



COMPETITION AND ANTITRUST IN CANADA

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First enacted in 1889, Canadian competition legislation predates the *Sherman Act*. Canada's current *Competition Act* (the 'Act') governs all Canadian antitrust matters and, with few exceptions, applies to all businesses in Canada.

THE LEGISLATION

The Act contains a mix of criminal offences, discretionary reviewable practices, and private damage actions. Criminal offences, such as conspiracy, bid-rigging, and discriminatory pricing are prosecuted in criminal courts. As such, the case must be proven beyond a reasonable doubt and strict rules of evidence apply. Mergers, abuse of dominant position, refusals to deal, and various vertical market restrictions constitute some of the non-criminal reviewable practices. Practices that substantially lessen competition may be restrained by the Competition Tribunal, a specialized adjudicative body for non-criminal antitrust matters.

The Act's stated purposes are to maintain and encourage competition in Canada, promote efficiency and adaptability, and ensure equitable opportunities for small business. Balancing these often conflicting objectives is a central feature of Canadian antitrust enforcement. Those involved in enforcement are particularly sensitive to mergers with both domestic and international competition implications.

ANTITRUST ACTORS

The Commissioner Of Competition

The Commissioner of Competition (the 'Commissioner') serves as Canada's chief antitrust enforcement official. In charge of the Competition Bureau (the 'Bureau'), the Commissioner has exclusive statutory authority to administer and enforce the Act. Only the Commissioner may investigate breaches of the Act and initiate proceedings for reviewable practices.

The Commissioner must commence a formal inquiry whenever there is reason to believe a criminal offence has been, or is about to be, committed. A formal inquiry also must be commenced whenever grounds exist for the Competition Tribunal (see below) to make an order regarding a reviewable practice. Although most inquiries begin at the Commissioner's instance, the Commissioner must also commence an inquiry when the federal Minister of Industry so directs, or on the sworn application of six Canadian residents. All inquiries are conducted in private and strict rules of confidentiality are applied.

A full arsenal of investigative tools assists the Commissioner with investigations. These include search and seizure, examinations under oath, production of records or other physical evidence and - in the case of deceptive telemarketing, bid-rigging and conspiracy - wire tapping. Exercise of these powers is subject to court supervision and must comply with the constitutional



protection afforded to everyone under Canada's Charter of Rights and Freedoms. Computer databases and corporate records of both Canadian and foreign affiliates are also vulnerable to compulsory process.

Competition Bureau

The Competition Bureau provides the Commissioner with all necessary administrative support. Appointed Deputy Commissioners and Chief Officers oversee branches dealing with mergers, civil matters, criminal matters, compliance and operations, economics and international affairs, and fair business practices.

Attorney General

Ultimate discretion in and responsibility for initiating criminal proceedings rests with Canada's Attorney General. However, antitrust prosecutions typically are initiated only upon the Commissioner's recommendation. All criminal proceedings under the Act take place in the criminal courts, rather than before the Tribunal.

The Tribunal

The Tribunal consists of both judicial and lay members. As such, the Tribunal is partly an expert body, although its role and structure is purely adjudicative. The mixed composition ensures that the Tribunal includes important elements of judicial independence and fairness, as well as specialized knowledge of business and economics. The Chairman, always selected from the judicial members, supervises the Tribunal's work.

The Tribunal possesses neither investigatory nor independent power to consider matters. Rather, the Commissioner must refer matters to it. Private parties have limited rights, with leave of the Tribunal, to initiate proceedings regarding certain reviewable practices (discussed below). And, interested parties may, with leave (often readily granted), intervene once the Commissioner or a private party initiates a Tribunal proceeding.

Although the Competition Tribunal Act requires that proceedings must be handled as 'informally and expeditiously as the circumstances and considerations of fairness permit,' the Tribunal tends to adopt a formal manner, appearing much like a regular court. The typical contested proceeding requires at least twelve months for final resolution; even consent proceedings may be lengthy.

Private Litigants

The Act provides a civil cause of action for loss or damage that results from violation of the Act's criminal offences, or from failure to comply with a Tribunal or court order. Although recovery is limited to actual loss plus costs, costs may include those of any investigation of the conduct in question, as well as the costs of the proceeding. Given that competition cases frequently require expensive investigative methods, such as surveys and economic analysis, the right to recover costs is significant and often provides some incentive to litigate. Notwithstanding Canada's generous costs rule, the private right of action operates very



differently in Canada compared to the United States, where the availability of treble damages provides a major incentive to litigate. Nevertheless, the private action provisions of the Act inevitably will be turned to by private litigants in follow-on suits in cases where the Commissioner has brought a successful prosecution, and follow-on class action proceedings are becoming commonplace on all significant cartel matters.

Amendments to the Act that came into force in June 2002 permit private parties to initiate Tribunal proceedings in respect of refusals to deal, tied selling, territorial restrictions and exclusive dealing. The private litigant must obtain leave of the Tribunal to bring the case. And, remedies are limited (generally an order to cease engaging in the conduct complained of; damages or other monetary awards are not available).

REGULATION OF ANTI-COMPETITIVE BEHAVIOUR

The Act adopts a bifurcated approach to the regulation of anti-competitive behaviour. The Act treats some conduct as sufficiently egregious to competition to warrant criminal sanction if the offence is proved to a criminal standard. Conversely, reviewable practices are considered only potentially anti-competitive, and therefore require review and possible prohibition only if the conduct is established as anti-competitive in fact.

Reviewable Practices

Mergers

The Act applies to mergers, regardless of size, that either occur in Canada or can be shown to substantially prevent or lessen competition in Canada. Mergers that have that effect on competition are controlled through discretionary administrative and civil law procedures, rather than criminal prohibitions.

Substantial Lessening of Competition

The Commissioner, and ultimately the Tribunal should the Commissioner refer the case to it, examines the merger to determine whether, in the words of the Act, it will likely prevent or lessen competition substantially.

Analysis of any merger case begins with identification of the relevant markets, considering both geographic and product dimensions. Although the Tribunal may not find against a merger solely on the basis of market share, concentration data remains a key consideration in any case. Under the Act, the Tribunal (and the Commissioner as a matter of practice) may also consider factors such as ease of entry into the market, effectiveness of remaining competition, and the likelihood of business failure.

To date, the Tribunal has considered few contested merger cases. In one of these cases, the Tribunal equated substantial lessening of competition with the prospect that customers would face 'significantly higher prices or significantly less choice over a significant period of time.' In another decision, the Tribunal explicitly recognized that, although market share data must be carefully considered, it is not necessarily a reliable determinant of anti-competitive effects. Sensitive to



industry realities and dynamics, the Tribunal concluded that competition in the market at issue would not likely decrease substantially. Barriers to entry play a crucial role in Canadian merger analysis and the Tribunal accepts that a substantial lessening of competition is unlikely to occur in the absence of such barriers. In the third and most recent case, the role of merger efficiencies in saving an anti-competitive merger was of crucial importance.

The Efficiency Defence

Of the principal industrial countries with intrusive antitrust regimes, Canada alone provides a statutory efficiency gains defense; at least, for the moment. The efficiency defence received extensive consideration recently in a propane-related merger (Superior Propane). The Tribunal and Courts ultimately determined that the statutory defense (which says an anti-competitive merger should not be prohibited if the gains in efficiency which result from the merger outweigh its anti-competitive effects) requires the Tribunal to take a “balancing weights” approach to assess whether the efficiency gains will offset the anticompetitive effects of the merger. This involves consideration of the deadweight loss resulting from the merger, wealth transfers from consumers, and a number of qualitative factors.

At the time of writing (March 2004), Parliament has passed a Bill to amend the Act to repeal the defense (the Bill is still before the Senate). Instead, efficiencies would be one of a number of factors the Tribunal (and, in practice, the Commissioner) could consider when assessing the competitive effect of a merger.

Merger Enforcement Guidelines

To reduce uncertainty for businesspeople and their advisors, the Commissioner issued comprehensive non-binding Merger Enforcement Guidelines (‘the Merger Guidelines’) in April 1991. Five key elements of the Merger Guidelines are particularly noteworthy. First, the Merger Guidelines use a market power test to measure the likelihood that competition will be substantially reduced. Second, the Merger Guidelines provide for deemed market power when a merger allows a material price increase to be imposed for two years. Third, the Merger Guidelines discuss determination of relevant product and geographic markets based on a hypothetical monopolist’s ability to impose significant, non-transitory price increases. The fourth significant element concerns ‘safe harbours.’ Generally, a post-merger market share of less than 35% is considered benign. However, where interdependent behaviour is of concern, the ‘safe harbours’ are a post-merger market share of less than 10%, or a combined market share of the four largest competitors of under 65%; and finally, the Merger Guidelines suggest that the most important factors in assessing market power are the absence of barriers to entry, business failure, and the effectiveness of remaining competition. Moreover, any of these three factors can, by itself, establish that a merger will not substantially lessen competition. Special guidelines applicable to the merger of banks were release in 1998 and are substantially similar to the Merger Guidelines. At the time of writing (March 2004), the Merger Guidelines and the Bank Merger Guidelines are under review by the Bureau.



Pre-merger Notification

Pre-merger notification is required only in large transactions. As in the United States, size-of-person and size-of-transaction tests determine pre-merger notification obligations in Canada.

Parties who, together with their affiliates, have neither Canadian assets nor gross annual revenues from sales in, from or into Canada exceeding C\$400 million are exempt. Pre-merger notification is necessary only if the value of the assets to be acquired, or gross annual sales from such assets, exceeds C\$50 million, or C\$70 million for corporate amalgamations. Similar but more complicated thresholds apply to voting share acquisitions.

Where pre-merger notification is required, the parties may not close the transaction before the mandatory waiting period expires. The period commences when the completed filing is delivered to the Commissioner. Parties may choose either a short- or long-form notification. If a short-form notification is used, the waiting period is 14 days unless the Commissioner exercises its right to require the parties to file a long-form. The long-form requires a 42 day waiting period (except for stock exchange share acquisitions, to which special rules apply). A fee of C\$50,000 is payable with a notification filing.

The Act does not provide for mandatory extension of waiting periods. In practice, however, the statutory periods are invariably extended by consent of the merging parties in cases where any competitive impact is anticipated. If the parties refuse to grant an extension, the Commissioner may seek early injunctive relief to prevent closing, or costly post-closure divestiture proceedings.

Advance Ruling Certificates

When the Commissioner is satisfied that there are not sufficient grounds to challenge a proposed merger, the Commissioner may issue an advance ruling certificate ('ARC'). If the transaction closes within one year of certification, the Commissioner cannot later challenge the merger unless the ARC was issued on incomplete or incorrect information. The ARC also exempts the merging parties from the pre-merger notification provisions. If the ARC is refused, the Commissioner typically explains his concerns in a detailed letter to the parties. A filing fee of C\$50,000 (plus goods and services tax of 7%) is payable upon application for an ARC.

Time for Review

Under the Commissioner's initiative, the Bureau strives to complete its investigation of mergers within a defined time period. For example, non-complex mergers should be reviewed within fourteen days, complex mergers within ten weeks, and very complex mergers within five months. These time periods are contained in the Commissioner's Fee and Services Handbook and are not related to the statutory no-close period applicable to notifiable mergers.

However, the time periods commence only after the Commissioner has received the information the Commissioner considers necessary to complete a proper investigation. In the case of complex or very complex mergers, submission requirements are substantial, requiring far more information than is currently prescribed for pre-merger notification filings.



Other Reviewable Practices

The Act treats abuse of dominant position and most vertical restrictions (except price maintenance) as non-criminal matters that the Tribunal may review. Refusal to deal, exclusive dealing, and tied selling are the principal vertical restraints. Misleading advertising is also an important reviewable practice.

Abuse Of Dominant Position

Anti-competitive conduct by firms in a dominant marketplace position is subject to non-criminal review. However, size alone is not grounds for complaint. Remedies are available only where the dominant firm (or firms) engages in anti-competitive behaviour that does, or is likely to, prevent or lessen competition substantially in a relevant market.

The Act's non-exhaustive list of anti-competitive conduct includes pre-empting scarce facilities or resources, buying up products to prevent erosion of existing price levels, and a vertically integrated supplier's squeezing the margin available to an unintegrated customer in competition with the supplier. Upon finding abuse, the Tribunal may prohibit the dominant firm from committing further anti-competitive acts. If the Tribunal finds that a prohibition order is not likely to restore competition, it may also direct reasonable action necessary to overcome the effects of the practice in the market, including divestiture of assets or shares. In a number of contested abuse of dominant position cases, the Commissioner successfully obtained orders nullifying and prohibiting the use of various terms in the dominant firm's contracts with its customers.

The Commissioner's enforcement views and practices relating to the abuse of dominance provisions of the Act are set out in the Commissioner's Abuse of Dominance Enforcement Guidelines.

Refusal To Deal

The Tribunal may order a supplier to accept a person as its customer. This will occur where the Tribunal determines that the person's business is substantially affected (or precluded from operating) because 'adequate supplies of a product' cannot be obtained anywhere in the market on usual trade terms. The refusal also must have resulted in an "adverse effect" on competition. Application for an order of the Tribunal may be made by the Commissioner or, with leave of the Tribunal, private parties.

Exclusive Dealing And Tied Selling

Exclusive dealing exists when a supplier requires or induces another to deal exclusively or primarily in products supplied or designated by the supplier. Tied selling exists when a supplier makes its supply of goods conditional on the customer's agreement to either purchase another product from the supplier or its nominee, or refrain from using or distributing another product



not manufactured or designated by the supplier in conjunction with the first product. The Tribunal may make an order if the practice has resulted in a substantial lessening of competition. Like with respect to refusals to deal, orders of the Tribunal with respect to exclusive dealing and tied selling may be made by the Commissioner and, with leave of the Tribunal, private parties.

Misleading Advertising

Recent statutory amendments divide the former criminal misleading advertising offence into a non-criminal reviewable practice and a criminal offence. The current legislation also permits the Tribunal or court (on application by the Commissioner) to review substantially all matters involving suspected misleading advertising. Such review would apply a civil standard of proof. The new provisions do not provide for private actions.

Criminal Offences

Cartels and Conspiracies

Since the Act's inception, conspiracy provisions have been at the heart of Canadian competition law. Prohibitions are substantial and carry the possibility of individual imprisonment for up to five years and fines of up to C\$10 million per count (for both individuals and corporations).

It is a criminal offence to enter into any agreement or arrangement that, if implemented, would lessen competition unduly. Examples include price fixing, market allocation, and embargoes. Such conduct is not *per se* illegal; the undue requirement necessitates a demonstration of market power in the hands of the conspirators. To this end, the court examines the alleged conspirators' control of affected markets. Whereas complete control is not required for conviction, the likelihood of an adverse finding increases as the conspirators' market share rises. However, the Supreme Court of Canada decision in *R. v. Nova Scotia Pharmaceutical Society* appears to expose firms to liability when their combined market share is as low as 35%.

Although conspiratorial agreements may be inferred from circumstantial evidence, the prosecution must prove that the accused intended to enter into the conspiracy in question. The Supreme Court of Canada has ruled that the prosecution must further establish that the accused were, or as reasonable business persons ought to have been, aware that the agreement would likely unduly lessen competition.

The Act also prohibits foreign-directed conspiracies. Thus, a corporation operating in Canada can be fined for implementing a conspiracy directed by persons outside of Canada. This anti-avoidance provision seeks to prevent circumvention of the general conspiracy offence through agreements entered into beyond Canadian borders. In contrast to other circumstances, the statute fixes no maximum amount for a fine against the Canadian business that implements the foreign conspiracy. Agreements among affiliates as well as agreements concerning the export of products from Canada are notable exemptions from and defences to the conspiracy provisions.



Immunity Program

The Bureau's information bulletin entitled 'Immunity Programme Under the Competition Act' sets out the Commissioner's policy with respect to the granting of prosecutorial immunity in exchange for cooperation in the investigation and prosecution of criminal activities under the Act. While the Attorney General of Canada has the ultimate discretion on whether to grant immunity, as a practical matter the Commissioner's recommendations will be given great weight by the Attorney General. Thus the Bulletin, while binding on neither the Commissioner nor the Attorney General, is a useful indication of the Commissioner's actual practice with respect to immunity recommendations.

The Bulletin states that the Commissioner will recommend to the Attorney General that immunity be granted to a party where the Bureau is unaware of an offence and the party is the first to disclose it or where the Bureau is aware of an offence and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General, so long as (in either case) the party meets the following requirements:

- the party must take effective steps to terminate its participation in the illegal activity and the party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada;
- throughout the course of the Bureau's investigation and subsequent prosecutions, the party must provide complete and timely cooperation;
- where possible, the party must make restitution for the illegal activity; and
- if the first party fails to meet the requirements, a subsequent party that does meet the requirements may be recommended for immunity.

Firms that are first in with evidence of a conspiracy where the Bureau does not have a provable case can expect full immunity. Subsequent firms are likely to be offered fine settlements of approximately 13%, 20% and 27% of the relevant volume of commerce, depending upon their position in the queue as well as other aggravating or mitigating factors. Unless a firm intends to put forward substantive and jurisdictional defences in an effort to avoid liability (with a risk of even higher fine levels being imposed after a contested conviction), there will be significant sums at stake for coming forward early in Canada.

The Bulletin makes explicit that being first in another jurisdiction will not result in any favourable treatment in Canada. The implication for foreign companies and their counsel is clear: the historical tendency to deal with large jurisdictions such as the United States or the European Union first will leave a firm exposed to slipping down the queue in Canada. Counsel will need to consider whether the potential fine savings in Canada offset the possible complications from parallel proffers in multiple jurisdictions.

Price Maintenance

The attempt to influence upward, or discourage the reduction of, the price at which anyone sells a product also constitutes an offence under the Act. As such, suppliers who suggest resale prices or minimum resale prices must clearly state that their customers are under no obligation to



accept their suggestions. Under a related offence, suppliers may not refuse to supply or otherwise discriminate against potential customers because of their low pricing policies. The Act provides various defences where the customer's conduct is deemed to be unfair, such as where the customer routinely uses a supplier's products as loss-leaders.

While price maintenance prosecutions traditionally focused on vertical relationships, convictions have been entered in connection with horizontal relationships. The accused in each case were convicted of attempting to influence competitors' prices, rather than prices charged by customers.

Predatory Pricing

The Act contains two distinct price predation provisions. The first offence (often referred to as geographic price discrimination) relates to a policy of selling products anywhere in Canada at prices lower than those charged elsewhere in Canada, with the effect or purpose of substantially lessening competition or eliminating a competitor. The second offence (generally called predatory pricing) involves a policy of selling products at unreasonably low prices, with the effect or purpose of substantially lessening competition or eliminating a competitor. Enforcement guidelines and bulletins have been issued which set out the Commissioner's approach to assessing predation and exercise of enforcement discretion.

Price Discrimination

Price discrimination occurs when a seller knowingly discriminates in the prices charged to one of its customer's competitors. The offence is committed where a more advantageous discount or rebate is granted to a purchaser over and above that which is available to competitors of that purchaser for articles of like quality and quantity. Conversely, discounts based on volume alone are permitted. An offence does not exist unless the supplier knows that the purchasers are in competition with each other and conducts the sale as part of a practice of discrimination.

The Commissioner's 1992 Price Discrimination Enforcement Guidelines have reduced uncertainty surrounding this complex offence. For example, the guidelines identify situations that typically will attract no enforcement action, even though the behaviour involved arguably does fall within the Act's wording.

The Act requires businesses to make price concessions available to all competing purchasers of like quality and quantity of goods. The guidelines then clarify the amount of disclosure needed for a price concession to be considered available in various circumstances. More importantly, the guidelines reveal that a wide range of conditional discounts may be employed without contravening the availability requirement, as long as they are not contrived to favour or deprive particular purchasers and competing purchasers have access to the discounts on the same conditions. Thus, multi-line volume rebates, functional discounts, growth bonuses and other conditional discounts, historically of uncertain legality, may be used with minimal risk of criminal charges. Inter-company sales to affiliates are also relaxed, although the Act does not explicitly exempt such transactions from the price discrimination rules. The guidelines do not, however, bind the courts in criminal or private damage actions.



Deceptive Marketing Practices

A host of criminal provisions designed to prevent deception in the marketplace also are included in the Act. Individual sections address misleading advertising, promotional contests, double ticketing, pyramid selling, bait-and-switch selling, and other deceptive practices. In the past, these sections tended to be enforced rigorously, and were widely recognized as among the statute's most effective provisions. However, here as elsewhere, limited resources have led the Bureau's Fair Business Practices Branch to concentrate on fewer and larger cases. The Branch typically focuses on matters with national or inter-provincial implications. For example, in June 1994, two top executives, including the president, of a national department store were charged with 17 counts of misleading advertising. In June 2003, a national clothing store chain was fined \$1 million for misleading advertising.

To address concerns over the increased number of deceptive telephone schemes aimed at vulnerable groups, recent amendments add a new criminal provision prohibiting certain telemarketing practices. The new provision carries a maximum penalty of five years imprisonment and an indeterminate fine.

The Act defines "telemarketing" as the use of interactive telephone communications to promote the supply or use of a product or to promote a business interest. Under Bureau guidelines issued in the fall of 1999, the provision covers only live voice communications. As such, faxes, Internet communications and automated pre-recorded messages are not covered.

The new provision prohibits: telemarketing representations that are false or misleading in a material way; offering a product at no cost, or a price less than fair market value, in return for the supply or use of another product, unless both the fair market price of the product and all terms and restrictions related to the supply or purchase are disclosed in a reasonable and timely manner; offering a product for sale at a price grossly exceeding its fair market value if delivery of the product is conditional upon prior payment; and telemarketing involving contests, lotteries or games of chance and skill, where the prize is conditional on the participant's prior payment of any sum or where the number and value of prizes and other information related to the chance of winning are not fairly and adequately disclosed.

International Cooperation

Cooperative efforts of the Bureau and the United States Department of Justice under the Mutual Legal Assistance Treaty ("MLAT") of 1985 have become increasingly important in the investigation of criminal offences having multi-jurisdictional implications. Allowing the two countries to assist in each other's investigations, the MLAT permits Canadian and US antitrust enforcement agencies to coordinate enforcement activities, exchange information and meet regularly to discuss matters of mutual interest.

Recent amendments to the Act enhance the scope of possible international cooperation. These amendments authorise the Minister of Industry to enter into competition enforcement cooperation agreements which would permit the exchange of information in criminal and civil competition matters (such as merger reviews) with other antitrust enforcement agencies such as the US Department of Justice. The Bureau has been interested in such powers since similar



enabling legislation (the *International Antitrust Enforcement Assistance Act*) was enacted in the US in 1994. To date, Australia is the only country which has entered into an 'Antitrust Mutual Assistance Agreement' with the US, but Canada is expected to follow quickly now that the Act has been amended.

ANTITRUST COMPLIANCE PROGRAMS

To assist firms in developing their own initiatives for compliance with the Act, the Commissioner has issued an Information Bulletin that outlines the components of an effective compliance program. The Bulletin also discusses the benefits of such a program, especially in relation to a company's dealings with the Bureau. The Commissioner considers the following five elements essential to the creation of an effective compliance program: involvement and support of senior management, development of relevant policies and procedures, ongoing education of management and employees, implementation of monitoring, auditing and reporting mechanisms, and institution of disciplinary procedures.

However, the Commissioner has indicated that the presence or absence of a compliance program will play little or no role in any decision by the Commissioner or Attorney General regarding whether to take enforcement action against a firm. Nevertheless, a company with a compliance program which the Commissioner considers "effective and appropriate for [the company's] particular business," may benefit in a number of ways. These benefits include early detection of criminal behaviour, establishment of due diligence defences, reduction of sentences or fines, and the Commissioner's greater willingness to consider alternative resolutions.

Moreover, in cases where the firm's "directing minds" either condoned or participated in the anti-competitive conduct, the Commissioner generally will not take the existence of a compliance program into account in deliberations about immunity or alternative dispute resolution. In such cases, the Commissioner's view is that management's commitment to the compliance program is not serious, and the program is neither effective nor meaningful.

A CAUTIONARY NOTE

The foregoing is an overview of Canadian antitrust law. A group of McMillan Binch lawyers prepared the information, which is accurate at the time of writing. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified Canadian lawyer should be consulted.

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