JANUARY 15, 2015

Top Competition and Foreign Investment Review Trends for 2015

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Our top Canadian competition and foreign investment review trends to watch for in 2015 reflect a confluence of key themes. In particular, developments are unfolding in a regulatory environment in which the administration and enforcement of the *Competition Act* and *Investment Canada Act* are increasingly:

- **Consumer-facing.** The Competition Bureau's focus on enforcement in consumer-facing industries will likely continue into 2015, with policy emphasis and recent or open dossiers related to matters such as health and pharmaceuticals, grocery retailing, digital taxi dispatch services, iPhones and deceptive marketing practices in the digital environment, among others.
- **International in scope and consequence.** Cooperation between competition agencies in different countries continues to reach new heights, requiring vigilance on the part of investigated parties regarding the treatment of their confidential information and extraterritorial access by competition enforcers to evidence out of jurisdiction. In addition, the impact of convictions (including by way of settlement) for various offences, such as those related to competition, deceptive marketing and corrupt practices, whether in Canada or abroad, is increasingly threatening global business operations in collateral areas such as disqualification from government contracting.
- **Influenced by government agenda.** As Canadians prepare to head to the polls later this year, federal politicians are calibrating policies and legislative agendas accordingly, including recently enacting and proposing amendments to the *Competition Act* that will fall to the Competition Bureau to enforce in 2015 and beyond. Foreign investment reviews under the *Investment Canada Act* may, in particular, be influenced by the election cycle, tending to heighten political sensitivities and reduce predictability in the review process.

In our annual forecast of the year to come, we evaluate how these key themes, together with developments from 2014, are shaping the emergence of issues and trends to watch for in 2015.

Growing international antitrust agency cooperation and access to evidence

The general trend toward increased international cooperation between competition enforcement agencies is likely to continue in 2015, spurred by the Commissioner of Competition's commitment to strengthening relations with foreign counterparts. In 2014, this commitment was reflected in, among other developments, the Competition Bureau's signing of a memorandum of understanding with the Competition Commission of India to facilitate communication and collaboration between the agencies; meetings with Chinese competition authorities to advance inter-agency cooperation; and the joint issuance with U.S. federal antitrust agencies of best practices for cooperation between the Bureau and the U.S. Department of Justice/Federal Trade Commission (FTC) in cross-border merger investigations.

For example, in July 2014, the U.S. District Court of Maryland ordered a company located in the United States to produce documents to the U.S. FTC on behalf of the Bureau. These documents related to the ongoing civil proceedings in Canada against wireless telecommunications carriers and their industry association in respect of alleged deceptive representations by third-party content providers regarding the marketing of premium text messaging services. The U.S. company was required to produce the documents in

accordance with provisions under the United States Code permitting U.S. courts to assist litigants before foreign tribunals. This is the first time a U.S. court has granted this kind of investigative assistance to obtain information for the Bureau in a civil case.

The decision to seek information in this way signals that the Bureau is prepared to bypass direct evidence-gathering mechanisms, including discovery in Canadian civil proceedings, that involve oversight by Canadian courts and standing for investigated parties. The Bureau's evidence-gathering powers under domestic Canadian law may also expand if proposed amendments to the *Competition Act* are passed that would broaden the Bureau's ability to directly compel the production of information from foreign affiliates of entities operating in Canada.

Companies subject to competition investigations or proceedings should be aware of the ways in which their own and third-party sensitive confidential information may be vulnerable to production and/or exchange between competition agencies, wherever that information is located.

Competition Bureau commitment to deliver on the federal government's consumer-focused agenda, from anti-spam regulation to U.S.-Canada price-gap inquiries

Although the Competition Bureau is an independent enforcement agency, it is not immune from the federal government's policy agenda, especially in an election year like 2015. The Bureau's 2014-2015 annual plan (a new document issued for the first time last year as part of the Commissioner's transparency initiative) identifies one of the Bureau's four stated priorities as to "align with and deliver on Government of Canada priorities". The Bureau has further indicated that it will complement the government's consumer agenda, including by doing the following:

- Implementing and enforcing relevant aspects of Canada's anti-spam legislation (CASL), much of which came into force on July 1, 2014. The Bureau has signed a memorandum of understanding with the Canadian Radio-television and Telecommunications Commission (CRTC) and the Privacy Commissioner clarifying the roles of each agency and the measures they will take to cooperate and coordinate with one another in enforcing CASL. As part of the legislative amendments that accompanied the implementation of CASL, the *Competition Act* was amended to permit the Bureau to pursue misleading representations in the sender information or subject line of an electronic message, whether or not (i) the representation is *materially* misleading (the threshold generally applicable for other types of representations) or (ii) the representation was actually received by anyone (*i.e.*, the offence is in transmitting the misleading representation).
- Continuing Bureau advocacy on telecommunications and wireless issues through interventions and submissions to the CRTC. In 2014, the Commissioner of Competition made several submissions to the CRTC strongly supporting targeted regulatory intervention in the wholesale mobile wireless industry to eliminate incentives for incumbents (whom the Commissioner considers to have retail market power) to adopt strategies to prevent entrants from becoming fully effective competitors.
- Completing a market study into the different functional levels of the retail beer industries in Ontario and Québec. Arrangements between the Beer Store and the LCBO have attracted media attention, and a restaurant industry association has asked the Bureau to investigate such arrangements.
- Implementing recently proposed amendments to the *Competition Act* contained in Bill C-49, the *Price Transparency Act*, intended to address "unjustified" cross-border price discrimination and reduce the gap between consumer prices in Canada and the United States. The proposed amendments would allow the Commissioner to investigate and publicly report on the extent and reasons for Canada/U.S. cross-border price differences by particular companies but would not prohibit or impose penalties for such differential pricing. Significant concerns remain about the price-gap proposals in Bill C-49, including the effectiveness of a non-remedial regime in addressing country pricing, the potential complexities involved in analyzing cross-border price differences, and how the Commissioner will select the products, suppliers and levels of distribution to investigate under these new powers. Despite these and other questions, the federal government appears committed to its passage in 2015.

Investment Canada Act election sensitivity and long-lagging regulations

With an anticipated Canadian federal election in 2015, we expect to see a higher level of political sensitivity for proposed transactions subject to government review and approval under the *Investment Canada Act* (ICA). With parties well into campaign mode, high-profile transactions subject to ICA review are likely to face closer scrutiny, and consequently relatively longer and/or less predictable review timeframes and increased pressure to deliver "net benefit" undertakings with political value. Particularly sensitive are reviewable investments that could have a significant impact on Canadian employment, involve state-owned enterprise (SOE) investors or raise national security issues for Canada or its close allies. The election cycle phenomenon compounds an already increased level of Cabinet and prime ministerial involvement and control over ICA reviews in sensitive cases, which has made the regulatory approval calculus more challenging for foreign investors subject to ICA review.

Canadian dealmakers may also be affected as the federal government continues to:

- interpret the SOE rules enacted in 2013 to increase the scope for reviewing transactions involving SOE-controlled or SOE-influenced investors and apply review criteria to such transactions, even as important stakeholders continue to debate whether these measures are unduly discouraging foreign investment in Canada;
- develop technical regulations to implement new financial thresholds for determining which direct acquisitions of control of non-cultural Canadian businesses are subject to net benefit review under the ICA. Once promulgated, such regulations would replace the current asset value review threshold ($369 million for 2015) with a review threshold based on "enterprise value", starting at $600 million and increasing to $1 billion over four years. SOE investments would remain subject to the lower asset-value threshold for net benefit review; and
- refine its national security review process, which lacks transparency and can extend to nearly any investment in a Canadian business, regardless of size. While only one transaction has apparently been rejected on national security grounds following a completed review, a number of others are understood to have been abandoned because of government concerns about national security.

Foreign investors should continue to be mindful of the ICA review processes and their potential implications for proposed acquisitions of or investments in Canadian businesses.

Heightened enforcement and stiff penalties for foreign corrupt practices

In the coming year, we expect to see more prosecutions and a continued trend of the government's seeking strict sentences under Canada's *Corruption of Foreign Public Officials Act* (CFPOA). An estimated 30 investigations have been instituted under the CFPOA, partly in response to international criticism of Canada's perceived weak enforcement record in the past. Furthermore, last year, after the first contested hearing under the CFPOA, an Ottawa businessman was sentenced to a three-year prison term for arranging bribes to public officials in India in relation to a proposed security contract from Air India. The prison term imposed is particularly significant, given that the case involved merely an agreement to offer bribes – the prosecution did not prove that a bribe was actually paid, and the relevant contract was not awarded to the accused's principal. In addition, the sentence was passed under the old version of the CFPOA, which provided for a maximum prison term of five years. The current maximum is now 14 years, and corporations are subject to fines in the discretion of the court. (The highest fine to date is $10.35 million.)

In recent press reports, an official from the RCMP's anti-corruption unit is quoted as saying that the RCMP is more aggressively enforcing the CFPOA, including in particular against the individuals involved in paying bribes. Expect more to come in 2015, including possible developments regarding bribery charges laid by the RCMP last year against three foreign nationals in connection with the Air India matter, which could see requests for extradition of the accused to face trial in Canada.

Companies carrying on business in Canada would be well advised to ensure that they have in place a clear compliance policy in relation to both domestic and foreign corruption laws, and that key individuals are trained and understand the policy. Further information on the CFPOA is available here.

Refined approach to competition enforcement in the pharmaceutical industry

The Competition Bureau has identified the pharmaceutical industry as being of significant importance to the Canadian economy and appears poised to take enforcement action in that area in 2015.

The Bureau's interest in pharma is evident from a first round of updates and revisions to the Bureau's *Intellectual Property Enforcement Guidelines* (IPEGs) completed in 2014, and a second round on the way in 2015. A notable change from the first round of revisions is the Bureau's position that "non-use" of intellectual property rights may raise issues under the *Competition Act* – for instance, when a branded pharmaceutical company ceases to market a patented product in respect of which competition from generic substitutes is imminent. Following the closure last year of an abuse of dominance investigation into such alleged conduct by Alcon Canada, the Bureau stated that it is actively looking for cases of "product hopping", in which innovative drug companies seek to pre-empt competition from generic entry by, for example, ceasing to market legacy products whose patent protection is expiring in order to switch consumer demand to newer versions of the product that enjoy longer-term patent protection.

The Bureau is also developing its enforcement approach to "reverse payment" patent litigation settlements between branded and generic pharmaceutical companies. In such settlements, disputes about the validity or infringement of a branded drug company's patent include payments from the branded manufacturer to the allegedly infringing generic manufacturer and agreement by the latter to enter the market at a later date. The Bureau's focus on this area is consistent with continued scrutiny of reverse payment settlements by U.S. and European competition authorities in recent years.

The Bureau has also suggested that Canada could benefit from a notification system for settlements of pharmaceutical patent litigation, similar to that in the United States and the European Union. Notification would provide the Bureau with automatic access to the confidential terms of patent settlements, without the need to conduct separate inquiries. In addition, the Commissioner has issued a white paper setting out his preliminary view that the *Competition Act*'s *per se* criminal conspiracy provisions could apply to certain conduct involving reverse payment settlements. This position, which the Bureau characterizes as under development, would set Canada apart from other key jurisdictions and significantly alter the calculus for pharmaceutical companies looking to resolve patent disputes involving Canada.

Further guidance is expected from the Bureau on these issues in 2015, with consultations on revisions to the IPEGs expected later in the year. In the meantime, pharmaceutical companies should expect Bureau scrutiny and enforcement, in one form or another, to ramp up significantly.

Deceptive marketing practices to remain a high enforcement priority

The Competition Bureau continues to actively pursue misleading advertising investigations, and we expect these efforts to continue unabated in 2015. In late 2014, the Bureau settled two advertising cases: one proceeding with respect to alleged misleading promotion of water heaters in door-to-door marketing (and leading to the payment of $7 million in monetary penalties); and another investigation regarding performance claims relating to hockey helmets. We foresee continued aggressive civil and criminal enforcement in 2015 across a range of deceptive marketing practices, including misleading representations, inadequate disclaimers, performance claims, ordinary selling prices, false testimonials and green claims. Particular matters to watch for in 2015 include the following:

- Ongoing contested proceedings regarding "drip-pricing" alleged to have been engaged in by certain furniture retailers. The Bureau alleges that advertising campaigns by the companies convey the general impression that no payment is required at the time of purchase, despite the existence of certain charges that are disclosed to the consumer only during the purchase process, rather than at the outset.
- The return of "ordinary selling price" investigations. The Bureau reports that it is receiving more complaints in this area, which may lead to rejuvenated enforcement efforts.
- False online endorsements or testimonials. This is one area in which the Bureau has acknowledged it has ongoing investigations. The focus on deceptive online or digital marketing is in keeping with the Bureau's stated concerns about representations made over digital platforms, particularly in relation to privacy, advertising aimed at children and representations viewed on mobile devices (given the limitations of this medium and how they may affect a consumer's general impression of the messages being conveyed).

Is the merger tide continuing to rise?

Merger filings at the Competition Bureau have returned to a pace not seen since before the financial crisis. The Bureau commenced 230 merger examinations in its fiscal 2013-14 year and is on track to increase that total by roughly 35% in 2014-15. With more merger activity has come heightened Bureau scrutiny, resulting in remedies being obtained on consent in six merger cases and two proposed transactions reported to have been abandoned in the face of Bureau concerns (one in the wood building materials industry and the other involving facilities-based telecommunications services). The remedies obtained by the Bureau in 2014 appear to signal a willingness to rely on behavioural commitments, in lieu of or together with structural divestitures, to resolve competition issues arising from mergers. Behavioural commitments were the sole remedy in three of the six settled cases and supplemented structural divestitures in two of the three others.

Against the background of continued strong merger activity, the Supreme Court of Canada's anticipated ruling on appeal from the Federal Court of Appeal's decision in the *Tervita case* will be the first time that the Supreme Court has considered a merger case since it decided the *Southam* matter in 1997. The Court may provide added clarity on the proper approach to "prevention" of competition cases and the scope of the *Competition Act*'s efficiency defence to mergers that otherwise prevent or lessen competition substantially. The case is also significant because the Bureau chose to challenge a merger falling below the pre-merger notification thresholds.

The next chapter in abuse of dominance

The following developments in abuse of dominance in 2014 may set new paths for enforcement in 2015 and beyond:

- The Supreme Court of Canada refused to hear an appeal from a February 2014 decision of the Federal Court of Appeal (FCA), which expanded the reach of the abuse of dominance provisions to include conduct that affects a market in which the allegedly dominant entity does not itself compete. The FCA's judgment overturned the Competition Tribunal's 2013 decision dismissing the Commissioner of Competition's abuse of dominance application against the Toronto Real Estate Board (TREB). The Commissioner challenged TREB rules alleged to have anti-competitive effects in the market for residential real estate brokerage services, a market in which TREB (a trade association of realtors) did not itself compete but in which the Commissioner alleged TREB members to be dominant. Until the principle established in the FCA's judgment can be tested in future proceedings, including the Tribunal's re-hearing of the TREB case in May 2015, potentially dominant companies or trade associations should consider whether their conduct could have significant exclusionary or other anti-competitive effects in markets in which they do not compete (*e.g.*, adjacent upstream or downstream markets).
- In November 2014, the Bureau secured its first-ever monetary penalty under the abuse of dominance provisions. The Commissioner filed an application against Reliance Comfort Limited Partnership concerning water heater return policies and procedures that were allegedly aimed at preventing consumers from switching to competitors in the residential water heater industry. As part of the settlement, Reliance agreed to pay $5 million in penalties. A parallel abuse of dominance application against Direct Energy Marketing Limited for similar historical conduct in the residential water heater industry is continuing before the Tribunal; in that case, the Bureau is seeking an order for, among other things, payment of $15 million in penalties. That hearing is scheduled to begin in March 2015.
- The Bureau also has ongoing investigations regarding supplier practices by potentially dominant companies. Following its review of the Loblaw/Shoppers merger in 2014, the Bureau commenced an inquiry into Loblaw's pricing practices with respect to its suppliers, including some contracting practices between Loblaw and its suppliers that reference competing retailer pricing (*e.g.*, requiring a supplier to compensate Loblaw for lower retail prices charged for that supplier's products by competing retailers). To date, the Bureau has obtained numerous court orders compelling some of Loblaw's suppliers to disclose information relevant to the investigation.
- Similarly, the Bureau has an ongoing investigation into potentially anti-competitive clauses in agreements between Apple Canada Inc. and Canadian wireless carriers that impose obligations on the wireless carriers regarding the sale and marketing of iPhones. The Bureau alleges that such practices may increase the prices that Canadian consumers pay for handsets and wireless services. In December 2014, the Commissioner obtained an order compelling Apple Canada Inc. to provide records for the investigation.

More contested criminal competition enforcement?

Enforcement of the *Competition Act*'s criminal conspiracy and bid-rigging provisions will continue to be a mainstay of the Competition Bureau's work program, particularly given the steady pipeline of inquiries that are generated from the Bureau's immunity and leniency processes, and public testimony about allegations of corruption and bid-rigging in of Québec. The government laid several new charges in 2014 against individuals and companies relating to alleged bid-rigging in federal and municipal procurement processes. However, in light of developments over the last couple of years that have significantly increased the consequences of criminal convictions under the *Competition Act*, a trend may emerge in 2015 of persons accused of such offences deciding to defend themselves in contested proceedings rather than resolving charges through plea agreements.

Specifically, the Bureau continues to make clear its intention to seek jail sentences for individuals in criminal cartel cases, particularly now that amendments to the Criminal Code have eliminated the availability of conditional sentences for the bid-rigging, conspiracy and criminal misleading advertising offences under the Act. Similarly, in addition to fines and other consequences, corporations convicted of any one of a number of prescribed criminal offences (including under the *Competition Act* and *Corruption of Foreign Public Officials Act*) are disqualified for 10 years from bidding on most federal government contracts under the *Integrity Framework* administered by Public Works and Government Services Canada. The policy also applies to convictions pursuant to plea agreements – for instance, under the Bureau's Leniency Program. In March 2014, the list of disqualifying offences was significantly broadened, including by making "similar foreign offences" among those that result in debarment.

Civil actions: Private litigants benefit from Supreme Court of Canada decisions in *Competition Act* matters

In our last annual forecast, we noted the important trilogy of decisions released in October 2013 in which the Supreme Court of Canada recognized the right of indirect purchasers (such as retailers and consumers) to claim for damages and restitution in class actions relying upon alleged competition law offences. The Court set a relatively low bar for certification of such actions. Since then, Canadian courts have certified a number of competition law class action proceedings, and more certification motions will be heard in 2015, including in relation to alleged conspiracies involving optical disc drives, lithium ion batteries, cathode ray tubes and various auto parts.

In October 2014, the Supreme Court of Canada issued another significant decision in *Imperial Oil v. Jacques*, ruling that private litigants may be permitted to access wiretap recordings gathered as part of a criminal investigation by the Competition Bureau in a gasoline price-fixing case, and that the *Competition Act*'s confidentiality protections did not apply to prevent such access. Counsel to the claimants in a follow-on class action sought to obtain the recordings and transcripts of wiretaps that had been disclosed to the defendants as part of ongoing criminal cartel proceedings. The Supreme Court of Canada confirmed a Québec Superior Court decision permitting the disclosure of the recordings and transcripts to counsel in the civil litigation, with some restrictions to protect the rights of third parties not involved in the proceedings.

As some indirect purchaser and other class action cases proceed to trial and additional practical issues with many such claims and discovery processes become apparent, we expect to see further developments that will guide the defence of such actions. In any event, the risks of investigations, class actions and disclosure of documents and other records reinforce the benefits of active compliance policies.

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