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CANADIAN COMPETITION LAW

AFFLECK & McCRACKEN

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This professional resource is designed to keep you fully informed of current legislation and to give you interpretation and analysis from Canadian specialists in competition law. It covers all aspects of the law pertaining to foreign companies doing business in Canada. Presented in a convenient loose-leaf format, Canadian Competition Law offers complete coverage of all areas of business conduct governed by the *Competition Act*, including: an overview of the Competition Act; price discrimination and advertising allowances; telemarketing and pyramid selling; misleading representations—criminal and civil; price maintenance; and agreements in restraint of trade.

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This release features updates to the commentary. This release also features updates to the legislation, including updates to the *Competition Act*—2023, c. 31, s. 8 is now in force; 2024, c. 15, ss. ss. 238, 239(1), (4), 240, 241, 243, 244(2), 245(2), 246, 247(1), (2), 248(2), (4), (7), 254, 255, 256(1), 257, 259, 264, and 271 are now in force, and updates to the *Competition Tribunal Act*—Amended by 2024, c. 15, s. 266. This release also includes updates to Appendix F—Interpretation/Information Bulletins including an updated version of Appendix § F:23 Market Studies Information Bulletin, the addition of Competitor Property Controls and the *Competition Act*, June 4, 2025, and the addition of Bulletin on Private Access to the Competition Tribunal, June 20, 2025. This release also includes updates to Appendix H—Enforcement Guidelines including an updated version of Appendix § H:5—"Product of Canada" and "Made in Canada" Claims, an updated version of Appendix § H:6—Competitor Collaboration Guidelines, and the addition of Environmental Claims and the *Competition Act*, June 5, 2025.

Highlights:

- **Prohibited Agreements—What Is An "Agreement" For the Purposes of Section 45 of the Act?—**Justice Fisher would describe the *actus reus* elements of the current s. 45 to be (i) the defendant conspired, combined, agreed, or arranged with a competitor in respect of a product; and (ii) the agreement was to do one of the acts set out in s. 45(1)(a), (b) or (c)—to fix prices, allocate markets, or restrict output of the product. The *mens rea* elements include the subjective intent to agree to do one of these prohibited acts and the objective intent to achieve that end. As with the former s. 45, the *actus reus* remains responsive to the underlying core requirement of conspiracy-based offences or torts, namely that the conspirators share a common object. That is clear from the statutory language: the parties must agree to fix prices, allocate markets, or control supply, etc. Thus, at a bare minimum, a proper pleading under the current s. 45 must provide that the parties to the alleged conspiracies had a common purpose of achieving one of the prohibited ends. That is what makes the activities prohibited under s. 45 "*per se unlawful*" and "unambiguously harmful to competition. Furthermore, material facts must be pleaded that support this common object and provide at least some basis upon which to conclude that it is not plain and obvious the claim cannot succeed. Justice Fisher explained that the chambers judge considered the pleadings to rely on agreements Qualcomm entered into with competitor modem chip suppliers (a) to preclude the adoption of alternative LTE standards, and (b) whereby the modem chip suppliers were only permitted to sell modem chips to OEMs who had a license agreement with Qualcomm. The FANOCC sets out the cause of action under s. 45, alleging that Qualcomm "conspired, agreed or arranged with Modem Chip suppliers and SEP holders" to: (a) fix, maintain, increase or control the price for the supply of Modem Chips; and/or (b) fix, maintain, control, prevent, lessen or eliminate the production or supply of Modem Chips. Justice Fisher noted that the essence of the

claim under s. 45 was that Qualcomm refused to issue licenses for their SEPs to competitor modem chip suppliers (contrary to FRAND commitments) and instead imposed non-assert agreements with their competitors that limited who they could sell to—i.e., OEMs with a Qualcomm license. That practice, it was alleged, restricted the supply of modem chips and also required competitors to comply with onerous reporting conditions. Justice Fisher noted that here was some discussion in oral argument about the novel nature of the claims, involving as they did, by the respondents' own admission, so-called "coerced co-conspirators". Justice Fisher explained that it was unnecessary to answer the question of whether conspiracies may be made out against parties whose cooperation is coerced. While each party's motive to enter into a conspiratorial agreement need not be the same, the pleadings must allege a common object among the conspirators beyond repeating only the bare statutory language of the offence, and this allegation must be supported by material facts. Justice Fisher concluded that the claims under the current s. 45 were even more plainly unsupportable on the material facts pleaded. The current s. 45 aims to target "hardcore cartel" behaviour which is *per se* unlawful and "unambiguously harmful". The agreements pleaded as material facts on which the allegations under the current s. 45 rested were not express agreements to fix prices, allocate markets, or restrict supply. The pleadings suggested that the effect of some of those agreements would be to "inflate" prices but did not say that this end was the common purpose of the contracting parties. The potential anticompetitive effects of agreements are why they may constitute abuse of dominance. The essential element of conspiracy, however, was absent from the pleadings. It was plain and obvious that the FANOCC disclosed no reasonable cause of action under the current s. 45: *Qualcomm Incorporated v. Barroqueiro*, 2025 CarswellBC 580, 2025 BCCA 65, 2025 A.C.W.S. 1452 (B.C.C.A.).

- **Advertising, Promotion and Misleading Representations—General Impression Test—**Justice Gascon noted that the legal standard for the general impression test under section 52 of the *Competition Act* has yet to be definitely determined. It is either the "credulous and inexperienced" consumer as set out in *Richard*, or the "ordinary consumer of the product or service" according to *Cineplex*. Regardless, it was unnecessary to decide this issue. In both *Richard* and *Cineplex*, the standard to determine whether an advertising claim is false or misleading is an objective one. It represents the attributes of the "credulous and inexperienced" or "ordinary" consumer to whom the representation is made, directed, or targeted. Here, it was plain and obvious that Zanin's claim under section 52 of the *Competition Act* did not satisfy the main constituent element of the provision—i.e., the requirement that the impugned representations were actually false or misleading. This claim was consequently doomed to fail and could not be certified: *Zanin v. Ooma Inc.*, 2025 CarswellNat 184, 2025 FC 51, 2025 A.C.W.S. 653, 211 C.P.R. (4th) 1 (F.C.).

- **Competition Bureau—Bulletin—Private Access to the Competition Tribunal—**The Competition Bureau may choose to participate in private access applications in the following ways: written representations on whether the Tribunal should grant leave, may intervene in the private access application. When deciding whether

to participate, the Bureau considers if it is in the public interest s to do so by assessing questions like: What is the potential economic impact? For example, could the issues have a significant impact on consumers, the business community, or the Canadian economy; What is the potential legal impact? For example, could the application decide important legal issues that would also be relevant for other cases; Does the Bureau bring a different perspective than others already involved; and does the private access application seem to make a strong case for appropriate remedies under the relevant provision of the Act? When deciding whether to participate at the leave stage, along with the above questions the Bureau may also ask whether it would be better for the Bureau to resolve the issue through public investigation and enforcement. If so, the Bureau may oppose the leave application. The Bureau may also apply to have an agreement that resolves a private access proceeding varied or rescinded if the Bureau believes that the agreement has or is likely to have anti-competitive effects. The Bureau may also take certain other actions that impact private access applications. In rare cases, the Bureau may begin an inquiry within the 48 hours after being served with an application for leave. If so, the Bureau would certify to the Tribunal that the Bureau has an inquiry into the matter and that they could not consider the application for leave. The Bureau is most likely to do this if the Bureau were already investigating the matter and where the Bureau believed it would be better for the Bureau to resolve the issue through public investigation and enforcement.