Competition and Antitrust

Lenczner Slaght has extensive experience in all areas of competition litigation. We regularly act in cases involving alleged breaches of the Competition Act, including misleading advertising, price fixing and conspiracy cases. We also represent defendants in class actions alleging violations of the Act. Our clients include leading multinational electronics manufacturers, auto parts companies, and technology companies, among others.

The breadth of our lawyers' courtroom experience, combined with their deep understanding of strategic business issues, allows our firm to provide effective representation for both Canadian and international clients in the most vigorously contested disputes. For example, we acted for Canada's Commissioner of Competition in one of the only misleading advertising cases to proceed to trial in recent years.

In addition, Lenczner Slaght lawyers have a wealth of experience in successfully guiding clients through all types of regulatory and criminal investigations, including those conducted by the federal Competition Bureau.

RECOGNITION

- The Legal 500 Canada (2014-2019)
  Dispute Resolution (Leading Lawyer), Competition and Antitrust (Recommended Lawyer 2018), Intellectual Property (Recommended Lawyer 2018).
- The Legal 500 Canada (2017-2018)
  Competition and Antitrust (Tier 4)
- Benchmark Canada (2012-2019)
  Top 50 Trial Lawyer in Canada and Litigation Star - Competition, General Commercial, Insolvency, Professional Liability and Securities

SELECT CASES

- **Staines v Royal Bank of Canada –** Counsel to the defendant Société Générale in a proposed class action alleging conspiracy and price fixing in connection with the international foreign exchange market. The plaintiffs seek billions of dollars in damages.
- **Cygnus Electronics Corporation v Hitachi AIC Inc –** Counsel to a defendant electronics company in a proposed Ontario class action relating to allegations of price-fixing in the market for electrolytic capacitors.

- **Di Filippo v The Bank of Nova Scotia –** Counsel to Société Générale in a proposed class action alleging conspiracy and price fixing in connection with the international gold market.
- **Sheridan Chevrolet Cadillac Ltd v Kyungshin-Lear Sales and Engineering –** Counsel to a defendant in a multi-jurisdictional class action involving alleged price-fixing among automotive parts manufacturers.
- **Commissioner of Competition v Rogers Communications Inc –** Counsel to the Commissioner of Competition in proceedings against Rogers Communications Inc. and Chatr Wireless Inc. relating to misleading advertising under the Deceptive Marketing Practices provisions of the *Competition Act*. The application involved successful defence to a constitutional challenge to certain provisions of the *Competition Act* brought by the respondents.
- **Ali Holdco Inc v Archer Daniels Midland Company –** Counsel to the defendant Corn Products International Inc. in a class proceeding alleging conspiracy to fix prices and restrain competition in the market for high fructose corn syrup.
- **Windsor Glass Company Limited v Asahi Glass Company Limited –** Counsel to one of the defendants in a class proceeding against numerous flat glass manufacturers alleging a price fixing conspiracy and breach of the *Competition Act* in the Canadian flat glass market.
- **Riediger v Air Canada –** Counsel to one of the defendants in a class proceeding alleging conspiracy to fix passenger fares, including breach of the *Competition Act*.
- **Nutech Brands Inc v Air Canada –** Counsel for a defendant in a class action relating to an alleged price-fixing conspiracy in the market for air freight shipping services.
- **Currie v McDonald's Restaurants of Canada Ltd –** Counsel to defendant, McDonald's Restaurants of Canada Ltd., in a class action alleging misrepresentation arising out of a marketing and promotion campaign.

SELECT PUBLICATIONS AND PRESENTATIONS

- **Competition Law In The “Mainstream” - The Rise of Hipster Antitrust? –** Paul-Erik Veel spoke at the CBA Competition Law Section's Young Lawyers Half Day Symposium in Ottawa. His panel discussed whether the practice of competition law is about to enter the era of “Hipster Antitrust” and its potential implications on mergers and conduct in the coming years.
- **Price-Fixing Actions After Pro-Sys v. Microsoft: Worrying Implications of the Supreme Court's Decision –** Paul-Erik Veel co-authored article *Price-Fixing Actions After Pro-Sys v. Microsoft: Worrying Implications of the Supreme Court's Decision* that appeared in the Fall 2014 issue of the Canadian Competition Law Review.

  "In *Pro-Sys Consultants Ltd. v Microsoft Corporation* and its companion cases, the Supreme Court of Canada recognized the right of indirect purchasers to advance claims for losses arising from price-fixing conspiracies. The Supreme Court's decision, while settling a long-standing doctrinal debate in Canadian law, gives rise to a number of additional problems..."

- **Beyond Refusal to Deal: A Cross-Atlantic View of Copyright, Competition, and Innovation Policies –** Paul-Erik Veel co-authored an article *Beyond Refusal to Deal: A Cross-Atlantic View of Copyright, Competition, and Innovation Policies* that appeared in Volume 79 of the Antitrust Law Journal.
- **Private Party Access to the Competition Tribunal: A Critical Evaluation of the S. 103.1 Experiment –** Paul-Erik Veel's article *Private Party Access to the Competition Tribunal: A Critical Evaluation of the S. 103.1 Experiment* appeared in Volume 18 of the Dalhousie Journal of Legal Studies.
- **New Evidentiary Requirements for Certification: The Future of Price-Fixing Class Proceedings in Ontario –** Ronald Slaght co-authored the article *New Evidentiary Requirements for Certification: The Future of Price Fixing Class Proceedings in Ontario* for the 2004 Canadian Class Action Review. ((2004) 1 Canadian Class Action Review 159)

BLOG POSTS

- **Confusion over "some basis in fact" rolls on in British Columbia Court of Appeal's RoRo decision –** Certification is a vital step in every class action. In order for a class action to be certified, the proposed representative plaintiff must show "some basis in fact" to believe that the certification requirements are met. These requirements include that there are common issues of fact or law and that a class action would be the preferable procedure for resolving those common issues. The Supreme Court of Canada was clear in its decision in *Pro-Sys Consultants Ltd v Microsoft Corporation* that the some basis in fact standard is less onerous than a balance of probabilities standard. However, how that standard is to be applied remains a source of great difficulty for courts.
- **No March Break for Competition, as Bureau Releases New Abuse of Dominance and Intellectual Property Enforcement Guidelines –** March 2019 has been a busy month for the Competition Bureau. On March 7, the Bureau released its updated Abuse of Dominance Enforcement Guidelines. Then, on March 13, the Bureau released its updated Intellectual Property Enforcement Guidelines ("IPEGs"). While neither new enforcement guideline reflects a fundamental shift in the Bureau's approach to these issues, they provide new guidance and reflect important nuances in the Bureau's consideration of these issues, particularly regarding abuse of dominance.
- **Foreign Discovery in Advance of Certification in a Class Action? Not So Fast, says Divisional Court –** Given the expansive discovery rights available under US law, plaintiffs may be tempted to try to use those rights in pursuit of proceedings under Canadian law. In its recent decision in *Mancinelli v RBC*, the Divisional Court placed an important limit on the ability of parties to do so. The Divisional Court upheld an order requiring plaintiffs in a proposed class action to obtain Court approval before taking any steps in furtherance of a subpoena issued by an American court.
- **Sweet Justice for IP Rights Holder: Agreement not in Restraint of Trade –** The intersection of intellectual property law and competition law is an area that gains greater significance with each passing year. Much of the focus in this area recently has been on the appropriate scope of action to take by regulators. For example, in Canada, the Intellectual Property Enforcement Guidelines promulgated by the Competition Bureau in 2016 have attracted significant attention.

- **The regulated conduct defence: we'll drink to that –** It says something about Canada that many famous cases throughout Canadian legal history relate to the regulation of alcohol. Through the early 20th century, the regulation of alcohol was a fertile domain for disputes about Canadian federalism. Now, in the 21st century, the complicated regulatory scheme of governing alcohol sales in Ontario is once again making new law. This time, however, the dispute is not over arcane principles of federalism, but rather over the scope of the regulated conduct defence to conspiracies under the *Competition Act*. While early 20th century federalism cases may be of interest to only a select few, the decision of the Ontario Superior Court of Justice in *Hughes v Liquor Control Board of Ontario* is likely to attract significantly broader interest, particularly among companies operating in regulated industries.
- **Toll the death knell for class-based public interest privilege in competition proceedings? –** The Competition Bureau relies heavily on voluntary cooperation from corporate Canada in order to enforce the *Competition Act*. Companies typically want assurances of confidentiality in order to cooperate with the Bureau. In recognition of the fact that companies are less likely to cooperate with the Competition Bureau if commercially sensitive information might be disclosed to third parties, the *Competition Act* provides a number of confidentiality protections for information acquired by the Bureau from third parties.
- **Voluntary Gift Cards: An Effective Strategy for Reducing Liability? –** The recent admissions by supermarket chain Loblaws and a related group of companies that they engaged in conduct to fix the retail price of bread products have drawn significant public attention to price-fixing. And Loblaws' response to those revelations of price-fixing—including giving consumers gift cards to be used at Loblaws—has also attracted significant interest, not just from the public, but also from businesses and the antitrust and class actions bar. For organizations that have engaged in misconduct looking to make a public response, Loblaws' actions highlight both the potential benefits and risks of such voluntary remediation.
- **Competing Fairly from a Monopoly Position: Six Things to Know about Abuse of Dominance After TREB –** Under Canadian law, many provisions of the *Competition Act* can only be enforced by the Commissioner of Competition, and not by private parties. That has led to a dearth of jurisprudence, and certainty, regarding the interpretation of several provisions of the *Competition Act*. For that reason, both major businesses and industry groups will want to take careful note of the recent decision in *Toronto Real Estate Board v Commissioner of Competition*, where the Federal Court of Appeal gave further guidance as to when a party will be liable for abuse of dominance.
- **Absent foreign claimants at the gates of Canadian class actions –** Class actions are almost invariably complicated and expensive matters for businesses to deal with. Such class actions only become more complicated and expensive the bigger the classes are. Now, in *Airia Brands Inc v Air Canada*, the Ontario Court of Appeal has given the green light to a class action that includes class members all around the world. This decision has significant implications for virtually all multinational businesses.

- **Compelling disclosure from the Competition Bureau for use in class actions: where are we now? –** A recurring source of challenging legal problems in the price-fixing class actions, and in class actions more generally, is the issue of what information and evidence the Courts can compel government investigators to provide to private litigants for use in those class actions.
- **Umbrella purchasers: Who are they, what do they want, and why are Courts (sometimes) certifying their claims? –** While competition law specialists are familiar with the ongoing debate about umbrella purchaser claims, most Canadian lawyers could be forgiven for wondering what all the fuss is about umbrellas. Far from being individuals who rejected raincoats or ponchos in favour of a more traditional option, umbrella purchasers are now at the center of a heated debate in Canadian competition law.
- **A risky rule of thumb for estimating damages in competition class actions –** Using rules of thumb to generate estimates can be very useful in a variety of circumstances: for example, when the detailed information necessary to generate a precise answer is unavailable, or when it's too difficult to analyze that detailed information. Lawyers use such rules of thumb in a number of circumstances, sometimes as an initial rough estimate, and sometimes to confirm the results of more detailed analysis.
- **Waiting forever for the axe to drop? Discoverability and the limitation period for Competition Act claims –** The limitation period for claims under s. 36 of the *Competition Act* is a longstanding question of Canadian competition law. The plain language of the statute suggests that such claims must be brought within two years of the anticompetitive conduct. But in *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, the Ontario Court of Appeal has reached a conclusion that is much more generous to Plaintiffs, holding that such claims must be brought within two years of the Plaintiff discovering the anticompetitive conduct.
- **Supreme Court Offers Guidance on Standard of Review and Efficiency Defence Under the Competition Act –** The Supreme Court in Tervita Corp. v. Canada (Commissioner of Competition) held that a merger between landfill operators would prevent competition but provide efficiency gains, and allowed the deal to proceed. In so doing, it has provided important guidance three issues:

SELECT NEWS ARTICLES

- **Gift cards–a new way to reduce liability –** Paul-Erik Veel is quoted in the Canadian Underwriter article *Gift cards–a new way to reduce liability* on January 26, 2018. This article discusses Loblaws' response to the revelations of bread price-fixing.
- **Lenczner Slaght is Named a Top-Tier Firm in Legal 500 Rankings –** Along with the firm's Tier 1 ranking in Dispute Resolution with four leading lawyers and one next generation lawyer recognized, Lenczner Slaght is also ranked in Intellectual Property, Labour and Employment, and Competition and Antitrust.
- **20 Lenczner Slaght Lawyers Recognized in 2015 Lexpert Directory –** Recognized by Canadian Legal Lexpert® Directory as leading practitioners.

- **Lenczner Slaght - "a fortress inhabited by litigation royalty" –** 13 Lenczner Slaght lawyers recognized in the 2015 Benchmark Litigation Directory.
- **SCC clarifies merger review requirements –** Tom Curry was quoted in the Lawyers Weekly on February 6, 2015 in relation to the Supreme Court of Canada decision in *Tervita Corp. v. Canada (Commissioner of Competition)*.
- **Supreme Court says mergers can't block future competition –** Tom Curry was quoted in the Financial Post on January 23, 2015 in regards to the Supreme Court of Canada ruling in *Tervita Corp. v. Canada (Commissioner of Competition).*
- **Supreme Court allows blocked merger in landfill case –** Scott Rollwagen was quoted in the Canadian Lawyer in regards to the Supreme Court of Canada ruling in *Tervita Corp. v. Canada (Commissioner of Competition).*
- **Art of the Case: How the Chatr Wireless case avoided incivility despite the high stakes –** Tom Curry, Jaan Lilles and Paul-Erik Veel were quoted in the September, 2014 issue of Lexpert Magazine in relation to Commissioner of Competition v. Rogers Communications Inc. et al.