

> perspective

Canada Sets Competition Agenda

October 12, 2006

Canada's Commissioner of Competition, Sheridan Scott, outlined her priorities and plans for the Competition Bureau in a speech delivered on September 28, 2006 to the Canadian competition bar. Some of the priority items the Commissioner discussed are continued from previous years (e.g., an ongoing focus on cartels and abuse of dominance). The Commissioner also announced several important new initiatives, such as studies into possible anti-competitive aspects of the generic pharmaceuticals industry and of self-regulated professions. Highlights from the Commissioner's speech are set out below.

Cartels

The Bureau's top enforcement priority continues to be fighting cartels, particularly domestic cartels. To that end, the Bureau's budget for cartel investigations has been increased by approximately 50 per cent over the last three years and the investigative capacities of the Bureau's regional offices have been strengthened.

The Bureau's anti-cartel efforts in 2006 began with three distributors pleading guilty to a conspiracy involving the distribution of carbonless sheets in Ontario and Québec. As part of the plea arrangement with the Bureau, the parties agreed to pay fines totalling \$37.5 million and to remove certain key personnel from their positions.

More recently, however, the Bureau had a case dismissed at the preliminary inquiry stage, when it failed to satisfy the presiding judge that the arrangement in question (which involved taxi companies in St. John's, Newfoundland agreeing not to bid on contracts put up for tender) had the effect of "unduly" preventing or lessening competition.

The Bureau's poor track record in litigating cartel cases in recent years (as exemplified by this most recent setback) led it at one point to support proposed amendments to Canada's conspiracy laws that would have eliminated the requirement to prove an "undue" prevention or lessening of competition. This proposal was shelved because it could not generate sufficient consensus. According to the Commissioner, however, the Bureau is continuing to review possible amendment options and hopes to commence public "technical roundtables" on the topic next year.

Abuse of Dominance

Combating abuses by "dominant" parties is a second ongoing enforcement priority of the Bureau. One initiative in this area will see the Bureau work to define more clearly the case selection criteria it employs. This analysis will no doubt be affected by the outcome of the *Canada Pipe* case, in which the Bureau is litigating the application of the abuse of dominance provisions to a loyalty rebate program. Earlier this year, the Federal Court of Appeal overruled the Competition Tribunal's dismissal of the Bureau's application at first instance, on the grounds that the Tribunal had incorrectly interpreted the required legal tests. The Federal Court of Appeal ordered the matter back to the Tribunal for re-hearing. The respondent, Canada Pipe Company Ltd. (which is represented by Davies Ward Phillips & Vineberg LLP), has filed for leave to appeal to the Supreme Court of Canada.

Another Bureau initiative is the preparation of enforcement guidelines specific to the telecommunications industry. Just prior to the Commissioner's speech, the Bureau released a draft Information Bulletin describing its approach to assessing allegations of abuse of dominance in telecommunications markets that are no longer subject to regulation by the Canadian Radio-television and Telecommunications Commission. Given her background in the industry, the Commissioner has a particular interest in this issue. The draft guidelines were also released against the backdrop of an expert panel report issued earlier in the year which recommended that a new tribunal be created with exclusive responsibility for applying the *Competition Act's* civil provisions to the telecommunications industry (e.g., abuse of dominance and mergers). Although the Bureau would continue to be involved (there would be one Bureau representative on the proposed tribunal), the new body would clearly represent a diminution of its jurisdiction.

Mergers

Although merger enforcement was not singled out as a Bureau priority, efficiencies were again a topic for discussion by the Commissioner, but with a different tone and message from that in years past.

Following its loss in the *Superior Propane* case, the Bureau arguably became pre-occupied with the efficiencies issue. First, the Bureau supported amendments to the *Competition Act* that would have eliminated the ability to claim efficiencies as a defence to the allegation that a merger would substantially prevent or lessen competition. The Bureau then commissioned an advisory panel to study the appropriate treatment of efficiencies in merger review. The Bureau also indicated that it would refer any serious claims of efficiencies to the Competition Tribunal rather than dealing with the issue internally.

The Commissioner is now restoring some much needed perspective to the Bureau's treatment of efficiencies. Recognizing that efficiencies are rarely a decisive issue in Canadian merger review (there has been only one disputed case turning on the efficiencies defence in the last 20 years), the Commissioner announced that the Bureau no longer considers it desirable or advisable to seek amendments to the law. She also urged parties to make "robust and thoughtful" submissions to the Bureau on efficiencies when considered appropriate. The Commissioner emphasized that the Bureau would not regard these submissions as an admission of anti-competitive concern or necessarily require recourse to the Tribunal.

Another initiative in the area relates to the Bureau's recent release of its Information Bulletin on merger remedies. The Bureau is proposing to follow up this document with an examination of approximately 30 closed merger files to assess whether the remedies that were implemented had the desired effect of avoiding a substantial prevention or lessening of competition. The project will include interviews with the merger participants and various third parties, with the results expected to be published sometime next year. This is a worthwhile venture – similar to what has been done in other jurisdictions such as the U.S. and EU – because it is important that the Bureau have an empirical foundation upon which to base its merger remedy policies.

Sectoral Studies

One of the shifts in emphasis introduced by the Commissioner has been to focus more closely on the application of the *Competition Act* to discrete sectors of the Canadian economy. For example, the Commissioner has made much of her "sector days", in which she has met with representatives of various industries to discuss specific issues relating to their businesses.

While it is safe to say that most businesses, if they had a choice, would prefer not to be the subject of the Bureau's attention, at least two industries or categories of businesses will now be coming under heightened Bureau scrutiny: the pharmaceuticals industry and self-regulated professions.

With respect to pharmaceuticals, the Commissioner stated that the Bureau has developed "a comprehensive work-plan for advocacy in this area". One project will involve a

"market study" of the generic pharmaceuticals sector, which will look at questions such as why generic prices tend to be higher in Canada than in other "comparator countries".

As for self-regulated professions, the Bureau has launched a study into a number of professions to determine the extent to which they may use restrictions to limit access or to control the competitive conduct of their members. The particular professions being studied are accountants, lawyers, optometrists, opticians, pharmacists and real estate agents.

The Bureau's inquiry into self-regulated professions is in line with efforts by competition authorities in other jurisdictions, such as the U.S., EU and Ireland. If the example of these other jurisdictions is followed, the Bureau could be initiating some manner of enforcement action against certain of these professions. Indeed, the Bureau has already intervened this year (albeit in an advocacy rather than litigation role) with respect to issues affecting dental hygienists and real estate agents in various parts of Canada.

The prospect of greater Bureau enforcement against self-regulated professions increases the likelihood of a clash between the requirements of the *Competition Act* and the provincial legislation and regulations that apply to these professions. Traditionally, the interface between the *Competition Act* and provincial laws has been governed by the so-called "regulated conduct defence" (RCD), which provides a form of immunity to persons engaged in conduct that is directed or authorized by other validly enacted legislation. The Commissioner made it clear in her speech that the Bureau will not be deterred by the RCD from using the *Competition Act's* civil provisions to pursue anti-competitive conduct by self-regulated professions. In fact, the Bureau is actively seeking an opportunity to bring this type of issue before the Competition Tribunal for adjudication.

The foregoing is a summary of a recent development in competition law. If you would like additional information about this topic or any aspect of Canadian competition law, please contact [George Addy](#), [Anita Banicevic](#), [John Bodrug](#), [Richard Elliott](#), [Mark Katz](#) in the Toronto office at (416) 863-0900, or [Hillel Rosen](#) in the Montréal office at (514) 841-6400, or any other member of the Competition and International Trade Practice Group at Davies Ward Phillips & Vineberg LLP.

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