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Addendum

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Competition Bureau targets professionals

By Mark Katz. Davies Ward Phillips & Vineberg LLP, Toronto

Since she assumed her position in 2004, Commissioner of Competition Sheridan Scott has demonstrated a keen interest in the interaction between competition law and regulated markets. Scott has described this topic as being "near and dear to [her] heart," a natural product of her having worked previously at both the CRTC and Bell Canada.

Scott's philosophy on the relationship between competition law and regulatory policy can be summarized as follows:

- open and effective competition should be the norm and regulatory intervention should occur only where absolutely necessary;
- where regulations are needed, they should be designed to interfere as little as possible with the marketplace; and
- the existence of regulation isn't an excuse to engage in anti-competitive behaviour and to circumvent the *Competition Act.*

As part of her focus on regulated markets, Scott has announced that the Competition Bureau will be investigating potentially anti-competitive conduct by certain self-regulated professions. In particular, the Bureau will be examining whether the governing bodies of these professions (self-regulatory organizations or SROs) impose restrictions that create barriers to effective competition. While willing to concede that SROs may have a legitimate role to play in ensuring the supply of quality professional services to the public, Scott has cautioned that "[a]rtificial regulatory barriers can depress the competitive vigour of a market, leading to increased prices, poorer quality and less consumer choice."

The Bureau's study will cover the legislation, regulations, and codes of practice governing six professions – accountants, lawyers, optometrists, opticians, pharmacists, and real estate agents. A draft consultation paper will be published in the next year setting out the Bureau's preliminary analysis and conclusions. The Bureau will then issue a final report with its findings and recommendations for provincial authorities.

Commissioner of Competition Sheridan Scott.

Related articles

- When is it legal to be loyal? Abuse of dominance and *Canada Pipe* (October 2006)
- The crackdown on cartels (April 2006)
- Competition law news and notes (December 2005)

According to Scott, the Bureau has decided to investigate self-regulated professions because it considers a competitive service sector to be vital to the future health of the Canadian economy.

The Bureau's interest in self-regulated professions is also consistent with competition authorities in other jurisdictions. As an example, the European competition authority published a study in 2004 examining the rules and regulations governing six professions – lawyers, notaries, engineers, architects, pharmacists and accountants – which recommended that member states review and remove unjustified restrictions on competition. Similar studies have been conducted by competition authorities in the U.K., Ireland, and Australia.

The prospect of heightened Bureau enforcement in the professional sector increases the likelihood of a clash between the requirements of Canadian competition law and the provincial legislation and regulations that apply to self-regulated professions. This, in turn, raises the potential applicability of the "regulated conduct defence" (RCD), a common-law doctrine that provides a form of immunity from enforcement action under the *Competition Act* when four criteria are satisfied: there is validly enacted legislation regulating the conduct at issue; the conduct is directed or authorized by that legislation; the authority to regulate has been exercised; and the regulatory scheme has not been hindered or frustrated by the conduct or used as a "shield" to engage in unauthorized anti-competitive conduct.

The RCD has been applied to exempt the activities of various provincially regulated professions from review under the Act. Indeed, the leading Supreme Court of Canada decision on the RCD involved a challenge under the *Competition Act*'s predecessor legislation to advertising restrictions imposed by the Law Society of British Columbia. The Supreme Court of Canada upheld these restrictions on the grounds that the Law Society was authorized by provincial legislation to determine what constituted "conduct unbecoming" to a lawyer, which the Court said was broad enough to encompass the power to restrict lawyers' advertising.

“The prospect of heightened Bureau enforcement in the professional sector increases the likelihood of a clash between the requirements of Canadian competition law and the provincial legislation and regulations that apply to self-regulated professions.”

The Bureau, however, is currently intent on limiting the scope and applicability of the RCD. This intention is particularly evident in the Bureau's technical bulletin on the RCD, which it released in June 2006. There the Bureau offers the opinion that "RCD case law is underdeveloped," and therefore "cautious application of the RCD is warranted."

Significantly, the technical bulletin expressly casts doubt on whether the RCD should apply to the activities of self-regulated professions falling under provincial jurisdiction. Scott has made the point even more aggressively in several speeches. She has said, for example, that the Bureau is "eager to clarify [its] role in regulated industries," and is particularly open to pursuing provincially regulated conduct under the *Competition Act*'s civil reviewable provisions (such as abuse of dominance). In Scott’s view, "the Bureau's mandate is to enforce the law as directed by Parliament, not a provincial legislature or its delegate.”

In short, it’s no coincidence that the Bureau's revised technical bulletin on the RCD was finalized and released at the same time that Scott was making SROs one of her advocacy and enforcement priorities. Scott and the Bureau are "spoiling for a fight" over the RCD, and they apparently see the potentially anti-competitive conduct of self-regulating professions as a particularly promising *casus belli*.

Mark Katz is a partner in the Toronto office of Davies Ward Phillips & Vineberg LLP, where he is a member of the firm's competition and law and foreign investment review group. He has appeared at every level of court in relation to competition matters, up to and including the Supreme Court of Canada and has acted as counsel on several leading cases before the Competition Tribunal, including the first abuse of dominance and merger cases heard by that body.