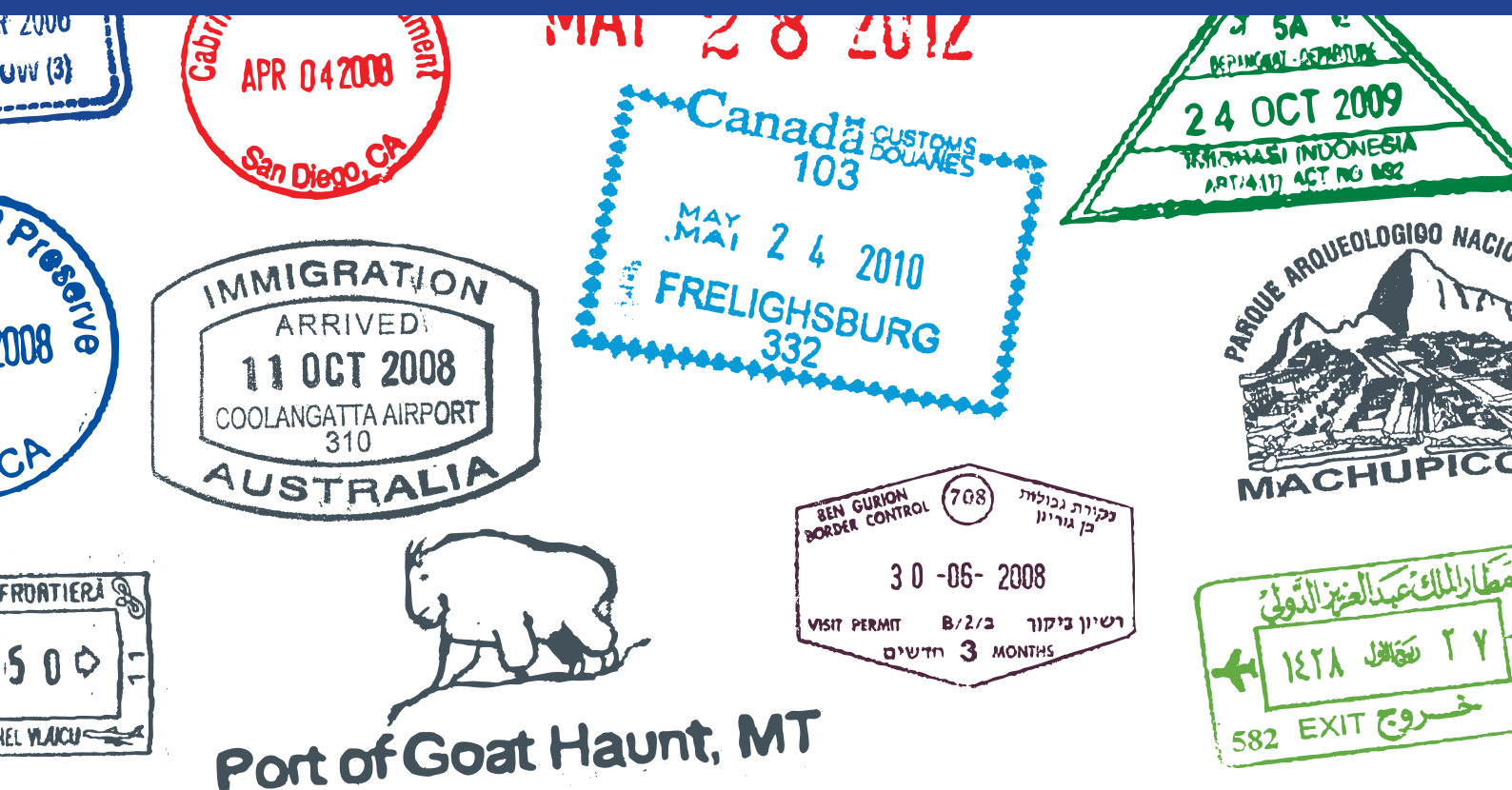


THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## National Competition Law Section International Committee

Summer 2015





Summer 2015

## Table of contents

|  |          |
|--|----------|
| Committee Mandate .....  | 1        |
| Introducing the CBA<br>Competition Law Section's<br>International Committee .....  | 1        |
| Go South, Young Man, Go South:<br>Canadians at the 63 <sup>rd</sup> Annual ABA<br>Spring Meeting .....   | 2        |
| <i>International Agency Co-operation:<br/>New Agreement between<br/>Switzerland and the EU - its<br/>Significance for Companies<br/>and Legal Advisers .....</i> | <i>3</i> |
| From the ABA Spring Meeting:<br>Rapporteur Panel Summary on<br>"International Agency Cooperation:<br>The Real Story" .....                                       | 5        |
| Recent Developments in Cooperation<br>between the Competition Bureau<br>and the Ministry of Commerce of the<br>People's Republic of China .....                  | 7        |
| At-a-Glance: Upcoming International<br>Antitrust Events .....  | 9        |
| International Committee<br>Officers, 2014-15 .....   | 9        |

## Committee Mandate



Brian Facey



Casey Halladay

The International Committee keeps the Canadian Bar Association National Competition Law Section (CBANCLS) members informed about new laws, key cases, enforcement trends and policy developments of interest in other jurisdictions, as well as news from foreign bar associations and regulatory agency developments. The Committee also coordinates the preparation of comments and analyses of policy initiatives and competition law developments in foreign countries with other relevant Committees. Interested in joining our committee? Please contact Brian Facey (brian.facey@blakes.com; 416-863-4262) or Casey Halladay (casey.halladay@mcmillan.ca; 416-865-7052).

## Introducing the CBA Competition Law Section's International Committee

Flipping through the Bureau's concluded mergers registry for 2015, you cannot find a month that is not peppered with transactions involving high-profile international reviews. From the US\$44 billion merger of Holcim/Lafarge of equals to the complex 3-part asset swap between GlaxoSmithKline and Novartis, the Bureau is cooperating and coordinating with its counterpart agencies around the world more frequently every day.

Similarly, on the cartel and unilateral conduct fronts, the Bureau's investigations over the past year have touched on sectors attracting scrutiny worldwide — perhaps no example of this is more notable than the Bureau's cartel and bid-rigging investigations in connection with the auto parts sector.

The Competition Law Section's newly-inaugurated International Committee ("IC") has evolved out of these practical realities. International stories, developments, trends and events are relevant to all of us because they have become integral to the practice of Canadian competition law.

In *PASSPORT*, the IC's semi-annual newsletter, we strive to bring you articles and information that touch on the international aspects and implications of Canadian competition law.

We look forward to receiving your feedback, and would welcome ideas for future issues of the newsletter.

Regards,

Brian Facey  
Chair, CBA National Competition Law Section, International Committee



Summer 2015

## ***Go South, Young Person, Go South: Canadians at the 63<sup>rd</sup> Annual ABA Spring Meeting***



**Casey Halladay**  
Partner, McMillan LLP  
Toronto

As the global popularity of the ABA Antitrust Section's showcase Spring Meeting continues to grow, Canadian competition lawyers attended this year's conference (held April 15-17, in Washington, DC) in record numbers, with **182** registered attendees from Canada.

Equally impressive was Canada's representation on panels, with **9** Canadians - Neil Campbell, Catherine Beagan Flood, Cal Goldman, Casey Halladay, Rob Kwinter, James Musgrove, Commissioner of Competition John Pecman, Sheridan Scott and Julie Soloway - acting as Speakers or Session Chairs, giving Canada the second-largest contingent (after Belgium) of foreign panelists.

Commissioner Pecman's comments on his panel, "International Agency Cooperation: The Real Story", are featured in an article contributed by Joshua Chad to this issue of *PASSPORT*.

---

## ***International Agency Co-operation: New Agreement between Switzerland and the EU - its Significance for Companies and Legal Advisers***



**Prof. Patrick L. Krauskopf,<sup>1</sup>**  
Partner, AGON Partners  
Zürich

Collaboration between competition authorities is a crucial instrument in combating cross-border competition constraints (cartel agreements, abuse of market power, as well as merger control). As a result, various cooperation agreements have been concluded between jurisdictions:

- The vast majority of such treaties ("first generation agreements") contain significant defects. This especially affects the exchange of confidential information.
- Attempts have been made to eliminate these existing defects with so-called "second generation agreements" with the possibility to exchange confidential information. Such an agreement was concluded at the end of 2014 between Switzerland and the EU.
- Within the EU, there exists an advanced form of cooperation. Its Member States are able to exchange all kinds of information with each other and with the European Commission within the closed framework of the European Competition Network (ECN).



Summer 2015

The agreement between Switzerland and the EU - a second generation agreement - is designed to facilitate the exchange of information between the Swiss Competition Commission ("COMCO") and the European Commission ("Commission").

- The agreement is a purely procedural agreement and thus enables collaboration and the coordination of procedural actions, including the exchange of information between the competition authorities.
- The agreement does not facilitate a material harmonization of the two competition law regimes. The agreement recognizes the autonomy of the respective competition rules. The competition authorities remain autonomous in the application of their respective competition laws.
- Nevertheless, it is clear that both the EU and Swiss systems rely on similar legal principles and contain equivalent provisions when it comes to enforcing competition law. In order to avoid conflicts between the contractual parties in the application of their respective competition laws, the respective authorities have agreed to inform each other about any changes to their competition laws.

### Key elements

By means of such collaboration and coordination, particularly in the transmission of any information which the Commission and COMCO may have discovered in the course of their investigations, it should be possible for the contractual parties to achieve a more effective implementation of both competition laws. In this respect, the following points should be observed:

- **Authorization.** Depending upon the circumstances, the competition authorities involved can in principle exchange information. Any such communication between the competition authorities must be submitted in English. Both competition authorities shall designate a point of contact for the transmission of such messages.
- **Cascade.** When a greater level of data protection is required in the exchange of information, it is then necessary for the competition authorities to fulfill more prerequisites in respect of such a transmission.
- **Requirements and prohibitions.** The cooperation agreement contains numerous provisions about the use of and protection of the information supplied.
- **Confidentiality.** The cooperation agreement also contains provisions for preserving the confidentiality of the information provided. Where such cooperation agreement safeguards are violated by a competition authority, then that competition authority is compelled to immediately inform any other affected authority.
- **Disclosure to other competition authorities.** Based upon its competition laws and the European Economic Area agreement, the Commission has certain obligations to provide information to the competent authorities of the Member States, as well as to the EFTA Surveillance Authority. The cooperation agreement specifies the extent of these obligations when applying the cooperation agreement.

### Relevance for Competition Authorities and Companies

From the authorities' perspective, the exchange of information which is made possible by the cooperation agreement will lead to a more effective implementation of anti-trust laws:

- The agreement will initially facilitate the work of the authorities. Competition authorities will be able to obtain decisive information more quickly and more easily. This is expected to shorten procedures.
- The cooperation agreement should take into account the increasingly international nature of cartel issues. In this way, COMCO can thus take stronger action against international cartels.



Summer 2015

From the business perspective, there is a consensus that companies which intentionally cause damage to the Swiss economy and to Swiss consumers should not be able to claim special protection from an exchange of information between “Berne” and “Brussels”. However, from a constitutional perspective, a slightly bitter aftertaste remains because “Berne” has shown itself willing to accept the following points, as a result of the numerous advantages of the agreement it feels it is getting:

- That the cooperation agreement makes no provision for an independent appeal against the transmission of information by COMCO. Although the companies affected have to be informed about the transmission of information, where the companies’ rights or the cooperation agreement safeguards are violated, then the companies can only make a valid claim in the context of an appeal against the decision of the authority which has received the information.
- That it is not envisaged to have an independent appeals process against the transmitting authority. A separate appeal against the transmission in itself would significantly affect the value of the exchange of information and lead to a delay and prolongation of the proceedings.

### Potential Significance for Legal Advisors

The cooperation agreement has been in force for barely half a year now. At this moment in time there are no examples or guidelines as to how the authorities will implement the agreement. This means that legal advisers need to anticipate possible consequences for their clients as follows:

- **Investigation procedure.** It must be expected that COMCO and the Commission will inform each other about questions that arise and doubts that they may have, without the knowledge of the companies in question, for example, on their “theory of harm”.
- **Amnesty Program/Leniency Application.** Special attention is required if a company provides information about a violation of cartel law to both jurisdictions. In this case a more prudent cooperation strategy may be required.
- **Private Enforcement.** Finally, it is important to exercise care that private claims for damages are neither made possible nor facilitated through a mistaken or negligent exchange of information between authorities.

<sup>1</sup> Prof. Patrick L Krauskopf, PhD, LL.M (Harvard), Attorney-at-law (admitted to the bar in both Zürich and New York) is the chairman of AGON Partners. He is also the head of the Centre for Competition Law at Zurich University (ZHAW), chairman of the Association for Compliance and Competition Law (ACCL), chairman of the New York State Bar Association's Swiss Chapter and an advisor (NGA) to the International Competition Network (ICN), WTO and UNCTAD.



Summer 2015

## From the ABA Spring Meeting: Rapporteur Panel Summary on “International Agency Cooperation: The Real Story”



**Joshua Chad**  
Associate, McMillan LLP  
Toronto

On April 16, 2015, the ABA’s 63rd Annual Spring Meeting hosted a panel entitled “International Agency Cooperation: The Real Story”. The session was moderated by Elizabeth Kraus, Deputy Director for International Antitrust, Federal Trade Commission (“FTC”), and featured John Pecman, Commissioner of Competition, Canadian Competition Bureau (“CCB”); Stanley Wong, Chief Executive Officer, Competition Commission of Hong Kong; and Vanessa Turner, Partner, Allen & Overy LLP. Highlights of the discussion that are likely to be of interest to Canadian practitioners are set out below.

### Increasing Cooperation through Capacity Building

CEO Wong explained that there is a tendency for established competition agencies to not spend enough time to understand local laws in emerging jurisdictions. The object should not be to export EU law or have the world adopt the Sherman Act. The goal of interagency cooperation and capacity building should be to help other jurisdictions apply their own laws.

Commissioner Pecman contended that capacity building has numerous other benefits. While he acknowledged the importance of teaching agencies how to use their own laws, he argued that capacity building can create international norms to create consistent economics and consistent procedural steps in areas such as dawn raids.

Both Commissioner Pecman and Deputy Director Kraus maintained that MOUs can provide for beneficial cooperation between agencies. Deputy Director Kraus elaborated that they help to build a knowledge base and create a convergence of approaches towards an international norm.

Ms. Turner stated that, from a European perspective, agencies cooperate much more in merger cases than in cartel and other cases. Much cooperation turns on whether the parties want to facilitate cooperation. For mergers, businesses often have an interest in cooperation taking place. Similarly, cooperation may be desired for immunity and leniency marker applications. However, at other stages, such as in the case of cartels and other restrictive agreements, the businesses being investigated probably do not want the agencies cooperating.

CEO Wong elaborated and explained that, for mergers, businesses will give agencies what they want to get the deal through, unless the agencies are being too unreasonable. For cartel investigations, agencies need to cooperate to make sure the global investigation runs smoothly. In contrast, abuse of dominance matters are much more complex with different laws in different locations. To add additional complexity, there are fair pricing rules, right to do business laws, and other factors that make cooperation a challenge. In those cases, agencies can still talk about the theory of harm, and more could be done on that front.

### Timing Considerations

Deputy Director Kraus explained that “timing is everything”. In order for the FTC to cooperate with other agencies, the agencies’ timetables for review have to be closely aligned. While timetables do not need to be in lock-step, they do need to be in the same “temporal space”. In particular, it is best when all agencies are considering remedies at the same time.

Commissioner Pecman highlighted that the CCB’s timing is generally driven by the parties. Often, parties will file mergers in Canada at the same time that they file in the U.S. As well, the CCB is guided by the parties’ expected closing date. In terms of cooperation with the U.S., the





Summer 2015

CCB has a bulletin explaining how the agency interacts with the U.S. agencies. Their goal is to try and come to an end point at a similar time.

Commissioner Pecman described several issues that can arise that lead to different timetables in Canada and the U.S. One such situation is where assets in the U.S. affect markets in Canada. In these situations, the CCB needs to wait for the U.S. resolution before deciding on a Canadian remedy because a U.S. remedy could resolve the Canadian concerns. Another situation where timing differs occurs where a party files late in one jurisdiction. This often leads to an agency being forced to “play catch-up”.

Commissioner Pecman also touched on timing considerations for unilateral conduct issues and potential cooperation in those investigations. Often, these reviews are triggered by a complainant. If the complainant does not complain in a particular jurisdiction, then that jurisdiction may not conduct a review. He also highlighted an example of an investigation that could be a model for future investigations of this type; in the Microsoft investigation, Microsoft agreed that any remedy in the U.S. would be accepted in Canada as well. This mechanism promoted cooperation between the agencies.

CEO Wong argued that timing is “a bit of a mess”. Each jurisdiction has a different review timetable. He thought that everyone would be best served if agencies could find a common approach to co-operation. Wong suggested that all agencies could, for example, opt into a standard form, with individual agencies able to make additional information requests on top of the international standard form.

Commissioner Pecman agreed that harmonizing merger review processes is an important goal. However, he indicated that dealing with existing legislation and institutional design from multiple jurisdictions to arrive at a uniform notification form would be challenging. To succeed, the major agencies would have to lead the way through the ICN. Moreover, there would likely need to be a supranational body such as the WTO engaging in significant trade discussions before such harmonization could occur.

On the information sharing front, Deputy Director Kraus expressed hope that jurisdictions could find a way to standardize merger notification forms, as they seem to be converging on thresholds and timetables.

### Information-Sharing

CEO Wong explained that under European law, many states are allowed to exchange confidential information relating to competition law matters, subject to certain exceptions. These information exchange rules apply not only to EU countries, but also to certain other countries, such as Switzerland. **(Editor’s Note: please see our separate article on this topic, authored by Dr. Patrick Krauskopf.)**

On this point, Commissioner Pecman noted that Canada is in the process of negotiating a similar arrangement with the EU that he expects will be finalized in the near future. Negotiations have been ongoing for several years.

Deputy Director Kraus explained that the FTC has attempted to implement these types of agreements, but has generally struggled to achieve success with them. As a result, if the FTC wants to exchange information, the agency needs to obtain waivers from the parties. She highlighted that the FTC has been successful in getting parties to provide waivers and has recently released a model waiver with the Department of Justice Antitrust Division. Deputy Director Krause described a recent success story in the Thermo Fisher Scientific/Life Technologies transaction where the parties granted waivers for nine competition agencies. Through these waivers, the parties and agencies were able to work together and time the filings so that multiple remedies could be discussed at the same time.

### The Past and Future of Interagency Cooperation

CEO Wong maintained that world events will often force regulators’ hands. Even where agencies may not want to cooperate, the increasingly international nature of business will force agencies to cooperate.

Commissioner Pecman described how, in the 1980s, there was almost no inter-agency cooperation and no one was focused on international cartels. In the late 1990s, agencies began cooperating on cartel matters, and then soon after cooperation spread to merger control. He expects that, over time, as businesses begin to more strongly voice concerns on



Summer 2015

matters such as divergent merger remedies, “bright minds” will together come up with a more universal cooperative approach. He believes it is just a matter of time until this occurs.

CEO Wong concluded by reminding the audience that competition agencies must for agencies to justify what they do. Agencies need to have good explanations for why they engage in the activities that they choose to engage in. The goal of cooperation should not be to just get stamps on a passport.

## Recent Developments in Cooperation between the Competition Bureau and the Ministry of Commerce of the People’s Republic of China



**Cassandra Brown**  
Associate, Blake Cassels & Graydon  
Toronto

The Competition Bureau (Bureau) announced on 19 May 2015 that it had signed a memorandum of understanding (MOU) with China’s State Administration for Industry and Commerce (SAIC) and the Ministry of Commerce of the People’s Republic of China (MOFCOM).<sup>1</sup> The MOU is the result of discussions initiated at the China-Canada Anti-monopoly Conference held in Beijing in January 2014 between Canada’s Commissioner of Competition, John Pecman, and senior officials from the three Chinese competition authorities: the Anti-monopoly Bureau of MOFCOM; the Anti-monopoly and Anti-unfair Competition Enforcement Bureau of SAIC; and the Bureau of Price Supervision and Anti-monopoly of the National Development and Reform Commission (NDRC).<sup>2</sup>

The MOU, which came into effect on 15 May 2015, includes provisions for cooperating on related competition matters and communicating about significant developments in each country’s competition regime.<sup>3</sup> These non-binding provisions may extend to developments touching on the Bureau’s treatment of state-owned enterprises (SOEs) as well as other areas of Canadian competition governance which may affect Chinese interests.

The provisions governing the relationship between the Bureau and MOFCOM provide that the agencies will exchange information about cases subject to the review of both agencies. Particular reference is made to the exchange of information about relevant market definitions, theories of harm, competitive impact assessments and the design of remedies.<sup>4</sup> However, the agencies may decline to share such information where doing so would be prohibited by the laws governing the agency in question, or where it would be incompatible with the agency’s interests.<sup>5</sup>

From the Canadian perspective, the MOU is both timely and significant. As MOFCOM assumes a heightened role in international antitrust matters, both agency and private stakeholders have a shared interest in streamlining the international review process and minimizing redundancies across agencies. The development of a closer working relationship with MOFCOM provides the Bureau with an opportunity to assist a relatively young and steadily evolving agency as it continues to develop and refine its framework of analysis for merger review. For MOFCOM, a closer working relationship with the Bureau allows it to leverage the Bureau’s many years of experience in conducting merger reviews.

As regards SAIC, while the formal framework of Chinese competition law governing the agency covers a wide range of anticompetitive behavior including market allocation, output restriction and abuse of dominance, there is limited guidance as to how this framework will be applied by China’s judicial system. (Indeed, the Anti-monopoly Law of the People’s Republic of China, which governs monopoly agreements, abuse of dominance and merger review in





Summer 2015

China, came into force less than 7 years ago, and only last year, on 16 Oct 2014, did the Chinese Supreme People's Court release its first ruling under the Anti-monopoly Law, addressing issues including market definition and the role of market share in assessing dominance).<sup>6</sup> The enhanced cooperation provided for by the MOU allows SAIC to supplement guidance from China's domestic judiciary with insights gained from the Bureau's deep experience.

Going forward, it is clear that the Canada-China MOU will underpin more frequent and in-depth communication and cooperation between the competition law agencies of the two countries. The Bureau has been clear that it expects the MOU to further communication with the Chinese agencies in order to facilitate technical and enforcement cooperation.<sup>7</sup> Similarly, MOFCOM has already shown an interest in advancing the dialogue regarding certain key issues affecting Chinese investment in Canada, such as the Bureau's continued requests for Chinese state-owned enterprises (SOEs) to provide confidential information on the Canadian investments of other Chinese SOEs during the course of a merger review. In the long run, to the extent that Canadian and Chinese businesses are subject to regulation under both regimes, the enhanced cooperation that is developing between the countries' respective antitrust agencies may reduce uncertainty as well as the overall burden of the regulatory process.

<sup>1</sup> Canada Competition Bureau, 'Competition Bureau enhances cooperation in cross-border enforcement', 19 May 2015: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03931.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03931.html)

<sup>2</sup> Ministry of Commerce of the People's Republic of China, 'China-Canada Anti-monopoly Conference Held in Beijing', 15 Jan 2014: [english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100464678.shtml](http://english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100464678.shtml).

<sup>3</sup> Canada Competition Bureau, 'Memorandum of Understanding on Cooperation Between the Commissioner of Competition, Competition Bureau of the Government of Canada and the State Administration for Industry and Commerce of the People's Republic of China', 23 May 2015: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03929.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03929.html); Canada Competition Bureau, 'Memorandum of understanding on Anti-Monopoly Cooperation Between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Ministry of Commerce of the People's Republic of China', 15 May 2015: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03930.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03930.html).

<sup>4</sup> Canada Competition Bureau, 'Memorandum of understanding on Anti-Monopoly Cooperation Between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Ministry of Commerce of the People's Republic of China', 15 May 2015: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03930.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03930.html), para 2.3.

<sup>5</sup> Ibid, para 5.

<sup>6</sup> Qihoo 360 v. Tencent (Supreme People's Court of China, 2014).

<sup>7</sup> Canada Competition Bureau, 'Competition Bureau enhances cooperation in cross-border enforcement', 19 May 2015: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03931.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03931.html).



Summer 2015

## At-a-Glance: Upcoming International Antitrust Events

| Date                    | Host Organization | Event  | Location             |
|-------------------------|-------------------|--|----------------------|
| September 11 - 12, 2015 | IBA               | 19 <sup>th</sup> Annual Competition Conference       | Florence, Italy      |
| September 23 - 24, 2015 | OECD              | Latin American Competition Forum                     | Montego Bay, Jamaica |
| September 24 - 25, 2015 | ICN               | 2015 ICN Merger Workshop                             | Brussels, Belgium    |
| October 4 - 9, 2015     | IBA               | IBA Annual Conference                                | Vienna, Austria      |
| October 18 - 21, 2015   | ICN               | 2015 ICN Cartel Workshop                             | Cartagena, Colombia  |
| October 29 - 30, 2015   | OECD              | OECD Global Forum on Competition                     | Paris, France        |
| November, 2015          | ICN               | 2015 ICN Unilateral Conduct Workshop                 | Istanbul, Turkey     |
| November 12, 2015       | ABA               | Antitrust Fall Forum                                 | Washington, DC USA   |
| February 3 - 5, 2016    | ABA, IBA          | International Cartel Workshop                        | Tokyo, Japan         |
| April 6 - 8, 2016       | ABA               | 64 <sup>th</sup> Antitrust Spring Meeting            | Washington, DC USA   |
| April 26 - 29, 2016     | ICN               | 2016 ICN Annual Conference                           | Singapore            |
| May 16 - 17, 2016       | IBA               | 12 <sup>th</sup> IBA Competition mid-Year Conference | Mexico City, Mexico  |

## International Committee Officers, 2014-15

### Chair:

Brian Facey  
Blake Cassels  
& Graydon LLP

### Vice-Chair:

Casey Halladay  
McMillan LLP

### Vice-Chair:

Daniel Wilcock  
Competition Bureau

### Vice-Chair:

Karounga Diawara  
L'Université Laval