

Canadian Competition Law Highlights

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Presentation to Antitrust
Lawyers Study Group
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DAVIES

Outline

1. Agreements with Competitors (*Criminal/Civil/Class Actions*)
2. Mergers
3. Unilateral Conduct and Pricing/Distribution Agreements
4. Marketing Practices
5. Advocacy/Regulatory Interventions by Competition Bureau

Agreements with Competitors

Criminal Competitor Agreements (s.45)

"Cartels"

- The Competition Act prohibits agreements / arrangements with competitors to:
 - Fix prices
 - Allocate markets
 - Control production or supply
- Limited defence ("ancillary restraints")
 - If agreement is ancillary to and reasonably necessary for a broader and separate legal agreement between the same parties
- No requirement to prove anti-competitive effects
- Fines: up to \$25M; Prison: up to 14 years

Civil Agreements with Competitors (s. 90.1)



- Applies to agreements / arrangements between competitors that are likely to prevent or lessen competition substantially
 - Efficiencies defence available
- Remedies:
 - Prohibit person from doing anything under the agreement
 - Require person to take any other action on consent
- Broad application, e.g. joint ventures, trade associations
- No limitation period – could capture long-standing arrangements similar to mergers (e.g., Commissioner's challenge to Air Canada/United JV)

Class Actions

- "Follow on" private actions increasingly commonplace, typically in the form of class actions
 - Could be "follow on" to announcement of investigation or plea in Canada/abroad
- Notable recent examples of Canadian civil actions for conspiracy claims include high fructose corn syrup, hydrogen peroxide, air cargo, chocolate, DRAM/SRAM, aftermarket automotive lighting products
- Aggressive/innovative tort claims of common law conspiracy
- Provinces differ on class action litigation process and rules

Supreme Court of Canada Weighs in on "Indirect Purchaser" Claims

- Three decisions on antitrust claims by indirect purchasers of Supreme Court of Canada held:
 - Defendants cannot assert a "passing on" defence against direct purchasers (i.e., no damages because such purchasers just passed on the price increase) – remains to be seen how courts will protect against double recovery in damages awards
 - Defendants Indirect purchasers can sue for damages under s. 36 of the *Competition Act*
 - Low certification threshold for plaintiffs to establish a methodology for proof of loss on a class-wide basis – need to establish only "some basis in fact"
 - However, SCC raised prospect of re-visiting certification after discovery
 - Unlike in U.S., no need to demonstrate predominance of common issues to obtain certification
 - Lower thresholds in Quebec
 - Need only an "arguable case" for establishing class-wide proof of loss, which typically does not even require expert evidence
 - Quebec courts have jurisdiction over manufacturer whose products are sold to consumers in Quebec, even if the manufacturer is not present in Quebec and was not a party to contracts with Quebec consumers

Public Works Canada Nov. 2012

Integrity Policy



- Corporation disqualified from bidding if it or any of its affiliates (including foreign affiliates) has been convicted of specified offences, including s. 45 conspiracy
- Participants in Leniency Program no longer exempted
- No limitation period
- Exceptions to disqualification
 - Public interest reasons (emergency, national security, health and safety, economic harm)
 - Restoration of bidding capacity by Cabinet
 - Suspension of criminal record – must complete sentence & abide waiting period to be eligible
- Calls for review of policy – perceived to be excessively harsh

Mergers



Overview

- Bureau reviews mergers to determine if transaction substantially lessens or prevents competition
- Mergers may be challenged by the Commissioner before the Competition Tribunal up to 1 year after closing
- Remedies include an order preventing the parties from closing the transaction or, if already closed, an order requiring the merger to be dissolved
- Transactions that exceed certain monetary thresholds are required to be notified to the Bureau in advance of closing with potential SIR and waiting periods
 - Transaction size – CDN\$ 86 million
 - Parties size – CDN\$ 400 million

Current Trends in Merger Enforcement



- Greater acceptance of behavioural remedies in addressing competition concerns arising from mergers
 - Acceptance of undertakings (less formal)
- Bureau uncovers other competition issues through merger review process
- Investigation of transactions that are under the threshold
 - Tervita case (application brought to unwind under the threshold transaction)

Growing Acceptance of Behavioural Remedies



Merger	Remedy
Ticketmaster / LiveNation	Ticketmaster prohibited from retaliating against any venue owner who chooses to use another company's ticketing services and restrictions on bundling
Coca-Cola / Dr. Pepper Distribution	Restrictions on use and access to Dr. Pepper's commercially sensitive information and personnel
Air Canada / United Continental	Prohibited from coordination on certain routes and sharing of confidential information
Waste Management / RCI	Long-term right of disposal at a landfill
BCE / Astral	Bell required to make TMN and Super Écran available on a stand-alone basis and to prevent anti-competitive bundling
Garda / G4S Cash Solutions	Modification of customer contracts to allow termination on 30 days' notice, limit term of contracts to two years, no right of first refusal and notice of price increases

Uncovering Other Issues

Merger Clearance	Conduct Challenge
<p>"Competition Bureau Clears Leon's / The Brick Furniture Merger" (March 11, 2013)</p>	<p>"Competition Bureau takes action against Leon's and The Brick for deceptive 'Buy Now, Pay Later' Promotions" (July 9, 2013)</p>
<p>"Competition Bureau Reaches Consent Agreement in Loblaws / Shoppers Deal" (March 21, 2014)</p>	<p>"...through the analysis of the Loblaw / Shoppers transaction, the Bureau has become aware of certain conduct by Loblaw with respect to its suppliers that could raise concerns under the <i>Competition Act</i>." (April 7, 2014)</p>
<p>"Agreement Reached to Preserve Competition for Waste Disposal in Western Quebec" (February 6, 2013)</p>	<p>"...the Commissioner of Competition has commenced an inquiry into certain contracting practices of Waste Management" (July 9, 2013)</p>

CCS/Tervita - Challenging "Under the Threshold" Transaction



- Not a typical merger challenge:
 - Very small transaction (total transaction value of CDN\$6 million)
 - Purchaser and vendor were not competitors at the time of the transaction
 - Commissioner challenged transaction after closing and named vendors as respondents
- Allegation that the transaction prevented future competition that would likely arise between the parties in the absence of the transaction
 - Tribunal found vendors would have initially used site for a non-competing remediation business, but that business would likely have failed, following which they would have used the site to compete with Tervita in waste disposal business
- Commissioner successful in requiring Tervita to divest landfill, but unsuccessful in requiring vendors to take site back
- Tribunal decision upheld on appeal by the Federal Court of Appeal but recently reversed by Supreme Court of Canada
- Supreme Court of Canada held that the Commissioner had not satisfied his burden of proving that the anti-competitive harm outweighed the efficiencies shown by the parties (quantification of effects)

Unilateral Conduct and Pricing/Distribution Arrangements

Overview

- Competition Act contains a number of provisions potentially applicable to pricing and distribution practices:
 - Abuse of dominance
 - Price maintenance
 - Exclusive dealing and market restriction
 - Tied selling
 - Refusal to deal

Recent Enforcement and Trends

- Federal Court of Appeal holds that conduct of an entity not competing in the relevant market can be considered to be "anti-competitive" [*Toronto Real Estate Board*]
 - Potentially expanding scope of provision in significant way
- Growing focus on contractual provisions that reference rivals prices
 - Loblaws investigation: Bureau investigating whether Loblaws supplier agreements reduce suppliers' incentives to offer lower prices to competing retailers and encourage suppliers to impose restrictions on the ability of retailers to reduce prices
- Cross-border price discrimination
 - Proposed amendments to Competition Act would authorize Commissioner to investigate and publicize, but not stop or punish, cases of "unjustified" cross-border price discrimination

Marketing Practices

Misleading Representations

- Criminal and civil misleading representations provisions
 - Bureau generally proceeds under civil provisions
- Civil:
 - S. 74.01(1)(a): Prohibit representations to the public that are false or misleading in a material respect
 - S. 74.01(1)(b): Representations re: performance claims must be supported by "adequate and proper" test
- Criminal:
 - S. 52: must have "knowingly or recklessly" made representation that is false or misleading in material respect

Misleading Representations

- **Penalties:**

- Under civil provisions:
 - Monetary penalties up to \$10 million for corporations for first contravention
 - Restitution (compensation for consumers) where false or misleading
 - Corrective notices
 - Prohibition Order for up to 10 years
- Under criminal provisions:
 - Fines and/or imprisonment
 - Civil / class actions are also likely (ss. 36, 52)

What's Hot at the Bureau

- **Price advertising**

- disclosure of "all-in" pricing (e.g., Bell consent agreement, Leon's/The Brick charges, and Avis investigation)
- ordinary price claims (Bureau receiving more complaints and enforcement priority)

- **Digital marketplace**

- Bureau has stated e-commerce area "ripe for more work"
- Bureau participated in sweep of e-commerce sites with ICPEN for disclosure issues
- premium text case initiated in September 2012

- **False Online Testimonials**

- Bureau has identified false or misleading on-line testimonials as area of concern
- focus on testimonials that "appear to be from unbiased individuals but are actually paid for, malicious or fraudulent"

- **Performance and comparative claims**

- contested case against Rogers/Chatr
- consent agreements with Hyundai Canada and Kia Canada re: fuel consumption ratings in August 2013
- consent agreement with Biersdorf re: slimming cream

- **Green claims**

- e.g., general claims to be "environmentally friendly"

Advocacy / Regulatory Intervention by Competition Bureau

Advocacy/Regulatory Intervention



- Commissioner has stated that he will increase the Bureau's "strategic and targeted regulatory interventions" in Canada's regulated sectors
- Competition Bureau can intervene in regulatory proceedings to make submissions on competition issues
- Current sectoral priorities include: digital economy, health sector, retail
 - recent Bureau advocacy initiatives have included telecom/wireless, pharmacists, taxicabs, Internet (generic top level domain names)

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