



THE CANADIAN  
BAR ASSOCIATION

# CBA COMPETITION LAW SPRING CONFERENCE

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May 7, 2019 | Toronto (ON)

# COMPETITION LAW ENFORCEMENT AT A CROSSROADS: DISRUPTION AND CHANGE

TUESDAY, MAY 7, 2019

8:15 - 9:00      **REGISTRATION AND BREAKFAST**

Sponsored by: 

9:00 - 9:05      **WELCOME AND INTRODUCTION**

**Speakers:**      **Oliver Borgers**, McCarthy Tétrault LLP (*Toronto, ON*)  
**Christopher Naudie**, Osler, Hoskin & Harcourt LLP (*Toronto, ON*)

9:05 - 10:20      **THE UNCERTAIN STATE OF IMMUNITY & LENIENCY**  
*(1.25 hours – substantive content)*

The Bureau's immunity and leniency programs are in a state of transition. Following an extensive consultation process, the Bureau adopted a number of significant changes to the programs in the fall of 2018. Since that time, the Bureau has issued further guidance, particularly on the status and confidential identity of cooperating witnesses. But in spite of these significant changes, applications for immunity & leniency have dropped significantly in Canada. Have the programs lost their shine? Have domestic and international enforcement trends changed the calculus for seeking immunity? Has the risk of civil class action litigation increased the risks and burdens of seeking immunity? Join our panel of domestic and international practitioners to discuss the current state of the programs in Canada and abroad.

**Moderator:**      **Mark Katz**, Davies Ward Philips & Vineberg LLP (*Toronto, ON*)

**Panelists:**      **Katherine Kay**, Stikeman Elliott LLP (*Toronto, ON*)  
**Huy Do**, Fasken LLP (*Toronto, ON*)  
**Guy Pinsonnault**, McMillan LLP (*Ottawa, ON*)

10:20 - 11:20      **COMPETITION ENFORCEMENT IN THE DIGITAL WORLD**  
*(1 hour – substantive content)*

In the past year, the Bureau has signalled a clear enforcement goal of combatting anti-competitive practices in the digital economy. The Bureau is expanding its digital enforcement capacity and will soon be appointing a new Chief Digital Enforcement Officer. The Bureau has also taken aggressive enforcement action to stop drip pricing in the online market place, and has commenced investigations relating to privacy-related representations that appear to set a collision course with privacy regulators. This panel of leading domestic and international practitioners will discuss and explore the implications of these developments.

**Moderator:**      **Micah Wood**, Blake, Cassels & Graydon LLP (*Toronto, ON*)

**Panelists:**      **Mark Opashinov**, McMillan LLP (*Toronto, ON*)  
**Josephine Palumbo**, Competition Bureau (*Ottawa, ON*)  
**Amanda Reeves**, Latham & Watkins LLP (*Washington, DC*)

11:20 - 11:35      **REFRESHMENT BREAK**

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11:35 - 12:35 **CLASS ACTIONS & PRIVATE ENFORCEMENT OF THE ACT**  
*(1 hour – substantive content)*

Parliament adopted the private damages remedy under the Act just over 40 years ago. However, as the recent appeal before the Supreme Court of Canada in *Godfrey* demonstrates, the nature and scope of the remedy is still the subject of vigorous debate. Does the remedy displace common law remedies for anti-competitive harm? Does the remedy cover relief for umbrella purchasers? What does a plaintiff have to show to bring collective relief on behalf of direct and indirect purchasers? And are private plaintiffs contributing to over-deterrence and displacing the Commissioner's role in achieving balanced enforcement outcomes? Is the private enforcement of reviewable practices a failed experiment?

**Moderator:** **Donald Houston**, McCarthy Tétrault LLP (*Toronto, ON*)

**Panelists:** **Sandra Forbes**, Davies Ward Phillips & Vineberg LLP (*Toronto, ON*)  
**Reidar Mogerma**n, Camp Fiorante Mogerma LLP (*Vancouver, BC*)  
**Julie North**, Cravath, Swaine & Moore LLP (*New York, NY*)

12:35 - 14:00 **LUNCHEON WITH KEYNOTE ADDRESS**

**Speaker:** **Matthew Boswell**, Commissioner of Competition (*Ottawa, ON*)

**Sponsored by:** 

14:00 - 15:00 **ABUSE OF DOMINANCE IN A CHANGING WORLD**  
*(1 hour – substantive content)*

The Bureau has ramped up its investigation and enforcement of abuse cases, including the recent trial in the Vancouver Airport Authority case. Are traditional concerns about exclusivity arrangements and pricing practices giving way to theories of harm based on concepts relating to essential facilities? Are elements of the digital economy (such as data platforms) susceptible to Bureau scrutiny as essential facilities? How should the Bureau approach zero-price platforms, and should the Bureau continue to apply a consumer welfare standard that focuses on price effects? Against the backdrop of this evolving approach to antitrust, the Bureau has adopted new abuse guidelines, and the Government of Canada is currently studying whether the abuse provisions need to be modernized to deal with “data-opolies”. Join this panel of leading practitioners and representatives of the Bureau to hear about evolving enforcement of the abuse provision including the scope for application of the essential facilities theory in the digital economy.

**Moderator:** **Sandy Walker**, Dentons Canada LLP (*Toronto, ON*)

**Speakers:** **Renée Duplantis**, The Brattle Group (*Toronto, ON*)  
**Anthony Durocher**, Competition Bureau (*Ottawa, ON*)  
**Michael Osborne**, Cassels Brock & Blackwell LLP (*Toronto, ON*)  
**Julie Rosenthal**, Goodmans LLP (*Toronto, ON*)

15:00 – 15:15 **REFRESHMENT BREAK**

**Sponsored by:** 

15:15 - 16:15

**RETHINKING MERGER REVIEW**

*(1 hour – substantive content)*

The vast majority of merger transactions raise no competition issues and litigated mergers are virtually non-existent in Canada. But Competition Bureau reviews seem to be increasing in complexity and duration, even on straightforward transactions. Is it time to re-think the approach to notifying and reviewing mergers in Canada? Should notification thresholds be increased, or should the notification threshold test itself be altered? Should there be more exemptions or a policy of lighter review in certain highly competitive industries, and should the Bureau apply greater scrutiny of acquisitions by the FAANGs and other digital giants of smaller start-ups? Is the Bureau interest in minority interests and cross-directorships misplaced or justified? If mergers are not being litigated, why do we need SIRs? (In fact, why do we have a system based on the pretext of litigation at all?) With our US-style notification regime, is it time to re-think the need for no action letters? Should merger parties simply close after waiting periods expire? This panel will explore, from domestic and international perspectives, these and other aspects of modern merger review in Canada.

**Moderator:** Omar Wakil, Torys LLP (*Toronto, ON*)

**Speakers:** Peter Glossop, Osler, Hoskin & Harcourt LLP (*Toronto, ON*)  
Anthony Niblett, University of Toronto, Faculty of Law (*Toronto, ON*)  
Chris Margison, Fasken Martineau DuMoulin LLP (*Toronto, ON*)  
Antonia Sherman, Linklaters LLP (*Washington, DC*)

16:15 – 18:30

**CLOSING REMARKS & NETWORKING RECEPTION**

**Speakers:** Oliver Borgers, McCarthy Tétrault LLP (*Toronto, ON*)  
Christopher Naudie, Osler, Hoskin & Harcourt LLP (*Toronto, ON*)

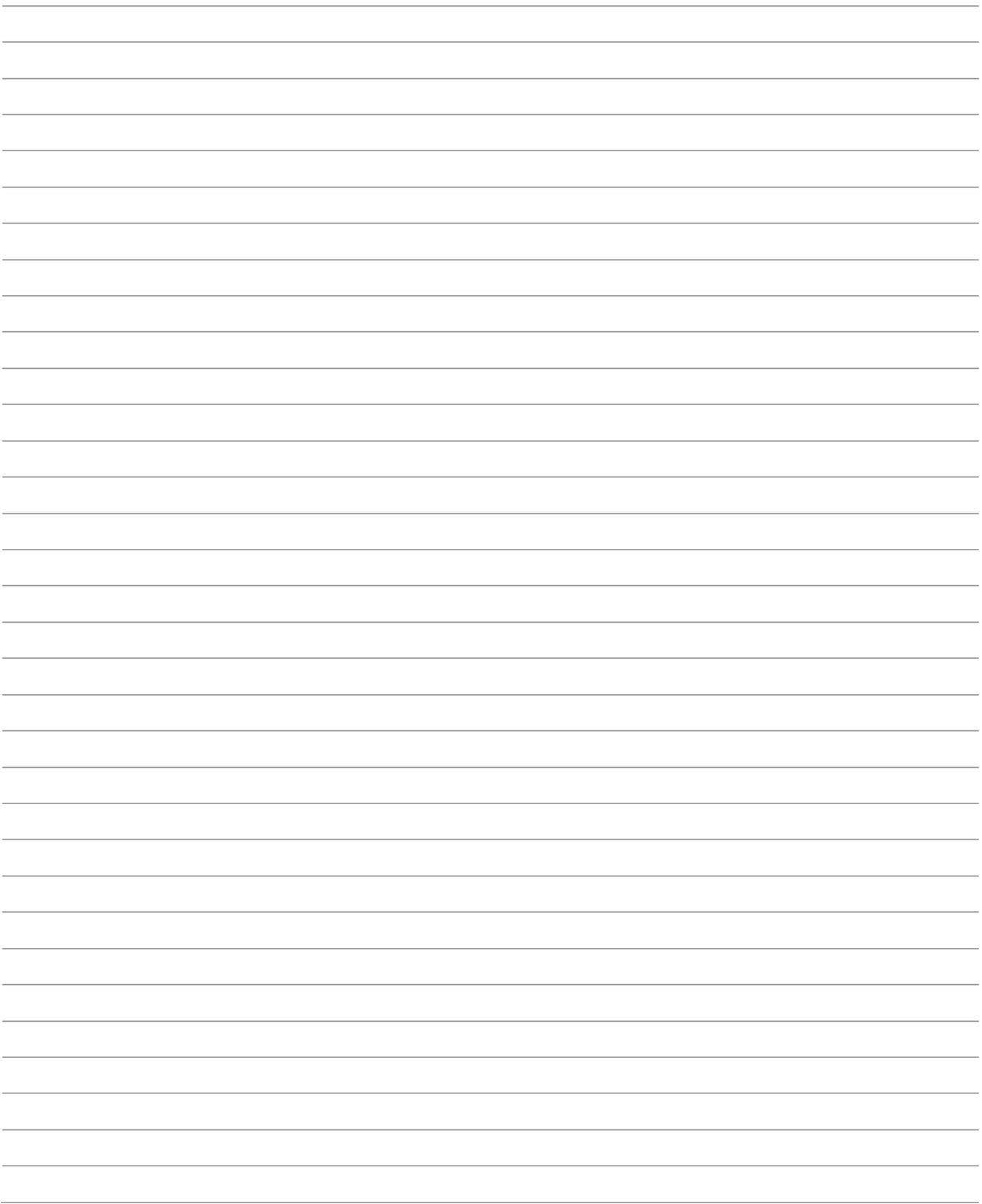
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