

Syllabus

Competition Law LAWS 2169

**Dalhousie University
Schulich School of Law**

Winter 2018

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General Description

Competition law (or antitrust law, as it is known in the United States) is the application of economic principles within a legal framework to ensure that markets operate to promote competition and applies to all businesses in Canada. This course will examine the scope and application of competition law in Canada, focusing on the Canadian *Competition Act* (the “**Act**”). The Act governs anti-competitive and potentially anti-competitive activities such as price fixing, abuse of market power, mass marketing fraud, misleading advertising and mergers in Canada. By the end of this course, you will be familiar with the legal, economic and policy underpinnings of the Canadian competition law regime.

Course Format

A two-hour lecture / seminar class will be held each week on Thursdays from 4:30 pm to 6:30 pm. A detailed outline of the classes in this course, indicating the topics, presentations and readings that will be covered in each class can be found in the chart at the end of this syllabus.

Office Hours

Office hours will be by appointment and take place on Thursdays in the hour before class - from 3:30 pm until 4:30 pm at a location to be determined. Meetings must be arranged in advance, preferably via email or telephone. Students are encouraged to use office hours to speak to the instructor about their paper topic and research progress.

Grading

Grading will be based on the following components:

- (a) *10% - Written paper proposal*, including an initial review of research sources (cases, articles, texts - an annotated bibliography covering at least 5 sources). The proposal should set out the topic or issue that your paper will address as well as state a clear thesis statement. The topic you choose should be discussed with the instructor in advance. The proposal is due by email on February 15, 2018 and should consist of prose (500 words or less not including the annotated bibliography which should be two pages or less), as well as a list of other sources you plan to use. You may include an outline (Table of Contents) but it is not necessary. This is an initial conceptualization of your written paper and the final paper may vary from this initial proposal as long as you consult with the instructor. The proposal will be evaluated on the same basis as the final paper, by using the criteria set out in the [Major Paper Guidelines](#), which are available on the Dalhousie web site.
- (b) *10% - Oral presentation*. Students will be required to give one 10-15 minute oral presentation on a topic arising from the lectures. Depending on the number of students enrolled, each class may include two student presentations. The presentation will constitute 10% of the overall evaluation and is intended to be a brief overview of a particular case, bulletin or statutory provision that is relevant to the day's lecture. Presenting students should be prepared to field general questions about the material they have reviewed, both from the instructor and from the class. Visual aids, written materials or other presentation materials are not necessary, but may be helpful. The assessment will be based on preparation, organization, a demonstration of a comprehension of the material, a demonstration of an ability to think critically and synthesize information, and time management.
- (c) *10 % - Class participation*. This component of a student's grade will be based on overall participation, including attendance, the number of times a student contributes, and the quality of that contribution.
- (d) *70% - Written paper*. In conformity with the [Major Paper Guidelines](#), students will submit a paper on a topic related to competition law. Pursuant to the school's guidelines, please note that all papers submitted are to be a minimum of 25 pages in length and, ideally, should not exceed 35 pages. All papers are due one week from the last day of class: **Thursday, April 12, 2018 at 4:00 pm**. No exceptions will be made and this time will not be extended without a penalty as set out in the Law School's regulations. Please refer to the [Major Paper Guidelines](#) for the applicable assessment factors.

Major papers must be submitted on hard copy. Students should hand papers in to the Schulich School of Law reception desk and ensure they are date and time stamped. Please note students are also required to provide an identical electronic copy of their paper to the instructor by the due date.

Materials

There are two required texts, available in the bookstore, with limited copies on reserve in the Law Library:

- Brian A. Facey & Cassandra Brown, *Competition Act: Commentary and Annotation, 2018 Edition* (Toronto: LexisNexis Canada Inc. 2018)
- James B. Musgrove, ed., *Fundamentals of Canadian Competition Law*, 3rd ed. (Toronto: Carswell, 2015)

Additionally, the key statutes (and the regulations promulgated thereunder) are available online:

- *Competition Act*, R.S.C. 1985, c. C-34 – office consolidation available on [Justice Laws website](#)
- *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.) – office consolidation available on [Justice Laws website](#)
- *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.) – office consolidation available on [Justice Laws website](#)

Supplementary materials for this class will largely available online, usually on the [Competition Bureau's website](#) and the [Competition Tribunal's website](#). Some materials may be placed on reserve in the Law Library. Students are expected to obtain the listed materials (largely online) and review them prior to class in which they will be discussed. Please let the instructor know if you have any difficulty obtaining the materials.

Reference Materials

The following texts are available in the Law Library:

- Omar Wakil, *The 2018 Annotated Competition Act* (Toronto: Thomson Reuters, 2017)
- Michael Trebilcock et al., *The Law & Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002)
- George N. Addy & William L. Vanveen, *Competition Law Service*, looseleaf (Toronto: Canada Law Book, 1999) - on reserve
- Calvin S. Goldman & John D. Bodrug, eds., *Competition Law of Canada*, looseleaf (New York: Juris Publishing, 1998) - on reserve

- Walter Adams & James W. Brock, *Antitrust Economics on Trial: A Dialogue on the New Laissez-Faire* (Princeton, NJ: Princeton University Press, 1991) - on reserve

Policy on Plagiarism

All students in this course must read the University policies on plagiarism and academic honesty referenced in the Policies and Student Resources sections of the <http://academicintegrity.dal.ca/> website, and the Law School policy on plagiarism, available online at <http://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html>. Any paper or assignment submitted by a student at the Schulich School of Law may be checked for originality to confirm that the student has not plagiarized from other sources. Plagiarism is considered a serious academic offence which may lead to loss of credit, suspension or expulsion from the law school, or even revocation of a degree. It is essential that there be correct attribution of authorities from which facts and opinions have been derived. Prior to submitting any paper or other assignment, students should read and familiarize themselves with the policies referred to above and should consult with the instructor if they have any questions. Ignorance of the policies on plagiarism will not excuse any violation of those policies.

Student Requests for Accommodation

Requests for special accommodation for reasons such as illness, injury or personal circumstances will require an application to the Law School Studies Committee. Such requests must be made to Associate Dean Michael Deturbide as soon as possible, before a scheduled exam or a deadline for an assignment. Retroactive accommodation will not be provided. Please note that individual professors cannot entertain accommodation requests.

Students may request accommodation as a result of barriers related to disability, religious obligation, or any characteristic under the Nova Scotia *Human Rights Act*. Students who require academic accommodation for either classroom participation or the writing of tests and exams should make their request to the Advising and Access Services Center (AASC) prior to or at the outset of the regular academic year. Please visit www.dal.ca/access for more information and to obtain the Request for Accommodation – Form A. Students may also contact the Advising and Access Services Centre directly at 494-2836, or they may contact Associate Dean Michael Deturbide for more information.

Class Outline

The following chart provides a detailed outline of the anticipated topics that will be covered in each class this semester, inclusive of readings and presentation topics.

DATE	TOPICS	READINGS
January 11	<p>Introductory Class</p> <p>Overview of course; historical background; sources of competition law; common law doctrine of restraint of trade; evolution and objectives of Canadian competition law and policy; promotion of competition vs. consumer protection; consumer welfare vs. “hipster” antitrust; structure of the <i>Competition Act</i>.</p>	<p><i>Competition Act</i>, s. 1.1 Musgrove, chapters 1 & 2 Facey, Preface</p> <p>Alan Greenspan, “Antitrust” (1962) in Ayn Rand, <i>Capitalism: The Unknown Ideal</i>, Centennial ed. (New York: Signet, 1967), pp. 63-71</p> <p>Matthew Yglesias, “Democrats’ push for a new era of antitrust enforcement, explained” <i>Vox</i> (Jul 31, 2017), online</p> <p>Adam S. Goodman, “The Origins of the Modern Patent in the Doctrine of Restraint of Trade” 19.2 <i>Intellectual Property Journal</i> 297</p> <p><i>Payette v. Guay Inc.</i>, [2013] 3 S.C.R. 95</p> <p>Competition Bureau, Bulletin – Options for the Internationalization of Competition Policy: Defining Canadian Interests (1999) - online</p>

DATE	TOPICS	READINGS
January 18	<p>Enforcement of Canadian Competition Law</p> <p>Canadian competition law actors and agencies; the role of the courts and the Competition Tribunal; Competition Bureau enforcement priorities; Immunity and Leniency Programs; formal inquiries; compliance; evidence gathering; confidentiality; communication of information by the Competition Bureau; interim and final orders; consent orders; statutory remedies, including criminal sanctions and administrative monetary penalties; principles of sentencing.</p>	<p><i>Competition Act</i>, ss. 7-29.1, 33-36 Musgrove, chapters 2 & 15</p> <p>Competition Bureau, Bulletin – Competition and Compliance Framework (2015) - online</p> <p>Competition Bureau, Bulletin - Corporate Compliance Programs (2015) - online</p> <p>Competition Bureau, Bulletin – Immunity Program under the <i>Competition Act</i> (2010) - online</p> <p>Competition Bureau, Bulletin – Leniency Program (2010) - online</p> <p>Competition Bureau, Bulletin – Sections 15 & 16 of the <i>Competition Act</i> (2008) - online</p> <p><i>R. v. Maxzone Auto Parts (Canada) Corp.</i>, 2012 FC 1117</p>

DATE	TOPICS	READINGS
January 25	<p>Competition Economics</p> <p>The role of economics in competition analysis; basic economic concepts; behavioural assumptions; market definition; market power; monopoly; oligopoly; monopsony; oligopsony; developments and trends (Chicago and post-Chicago); “hipster” antitrust</p> <p>Presentation Topic: 1. <i>Antitrust Economics on Trial</i>, pp. 3-42 2. A Better Deal on Monopolies & Abuse</p>	<p>Musgrove, chapter 3</p> <p>Walter Adams & James W. Brock, <i>Antitrust Economics on Trial: A Dialogue on the New Laissez-Faire</i> (Princeton, NJ: Princeton University Press, 1991), pp. 3-42</p> <p>Democratic Party (US), A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power (2017) - online</p>
February 1	<p>Horizontal Restraints I</p> <p>Criminal conduct; <i>per se</i> vs. rule of reason; cartels; conspiracy; price fixing, market allocation, and output restriction; definition of “competitor”; ancillary restraints; regulated conduct defence; bid rigging.</p> <p>Presentation Topics: 1. Competitor Collaboration Guidelines, sections 1-2 & 4 (examples 1-6) 2. Competition Bureau, Bulletin – “Regulated Conduct” (2010)</p>	<p><i>Competition Act</i>, ss. 45-49</p> <p>Musgrove, chapter 4</p> <p>Competition Bureau, Enforcement Guidelines – Competitor Collaboration Guidelines (2009), sections 1-2 & 4 (examples 1-6) - online</p> <p>Competition Bureau, Bulletin – “Regulated Conduct” (2010) - online</p>

DATE	TOPICS	READINGS
February 8	<p>Horizontal Restraints II</p> <p>Civil review; rule of reason; substantial lessening or prevention of competition (SLPC); efficiencies exemption; agreements between competitors; joint ventures; joint selling; information exchanges; buying groups; non-compete covenants.</p> <p>Presentation Topics:</p> <ol style="list-style-type: none"> 1. Competitor Collaboration Guidelines (2009), sections 3 & 4 (examples 8-12) 2. Consent Agreement in <i>Air Canada et al.</i> 3. Competition Bureau Position Statement – BCE/Rogers/GLENTEL 	<p><i>Competition Act</i>, s. 90.1</p> <p>Musgrove, chapter 5</p> <p>Competition Bureau, Enforcement Guidelines – Competitor Collaboration Guidelines (2009), sections 3 & 4 (examples 8-12) - online</p> <p><i>Commissioner of Competition v. Air Canada et al.</i>, CT-2011-004 – Notice of Motion, Responses, and Consent Agreement</p> <p>Competition Bureau, Position Statement - Competition Bureau statement regarding BCE and Rogers’ acquisition of GLENTEL (May 14, 2015) - online</p>

DATE	TOPICS	READINGS
Feb. 15	<p>Deceptive Marketing Practices I Guest Lecturer: Paul Berry</p> <p>False or misleading advertising or representations; other deceptive marketing practices; ordinary price claims; deceptive telemarketing; choice of civil vs. criminal track; use of administrative monetary penalties.</p> <p>Presentation Topics:</p> <ol style="list-style-type: none"> 1. Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act (1999) 2. Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the <i>Competition Act</i> (2009) 	<p><i>Competition Act</i>, s. 52-60, Part VII.1 Musgrove, chapter 12</p> <p>Competition Bureau, Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act (1999) - online</p> <p>Competition Bureau, Enforcement Guidelines - Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the <i>Competition Act</i> (2009) - online</p> <p>Competition Bureau, Press Release - Michaels to pay \$3.5 M penalty to settle frames and custom framing services price advertising case (2015) - online</p> <p><i>Commissioner of Competition v. Sears Canada Inc.</i>, 2005 Comp. Trib. 2</p> <p><i>Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)</i>, 2008 Comp. Trib. 02</p>
Feb. 22	Winter Study Break – No Class	

DATE	TOPICS	READINGS
<p>March 1</p>	<p>Vertical Restraints and Unilateral Conduct</p> <p>Economic consequences of vertical restraints; refusal to deal; tied selling; market restriction; exclusive dealing; exclusivity; price maintenance; price discrimination; dominance; abuse of dominance; predatory pricing; essential facilities; unilateral anti-competitive conduct.</p> <p>Presentation Topics:</p> <ol style="list-style-type: none"> 1. Competition Bureau, Enforcement Guidelines – The Abuse of Dominance Provisions 2. Notice of Application – <i>Vancouver Airport Authority</i> 	<p><i>Competition Act</i>, ss. 75-79.1</p> <p>Musgrove, chapters 6-9</p> <p>Competition Bureau, Enforcement Guidelines - Price Maintenance (2014) - online</p> <p>Competition Bureau, Enforcement Guidelines – The Abuse of Dominance Provisions (2012) - online</p> <p>Competition Bureau, Statement regarding inquiry into alleged anti-competitive conduct by Loblaw Companies Limited (November 21, 2017) - online</p> <p><i>Commissioner of Competition v. Air Canada</i>, 2003 Comp. Trib. 13</p> <p><i>Nadeau Poultry Farm Limited v. Groupe Westco Inc.</i>, 2009 Comp. Trib. 6</p> <p><i>Commissioner of Competition v. The Toronto Real Estate Board</i>, 2017 FCA 236</p> <p><i>Commissioner of Competition v. Vancouver Airport Authority</i>, CT-2016-015 – Notice of Application</p>

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March 8	<p>Mergers I</p> <p>Pre-merger notification; Advance Ruling Certificates; merger review process; supplementary information requests; Bureau information gathering; sector-specific regulations; foreign investment review; national security review.</p> <p>Presentation Topics:</p> <ol style="list-style-type: none">1. Merger Review Process Guidelines2. Fees and Service Standards Handbook for Mergers and Merger-Related Matters3. Investment Canada Act Annual Report 2015-16	<p><i>Competition Act</i>, ss. 102-103, Part IX Musgrove, chapter 10</p> <p><i>Notifiable Transactions Regulations</i>, SOR/87-348</p> <p>Competition Bureau, Merger Review Process Guidelines (2015) - online</p> <p>Competition Bureau, Fees and Service Standards Handbook for Mergers and Merger-Related Matters (2010) - online</p> <p>Pre-Merger Notification Form - online</p> <p>Innovation, Science and Economic Development Canada, Investment Canada Act Annual Report 2016-17 - online</p>

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March 15	<p>Mergers II</p> <p>Substantive merger review; definition of “merger”; types of mergers; the SLPC test; measuring effects; market definition; market shares; safe harbours; unilateral effects; coordinated effects; barriers to entry; remaining competition; impact of other regulation; remedies; the efficiencies defence.</p> <p>Presentation Topics:</p> <ol style="list-style-type: none">1. Information Bulletin on Merger Remedies in Canada (2006)2. Technical Backgrounder - Acquisition of Maytag by Whirlpool (2006)	<p><i>Competition Act</i>, ss. 91-103 Musgrove, chapter 11</p> <p>Competition Bureau, Merger Enforcement Guidelines (2011) - online</p> <p>Competition Bureau, Information Bulletin on Merger Remedies in Canada (2006) - online</p> <p>Competition Bureau, Technical Backgrounder - Acquisition of Maytag by Whirlpool (2006) - online</p> <p><i>Tervita Corp. v. Canada (Commissioner of Competition)</i>, [2015] 1 S.C.R. 161</p> <p><i>Canada (Director of Investigation and Research) v. Southam Inc.</i>, [1997] 1 S.C.R. 748</p>

DATE	TOPICS	READINGS
March 22	<p>Private Enforcement</p> <p>Private actions; statutory cause of action; causes of action in tort; restitution; class proceedings; jurisdiction; private applications for leave in the Competition Tribunal; test for leave; private incentives for enforcement.</p> <p>Presentation Topics:</p> <ol style="list-style-type: none">1. <i>Shah v. LG Chem, Ltd.</i>2. <i>Audatex Canada, ULC v. CarProof Corporation</i>	<p><i>Competition Act</i>, ss. 36, 103.1-107 Musgrove, chapters 13, 14 & 17</p> <p><i>Pro-Sys Consultants Ltd. v. Microsoft Corporation</i>, [2013] 3 S.C.R. 477</p> <p><i>Sun-Rype Products Ltd. v. Archer Daniels Midland Company</i>, [2013] 3 S.C.R. 545</p> <p><i>Infineon Technologies AG v. Option consommateurs</i>, [2013] 3 S.C.R. 600</p> <p><i>Fairhurst v. De Beers Canada Inc.</i>, 2012 BCCA 257</p> <p><i>Shah v. LG Chem, Ltd.</i>, 2015 ONSC 2628</p> <p><i>Audatex Canada, ULC v. CarProof Corporation</i>, 2015 Comp. Trib. 28</p>

DATE	TOPICS	READINGS
March 29	<p>Competition Law and Intellectual Property</p> <p>The interface between competition law and intellectual property; copyright; trademark; patents; conflict vs. complementary; approach of the <i>Competition Act</i>; patent settlements; product switching; patent trolls; standard essential patents.</p> <p>Presentation Topics:</p> <ol style="list-style-type: none">1. <i>Warner Music Canada Ltd.</i>2. <i>Apotex Inc. v. Eli Lilly and Company</i>	<p><i>Competition Act</i>, ss. 32 & 79(5) Musgrove, chapter 16</p> <p>Competition Bureau, Intellectual Property Enforcement Guidelines (2016) - online</p> <p><i>Director of Investigation & Research v. Warner Music Canada Ltd.</i>, CT-1997/003 – Doc # 22</p> <p><i>Apotex Inc. v. Eli Lilly and Company</i>, 2005 FCA 361 (CanLII)</p>

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April 5	<p>Deceptive Marketing Practices II Guest Lecturer: Paul Berry</p> <p>Consumer packaging; textile labelling; precious metals marking; mass marketing fraud; cross-border issues; inspection vs. investigation.</p> <p>Presentation Topics: 1. Enforcement Guidelines - "Product of Canada" and "Made in Canada" Claims 2. Enforcement Guidelines - Environmental Claims: A Guide for Industry and Advertisers</p>	<p><i>Consumer Packaging and Labelling Act</i>, R.S.C., 1985, c. C-38</p> <p>Competition Bureau, Guide to the Consumer Packaging and Labelling Act and Regulations (1999) - online</p> <p><i>Precious Metals Marking Act</i>, R.S.C., 1985, c. P-19 Competition Bureau, Guide to the Textile Labelling and Advertising Regulations (2000) - online</p> <p><i>Textile Labelling Act</i>, R.S.C., 1985, c. T-10</p> <p>Competition Bureau, Guide to the Precious Metals Marking Act and Regulations (2006) - online</p> <p>Competition Bureau, Enforcement Guidelines - "Product of Canada" and "Made in Canada" Claims (2009) - online</p> <p>Competition Bureau, Enforcement Guidelines - Environmental Claims: A Guide for Industry and Advertisers (2008) - online</p>