CANADA

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A. Legislative Developments

During Canada's October 2008 election, the Conservative party promised to introduce several far-reaching changes to Canada's *Competition Act* (the "Act"), including:

- a new criminal conspiracy offence focussed on "hard core" cartel conduct such as price fixing and market allocation, with other types of potentially anticompetitive agreements to be dealt with on a separate non-criminal track;
- new maximum penalties for cartels and bid-rigging of CDN$25 million (approximately US$20.5 million) in fines and 14 years in prison (up from the current maximum of CDN$10 million (approximately US$8.2 million) in fines and five years' imprisonment);
- new fines for abuse of dominance (up to CDN$10 million (approximately US$8.2 million) for initial offenders and CDN$15 million (approximately US$12.3 million) for repeat offenders); and
- repeal of the Act's criminal offences for price discrimination, promotional allowances and predatory pricing.

The Conservatives received a plurality of seats in the House of Commons following the October 2008 election and formed a minority government. In early 2009, as part of its budget legislation, the Conservative government introduced a variety of amendments to the Act,[1] including changes largely following those described in their election platform, but also other significant proposed amendments, such as:

- amending the merger notification process under the Act to mirror the U.S. *Hart-Scott-Rodino Antitrust Improvements Act* process;
- reducing to one year the three-year waiting period following closing within which the Commissioner currently may challenge a completed merger;
- increasing one of the thresholds for merger notification from CDN$50 million (approximately US$41 million) to CDN$70 million (approximately US$57 million) (the "size of transaction" test); and
- de-criminalization of the price maintenance offence.

The above proposed amendments largely follow the recommendations contained in a June 2008 report released by the Competition Policy Review Panel (the "Panel") on Canada's competition and investment policies.[2] The Panel was created in July 2007 by the federal government with the mandate of examining how to improve the domestic and international competitiveness of the Canadian economy.

B. Mergers

1. Production Orders

Among its various investigative powers, the Competition Bureau is entitled to apply *ex parte* to a judge for orders requiring the production of documents and other information. The use of these orders has been controversial, with the business and legal communities expressing concern over the Bureau's general unwillingness to consult with parties prior to seeking such orders, and the

[1] Bill C-10, *Budget Implementation Act, 2009*, 2nd Sess., 40th Parl., 2009.

[2] The Panel's report and related materials are *available at* http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home.

tendency of such orders to be overbroad and poorly drafted.

On January 28, 2008, a Federal Court judge took the unusual step of setting aside two Bureau production orders obtained in the course of a merger investigation on the grounds that the Bureau's applications for the orders were "misleading, inaccurate and incomplete".[3] As a result of this criticism, the Minister of Industry ordered an investigation into the Bureau's processes and procedures for obtaining production orders. The report was publicly released on August 13, 2008.[4] Although largely refraining from finding fault with the Bureau, the report offered several helpful suggestions that could, if implemented, alleviate some of the concerns about the use of production orders. These recommendations include encouraging the Bureau to engage in pre-application dialogue with parties where feasible, limiting the number of custodians whose documents must be searched, discouraging production orders from being sought in furtherance of a criminal inquiry against a person who is a suspect at the time of the application and requiring the Commissioner of Competition to inform the court of any point of fact or law known to the Commissioner why a requested production order should not be granted.

2. Review of Transportation Mergers

In July 2008, the Department of Transport released draft *Guidelines for Mergers & Acquisitions involving Transportation Undertakings*[5] regarding the new merger review provisions of the *Canada Transportation Act* ("CTA") that came into force in June 2007.[6] Under the CTA merger review provisions, any proposed transaction that is required to be notified under the merger provisions of the *Competition Act* and which "involves" a federal "transportation undertaking" must also be notified to the Minister of Transport. If the Minister determines that the proposed transaction "raises issues with respect to the public interest as it relates to national transportation", then the transaction cannot be completed unless approved (potentially subject to modifications or conditions) by the federal Cabinet. If no public interest issues are raised, there is no further review under the CTA.

The draft guidelines set out a series of factors relevant to determining whether a proposed transaction raises public interest issues relating to national transportation. These include economic (e.g. the transaction's impact on prices and employment), social (e.g. the transaction's impact on low-income workers and Canadian sovereignty), environmental, security and safety factors. Many of the economic factors overlap with issues dealt with under the *Competition Act* (e.g. impact on prices, service quality and Canadian competitiveness). However, the draft guidelines do not clarify whether the Minister of Transport will refrain from reviewing a proposed merger where it raises only public interest issues that relate to competition.

C. Cartels

1. Enforcement

Charges were laid in June 2008 against 13 individuals and 11 companies accused of fixing gasoline prices in Quebec.[7] While many defendants have indicated their intent to vigorously contest the charges, certain individuals and companies have pleaded guilty and agreed to pay fines exceeding CDN$2 million (approximately US$1.6 million) in total.[8] One individual defendant pleaded guilty and agreed to be sentenced to 12 months' imprisonment

3 Canada (Commissioner of Competition) v. Labatt Brewing Co., 2008 FC 59.

4 Brian Gover, REVIEW OF SECTION 11 OF THE COMPETITION ACT (June 19, 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02709e.html.

5 Transport Canada, GUIDELINES FOR MERGERS & ACQUISITIONS INVOLVING TRANSPORTATION UNDERTAKINGS (June 2008), *available at* http://www.tc.gc.ca/pol/en/acg/acgb/mergers/guidelines-draft.htm.

6 *Canada Transportation Act*, S.C. 1996, c. 10, § 53.1.

7 Press Release, Competition Bureau, Competition Bureau Uncovers Gasoline Cartel in Quebec (June 12, 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02694e.html.

8 Press Release, Competition Bureau, Third Individual Pleads Guilty in Quebec Gasoline Cartel Case (October 31, 2008), *available at* http:// www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02744e.html.

to be served in the community.[9] Also of note is that the Bureau used wiretaps as part of its investigation.

In July 2008, the Bureau announced that two individuals had been extradited to the United States for their role in a deceptive telemarketing scheme involving American consumers and had been found guilty and sentenced to a combined 42 years in prison by the U.S. Federal Court in the Southern District of Illinois.[10] This is the first time that Canadian nationals have been extradited to a foreign jurisdiction for a competition-related offence.

On November 21, 2008, the Competition Bureau announced that Akzo Nobel Chemicals International BV had pleaded guilty to criminal charges for its role in an international cartel to fix the price of hydrogen peroxide sold in Canada.[11] Akzo agreed to pay a fine of CDN$3.15 million (approximately US$2.6 million). This case is yet another example of an international cartel investigation where the Bureau benefited from the cooperation of an immunity applicant.

2. Draft Leniency Bulletin

In April 2008, the Bureau released a Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (the "Draft Bulletin").[12] The Draft Bulletin sets out the Bureau's suggested approach for recommending sentences in cartel cases, including when it will recommend that cartel participants that do not qualify for immunity may receive "lenient treatment" (i.e., a reduced penalty). For the most part, the Draft Bulletin's description of the Bureau's approach to sentencing recommendations reflects current practice. The key factor that the Bureau will consider in recommending a sentence in a cartel matter is the overall economic harm that was caused.

The leniency aspect of the Draft Bulletin is intended to complement the Bureau's information bulletin on its immunity program ("Immunity Bulletin").[13] The Immunity Bulletin describes the circumstances in which the Bureau will recommend that persons be granted complete immunity from prosecution under the Act's criminal provisions. The Draft Bulletin, on the other hand, covers situations in which full immunity is not available, but where parties may still qualify for some sort of leniency.

According to the Draft Bulletin, the Bureau will recommend leniency where (i) the Director of Public Prosecutions has not yet filed criminal charges against the party, and (ii) where the party has terminated its participation in the illegal activity, cooperates with the Bureau's investigation and any subsequent prosecution, and admits guilt. The timeliness of the party's cooperation and the value of the evidence offered will also be considered. The first party eligible for a leniency recommendation will generally receive a reduction of up to 50% of the fine that otherwise would have been recommended and subsequent applicants will receive up to 30%.

A new version of the Bulletin is expected to be released in 2009.

D. Abuse of Dominance

In June 2008, the Bureau released its Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry.[14]

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9 *Id.*

10 Press Release, Competition Bureau, Canadian Scammers Extradited to the U.S. Receive Lengthy Prison Sentences (July 30, 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02717e.html.

11 Press Release, Competition Bureau, Akzo Nobel Chemicals International BV Fined $3.15 Million for its Role in an International Cartel (November 21, 2008), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02750.html.

12 Competition Bureau Canada, DRAFT INFORMATION BULLETIN ON SENTENCING AND LENIENCY IN CARTEL CASES (April 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02663e.html.

13 Competition Bureau Canada, IMMUNITY PROGRAM UNDER THE COMPETITION ACT (September 2000), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01752e.html.

14 Competition Bureau, INFORMATION BULLETIN ON THE ABUSE OF DOMINANCE GUIDELINES AS APPLIED TO THE TELECOMMUNICATIONS INDUSTRY (June 2008), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html.

Although nothing in the Information Bulletin deviates from the Bureau's general enforcement approach, as described in the Draft Abuse Guidelines, the Bureau notes that unique characteristics of the telecommunications industry warrant particular consideration in determining whether abuse of dominance has occurred.[15] To that end, the Information Bulletin describes the Bureau's approach under the abuse of dominance provisions with respect to conduct in the telecommunications industry to the extent that the Canadian Radio-television and Telecommunications Commission, Canada's telecommunications regulator, has decided to forbear from regulating such conduct.

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[15] The Information Bulletin notes: "The telecommunications industry is a network industry with large sunk costs and significant economies of scale, density, and scope, implying that some firms are likely to have larger market shares than might be typical in non-network industries. Interconnection, both among competitors in the same market and across market boundaries (i.e., call termination), is widespread and in many respects necessary for firms to compete. Proper definition of the relevant market in the telecommunications industry poses particular challenges because the sector is dynamic, shaped by constant and rapid technological change. Finally, certain acts are more likely to be the subject of an abuse of dominance complaint in the telecommunications industry, given the nature of the sector." *Id.* § 1.4.