

Proposed Amendments to the *Competition Act*

With the re-election of Stephen Harper's Conservative government yesterday, significant amendments to Canada's conspiracy and unilateral conduct regimes seem more certain. Based on announcements made by the Conservative party during the election, the scope of the amendments is great and the amendments could have important effects on how businesses compete in Canada. All Canadian businesses should be aware of the coming changes.

The Conservatives' Proposals

During the election campaign, the Conservatives announced proposed amendments to the *Competition Act* as part of their so-called "consumer protection plan". This plan is based largely on the recommendations of the Competition Policy Review Panel, which Prime Minister Harper convened during his previous term in Government. The most significant amendments relate to conspiracies and abuse of dominance.

Fines for Abuse of Dominance

The proposals would transform the current abuse of dominance provision in the *Competition Act* from a balanced "reviewable practice" into an offence-like regime. Under the current law, abuse of dominant position is treated as a reviewable practice; that is, a business practice this is recognized as conduct that generally is pro-competitive but which may, if it results in a substantial prevention or lessening of competition, be prohibited by the Competition Tribunal. Fines are not a feature of the law. During the election, the Conservatives promised to amend the *Competition Act* to introduce fines of up to \$10 million, and up to \$15 million for "repeat offenders", for abuses of dominance.

The challenge for businesses is that the line between pro-competitive conduct and abuse is not always clear. The current approach avoids deterring conduct that is likely pro-competitive, while also providing recourse where conduct crosses the line. Introducing substantial fines and turning reviewable practices into offences would be a cause of concern for many Canadian businesses. These changes could discourage business from engaging in activities that, in almost all situations, enhance competition and could, therefore, limit the competitive options available to

Canadian businesses.

Amendments to the Conspiracy Provisions

The Conservatives also proposed introducing dual criminal and civil regimes for cartels. Under the current *Competition Act*, conspiracy is a criminal offence and, upon conviction, an accused can be liable to fine or imprisonment. But, only those agreements that reasonably could, or do, result in an “undue” lessening of competition are unlawful. This has been described as requiring a “partial rule of reason” analysis.

The Conservatives’ proposal would treat “hardcore” cartels as criminal conduct and treat other unlawful agreements as a civil, administrative matter. The background on the Conservatives’ consumer protection plan suggests that the majority of cartels cannot be successfully prosecuted because the current law requires proof of economic harm beyond a reasonable doubt. The argument that enforcement of the existing conspiracy provisions is too challenging to be effective has been raised repeatedly over the past decade, but proponents of the existing regime note that, since 1992, the Competition Bureau has been successful in over 91% of cartel cases. The majority of these cases have been settled following a guilty plea by the accused. It may not, therefore, be clear that amendments to the cartel provisions are necessary to protect competition in Canada.

Previous attempts to amend the conspiracy provision have failed due to an inability to devise new provisions that were neither over- nor under-inclusive. An additional risk in introducing dual criminal and civil approaches, which has been raised in consultations on similar proposals in other jurisdictions, is that the lack of a bright-line between the criminal offence and civil reviewable matter may lead to situations where the threat of criminal charges could induce individuals and companies to agree to substantial civil penalties

A Cautionary Note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

that they might otherwise have opposed. And, the uncertainty resulting from potentially over-inclusive criminal provisions creates a chill against some pro-competitive behaviour.

Other Increased Fines

In addition to amending the substantive conspiracy law, the Conservatives have proposed increasing the maximum penalties for conspiracy and bid rigging offences to \$25 million and a prison term of 14 years. Under the current *Competition Act*, the maximum penalties for conspiracy are a fine of up to \$10 million and up to 5 years in prison. There is no maximum fine for bid rigging, but the maximum prison term is five years.

Conclusion

Businesses should be aware of these important changes, which seem more certain given the Conservatives’ election victory. Any changes to Canada’s current competition regime will warrant careful scrutiny to ensure that amendments, which are intended to enhance competition, do not instead limit the competitive options available to Canadian businesses.

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