more than a previously disclosed maximum royalty rate by the original patent owner or a subsequent transferee of the patent rights and a patent owner seeking an injunction against a “willing licensee.”

TIPS to remember...

**Abuse of dominance concerns can arise in a variety of contexts.**

Businesses should carefully monitor their policies and rules to ensure they are not in danger of engaging in abuse of dominance, including in markets in which they do not actually compete. The Bureau has recently investigated parties for allegedly engaging in abuse of dominance through the use of trade association rules, return policies or warranties, and it has carried out these investigations in a variety of industries, including in-flight catering services, real estate, medical devices and water heaters.

**Audit ongoing contracts, distribution practices and joint ventures.**

When dealing with distributors in Canada, businesses should be conscious that a wide range of common business practices could fall under the reviewable practices provisions of the *Competition Act*, whether or not any actual agreement exists between the supplier and distributor. In addition, market conditions will change, meaning that contracts, distribution practices or joint ventures that previously did not raise competition issues could do so in future.

**Abide by document creation protocols.**

Avoid creating documents that could be misinterpreted by the authorities, which may lead to an unwarranted investigation by antitrust authorities.
2015 Highlights

Developments in 2015 have highlighted the continued commitment of the Competition Bureau (Bureau) to investigating and enforcing the proper disclosure of fees and charges, ordinary selling price and deceptive telemarketing provisions of the *Competition Act* (Act). Reflecting the Bureau’s continued priority to promote competition law compliance, the *Deceptive Marketing Practices Digest* was published on June 10, 2015. This is the first issue of the publication, based off of the former *Misleading Advertising Bulletin*, and will be released periodically by the Bureau.

The Bureau’s enforcement focus remains on the digital economy and the application of disclosure obligations in this evolving medium as demonstrated by its recent enforcement and compliance efforts involving advertising in the online space. Evidencing that this is a priority area for the Bureau, the first issue of the Bureau’s *Deceptive Marketing Practices Digest* focuses on misleading advertising occurring online, specifically with respect to disclaimers and fine print and through online reviews. This issue provides an overview of general online marketing trends and examines particular misleading advertising pitfalls that are specific to the digital and online economy.

Ordinary Selling Price Claims

The Bureau continues to enforce the ordinary selling price claims under the Act. In May 2015, following a four-year investigation, the Bureau concluded that Michaels of Canada ULC did not ensure that its custom and select ready-made framing were offered for sale in good faith before they were promoted at substantial discounts. To resolve the matter, Michaels agreed to pay a C$3.5-million administrative monetary penalty and to establish a corporate compliance program under a 10-year consent agreement.
The Bureau is currently investigating Sears Canada and Hudson’s Bay Company with regards to their respective ordinary selling price claims in relation to the supply of mattresses. The investigation will consider whether the companies have sold sufficient volumes of mattresses or offered those products for a sufficient period of time, at the regular price, before running a “sale.”

**Deceptive Telemarketing**

The Bureau also continues to utilize its criminal enforcement powers to penalize deceptive advertising. In June 2015, the Court of Quebec sentenced three individuals after they pleaded guilty to charges of making misleading representations and engaging in deceptive telemarketing under the Act. They represented only three of five individuals and four Montréal-based companies that were charged in September 2011 for their role in a deceptive telemarketing operation that sold business directories, subscriptions to online directories, office supplies and first-aid kits using misleading sales techniques directed at businesses in Canada, the United States, Europe and Central America. The three individuals received conditional sentences ranging from two to 15 months, were fined or ordered to donate to charity a range of C$5,000 to C$50,000 and were required to do community service.

**TIPS**

**to remember...**

**Be compliant.**

As technology and media continue to evolve, advertisers should ensure that new and innovative marketing efforts remain in compliance with the misleading advertising provisions of the *Competition Act*.

**Look for common online pitfalls.**

When advertising online, particular attention should be paid to common misleading advertising pitfalls such as disclaimers and fine print, astroturfing through online reviews, and emails that may be offside the anti-spam legislation.

**Compliance applies to all forms of media.**

Despite the Bureau’s recent focus on online advertising, misleading advertising in traditional media has not gone unnoticed by the Bureau. In line with its consumer protection mandate, the Bureau continues to rely on its investigative and enforcement powers to tackle misleading advertising to promote compliance with the *Competition Act*, regardless of the medium used.
2015 Highlights

In November 2015, the Competition Bureau (Bureau) released the final version of the Competition and Compliance Framework bulletin following a period of public comment on the draft released in May 2015. This bulletin replaces the Bureau’s previous Conformity Continuum bulletin, last updated in 2000, and underscores the Bureau’s recent priority focus on competition law compliance. The Bureau also undertook a number of competition advocacy initiatives, including a submission to the Department of Finance on payment systems.

Competition and Compliance Framework

As part of its effort to promote competition compliance, the Bureau released its Competition and Compliance Framework bulletin in November 2015. Among the key themes set out in the bulletin, the Bureau has indicated that it will (1) continue to adopt proper safeguards to protect confidential information to ensure the integrity of the investigative process and commercially sensitive information provided to the Bureau; (2) be fair in its decisions and try to strike the right balance between enforcement and compliance; (3) provide appropriate background information on its decisions and publish its position on as many issues as possible; (4) strive to deal with issues quickly; and (5) be as open as possible in the circumstances, develop appropriate service and performance standards, and be prepared to be judged according to these standards.

In June 2015, the Bureau also revised its Corporate Compliance Programs bulletin to provide that the Bureau will take into account the presence of a compliance program when making a recommendation to the Public Prosecution Service of Canada in respect of a criminal matter. To be an effective compliance program as per the bulletin, it needs to motivate and inform all those acting for the company about their legal duties under the Competition Act (Act),
ensure that internal policies and procedures are in place and outline the potential costs of contravening the Act to competition and the Canadian economy.

This updated bulletin reflects a greater emphasis by the Bureau on competition law advocacy and the Commissioner’s focus on “shared compliance.” The Bureau has committed to implementing an outreach strategy that will actively encourage businesses to adopt rigorous compliance practices, policies and programs as part of its five strategic commitments for 2015-2018.

**Advocacy Initiatives**

As part of its advocacy and promotion efforts, the Bureau conducts market studies and engages the public for feedback and comments, and may be expected to increasingly provide advice to other government regulators through its recently established Competition Promotion Branch. In a submission made to the Department of Finance related to oversight of national payment systems, it made a number of recommendations including ensuring that merchants be empowered to accept new forms of payment and encouraging collaborations between industry participants to innovate in this area. The Bureau also published a white paper calling for the modernization of regulations relating to taxi services to permit ride sharing services, to ease regulations over fares and to eliminate licensing barriers.

**TIPS to remember...**

**Have an effective competition compliance program.**

This will help prevent breaches of the *Competition Act* and may also help mitigate the extent of any penalties sought by the Bureau in the event of a breach.

**Exercise caution if approached by the Bureau about a market study.**

Unlike a merger review, the *Competition Act* does not prescribe how the Bureau can conduct a market study.
ABOUT BLAKES

As one of Canada’s top business law firms, Blake, Cassels & Graydon LLP (Blakes) provides exceptional legal services to leading businesses in Canada and around the world. We focus on building long-term relationships with clients. We do this by providing unparalleled client service and the highest standard of legal advice, always informed by the business context.

In 2015, Blakes was named one of Canada’s Best Diversity Employers by Mediacorp Canada Inc. for the fifth time and Canada Law Firm of the Year in the Who’s Who Legal Awards for the seventh consecutive year. Thanks to our clients, we were once again the top-ranked Canadian firm in Chambers Global: The World’s Leading Lawyers for Business and selected as one of the most innovative law firms in the BTI Brand Elite. In addition, and according to Bloomberg, Blakes has been the No. 1 Canadian law firm in both Canadian and global M&A deals by deal value and deal count for the past seven years (2008-2014).

Serving a diverse national and international client base, our integrated network of 11 offices worldwide provides clients with access to the Firm’s full spectrum of capabilities in virtually every area of business law. Whether an issue is local or multi-jurisdictional, practice-area specific or interdisciplinary, Blakes handles transactions of all sizes and levels of complexity.

www.blakes.com
Blakes has one of the LARGEST AND MOST ACTIVE Mergers and Acquisitions Practices in Canada.

These deals spanned 50+ countries and/or geographical regions.

Number of Public and Private M&A transactions we have been involved in over the past five years: 1,300+

The aggregate dollar value of these deals is in excess of US$1.6-trillion.

According to Bloomberg Blakes is the #1 Canadian Law Firm by deal value and deal count for the last 10 years from October 31, 2015.

### Acquirer Industry

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COMPETITION & ANTITRUST

“The Blakes Competition, Antitrust & Foreign Investment group is ‘unreservedly in the top tier for competition work in Canada’ and fields a ‘deep bench of leading lawyers in this area, with excellent young names coming through.’”

The Legal 500 Canada 2015

The Blakes Competition, Antitrust & Foreign Investment group is repeatedly acknowledged as the leading practice in Canada. We work with clients to facilitate their strategic objectives in compliance with the Competition Act and Canada’s rules on foreign investment.

Blakes is frequently retained by major domestic and international companies and by international and domestic law firms to provide strategic counsel and representation in merger reviews, cartel investigations, abuse of dominance cases, distribution practices, advertising matters, antitrust class-action defence and other competition issues. Blakes is also a leading firm with respect to securing merger approvals for non-Canadian purchasers under Canada’s foreign investment laws, which are typically required in all transactions where a non-Canadian purchases a Canadian business.

Blakes has a proven track record of success in acting for clients on multinational transactions and investigations where coordination among counsel and agencies in the U.S., Europe and other jurisdictions is a paramount objective. Blakes lawyers understand how competition laws fit within the broader context of complex corporate transactions and business affairs generally. Blakes can draw on the Firm’s vast resources and leading expertise in related practice areas, such as litigation, securities and intellectual property.

PUBLICATIONS

*Competition and Antitrust Law: Canada and the United States*
Brian A. Facey, Lexis Nexis, Fourth Edition (June 2014)

*Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations*
Brian A. Facey and Cassandra Brown, LexisNexis Canada (May 2013)
Blakes has a leading Investment Canada practice, advising both international and Canadian clients on the application of the *Investment Canada Act* (ICA) with respect to securing merger approvals for non-Canadian purchasers under Canada’s foreign investment laws. Blakes lawyers are experienced in navigating the complex maze of regulations governing investments by non-Canadians, including state-owned enterprises and sovereign wealth funds.

The Blakes team has extensive experience in all aspects of foreign investment review under the ICA and has represented numerous clients before the Investment Review Division of Industry Canada and the Cultural Sector Investment Review Branch of Canadian Heritage. Blakes lawyers have successfully cleared a number of high-profile transactions under Canada’s foreign investment review regime, including those that involve industry sectors subject to special consideration and review under the ICA (i.e., cultural businesses and national security). Blakes is experienced with the national security provisions of the ICA and was successful in persuading the minister not to invoke this power in one of Canada’s most high-profile cases.

### PUBLICATIONS

**Investment Canada Act: Commentary and Annotation**  
Brian A. Facey and Joshua Krane, LexisNexis Canada (2015)

**The Foreign Investment Regulation Review**  

**Regulation of Foreign Investment in Canada – The Investment Canada Act – Law**  
Navin Joneja, Policy and Practice, Thomson Carswell (January 2014)
COMPETITION LITIGATION

“We strongly believe that this is the best antitrust practice in Canada.”

Chambers Global: The World’s Leading Lawyers for Business 2015

Blakes competition litigators play a key role in one of Canada’s largest and most experienced competition law practices. Blakes is frequently at the forefront of high-profile competition litigation matters, including contentious mergers, advertising, abuse of dominance, reviewable trade practices and other civil matters before the Canadian Competition Tribunal and Canadian provincial and federal courts. Our lawyers also routinely appear before Canadian courts on major antitrust criminal matters and class actions.

Much of the Firm’s work in this area involves strategic advice to best position matters for success in the event of litigation as well as preventing problems before they lead to litigation through prudent advice concerning the structuring of business transactions and the conduct of business affairs.

PUBLICATION

Cartel leniency in Canada: Overview
Robert E. Kwinter and Evangelia L. Kriaris,
Practical Law (2014)
RECENT AWARDS AND RECOGNITION

• Chambers Global: The World's Leading Lawyers for Business 2015 ranks Blakes in Band 1, its top tier for Competition/Antitrust (including litigation and foreign investment review). Brian A. Facey, Jason Gudofsky, Randall Hofley, Navin Joneja, Robert E. Kwinter, Julie Soloway, Debbie Salzberger and Micah Wood are recognized as leading lawyers.

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• The 2015 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada ranks Brian A. Facey and Robert E. Kwinter as leading lawyers in the area of Competition Law.

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• BTI Consulting Group names Brian A. Facey “BTI Client Service All-Star” for 2014 for delivering exceptional client service in the area of competition/antitrust. He is one of 15 top antitrust lawyers and the only Canadian competition lawyer to receive this distinction.
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If you have any questions or comments regarding the developments outlined in this report, please do not hesitate to contact your usual Blakes contact or any member of Blakes Competition, Antitrust & Foreign Investment group.