

## TABLE OF CONTENTS

<i>Dedication</i> .....	iii
<i>Foreword to the First Edition</i> .....	v
<i>Foreword to the Second Edition</i> .....	vii
<i>Foreword to the Third Edition</i> .....	ix
<i>Foreword to the Fourth Edition</i> .....	xi
<i>Acknowledgments</i> .....	xiii
<i>Chapter Authors and Contributors</i> .....	xv
<i>Table of Cases</i> .....	xliv

### CHAPTER 1 INTRODUCTION AND OVERVIEW: THE PURPOSE OF CANADIAN COMPETITION LAW

### CHAPTER 2 INSTITUTIONAL OVERVIEW AND STATUTORY HISTORY

I. ENFORCEMENT FRAMEWORK .....	13
A. <i>Competition Enforcement Institutions</i> .....	13
1. Overview .....	13
2. The Commissioner and the Competition Bureau .....	15
3. The Public Prosecution Service of Canada .....	16
4. The Competition Tribunal.....	17
5. The Courts.....	17
B. <i>The Enforcement Process</i> .....	18
1. The Competition and Compliance Framework .....	18
2. Reviewable Matters.....	20
3. Criminal Offences.....	21
4. Private Right of Action .....	21
II. STATUTORY HISTORY .....	22
A. <i>Unsteady Beginnings: First Attempts at Regulating         Combines (1889–1921)</i> .....	22
B. <i>Towards a Modern Competition Law (1923–1960s)</i> .....	24
C. <i>The Creation of a Modern Canadian Competition Law         (1969–1986)</i> .....	26
D. <i>The Competition Act (1986–2008)</i> .....	28
E. <i>The 2009 Amendments</i> .....	30
F. <i>More Recent Amendments</i> .....	32

### CHAPTER 3 MARKET POWER AND MARKET DEFINITION

I. INTRODUCTION.....	35
A. <i>Basic Concepts</i> .....	35
B. <i>Market Power and Market Definition</i> .....	36
II. MARKET DEFINITION.....	38
A. <i>Product Market Definition</i> .....	41
B. <i>Geographic Market Definition</i> .....	44
C. <i>The Cellophane Fallacy</i> .....	46
III. MARKET SHARE AND CONCENTRATION .....	47
IV. BARRIERS TO ENTRY .....	48
V. THE ROLE OF MARKET POWER IN THE <i>COMPETITION ACT</i> .....	50
A. <i>Mergers</i> .....	50
B. <i>Strategic Alliances</i> .....	53
C. <i>Abuse of Dominance</i> .....	54
D. <i>Other Provisions</i> .....	57
1. <i>Refusal to Deal</i> .....	58
2. <i>Price Maintenance</i> .....	58
3. <i>Exclusive Dealing, Tied Selling and Market             Restriction</i> .....	59
VI. CONCLUSION .....	59

### CHAPTER 4 CRIMINAL CONSPIRACY

I. INTRODUCTION.....	61
II. CONSPIRACY — SECTION 45.....	62
A. <i>What Constitutes a Conspiracy, Combination, Agreement         or Arrangement?</i> .....	64
1. <i>Agreement</i> .....	64
2. <i>Evidence of an Agreement</i> .....	66
3. <i>Conscious Parallelism and Tacit Agreements</i> .....	68
B. <i>Mens Rea of the Offence</i> .....	69
C. <i>Defences</i> .....	71
D. <i>Penalties and Consequences</i> .....	73
E. <i>International Conspiracies — Jurisdiction Issues</i> .....	76
1. <i>Subject Matter Jurisdiction</i> .....	76
2. <i>Personal Jurisdiction</i> .....	77
III. FOREIGN DIRECTIVES TO IMPLEMENT A FOREIGN CONSPIRACY IN CANADA — SECTION 46 .....	78

IV. BID-RIGGING — SECTION 47 .....	79
V. AGREEMENTS RELATING TO PROFESSIONAL SPORT — SECTION 48.....	81
VI. FINANCIAL INSTITUTIONS — SECTION 49.....	82
VII. RELATED OFFENCES.....	84
VIII. CANADA’S IMMUNITY AND LENIENCY PROGRAMS.....	86
A. <i>The Immunity Program</i> .....	87
1. Eligibility for Grant of Immunity.....	87
2. Steps in an Immunity Application.....	89
B. <i>Leniency Program</i> .....	91
 <b>CHAPTER 5 NON-CRIMINAL REVIEW OF AGREEMENTS AMONG COMPETITORS THAT PREVENT OR LESSEN COMPETITION SUBSTANTIALLY</b>	
I. INTRODUCTION.....	95
A. <i>Legislative History of Section 90.1</i> .....	95
B. <i>The Competitor Collaboration Guidelines</i> .....	96
II. SECTION 90.1 .....	99
III. ELEMENTS .....	100
A. <i>Agreement or Arrangement</i> .....	100
B. <i>Existing or Proposed Agreement and Where Agreement Is Made</i> .....	101
C. <i>Between Two or More Parties</i> .....	101
D. <i>Between Competitors</i> .....	102
E. <i>Substantial Prevention or Lessening of Competition</i> .....	103
F. <i>Identifying a Relevant Market</i> .....	104
1. Market Definition, Market Share and Market Changes over Time.....	104
2. Safe Harbours .....	104
3. Other Factors .....	105
IV. DEFENCES AND EXCEPTIONS .....	105
A. <i>Efficiency Defence</i> .....	105
1. Burden of Proof .....	106
2. Measuring Efficiencies .....	107
3. Measuring Anti-Competitive Effects and Balancing Them against Efficiencies.....	107
B. <i>Federal Financial Institutions and the Canada Transportation Act</i> .....	109

C. <i>Agreements Relating Only to Exports</i> .....	110
D. <i>Specialization Agreements</i> .....	111
E. <i>Agreements between Affiliates</i> .....	111
F. <i>Proceedings Commenced under Sections 45, 49, 76, 79</i> or 92 .....	112
V. REMEDIES.....	112
VI. TYPES OF AGREEMENTS OR ARRANGEMENTS TO BE MOST LIKELY REVIEWED UNDER SECTION 90.1.....	113
A. <i>Relationship to Other Provisions of the Act</i> .....	113
B. <i>Commercialization and Joint Selling</i> .....	114
C. <i>Information Sharing</i> .....	115
D. <i>Research and Development</i> .....	116
E. <i>Joint Production</i> .....	117
1. <i>Agreement between Competitors</i> .....	117
2. <i>Restraints on Competition</i> .....	117
3. <i>Incentive or Ability to Compete Independently</i> .....	117
4. <i>Market Power</i> .....	118
F. <i>Environmental Measures</i> .....	118
G. <i>Buying Side Agreements</i> .....	119
1. <i>Defining the Upstream Market</i> .....	121
2. <i>Monopsony Power and Likely Exercise of</i> <i>Monopsony Power</i> .....	121
H. <i>Non-Compete Clauses</i> .....	122
VII. OVERVIEW OF SECTION 90.1 ENFORCEMENT .....	123
A. <i>Air Canada and United Continental</i> .....	124
B. <i>Ebooks</i> .....	126
C. <i>TREB (Tribunal Comments about section 90.1)</i> .....	128
VIII. BUREAU ENFORCEMENT POSITIONS .....	130
A. <i>Intellectual Property Enforcement Guidelines</i> .....	130
B. <i>Statement regarding Enforcement during the</i> <i>COVID-19 Pandemic</i> .....	132
IX. CONCLUSION.....	133

## **CHAPTER 6 REFUSAL TO DEAL**

I. INTRODUCTION.....	135
II. REFUSAL TO DEAL — SECTION 75 .....	135
III. CONSTITUTIONALITY — SECTION 75 .....	137
IV. ESSENTIAL ELEMENTS OF REFUSAL TO DEAL .....	138

A. <i>Product Market</i> .....	138
B. <i>Geographic Market</i> .....	140
C. <i>Obtaining Adequate Supplies Anywhere in the Market</i> .....	141
D. <i>Substantially Affected or Precluded from Carrying on         Business</i> .....	142
E. <i>Usual Trade Terms</i> .....	147
F. <i>Insufficient Competition among Suppliers</i> .....	149
G. <i>Ample Supply</i> .....	151
H. <i>Adverse Effect on Competition in a Market</i> .....	154
V. APPLICATIONS BY PRIVATE PARTIES .....	156
A. <i>Test for Leave</i> .....	157
VI. REFUSAL TO LICENSE INTELLECTUAL PROPERTY .....	161
VII. REMEDIES .....	162
A. <i>Interim Orders</i> .....	163
B. <i>Discretion</i> .....	166
VIII. COMPARISON WITH FOREIGN ANTITRUST REGIMES .....	169
IX. CONCLUSION .....	170

## **CHAPTER 7 PRICE MAINTENANCE**

I. INTRODUCTION .....	173
A. <i>Purpose and Scope</i> .....	173
B. <i>Legislative History</i> .....	175
II. ELEMENTS OF RESALE PRICE MAINTENANCE .....	177
A. <i>Persons Covered</i> .....	178
B. <i>Elements of the Conduct</i> .....	180
1. <i>Supply of a Product for Resale</i> .....	180
2. <i>Direct or Indirect Influence on Price</i> .....	181
3. <i>By Agreement, Threat, Promise or Like Means</i> .....	182
a. <i>Agreement</i> .....	183
b. <i>Threat or Promise</i> .....	184
c. <i>Any Like Means</i> .....	185
4. <i>Adverse Effect on Competition in a Market</i> .....	186
C. <i>Suggested Selling Prices</i> .....	189
D. <i>Horizontal Price Maintenance</i> .....	190
III. REFUSAL TO SUPPLY OR OTHERWISE DISCRIMINATE BECAUSE OF A LOW PRICING POLICY .....	191

A. <i>Elements of the Conduct</i> .....	192
1. A Person Engaged in Business in Canada .....	192
2. Direct or Indirect Refusal to Supply or Discrimination .....	193
3. Because of a Low Pricing Policy .....	194
4. Adverse Effect on Competition in a Market .....	195
B. <i>Exceptions and Defences</i> .....	195
1. Loss Leaders.....	196
2. Bait and Switch Selling.....	197
3. Misleading Advertising.....	197
4. Inadequate Service .....	197
IV. INDUCING A SUPPLIER TO REFUSE TO DEAL .....	198
A. <i>Persons Covered</i> .....	198
B. <i>Elements of the Conduct</i> .....	198
V. TRIBUNAL ORDERS .....	199
VI. COMPARISON WITH OTHER JURISDICTIONS .....	200
A. <i>United States</i> .....	200
B. <i>European Union</i> .....	202

## CHAPITRE 7 MAINTIEN DES PRIX

I. INTRODUCTION.....	205
A. <i>Objectif et portée</i> .....	205
B. <i>Historique législatif</i> .....	207
II. ÉLÉMENTS DU MAINTIEN DES PRIX DE DÉTAIL.....	209
A. <i>Personnes visées</i> .....	211
B. <i>Éléments du comportement</i> .....	212
1. Fourniture d'un produit en vue de sa revente .....	212
2. Influence directe ou indirecte sur le prix.....	213
3. Par entente, menace, promesse ou quelque autre moyen semblable .....	214
a. Entente .....	215
b. Menace ou promesse.....	216
c. Quelque autre moyen semblable .....	218
4. Pour effet de nuire à la concurrence dans un marché.....	218
C. <i>Prix de détail proposés</i> .....	222
D. <i>Maintien horizontal des prix</i> .....	223

III. REFUS DE FOURNIR UN PRODUIT, OU AUTRE MESURE DISCRIMINATOIRE, EN RAISON D'UN RÉGIME DE BAS PRIX.....	224
A. <i>Éléments du comportement</i> .....	225
1. Refus de fournir un produit, direct ou.....	226
2. En raison de son régime de bas prix .....	227
3. Pour effet de nuire à la concurrence dans un marché.....	228
B. <i>Exceptions et défenses</i> .....	228
1. Sacrifier les produits .....	229
2. Vendre à prix d'appel .....	230
3. Publicité trompeuse.....	230
4. Service inadapté.....	231
IV. PERSUADER UN FOURNISSEUR DE REFUSER DE VENDRE .....	231
A. <i>Personnes visées</i> .....	231
B. <i>Éléments du comportement</i> .....	232
V. ORDONNANCES DU TRIBUNAL .....	232
VI. COMPARAISON AVEC D'AUTRES PAYS.....	233
A. <i>États-Unis</i> .....	233
B. <i>Union européenne</i> .....	236

**CHAPTER 8 EXCLUSIVE DEALING, TIED SELLING, MARKET  
RESTRICTION AND THE REMAINING  
REVIEWABLE PRACTICES**

I. INTRODUCTION.....	239
II. RESTRICTIONS ON DISTRIBUTION — SECTION 77.....	239
A. <i>Common Principles and Rationale</i> .....	239
B. <i>Exclusive Dealing</i> .....	241
1. Definition and Elements .....	241
a. Practice.....	241
b. By a Supplier of a Product .....	241
c. Exclusivity as Condition of Supply.....	241
d. Exclusivity as an Incentive .....	242
2. Market Power or Prevalence Requirement .....	242
3. Exclusionary Effects.....	243
4. Substantial Lessening of Competition .....	243
5. Exemptions .....	243
6. Remedies.....	244

a. Final .....	244
b. Interim .....	245
C. <i>Tied Selling</i> .....	246
1. Definition and Elements .....	246
a. Two Products .....	246
b. Practice by a Supplier of a Product .....	247
c. Condition of Supply or Inducement .....	247
2. Market Power, Exclusionary Effects and Substantial Lessening of Competition .....	247
3. Exemptions .....	247
4. Remedies .....	248
D. <i>Market Restriction</i> .....	248
1. Definition and Elements .....	248
2. Market Power and Competitive Effect .....	249
3. Exemptions .....	249
4. Remedies .....	250
E. <i>Relationship to Abuse of Dominance</i> .....	250
F. <i>Private Proceedings</i> .....	251
III. DELIVERED PRICING — SECTIONS 80 and 81 .....	253
A. <i>Rationale</i> .....	253
B. <i>Definition and Elements</i> .....	253
1. Definition .....	253
2. Elements .....	254
3. Exceptions .....	254
4. Remedies .....	255
IV. FOREIGN JUDGMENTS, LAWS AND DIRECTIVES — SECTIONS 82 and 83 .....	255
A. <i>Rationale</i> .....	255
B. <i>Elements of Section 82</i> .....	256
1. Judgment, Decree or Order .....	256
2. Adverse Effects .....	256
3. Remedies .....	257
C. <i>Elements of Section 83</i> .....	257
1. Decisions Made .....	257
2. Implementation of Foreign Law or Directive Pertaining to a Foreign Law .....	257
3. Communications to Implement Foreign Conspiracy .....	257
4. Remedies .....	258



V. DISCRIMINATION BY A FOREIGN SUPPLIER —	
SECTION 84 .....	258

## CHAPTER 9 ABUSE OF DOMINANCE

I. INTRODUCTION.....	261
II. ENFORCEMENT .....	262
III. ELEMENTS .....	264
A. <i>Control</i> .....	265
B. <i>Practice of Anti-Competitive Acts</i> .....	270
C. <i>Substantial Prevention or Lessening of Competition</i> .....	279
IV. REMEDIES .....	282
V. DEFENCES AND EXEMPTIONS.....	284

## CHAPTER 10 MERGER NOTIFICATION

I. INTRODUCTION.....	287
II. LEGISLATIVE HISTORY .....	288
III. NOTIFIABLE TRANSACTIONS .....	289
A. <i>Categories of Transactions That Are Notifiable</i> .....	289
1. Type of Transaction.....	289
2. Operating Business.....	290
B. <i>Notification Thresholds</i> .....	291
1. Size of the Parties Threshold .....	291
2. Size of the Transaction Threshold.....	291
a. Asset Acquisition .....	292
b. Acquisition of Voting Shares of a Corporation.....	292
c. Amalgamation .....	293
d. Formation of a Combination.....	293
e. Acquisition of an Interest in a Combination ...	294
C. <i>Measurement of Assets and Revenues</i> .....	294
1. Calculation of Assets and Revenues.....	294
2. Subsequent Events .....	295
D. <i>General Exemptions</i> .....	295
E. <i>Specific Exemptions</i> .....	296
1. Acquisition of Non-voting Shares .....	296
2. Acquisition of Voting Shares, Assets or Interests ....	297
3. Combinations that are Joint Ventures.....	298

IV. TO WHOM DOES THE OBLIGATION TO NOTIFY APPLY?.....	298
V. NOTIFICATION PROCEDURE.....	299
A. <i>Methods of Fulfilling or Avoiding Pre-Merger Notification</i> .....	299
1. Advance Ruling Certificate Applications.....	299
2. Subsection 113(c) Waiver .....	301
3. Relief for Fluctuating Interests and Staged Acquisitions .....	301
4. Unsolicited Takeover Bids.....	302
5. Prescribed Information for Notification .....	302
6. Optional Information: Competitive Impact Statement .....	304
7. Supplementary Information Requests .....	304
8. Section 11 Order .....	306
9. Amendment to Proposed Transaction Triggering Requirement for a New Notification or ARC Request .....	307
B. <i>Filing Fees</i> .....	307
C. <i>Statutory Waiting Periods</i> .....	308
D. <i>Competition Bureau Service Standards</i> .....	308
E. <i>Limitation Period</i> .....	309
F. <i>Confidentiality Protection</i> .....	310
G. <i>Failure to Comply</i> .....	311
H. <i>Transaction Documents</i> .....	311
I. <i>Non-notifiable Transactions</i> .....	312
VI. INTERACTION WITH OTHER REGULATORY REGIMES.....	312
A. <i>Investment Canada Act</i> .....	312
B. <i>Canada Transportation Act</i> .....	313
C. <i>Foreign Competition/Antitrust Agencies</i> .....	314
D. <i>Sector-Specific Legislation</i> .....	314
VII. DISPOSITION.....	315
A. <i>Advance Ruling Certificate</i> .....	315
B. <i>Waiver</i> .....	315
C. <i>No-Action Letter</i> .....	316
D. <i>Other</i> .....	316
VIII. INTERIM ORDERS .....	316
A. <i>Section 100 of the Competition Act</i> .....	316
B. <i>Section 104 of the Competition Act</i> .....	318

IX. LIMITATION PERIODS .....	320
X. NOTIFICATION STRATEGY .....	321
XI. INFORMATION RESOURCES .....	321

## **CHAPTER 11 SUBSTANTIVE MERGER REVIEW**

I. INTRODUCTION TO THE STATUTORY FRAMEWORK .....	325
A. <i>Principal Substantive Test and Remedial Powers of         the Tribunal</i> .....	328
B. <i>Exceptions and Limitations</i> .....	328
C. <i>Assessment Criteria</i> .....	329
D. <i>Remedies in Contested Cases</i> .....	332
E. <i>Preliminary and Interim Injunctions</i> .....	334
F. <i>Advance Ruling Certificates</i> .....	334
G. <i>Consent Agreements</i> .....	335
II. SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION.....	338
III. MARKET SHARE AND CONCENTRATION LEVELS ...	340
IV. THEORIES OF ANTI-COMPETITIVE EFFECTS .....	341
A. <i>Unilateral Effects</i> .....	342
B. <i>Coordinated Effects</i> .....	343
C. <i>Non-Horizontal Mergers</i> .....	345
V. THE EFFICIENCY EXCEPTION.....	346
A. <i>Overview</i> .....	346
B. <i>Cognizable Efficiencies</i> .....	347
C. <i>“Effects” of Any Prevention or Lessening of         Competition</i> .....	351
D. <i>The Trade-off Framework</i> .....	352
VI. THE MERGER REVIEW PROCESS.....	355
A. <i>The Content and Timing of Substantive Submissions</i> .....	355
B. <i>Coordination with Foreign Counsel</i> .....	356

## **CHAPTER 12 MISLEADING ADVERTISING AND MARKETING PRACTICES**

I. INTRODUCTION.....	359
A. <i>Overview</i> .....	359
B. <i>Legislative History</i> .....	360
C. <i>Institutional Overview</i> .....	361

1. Commissioner of Competition/ Competition Bureau.....	361
2. Ad Standards.....	361
3. The Pharmaceutical Advertising Advisory Board ....	362
4. Provincial Regulation under Consumer Protection Statutes.....	362
5. Licensing Bodies.....	364
II. THE <i>COMPETITION ACT</i> — BASIC ADVERTISING PROHIBITION.....	364
A. <i>Materially False or Misleading Representations</i> .....	364
B. <i>Dual Track: Criminal or Civil Enforcement</i> .....	364
C. <i>Background Concepts</i> .....	366
1. What Is Advertising? .....	366
2. No Person.....	367
3. Purpose Requirement.....	367
4. Representation.....	368
5. To the Public.....	368
6. Deemed Representations to the Public.....	369
7. Representations from Outside of Canada.....	370
D. <i>False or Misleading in a Material Respect</i> .....	370
1. General Impression .....	370
2. The Notional Consumer .....	372
3. Materiality .....	375
4. Two Alternative Meanings.....	376
5. Puffery.....	376
6. Omissions.....	377
7. Disclaimers.....	378
III. CRIMINAL MISLEADING ADVERTISING TRACK: PART VI OFFENCES .....	380
A. <i>Overview</i> .....	380
B. <i>Knowing or Reckless Conduct</i> .....	380
C. <i>Competition Act Criminal Marketing Offences</i> .....	382
1. Materially False or Misleading Representations .....	382
2. Deceptive Telemarketing .....	383
3. Sender/Subject Matter/Electronic Message Provisions .....	383
4. Deceptive Prize Notices .....	384
5. Double Ticketing.....	385
6. Multi-level Marketing/Pyramid Selling .....	385

IV. CIVIL MISLEADING ADVERTISING TRACK:	
PART VII.1 OF THE <i>COMPETITION ACT</i> .....	386
A. <i>Overview</i> .....	386
B. <i>Conduct Specifically Addressed in Part VII.1</i> .....	386
1. False or Misleading in a Material Respect:	
General Provision.....	386
2. Performance Claims.....	387
3. Warranties and Guarantees.....	390
4. “Sale” / Ordinary Selling Price Claims.....	390
a. Enforcement Guidelines.....	392
b. Commissioner of Competition v. Sears Canada.....	393
c. Cases since Sears.....	396
d. Advertiser’s Own Price versus Ordinary Price in the Market.....	397
5. Tests and Testimonials.....	398
6. Survey Evidence.....	399
7. Sale Above Advertised Price.....	399
8. Bait and Switch Selling.....	400
9. Civil Sender / Subject Matter / Location / Electronic Message Provisions.....	400
C. <i>Other Common Conduct Attracting Enforcement             Efforts</i> .....	401
1. Drip Pricing.....	401
2. Comparative Claims.....	404
3. “Free” Product Claims.....	405
4. Influencer Marketing.....	405
5. Astroturfing (Fake Reviews).....	407
6. Environmental Claims.....	408
7. Made in Canada Claims.....	409
8. Rebates.....	411
9. Coupons.....	412
V. PROMOTIONAL CONTESTS.....	413
A. <i>Competition Act</i> .....	413
B. <i>Criminal Code</i> .....	414
C. <i>Quebec</i> .....	414
D. <i>Contract Law</i> .....	415
VI. REMEDIES AND CONSEQUENCES — GOVERNMENT ENFORCEMENT.....	415

A. <i>Criminal Penalties and Remedies under Part VI of the Competition Act</i> .....	415
B. <i>Remedies under Part VII.1 of the Competition Act</i> .....	416
1. Available Orders.....	416
a. Generally.....	416
b. Cease and Desist Order .....	417
c. Corrective Notices .....	417
d. Administrative Monetary Penalties .....	417
e. Restitution.....	418
2. Due Diligence .....	418
3. Resolution Mechanisms.....	420
a. Consent Agreements .....	420
b. Temporary Consent Agreements .....	421
c. Injunctions .....	422
VII. PRIVATE CHALLENGES .....	422
A. <i>Civil Damages Actions</i> .....	422
B. <i>Civil Injunctions</i> .....	424
C. <i>Ad Standards Disputes / Complaints</i> .....	428
VIII. OTHER SOURCES OF ADVERTISING LAW.....	430
A. <i>Advertising to Children Rules</i> .....	430
B. <i>Ad Standards Preclearance</i> .....	431
C. <i>Packaging and Labelling</i> .....	431
1. Consumer Packaging and Labelling Act (“CPLA”).....	432
2. Textile Labelling Act .....	432
3. Precious Metals Marking Act .....	433
D. <i>Weights and Measures</i> .....	434
E. <i>Criminal Law</i> .....	434
F. <i>Gambling</i> .....	434
G. <i>Consumer Protection Laws</i> .....	435
H. <i>Trademark and Related Issues</i> .....	436
I. <i>Product Safety Regulation</i> .....	437
J. <i>Industry Specific Rules</i> .....	438

**CHAPTER 13 COMMON LAW CONSPIRACY AND OTHER ECONOMIC TORTS**

I. INTRODUCTION.....	439
II. CIVIL CONSPIRACY .....	439
A. <i>Elements of Civil Conspiracy to Injure</i> .....	441

1. An Agreement Between Two or More Persons .....	441
2. Predominant Purpose.....	443
3. Damages .....	444
B. <i>Elements of Civil Conspiracy by Unlawful Means</i> .....	445
C. <i>Potential Defences</i> .....	449
D. <i>Continued Evolution of the Tort of Civil Conspiracy</i> .....	450
III. UNLAWFUL MEANS OR UNLAWFUL INTERFERENCE WITH ECONOMIC INTERESTS TORT .....	451
A. <i>Elements of Unlawful Interference with Economic Interests Tort</i> .....	453
1. Interference with Plaintiff's Trade or Business .....	453
2. Unlawful Means.....	454
3. Intent to Injure.....	457
4. Damages .....	458
B. <i>Potential Defences</i> .....	458
C. <i>Continued Evolution of the Tort of Unlawful Means or Interference with Economic Interests Tort</i> .....	459
IV. UNLAWFUL RESTRAINT OF TRADE .....	459
A. <i>Elements Required for Enforceability of a Restraint of Trade</i> .....	460
1. Reasonable with Regard to the Parties' Interests.....	464
2. Reasonable with Regard to Public Interest .....	467
B. <i>Remedies for Unenforceable Restrictive Covenants</i> .....	469
V. WAIVER OF TORT .....	472
VI. CONCLUSION .....	473

**CHAPTER 14 PRIVATE APPLICATIONS TO THE COMPETITION TRIBUNAL**

I. INTRODUCTION.....	475
II. OBTAINING LEAVE .....	476
A. <i>Leave Process</i> .....	476
B. <i>Leave Threshold</i> .....	479
C. <i>Leave Ruling</i> .....	484
III. HEARING THE APPLICATION .....	485
IV. REMEDIES .....	486
A. <i>Injunctive Relief</i> .....	486
B. <i>Damages</i> .....	488
V. CONSENT AGREEMENTS.....	489

VI. COSTS.....	490
VII. CONCLUSION.....	491

## CHAPTER 15 STATUTORY POWERS OF INVESTIGATION

I. INTRODUCTION.....	493
II. THE PRE-INQUIRY STAGE: PRELIMINARY EXAMINATIONS.....	493
III. <i>COMPETITION ACT</i> SECTION 10: FORMAL INQUIRIES.....	494
A. <i>Initiating a Formal Inquiry</i> .....	494
B. <i>During the Inquiry</i> .....	496
1. Inquiries “Conducted in Private”, Except Where Duty to Inform.....	496
2. Impeding an Inquiry.....	497
C. <i>Referral of an Inquiry to the Attorney         General of Canada</i> .....	497
D. <i>Discontinuation of an Inquiry</i> .....	498
IV. <i>COMPETITION ACT</i> SECTION 11: ORDERS FOR ORAL EXAMINATION, PRODUCTION OF DOCUMENTS OR WRITTEN RETURNS.....	498
A. <i>The Statutory Test for Issuance</i> .....	498
B. <i>Section 11 Oral Examination and Related Matters</i> .....	503
C. <i>Section 11 Orders in the Merger Context</i> .....	505
D. <i>Complying with a Section 11 Order for Production         of Documents or Written Returns</i> .....	507
E. <i>Procedural Matters</i> .....	507
F. <i>Use of Section 11 Order Responses in Competition Act         Enforcement</i> .....	509
1. Protection against Self-Incrimination.....	509
2. “Dual Track” Competition Act Inquiries.....	509
V. SEARCH AND SEIZURE.....	510
A. <i>Competition Act Section 15: Search Warrants</i> .....	510
B. <i>Warrantless Searches</i> .....	512
C. <i>Computer Searches</i> .....	512
D. <i>Criminal Code Search Warrants</i> .....	513
E. <i>Bureau Review of Seized Records and Privilege Issues</i> .....	513
F. <i>Failure to Grant Access</i> .....	515
G. <i>Challenging a Warrant</i> .....	515
H. <i>Evidentiary Presumption and Rules</i> .....	516



VI. <i>CRIMINAL CODE</i> PART VI: INTERCEPTION OF PRIVATE COMMUNICATIONS .....	517
A. <i>Context</i> .....	517
B. <i>Ex Parte Application by Commissioner for Wiretap Authorization</i> .....	518
1. Criminal Code Section 184.2 Authorization: One-Party Consent.....	519
2. Criminal Code Section 186 Authorization: No Party Consent .....	520
3. Potential Challenges to the Admission into Evidence of Interpreted Private Communications.....	522
4. Selling and Unsealing of Wiretap Authorizations....	523
VII. <i>CRIMINAL CODE</i> SECTION 487.014: PRODUCTION ORDERS .....	524
VIII. <i>COMPETITION ACT</i> SECTION 14.1: TRANSMISSION, TRACKING AND FINANCIAL DATA .....	526
IX. ACCESS TO EVIDENCE GATHERED BY THE COMMISSIONER .....	527
A. <i>Competition Act Section 29: General Confidentiality Protections</i> .....	527
B. <i>Sharing with Domestic Enforcement Agencies</i> .....	529
C. <i>Sharing with International Enforcers</i> .....	530
D. <i>Private Party Access to Evidence Collected by the Competition Bureau</i> .....	533
1. Evidence Gathered in a Criminal Investigation.....	533
2. Evidence Gathered in a Civil Investigation .....	535
<b>CHAPTER 16 THE INTELLECTUAL PROPERTY AND REGULATED CONDUCT INTERFACE WITH COMPETITION LAW</b>	
I. INTRODUCTION.....	537
II. INTELLECTUAL PROPERTY AND COMPETITION LAW INTERFACE .....	538
A. <i>Intellectual Property</i> .....	538
B. <i>Relationship between Intellectual Property Law and the Competition Act</i> .....	538
C. <i>Intellectual Property Enforcement Guidelines</i> .....	539

1. Analytical Principles .....	540
a. Markets .....	541
b. Market Power.....	541
c. Anti-competitive Effects.....	542
d. Efficiencies.....	542
2. Enforcement Principles .....	544
D. <i>The Application of the General Provisions of the Competition Act to Conduct Involving IP Rights</i> .....	545
1. Criminal Conspiracies — Section 45 .....	545
a. Licensing Agreements .....	547
b. Patent Pools and Cross-Licensing .....	548
c. R&D Cooperation.....	549
d. Transfers and Assignments .....	549
e. Patent Litigation Settlement Agreements .....	551
f. Provision of Samples for Proof of Bio-Equivalence .....	554
2. Civilly Reviewable Practices.....	555
a. Section 75 — Refusal to Deal.....	555
b. Section 76 — Price Maintenance.....	556
c. Section 77 — Vertical Restraints: Exclusive Dealing, Tied Selling, Market Restrictions .....	559
i. Exclusive Dealing.....	559
ii. Tying.....	559
iii. Market Restriction.....	560
d. Section 90.1 — Agreements Amongst Competitors.....	560
i. Licensing.....	561
ii. R&D Cooperation Agreements .....	562
iii. Joint Production Agreements.....	563
iv. Commercialization and Joint Selling Agreements .....	564
v. Information Sharing Agreements.....	564
vi. Ancillary Restraints .....	565
vii. Pharmaceutical Patent Litigation Settlement Agreements .....	565
e. Section 79 — Abuse of Dominance.....	567
i. Exclusive Licensing .....	567
ii. Restrictive Licensing Terms .....	568
iii. Product Switching and Ever-Greening...	569
iv. Patent Settlement Agreements.....	572

v. Predatory Pricing .....	572
f. Sections 91 and 92 — Mergers .....	573
E. <i>Section 32 — Special Remedies for Conduct Involving     IP Rights</i> .....	575
F. <i>Treatment of IP and Competition Law Interface in     Other Jurisdictions</i> .....	576
III. THE REGULATED CONDUCT DOCTRINE.....	580
A. <i>Introduction</i> .....	580
B. <i>General Principles</i> .....	580
C. <i>Conflicts between Federal Competition Laws and     Provincial Regulatory Regimes</i> .....	582
1. Regulated Conduct Doctrine .....	583
2. Regulated Conduct Doctrine and Criminal Provisions of the Competition Act .....	583
3. Regulated Conduct Doctrine and Civilly Reviewable Matters Provisions of the Competition Act.....	585
D. <i>Conflicts between Federal Competition Laws and other     Federal Laws</i> .....	589

## CHAPTER 17 PRIVATE LITIGATION AND CLASS ACTIONS

I. INTRODUCTION.....	591
II. EVOLUTION OF PRIVATE LITIGATION IN CANADIAN COMPETITION LAW .....	592
III. SECTION 36 CLAIMS .....	593
A. <i>Section 36</i> .....	593
B. <i>Elements of a Section 36 Claim</i> .....	595
1. Proscribed Conduct.....	595
a. Conduct Contrary to Part VI .....	595
b. Breach of an Order .....	596
2. Damages and Causation.....	596
C. <i>Available Remedies</i> .....	597
D. <i>Standing to Sue</i> .....	600
1. Indirect Purchasers.....	600
2. Umbrella Purchasers.....	601
3. Investors.....	602
E. <i>Proving Section 36 Cases</i> .....	603
1. Standard of Proof .....	603
2. Prior Convictions .....	604

3. Special Evidence Rules .....	606
4. Production from the Commissioner .....	607
5. Production of Without Prejudice Correspondence between the Defendant and the Bureau .....	611
6. Production of the Crown Brief by a Defendant .....	612
7. Competent Court .....	613
8. Limitation Period .....	614
F. <i>Jurisdiction</i> .....	616
1. Test for Jurisdiction Simpliciter .....	616
2. Jurisdiction in Price-Fixing Actions .....	619
G. <i>Common Law Claims</i> .....	621
V. COMPETITION CLASS ACTIONS .....	622
A. <i>Introduction</i> .....	622
B. <i>What Is a Class Action?</i> .....	623
C. <i>Typical Issues in Competition Class Actions</i> .....	624
1. Carriage Motions among Multiple Competing Plaintiffs .....	624
a. Common Law Test .....	624
b. Statutory Test in Ontario .....	626
c. Quebec .....	626
2. Funding .....	627
3. National Classes and Multijurisdictional Proceedings .....	630
a. National Classes .....	630
b. Interjurisdictional Carriage Motions .....	632
c. Opt-Out vs. Opt-In .....	635
d. Management of Multijurisdictional Class Actions .....	635
e. National Settlements .....	635
4. Access to Discovery in the U.S. Action for Purposes of the Canadian Action .....	637
5. Certification .....	638
a. Test for Certification in Common-Law Provinces .....	639
b. Authorization in Quebec .....	640
c. Proof of Loss on a Class-Wide Basis .....	640
6. Trial .....	641
7. Settlements .....	642
8. Distribution of Settlements and Awards .....	644

**CHAPTER 18 FOREIGN INVESTMENT REVIEWS**

I. OVERVIEW .....	647
II. LEGISLATIVE HISTORY .....	648
A. <i>The Foreign Investment Review Act</i> .....	648
B. <i>The Investment Canada Act</i> .....	648
C. <i>Millennial Reform</i> .....	649
III. REVIEW OF FOREIGN INVESTMENTS UNDER THE <i>INVESTMENT CANADA ACT</i> .....	652
A. <i>Application of the Investment Canada Act</i> .....	653
1. Meaning of “Business” and “Canadian Business” ...	653
2. Acquisition of Control.....	655
a. General Rules .....	655
b. Control in Fact Determinations for Cultural Businesses .....	655
3. Establishment of a New Canadian Business .....	656
B. <i>Net Benefit Review Thresholds</i> .....	657
1. Direct Investments — WTO Investors .....	657
2. Direct Investments — Trade Agreement Investors.....	658
3. Direct Investments — State-Owned Enterprise Investors.....	658
4. Indirect Investments.....	659
5. Investments not Involving WTO Investors or Trade Agreement Investors and Investments Involving Cultural Investments .....	659
C. <i>National Security</i> .....	660
1. Background on the National Security Regime .....	660
2. The Meaning of “National Security” .....	661
D. <i>Net Benefit to Canada</i> .....	663
E. <i>Rejected Transactions</i> .....	665
1. Net Benefit Rejections .....	666
2. National Security Rejections .....	667
F. <i>Review Process and Timing</i> .....	673
1. Net Benefit Reviews.....	673
2. National Security Reviews.....	673
G. <i>Undertakings</i> .....	676
IV. ACQUISITIONS BY STATE-OWNED ENTERPRISES .....	677
A. <i>Meaning of State-Owned Enterprise</i> .....	678

B. <i>Control in Fact by an SOE</i> .....	679
C. <i>Net Benefit Assessment in Investments Involving SOEs</i> ...	680
V. PENALTIES AND REMEDIES .....	681
VI. CONCLUSION .....	682

## CHAPITRE 18 EXAMENS D'INVESTISSEMENTS ÉTRANGERS

I. APERÇU .....	683
II. CONTEXTE LÉGISLATIF .....	684
A. <i>La Loi sur l'examen de l'investissement étranger</i> .....	684
B. <i>La Loi sur Investissement Canada</i> .....	685
C. <i>Réforme du millénaire</i> .....	686
III. EXAMEN D'INVESTISSEMENTS ÉTRANGERS EN VERTU DE LA LOI SUR INVESTISSEMENT CANADA .....	688
A. <i>Application de la Loi sur Investissement Canada</i> .....	689
1. Signification du terme « non-Canadien » .....	689
2. Signification du terme « entreprise » et « entreprise canadienne » .....	690
3. Acquisition du contrôle .....	691
a. Règles générales .....	691
b. Décisions concernant le contrôle en fait d'entreprises culturelles .....	692
4. Constitution d'une nouvelle entreprise canadienne ..	693
B. <i>Seuils déclencheurs d'examen</i> .....	694
1. Cas général .....	694
2. Entreprises culturelles .....	695
3. Sécurité nationale .....	696
C. <i>Avantage net du Canada</i> .....	697
1. En général .....	697
2. Opérations refusées .....	699
D. <i>Processus et délai d'examen</i> .....	702
E. <i>Engagements</i> .....	703
IV. ACQUISITIONS PAR DES ENTREPRISES D'ÉTAT .....	704
A. <i>Définition du terme « entreprise d'État »</i> .....	705
B. <i>Contrôle en fait par une entreprise d'État</i> .....	706
C. <i>Évaluation de l'avantage net dans le cadre d'investissements         auxquels participent des entreprises d'État</i> .....	707
V. SANCTIONS ET RECOURS .....	709
VI. CONCLUSION .....	710

**CHAPTER 19 COMPETITION TRIBUNAL PROCEDURE**

I. INTRODUCTION.....	711
II. THE COMPETITION TRIBUNAL.....	711
A. <i>Overview</i> .....	711
B. <i>The Tribunal's Jurisdiction and Powers</i> .....	712
C. <i>Composition of the Tribunal, Where It Sits, and How It Organizes Itself</i> .....	714
D. <i>The Legal Framework</i> .....	715
III. CONTESTED PROCEEDINGS — REGULAR PROCESS.....	716
A. <i>Overview</i> .....	716
B. <i>Pre-hearing Procedures</i> .....	717
1. Initial Steps - Serving and Filing the Pleadings.....	717
2. Setting the Timetable.....	719
3. Filing Confidential Documents and Seeking Confidentiality Orders.....	721
4. Intervenors.....	723
5. Discovery Plans.....	727
6. Documentary Discovery.....	727
a. Affidavits of Documents.....	727
b. Third-Party Evidence.....	729
7. Examinations for Discovery.....	730
8. Admissions and Deemed Admissions.....	730
9. Section 69 Documents.....	731
10. Pre-hearing Disclosure.....	732
C. <i>Hearing on the Merits</i> .....	733
1. Open to the Public.....	733
2. Composition of the Panel.....	735
3. Chess Clock Proceedings.....	735
4. Opening and Closing Statements.....	736
5. Evidence at the Hearing.....	737
a. Burden of Proof.....	737
b. Examination in Chief, Cross-Examination, and Re-examination.....	737
c. Hearsay.....	738
D. <i>Discontinuance and Withdrawal</i> .....	739
E. <i>Remedies</i> .....	739
1. Interim and Temporary Orders and Injunctions.....	739

a. Temporary Orders and Interim Injunctions under Part VII.1 (Deceptive Marketing Practices).....	740
b. Interim Orders under Part VIII (Matters Reviewable by Tribunal) .....	741
2. Final Orders.....	744
3. Cost Awards .....	744
4. Consent Agreements .....	746
a. Settlements with the Commissioner .....	746
b. Settlements between Private Parties .....	748
<b>IV. CONTESTED APPLICATIONS — EXPEDITED PROCESS.....</b>	<b>749</b>
A. <i>Overview</i> .....	749
B. <i>Procedure</i> .....	750
1. Where Available.....	750
2. The Tribunal’s Indicative Timeline.....	751
3. Pre-hearing Procedures .....	752
4. Hearing on the Merits .....	753
<b>V. MOTIONS.....</b>	<b>754</b>
A. <i>Overview</i> .....	754
B. <i>Motions for Leave to Intervene</i> .....	755
C. <i>Motions to Dispose of Proceedings without Trial</i> .....	755
1. Motions for Summary Disposition or Summary Judgment.....	755
2. Motions to Strike.....	758
<b>VI. REFERENCES .....</b>	<b>760</b>
A. <i>Overview</i> .....	760
B. <i>Procedure</i> .....	761
<b>VII. PRIVATE APPLICATIONS.....</b>	<b>762</b>
A. <i>Overview</i> .....	762
B. <i>Seeking Leave under Section 103.1 of the Competition     Act</i> .....	764
1. The Application for Leave .....	764
2. The Commissioner’s Certification.....	765
3. Respondent Representations and Reply.....	766
4. Amendments to Pleadings .....	768
5. The Tribunal’s Decision .....	768
C. <i>Bringing an Application under Section 103 after     Obtaining Leave</i> .....	769



D. <i>Consent Agreements between Parties to a Private Application</i> .....	770
VIII. CASE MANAGEMENT.....	770
IX. MEDIATION.....	772
A. <i>Overview</i> .....	772
B. <i>Procedure</i> .....	773
1. <i>Selecting Mediation</i> .....	773
2. <i>Default Rules</i> .....	774
X. APPEALS, RECONSIDERATIONS AND JUDICIAL REVIEW.....	775
A. <i>Appeals</i> .....	775
1. <i>Overview</i> .....	775
2. <i>Procedure</i> .....	777
B. <i>Reconsiderations</i> .....	779
1. <i>Overview</i> .....	779
2. <i>Procedure</i> .....	780
C. <i>Judicial Review</i> .....	780
1. <i>Overview</i> .....	780
2. <i>Procedure</i> .....	782
<b>APPENDIX 1 — Price Discrimination, Predatory Pricing and Promotional Allowances</b> .....	787
I. INTRODUCTION.....	787
II. SECONDARY-LINE PRICE DISCRIMINATION.....	788
A. <i>The Provision and Its Elements</i> .....	788
B. <i>Secondary-Line Price Discrimination Was a Per Se Offence</i> .....	789
C. <i>Analysis of the Constituent Elements of Paragraph 50(1)(a)</i> .....	790
1. <i>Sale of an Article to a Purchaser at a Preferential Rate of Discount, Rebate, Allowance, Price Concession or Other Advantage</i> .....	790
2. <i>Availability to Purchaser’s Competitors; Definition of “Competitors”</i> .....	791
3. <i>Like Quantity and Quality</i> .....	792
4. <i>The Discrimination Had to Be a Practice</i> .....	793
5. <i>Buying Groups</i> .....	793
D. <i>Penalty</i> .....	794
E. <i>The Case Law</i> .....	794

III. REGIONAL PRICE DISCRIMINATION .....	794
A. <i>The Provision and Its Elements</i> .....	794
B. <i>The Case Law</i> .....	795
C. <i>Analysis of the Constituent Elements of Paragraph</i> 50(1)(b) .....	796
1. The Nature of Primary-Line Price Discrimination...	796
2. Selling Products in Different Areas .....	797
3. Different Prices.....	797
4. Engaged in a Policy .....	797
5. Effect or Tendency of Substantially Lessening Competition or Eliminating a Competitor.....	799
D. <i>Penalty</i> .....	800
IV. PREDATORY PRICING .....	800
A. <i>The Provision and Its Elements</i> .....	800
B. <i>Analysis of the Constituent Elements</i> .....	801
1. Selling Products at Unreasonably Low Prices .....	801
a. Step One: Assessment of Market Share .....	801
b. Step Two: Price/Cost Methodology .....	802
2. Sale of “Products” .....	804
3. Engaged in a Policy .....	804
4. Effect or Tendency of Substantially Lessening Competition or Eliminating a Competitor.....	805
a. Effect on Primary-Line Competitors .....	805
b. “Substantially” Lessening Competition or Eliminating a Competitor.....	805
C. <i>Penalty</i> .....	806
V. PROMOTIONAL ALLOWANCES .....	807
A. <i>The Provision and Its Elements</i> .....	807
B. <i>Analysis of the Constituent Elements</i> .....	808
1. Allowance for Advertising or Display Purposes.....	808
2. Allowance Must be Collateral and Not Apply to the Selling Price .....	808
3. Allowances Had to Be Offered Proportionately to Competing Purchasers.....	809
C. <i>Penalty</i> .....	809
<i>Selected Bibliography</i> .....	811
<i>Index</i> .....	821