

CANADIAN

ANTITRUST

REPORT

*An Analysis of Canadian
Competition Law Developments*

Fall 2002

COMPETITION BUREAU TO DOUBLE MERGER FILING FEES

On August 19, 2002, the Competition Bureau announced proposals to amend its Fee & Service Standards Policy to:

- (a) *Raise the “transaction size” threshold for pre-merger notification from C\$35 million to C\$50 million.* This proposal is welcome, since the current threshold in Canada is widely regarded as being too low relative to the merger notification thresholds in comparable jurisdictions and in absolute terms. Criticism has centred on the view that at the C\$35 million level, competitively inconsequential transactions have had to be notified, with significant notification fees and transactions costs. The “party size” threshold would remain unchanged at C\$400 million.
- (b) *Double the fees for pre-merger notifications and Advance Ruling Certificates to C\$50,000.* While not egregious by international standards, the proposed increase is still a 100% increase in just 5 years, in an environment where the number of mergers have recently fallen off substantially. The Bureau has chosen not to base the filing fees on the size or the economic importance of the transaction, but to stay with a flat-fee system. As a result, the majority of small and non-complex mergers will arguably continue to subsidise the larger and more competitively complicated transactions.
- (c) *Substantially increase fees for binding Advisory Opinions.* The fees to be paid under the new set of proposals will depend on the opinion being sought. Opinions relating to possible criminal offences (such as conspiracy and bid rigging) and abuse of dominance will cost C\$15,000. Opinions related to promotional contests will be set at C\$1,000 and opinions concerning all other sections of the Act will cost C\$10,000. The binding character of these opinions is a welcome change (formerly they were non-binding), but will greater analytical effort be forthcoming? If the promotion of compliance with the Act is still a primary policy objective, the Bureau’s decision to charge significant fees for opinions on areas of law which are unclear or on ambiguous facts may backfire by deterring approaches.

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BILL C-23 COMES INTO FORCE

On June 21, 2002, the much-discussed changes to the *Competition Act* and the *Competition Tribunal Act* came into force. The most significant amendments include private access to the Tribunal for certain reviewable distribution practices and the enabling provisions for mutual legal assistance agreements with other jurisdictions in non-criminal matters.

The Bureau also invites comments on its service standards, in respect of the type of information requested, the complexity categories and the applicable time frames.

The Bureau is seeking comments by October 18, 2002. The discussion paper can be found at <http://strategis.ic.gc.ca/pics/ct/feeproposal.pdf>. The target for implementation is January 2003. These proposed changes will have significant implications for companies doing business in Canada. We will be providing the Bureau feedback on its proposals, and welcome any comments that you may have.

INVESTIGATORS WANT ELECTRONIC INFORMATION

A second recent announcement involves proposed legislative changes related to investigative techniques to be made available to the Bureau as well as other Canadian law enforcement officials. If adopted, these important changes will facilitate compulsory access to confidential electronic and other information of private parties, and will impose significant obligations on telecommunications and other service providers.

Specifically, these proposed amendments would add the following items to the Bureau's investigative toolkit:

- (a) *Assistance orders*: Judges would be authorised to make orders that would require parties, such as telecommunications service providers, to assist in the interception of private communications. The scope of the technological and financial burden that such orders might impose is unclear, as are possible limitations based on privacy considerations.
- (b) *Data preservation orders*: These "expedited" but time-limited judicial orders would require businesses such as internet service providers to save data relating to a particular transaction or client. The apparent object is to prevent the deletion of particular information before authorities can obtain it. The privacy and other considerations underlying these issues will be complex and controversial and the implications

for Competition Bureau investigations may be lost in the wider debate.

- (c) *Remedying the Bureau's difficulty in obtaining electronic evidence*: While not outlined in great detail, the consultation document refers to a possible requirement that persons present on premises being searched must provide records "hidden on their person," including access to personal electronic or digital devices (*e.g.*, blackberries, Palm pilots, pagers, *etc.*).

In addition, a number of other amendments propose extending existing investigative powers, which are already available under the *Competition Act* (such as Section 11-type production orders—with extraterritorial application of such orders a distinct possibility), to other law enforcement officials. Orders of this type could be quite onerous and costly including for any third party holder of voluminous records.

This is a substantial legislative initiative, with investigative and privacy implications well beyond the competition area. We will be preparing submissions on these proposals prior to the November 15, 2002 deadline with the aim of promoting change that is consistent with the critical public interest in privacy and the confidentiality of commercial documents. If you have suggestions or particular concerns, we would welcome hearing from you.

BAYER/AVENTIS DIVESTITURES

In the proposed acquisition of Aventis Crop Science Holdings S.A by Bayer AG, the Competition Tribunal has issued a consent order under which Bayer has 180 days to divest businesses relating to: (a) insecticides for certain fruit and vegetable crops in Canada; (b) seed treatments for canola in Canada; (c) seed treatments for cereals in Canada; and (d) post-emergent grassy weed herbicides for spring wheat in Western Canada.

The definition of the relevant markets was extremely narrow. For each market, the Commissioner went beyond the class of product (*e.g.*, insecticide, herbicide) to the crop that the product was to be used (*e.g.*,

insecticides for certain fruit and vegetable crops). In one case, the relevant product market was a certain class of product (*i.e.*, herbicide) used for a certain crop (*i.e.*, spring wheat) in respect of a certain target (*i.e.*, grassy weeds) when applied at a certain time (*i.e.*, post-emergent).

A particular difficulty arose from the fact that the products relating to each market are not separate operating units but potentially from the same businesses.

For each business, Bayer must sell inventories and intellectual property, and provide a transitional supply of product and technical assistance to the purchasers. It remains to be seen whether the assets to be divested will generate effective competition to the merged entity. If they are not auctioned successfully within the prescribed period, the order provides a larger “crown jewel” divestiture in respect of each market.

In one market where Bayer/Aventis represents only 28% of sales, a substantial lessening of competition was found on the basis of likely interdependent behaviour. (Syngenta is the major player in the sale of grassy weed herbicides for spring wheat with almost 46% of sales.)

There was a significant level of inter-agency cooperation in this case. Authorities in the E.U., U.S., and Canada conducted joint negotiations with the parties to arrive at similar, but not identical, remedies in all three jurisdictions. The Commissioner obtained divestitures which departed from past practice by applying on a worldwide basis and not just in respect of Canada. Further evidence of this close coordination is that the “crown jewel” in the grassy weed herbicide market, OLYMPUS, is not even sold, nor expected to be sold, in Canada.

ONTARIO COURT REFUSES TO CERTIFY A CLASS DUE TO COMPLEXITY

The Ontario Superior Court of Justice recently refused to certify a class action lawsuit against Panasonic Canada in an important review of the relevance of complexity in determining whether a class action meets the test of being a preferable method of resolving a dispute.

In *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362, the Plaintiff sought to certify a class of approximately twenty million consumers as a first step in bringing a class proceeding for alleged retail price maintenance in the sale of audio-visual products from 1980 through 1999. The Court ruled that the Plaintiff had adduced sufficient evidence to surpass the “plain and obvious test” and thus to meet the first certification requirement of disclosing a cause of action against Panasonic: for breaching s. 61 of the *Competition Act*. The Plaintiff also satisfied the Court that there was a satisfactory representative plaintiff and that there were common issues: whether a tort of breach of statute was committed. But the Court ruled that a class action was not the preferable procedure for resolving these issues and, accordingly, refused to certify.

In essence, the Court focused on the impracticality of having each claimant prove individual loss separately. It noted that the entitlement to damages is an inherently individual issue that requires each class member to establish the amount of loss or damage they actually personally sustained. The Court concluded that even if the Plaintiffs could prove that Panasonic engaged in price maintenance, a myriad of issues would still need to be considered to establish liability. They include whether each Plaintiff had in fact purchased the specific Panasonic product, the actual price paid, the impact of dealer incentive programs and added-value items included with the sale, and the actual effect of the alleged conduct, if any, on the price at which the product was sold.

The Court rejected the Plaintiff’s argument that the amount of liability was a separate common issue from liability itself. The *Class Proceedings Act* prohibits a court from refusing to certify a proceeding solely on the ground that an individual assessment of damages will be required after determination of the common issues. Nevertheless, the Court found that the requirements for proof of liability (as opposed to damages) must be taken into account when considering the complexity of the proceeding and whether a class action is a viable and preferable procedure. The Court also noted that it would be insufficient for the Plaintiffs to point to

evidence that the *average* consumer overpaid by 15% as a result of the alleged price maintenance.

The *Panasonic* case is similar to the Divisional Court's 2001 decision in *Chadba v. Bayer Inc.*, which overturned the certification of a class proceeding for price fixing of building materials. In both *Panasonic* and *Chadba*, a class proceeding would have created a "monster of complexity" when it inevitably broke down into a long series of individual trials on many complex issues, thereby losing any potential judicial efficiency.

Panasonic is only the second *Competition Act* certification decision of which we are aware, and the first to interpret and apply the Supreme Court of Canada's landmark certification decision in *Hollick v. Toronto City*, (2001) 205 D.L.R. (4th) 19. As with other post-*Hollick* decisions, it suggests a tightening of the standard for class certification and increased difficulty for would-be plaintiffs. If this trend holds, competition law cases will generally present sufficient individual issues that certification would be difficult.

HOT OFF THE PRESSES!

Members of McMillan Binch's Competition Law Group have recently written the following articles which are available online at <www.mcmillanbinch.com/antitrust>.

- Neil Campbell and Mark Opashinov, "Vertical Restraints: Dos and Don'ts in Antitrust". National Report for Canada, 40th Annual Congress of the International Association of Young Lawyers, Lisbon, August 2002.
- Neil Campbell and J. William Rowley QC, "The Privatization of Canadian Competition Law Enforcement" *Global Competition Review*, September 2002.
- J. William Rowley QC and Mark Opashinov, *Merger Control 2003: Getting the Deal Through*, October 2002.
- Neil Campbell and Mark Opashinov, "Untangling the Web of the Canadian Telecommunications and Competition Regimes" *International Business Lawyer*, July/August 2002.
- Omar Wakil and Casey Halladay, "Canada Again Considers Reform of Criminal Pricing Offences" *Antitrust Report*, July 2002.

In Canadian antitrust, there is no competition.

For further information on these or other competition law matters, please contact your regular McMillan Binch LLP lawyer or one of the lawyers listed below, all of whom practice in the competition law field:

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This Report summarizes current developments in competition law. It does not offer legal advice. We would be pleased to elaborate on any issue raised and discuss how it might apply to specific problems. This Report may be reproduced with acknowledgement.

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