



# competition and antitrust in Canada



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## competition and antitrust in Canada

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.

### 1. the legislation

The stated purposes of the Act 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.

The Act contains a mix of criminal offences, civil reviewable practices (such as mergers) and private rights of action. Matters such as conspiracy to fix prices or allocate customers or markets and bid-rigging are prosecuted as criminal offences in the criminal courts. As such, each case must be proven beyond a reasonable doubt and strict rules of evidence apply. The Act specifically authorizes private actions for damages incurred as a result of criminal conduct that is prohibited by the Act. Merger review, abuse of dominant position, refusals to deal, resale price maintenance and various non-price 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 competition matters.

### 2. antitrust actors

#### 2.1 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 the statutory authority to administer and enforce the Act. Only the Commissioner may investigate breaches of the Act and, with minor exceptions, initiate proceedings for reviewable practices. The Commissioner collaborates with the Public Prosecution Service of Canada, which is responsible for criminal prosecutions under the Act.

The Commissioner must commence a formal inquiry whenever she has reason to believe that a criminal offence has been, or is about to be, committed. A formal inquiry must also be commenced when the Commissioner considers that grounds exist for the Competition Tribunal (the 'Tribunal') to make an order regarding a merger or other 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 confidentiality requirements are established by the statute.

A broad arsenal of compulsory investigative tools is available to the Commissioner to assist with investigations. These include warrants for search and seizure and orders for examinations under oath, production of records or other physical evidence, and – in the case of deceptive telemarketing, bid-rigging and conspiracy – judicial authorizations to conduct wire tapping. Computer databases and corporate records of both Canadian and foreign affiliates are also specifically exposed to compulsory investigative procedures. Exercise of these powers requires advance judicial authorization and is subject to the constitutional protections afforded under the Canadian Charter of Rights and Freedoms.

## 2.2 Competition Bureau

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

## 2.3 Attorney General/Public Prosecution Service of Canada

The ultimate responsibility for federal criminal prosecutions rests with Canada's Attorney General. The Public Prosecution Service of Canada has discretion in and responsibility for initiating federal criminal proceedings and prosecuting federal criminal offences in Canada, including the criminal provisions of the Competition Act. In practice, prosecutions under the Act normally are initiated only upon a referral by the Commissioner, and the Bureau's Criminal Matters Branch will be closely consulted in the course of a prosecution and on any sentencing recommendation to be made. All criminal proceedings under the Act take place in the criminal courts, rather than before the Tribunal.

## 2.4 the Tribunal

The Tribunal consists of both judicial and lay members. As such, the Tribunal's composition endows it with considerable relevant expertise, although its role and structure is purely adjudicative. The mixed composition seeks to ensure that the Tribunal will include the critical components of judicial independence, impartiality and fairness, as well as specialized knowledge of business and economics. The Tribunal sits in panels of at least three, and no more than five, members to consider any application. The Chairman of the Tribunal is selected from among the judicial members and supervises the Tribunal's work.

The Tribunal possesses neither investigatory nor independent power to consider matters. In most circumstances, the Commissioner must initiate an application for an order of the Tribunal on matters subject to determination. However, private parties have certain limited rights to initiate proceedings regarding several reviewable practices (discussed below). As well, an interested party may, with leave of the Tribunal, intervene in a Tribunal proceeding in respect of matters relevant to the proceeding that affect that person. The Tribunal may grant leave where: (a) the matter alleged to affect the interested party is legitimately within the scope of the Tribunal's consideration or is a matter sufficiently relevant to the Tribunal's mandate; (b) the interested party is directly affected by that matter; (c) all representations made by the interested party are relevant to a matter specifically raised by the Commissioner or the private party who initiated the proceeding; and (d) the interested party brings to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the matters before it.

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 has tended to

adopt a relatively formal manner, appearing much like a regular court. A typical contested proceeding will require as much as twelve months for final resolution. Even consent proceedings may be lengthy, but the Tribunal increasingly tends to insist on tight time limits for the interlocutory stages of an application.

## 2.5 private litigants

The private right of action in Canada is very different than treble damages actions in the United States. Nevertheless, the private action provisions of the Act are frequently invoked by private litigants in follow-on class actions in cases where the Commissioner has brought a successful prosecution. Class action proceedings are also becoming commonplace in significant cartel matters where criminal proceedings are not undertaken in Canada.

The Act provides a statutory cause of action for loss or damage that results from conduct that is contrary to the criminal provisions of the Act, or from failure to comply with a Tribunal or court order. Recovery is limited to actual loss plus costs, but both pre- and post-judgment interest may also be awarded. Costs may include those of any investigation of the conduct in question as well as the costs of the proceeding, which frequently require expensive investigative methods, such as surveys and economic analysis. Interest claims and the right to recover costs will frequently involve significant amounts and often provide significant incentives to litigate.

Private parties may seek leave of the Tribunal to initiate Tribunal proceedings in respect of resale price maintenance, refusals to deal, exclusive dealing, tied selling and market restriction. The Tribunal has held that the threshold for seeking leave is low, but there must be some credible evidence that would satisfy the Tribunal that the applicant was in fact directly and substantially affected by the alleged reviewable practice. If leave is granted and proceedings commenced, the Tribunal ultimately may make a supply or prohibition order, but it has no jurisdiction to award damages to private parties.

## 3. 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 sanctions. Conversely, reviewable practices are considered only potentially anti-competitive, and they are therefore subject to review and prospective prohibition only after the conduct has been established to have had anti-competitive effects. Payment of administrative monetary penalties (very much like fines) also can be ordered in respect of certain reviewable practices.

### 3.1 criminal offences

#### 3.1.1 cartels

Since the Act's inception, conspiracy provisions have been at the heart of Canadian competition law. The prohibition of hard core cartel conduct is a serious criminal offence in Canada and carries the possibility of individual imprisonment for up to five years and corporate and individual fines of up to C\$10 million per count. Amendments to the conspiracy provision, which will come into effect in March 2010, will create dual criminal and civil regimes to address competitor agreements. The new *per se* criminal offence is intended to capture hard core cartel conduct and carries the possibility of individual imprisonment for up to 14 years and corporate and individual fines of up to C\$25 million per count. The new civil provision is intended to capture other agreements between competitors that have anticompetitive effects; such agreements are subject to behavioural remedies.

The current Section 45 of the Act creates a criminal offence to enter into any agreement or arrangement that, if implemented, would prevent or lessen competition unduly. Examples of such agreements include price fixing, market allocation, and group embargoes. Such conduct is not per se illegal; the “undueness” requirement necessitates a demonstration of market power in the hands of the conspirators. To this end, the court examines the alleged conspirators’ ability to exercise market power in affected markets. While complete control is not required for conviction, the likelihood of adverse finding increases as the conspirators’ market share rises.

Although conspiratorial agreements may be inferred from circumstantial evidence, the prosecution must prove beyond a reasonable doubt that the accused intended to enter into the conspiracy in question and that the accused was, or that a reasonable business person would have been, aware that the agreement would likely lessen competition unduly.

Under the new criminal provision (which comes into force on March 12, 2010), it will be a per se offence to conspire, agree or arrange with a competitor to fix prices, allocate customers or markets, or control the production or supply of a product. A “competitor” includes a person who would be likely to compete with respect to the product in the absence of agreement. A product includes any article or service.

Under the new criminal provision, an ancillary restraints defence provides a partial safety valve for non-hard-core conduct. However, it places the onus on the parties to the agreement to establish that the price, customer/territory or production restriction was directly related to and reasonably necessary to achieve the objective of a broader agreement between the same parties that, when considered without the restriction, would not contravene the new criminal offence. This will be a difficult standard to meet in many situations.

The new civil provision relating to competitor agreements is discussed in more detail below.

### 3.1.2 foreign directed conspiracies

The Act also contains a unique offence to punish the implementation of a foreign cartel in Canada. This provision seeks to prevent circumvention of the general conspiracy offence through the implementation of anti-competitive agreements entered into by parties beyond Canada’s borders. A corporation operating in Canada can be fined for implementing a conspiracy directed by persons outside of Canada, even if the persons acting on behalf of the Canadian corporation had no knowledge of the foreign conspiracy. The Act fixes no maximum amount for a fine against the Canadian corporation that is convicted of implementing a foreign-directed conspiracy.

### 3.1.3 bid-rigging

The Act contains a specific definition and offence of bid-rigging. It provides for an unlimited fine, imprisonment of up to 14 years, or both. Like the new criminal conspiracy offence, bid-rigging is a per se offence, in that proof of market power or the economic impact of the bid-rigging is not a component of the offence.

### 3.1.4 immunity program

The Bureau has published an Information Bulletin, entitled “Immunity Program under the Competition Act”.<sup>1</sup> The Bulletin sets out the Bureau’s policy with respect to the granting of immunity from prosecution in exchange for cooperation in the investigation and prosecution of criminal

<sup>1</sup> Competition Bureau, “Immunity Program under the Competition Act,” (October 2007), online: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02483e.html>

activities under the Act. The Director of Public Prosecutions (the 'D.P.P.') of Canada has the ultimate discretion on whether to grant immunity, but as a practical matter, immunity has never been granted without a recommendation by the Commissioner and the Bureau's position is invariably given considerable weight by the D.P.P. The Bulletin is a significant contribution to transparency, in setting out the policy and practice guidance applicable to immunity decisions.

The Bulletin states that the Commissioner will recommend to the Attorney General that immunity be granted to a party where: (i) the Bureau is unaware of an offence and the party is the first to disclose it; or (ii) 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 D.P.P. A party seeking immunity must meet the following requirements in order to qualify for immunity:

- the party must terminate its participation in the illegal activity;
- the party must not have coerced others to be party to the illegal activity;
- the party was not the only party involved in the offence; and
- throughout the course of the Bureau's investigation and subsequent prosecutions, the party must provide complete, timely and on-going cooperation.

If the first applicant fails to meet these requirements, a subsequent party that does meet the requirements may be recommended for immunity.

Parties that are first-in with evidence of a conspiracy and that meet the requirements of the program can expect to receive full immunity. Parties that come forward subsequently will not receive immunity, but are likely to be offered lenient fine settlements, calculated by reference to the relevant volume of commerce, the party's position in the queue, and other aggravating or mitigating factors. The Commissioner has issued draft guidance on leniency and is expected to finalize this guidance in the near future. Unless a firm intends to contest cartel allegations on substantive or jurisdictional grounds in an effort to avoid criminal liability, there are significant benefits to coming forward early in Canada.

The Bulletin makes it clear that being the first to seek immunity 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 may leave a firm exposed to slipping down the queue and missing the opportunity for immunity in Canada.

### 3.1.5 deceptive marketing practices

A host of criminal provisions designed to prevent deception in the marketplace are also 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 Act's most frequently invoked provisions. However, in Canada 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 cases with national implications.

To address concerns over the increased number of deceptive telephone schemes aimed at vulnerable groups, amendments were introduced to the Act in 1999 which specifically prohibit deceptive telemarketing. 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. The Bureau's Information

Bulletin on telemarketing provides that the offence covers only live voice communications.<sup>2</sup> As such, faxes, Internet communications and automated pre-recorded messages are not covered by the specific deceptive telemarketing offence, but are subject to the general provisions concerning misleading advertising.

The Act provides that no person who engages in telemarketing shall: (i) make representations that are false or misleading in a material way; (ii) offer 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; (iii) offer a product for sale at a price grossly exceeding its fair market value if delivery of the product is conditional upon prior payment; or (iv) offer or purport to offer 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.

### 3.1.6 misleading advertising

Misleading advertising constitutes both a criminal offence and a civil reviewable matter, subject to administrative monetary penalties, under the Act. The administrative monetary penalties can be significant reaching a maximum of C\$1 million for individuals and C\$15 million for businesses.

The Act permits the Tribunal or court, on application by the Commissioner, to review misleading advertising issues as an administrative law matter, rather than as a criminal prosecution. The relevant conduct is described in similar terms by the Act, but there are misrepresentations that are specific to the civil track. For example, it is a civil reviewable practice for a supplier to advertise a product as having an ordinary selling price, where suppliers in the relevant geographic market have not recently offered in good faith and sold a substantial volume of the product at that price. In a string of recent cases, the Commissioner has initiated proceedings against several retailers for misleading advertisements about sale prices. These proceedings resulted in consent orders that imposed administrative monetary penalties of a million dollars or more, together with prohibition orders and costs awards. The Commissioner has issued an Information Bulletin for Ordinary Price Claims.<sup>3</sup>

In both criminal and administrative reviews of misleading advertising, it is not necessary to establish that any person was misled – a representation can be misleading even if no one is actually misled. It is also not necessary to establish that persons to whom the representations were made were within Canada or that representation was made in a place to which the public had access.

## 4. reviewable practices

### 4.1 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 negatively affect competition are controlled through civil proceedings, rather than criminal sanctions.

<sup>2</sup> Competition Bureau, "Information Bulletin – Telemarketing: Section 52.1 of the Competition Act," (September 22, 1999), online: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/telemarketing.pdf>.

<sup>3</sup> Competition Bureau, "Ordinary Price Claims," (September, 1999), online: [http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/ct01182e.pdf/\\$file/ct01182e.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/ct01182e.pdf/$file/ct01182e.pdf)

### 4.1.1 substantial lessening of competition

The Commissioner, and ultimately the Tribunal, on application by the Commissioner, examines mergers to determine whether, in the words of the Act, a merger will likely prevent or lessen competition substantially.

The Tribunal has 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 relevant markets’. Thus, analysis of any merger case begins with definition of relevant markets, considering both geographic and product dimensions. Market share data is important in determining whether a proposed merger is likely to prevent or lessen competition substantially, but the Tribunal has expressly recognized that market share data is not necessarily a reliable determinant of anti-competitive effects. Other factors such as ease of entry into the market, effectiveness of remaining competition and the likelihood of business failure will be considered. Barriers to entry are particularly important: the Tribunal has also stated that a substantial lessening of competition is unlikely to occur in the absence of such barriers.

### 4.1.2 the efficiency defence

Of major jurisdictions with sophisticated merger review enforcement regimes, Canada alone provides a statutory efficiency gains defence. The Act’s efficiency defence provides in substance that an anti-competitive merger will not be prohibited if the gains in efficiency which result from the merger outweigh its anti-competitive effects. This involves a comparison of the aggregate gains in efficiency with the aggregate effects of the lessening of competition, and accordingly requires consideration of the deadweight loss resulting from the merger, wealth transfers from consumers to producers, and a number of qualitative factors.

### 4.1.3 merger enforcement guidelines

The Bureau updated its Merger Enforcement Guidelines (‘the Merger Guidelines’) in September 2004.<sup>4</sup> Five key elements of the Merger Guidelines are particularly noteworthy. First, the Merger Guidelines use a market power test to measure whether a merger will prevent or lessen competition substantially in any relevant market. Second, the Merger Guidelines require determination of relevant product and geographic markets based on a hypothetical monopolist’s ability to impose a significant, non-transitory price increase. The third 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 65%. Fourth, the Merger Guidelines provide guidance on the Commissioner’s analysis of a proposed merger’s anti-competitive effects, specifically with respect to the merger’s unilateral and coordinated effects. The Merger Guidelines also include a brief discussion of vertical and conglomerate mergers. Special guidelines applicable to the merger of banks were released in 2003 and are substantially similar to the Merger Guidelines.<sup>5</sup>

<sup>4</sup> Competition Bureau, “Merger Enforcement Guidelines,” (September 2004),  
online: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01245e.html>

<sup>5</sup> Competition Bureau, “Merger Enforcement Guidelines as Applied to a Bank Merger,” (January 2003),  
online: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01253e.html>

#### 4.1.4 pre-merger notification

As with other mature competition regimes, Canada's merger review regime is preventative rather than curative. Pre-merger notification is required for large transactions. As in the United States, size-of-person and size-of-transaction tests determine pre-merger notification obligations in Canada.

##### thresholds

Parties that, 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 from the pre-notification obligations. Pre-merger notification is required only if the value of the assets to be acquired, or gross annual sales from such assets, exceeds C\$70 million. This C\$70 million threshold is subject to an annual adjustment based on inflation. Similar but more complicated thresholds apply to voting share acquisitions and amalgamations.

##### no-close period

Where pre-merger notification is required, the parties may not close the transaction until the mandatory waiting period of 30 days expires. The waiting period begins to run once the completed filing has been delivered to the Commissioner. A fee of C\$50,000 is payable in connection with notification.

During the 30 day waiting period, the Commissioner may exercise the right to require additional relevant information from the parties. If the Commissioner elects to require the parties to provide additional information that is "relevant" to an assessment of the transaction, a further mandatory waiting period will run until 30 days after the Commissioner's requirements have been fully satisfied (subject to early termination by the Commissioner). No form is prescribed for the supplementary information request and the Commissioner's request is not subject to judicial oversight.

#### 4.1.5 advance ruling certificates

Parties to a proposed merger may apply for an advance ruling certificate ('ARC'). When the Commissioner is satisfied that insufficient grounds exist to challenge a proposed merger, an ARC may be issued. If the merger closes within one year of the issuance of the ARC, the Commissioner cannot challenge the merger unless the ARC was issued on incomplete or incorrect information. An ARC also exempts the merging parties from the pre-merger notification provisions. A filing fee of C\$50,000 is payable upon application for an ARC.

#### 4.1.6 time for review

The Bureau strives to complete its investigation of mergers within defined time periods, which are discussed in the Bureau's Fee and Services Standards Handbook.<sup>6</sup> Non-complex mergers are to be reviewed within 14 days, complex mergers within ten weeks, and very complex mergers within five months. These time periods are not related to the statutory no-close periods applicable to notifiable mergers under the Act.

Frequently, the parties agree not to close their transaction after expiry of the statutory waiting period to allow the Bureau to complete its investigation. If the parties refuse a request not to

<sup>6</sup> Competition Bureau, "Fee and Services Standards Handbook," (December 2003), online: [http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/wwapj/ct02530e\\_a.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/wwapj/ct02530e_a.pdf)

close, the Commissioner may seek injunctive relief to prevent closing, or take costly post-closing divestiture proceedings. However, the courts have made it clear that in the absence of consent, the Commissioner is bound to respect the statutory waiting period.

## 4.2 other reviewable practices

The Act treats some competitor agreements, abuse of dominant position and most vertical restraints as non-criminal matters reviewable by the Tribunal on application by the Commissioner. Resale price maintenance, refusal to deal, exclusive dealing and tied selling are the principal vertical restraints. Misleading advertising is also an important reviewable practice, as indicated above.

### 4.2.1 competitor agreements

The civil conspiracy provision, which will come into force in March 2010, is designed to address competitor agreements that do not amount to hard core cartel conduct, but that have an adverse effect on competition. Under this provision, the Commissioner can challenge any agreement or arrangement made between competitors and seek a remedial order from the Competition Tribunal. The test for imposing a remedial order is whether the agreement or arrangement is likely to adversely affect.

### 4.2.2 price maintenance

Influencing upward, or discouraging the reduction of, the price at which anyone sells a product is a civil reviewable matter that can be reviewed and prohibited by the Competition Tribunal under the Act. The test for imposing a remedial order is whether competition is likely to be adversely affected.

Prior to March 2009, resale price maintenance was per se criminal offence in Canada. The decriminalization of price maintenance will allow Canadian businesses flexibility to adopt, for instance, minimum advertised pricing policies ("MAPPs"), which are commonly used in the United States, provided that the policy does not have a negative effect on competition. Businesses should note, however, that where they sell both through a distributor and directly to customers, that distributor will likely be a "competitor" pursuant to the competitor agreement provisions and agreements on the resale price of the product could contravene these provisions.

### 4.2.3 abuse of dominant position

Abuse of dominant position is a reviewable practice under the Act. The Tribunal may make an order prohibiting a dominant firm or a group of dominant firms from engaging in a practice of anti-competitive acts that is likely to prevent or lessen competition substantially in the market. The Tribunal may also order a firm to pay an administrative monetary penalty (AMP) of up to C\$10 million for the first occurrence of an abuse of dominance and up to C\$15 million for subsequent occurrences.

The Act contains a non-exhaustive list of anti-competitive acts, including: pre-empting scarce facilities or resources; buying up products to prevent erosion of existing price levels; and squeezing by a vertically integrated supplier of the margin available to an unintegrated customer in competition with the supplier. However, party size (or market share) alone is not a ground for a finding of dominance. If the Tribunal finds that a prohibition order is not likely to restore competition, it may also direct the dominant firm or firms to take such reasonable actions as are necessary to overcome the effects of the practice in the market, including the divestiture of assets or shares. If the Tribunal issues either a prohibition order or non-monetary order, it may also order the party to pay an administrative monetary penalty. In a number of contested abuse of dominant position cases, the Commissioner

has 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 in relation to the abuse of dominant position provisions of the Act are set out in the Enforcement Guidelines on the Abuse of Dominance Provisions.<sup>7</sup>

Prior to March 2009, predatory pricing and price discrimination were criminal offences. While these offences have been repealed, predatory pricing or price discrimination could be subject to review, and to administrative monetary penalties, under the abuse of dominance provisions.

#### 4.2.4 refusal to deal

The Tribunal may order a supplier to accept a person as its customer, 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 to deal must have resulted from insufficient competition among suppliers, and the refusal must have, or be likely to have, an adverse effect on competition. An application to the Tribunal for a supply order may be made by the Commissioner or, with leave of the Tribunal, by a private party. The Tribunal may grant leave to a private party to initiate proceedings if it has reason to believe that the party's business is directly and substantially affected by the refusal to deal.

#### 4.2.5 exclusive dealing and tied selling

Exclusive dealing occurs when a supplier requires or induces another to deal exclusively or primarily in products supplied or designated by the supplier. Tied selling occurs 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 prohibiting exclusive dealing or tied selling if the practice has resulted in a substantial prevention or lessening of competition. As in the case of refusals to deal, an application for a prohibition order with respect to exclusive dealing and tied selling may be made by the Commissioner and, with leave of the Tribunal, a private party.

## 5. international cooperation

International consultation and coordination activities between the Competition Bureau and competition enforcement agencies in other jurisdictions have become a major element of Canadian enforcement policy and practice in cartel matters, as well as in merger review and other civil non-merger matters. Amendments to the Act introduced in 2002 enhance the scope of international cooperation in antitrust enforcement. The Act explicitly provides that Canada may enter into competition enforcement cooperation agreements with other countries that permit the exchange of information in criminal and civil competition matters between the Competition Bureau and other antitrust enforcement agencies. The Bureau has been interested in such powers since similar enabling legislation (the International Antitrust Enforcement Assistance Act) was enacted in the United States in 1994. Canada currently has competition cooperation agreements with the United States, the European Union, the United Kingdom, Mexico, Chile,

<sup>7</sup> Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions," (July 2001), online: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/aod.pdf>

New Zealand, Japan and Korea. These agreements do not, however, impinge on the provisions of the law of either jurisdiction that govern the confidentiality of information of private parties.

Cooperative efforts of the Bureau and the United States Department of Justice under the Mutual Legal Assistance Treaty ('MLAT') of 1985 are very important in the investigation of criminal offences with cross-border implications. Allowing the two countries to assist in each other's investigations, the MLAT permits Canadian and U.S. antitrust enforcement agencies to coordinate enforcement activities, exchange information and meet regularly to discuss matters of mutual interest.

## 6. 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.<sup>8</sup> 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: (i) involvement and support of senior management, (ii) development of relevant policies and procedures, (iii) ongoing education of management and employees, (iv) implementation of monitoring, auditing and reporting mechanisms, and (v) 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 the Attorney General regarding whether to take enforcement action against a firm. 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.

Nevertheless, a company with a compliance program which the Commissioner considers "effective and appropriate for [the company's] particular business" may benefit from the potential for 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.

## a cautionary note

The foregoing is an overview of Canadian competition law. The Competition Group of McMillan LLP prepared this information, which is accurate at the time of writing as a general outline of the key elements of Canada's *Competition Act* and practice under the Act. Readers are cautioned that in considering the application of the law to any particular situation, a qualified Canadian lawyer should be consulted.

January 2010

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<sup>8</sup> Competition Bureau, "Corporate Compliance Programs," (September 2008),  
online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02732.html>