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Introduction

This year marks the 20th anniversary of Canada's *Competition Act* ("Act"). The adoption of the Act in 1986 saw Canada's previously moribund criminal merger and monopolization laws replaced with the new legislation's economically based civil merger and abuse of dominance provisions, as well as the establishment of the Competition Tribunal ("Tribunal") to deal with such matters. The result has been a considerable increase in enforcement in these areas, a trend that continued over the past year. In addition, the Act's criminal conspiracy provisions remain a cornerstone of competition law enforcement in Canada, and policing cartels remains a top objective of the Commissioner of Competition ("Commissioner") and her staff at the Competition Bureau ("Bureau"). This article looks at some of the key developments in 2006 relating to conspiracies, mergers and abuse of dominance, as well as other policy developments in Canadian competition law.

Conspiracies

Enforcement Efforts

Prosecuting international and domestic cartels continued to be an enforcement priority for the Bureau in 2006.

The Bureau's anti-cartel efforts began with three distributors pleading guilty in January to a conspiracy involving the distribution of carbonless sheets in Ontario and Quebec (Davies represented one of the parties in this matter.)[1] As part of the plea agreement with the Bureau, the parties were to pay fines totaling $37.5 million and to remove certain key personnel from their positions. The latter reflects the Bureau's continuing commitment to holding accountable those individuals who are involved in cartel activity. The Bureau also finally resolved in August 2006 its investigation of Sotheby's participation in an international price-fixing conspiracy that affected auction services supplied to Canadian clients. Among other things, Sotheby's agreed to maintain and implement compliance measures designed to avoid future offenses and to pay approximately $800,000 of the Bureau's costs.[2]

In September, however, the Bureau suffered a setback when it had a conspiracy prosecution dismissed at the preliminary inquiry stage in *R. v. Bugdens Taxi et al.*[2] By its own admission, the Bureau has a poor track record of litigating conspiracy cases at trial, and *Bugdens Taxi* is a perfect illustration of this trend. The case involved charges under the Act's conspiracy provisions against six taxi companies and seven individuals from the St. John's, Newfoundland area. The allegation was that the accused had unlawfully conspired to refrain from tendering on contracts put up for bid to supply exclusive taxi services to the local airport, hospital, university and hotels. The accused also allegedly deterred others from bidding on the contracts. The goal was apparently to compel the institutions in question to accept a different arrangement that would have been more profitable for the accused.

At a preliminary inquiry (where the prosecution's burden of proof is very low), the judge held that while there was sufficient evidence of an agreement between the accused (indeed, no secret was made of the arrangement), the prosecution had failed to demonstrate that it could establish an "undue" lessening or prevention of competition, another element of the conspiracy offense. In particular, the prosecution had not set forth a clear definition of the relevant market nor adequately explained how the agreement would have an "undue" impact on competition in that market. The judge was also influenced by the fact that the issue had been brought to the attention of the relevant regulatory body, which had declined to intervene.

Possible Amendments?

Because of its lack of litigation success in recent years, the Bureau had supported a proposal to eliminate the "undueness" requirement for certain types of hard core cartel activity, such as price fixing and market sharing, and create a "*per se*" conspiracy offense in Canada. This proposal was considered controversial and opposed by many in the Canadian competition bar. It was thus shelved for further study. In a speech delivered in September 2006, however, the Commissioner indicated that the Bureau continues to review possible amendment options for the Act's conspiracy provisions and hopes to commence public "technical roundtables" on the topic in early 2007.[4] Although the Commissioner did not say so specifically, it would not be surprising to see the Bureau again advocating some form of *per se* conspiracy offense for Canada.

Immunity

The Bureau's other major cartel-related initiative is the review of its "immunity program," pursuant to which cartel participants are offered the incentive of immunity from prosecution if they are the "first in" to disclose their illegal conduct. The Bureau considers its immunity program to be one of its most effective tools for detecting, investigating and prosecuting cartel activity. The Bureau published a consultation paper in February 2006 soliciting views and comments on a series of questions relating to the immunity program. It is now considering the responses and hopes to publish a revised Information Bulletin on the topic by March 2007. As part of this effort, the Bureau also intends to issue a formal document on its policies regarding parties that do not qualify for immunity but seek to cooperate with the Bureau in return for more lenient treatment. Currently, the Bureau employs a largely case-driven, *ad hoc* approach to this issue.

Mergers

Tribunal Limits the Scope for Challenging Merger Settlements

In March 2006, the Tribunal rejected an application by the Burns Lake Native Development Corp. ("Burns Lake") to set aside a merger consent agreement between the Commissioner and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.[3] This was the first (and still only) application to challenge a consent agreement since the Act's new streamlined consent agreement process was introduced in 2002. The Commissioner therefore brought a reference to clarify the scope of such applications. The Tribunal agreed with the Commissioner that Burns Lake was not "directly affected" by the divestiture terms of the consent agreement, as required under the Act, because it had not experienced "a significant impact on a right which relates to competition or on a serious interest which relates to competition." The Tribunal concluded that Burns Lake's interest arose from its minori-

ty shareholding in a joint venture affected by the consent agreement but that the consent agreement did not alter Burns Lake's rights in the joint venture. The Tribunal's decision signals that the scope for third parties to challenge merger settlements will be narrow, although the facts of the case were relatively unique.

Merger Consent Agreements

Of the three merger consent agreements registered with the Tribunal over the past year, two were noteworthy. The first, in December 2005, stemmed from the acquisition by Quebecor Media Inc. ("QMI") of Sogides. Interestingly, the Bureau determined that the merger itself did not raise competition issues with respect to the area of overlap—publishing and distribution of French-language trade books. Instead, the consent agreement indicated that the Bureau had "some concerns" about the fact that Pierre Lesperance, President of Sogides, had an interest in, and was a member of the board of, Renaud-Bray, a bookstore chain that competed against another chain owned by QMI (Archambault). According to the Bureau's backgrounder (released in March 2006), the Bureau was concerned that "an information exchange [between Archambault and Renaud-Bray through Mr. Lesperance] could be detrimental to publishers and distributors who have supplier relationships with Archambault and Renaud-Bray bookstores."[8] Thus, the case signals that the Bureau may take a hard line against interlocking directorates among competitors irrespective of whether there is a clear determination of an underlying competition problem within the meaning of the Act.

In June 2006, the Bureau announced that it had registered a consent agreement in respect of the merger of the electronic television audience measurement ("TAM") operations of BBM Canada and Nielsen Media Research Ltimited, the only two providers of electronic TAM services in Canada.[9] As with the QMI/Sogides merger, the Bureau saw fit to intervene even though it did not articulate clearly how the BBM/Nielsen merger would result in a substantial prevention or lessening of competition, the statutory threshold for prohibiting a merger. Indeed, in its information notice regarding the transaction, the Bureau indicated only, more modestly, that it had "concerns" that the merger "could lessen competition substantially." It is not clear why the Bureau had even this degree of concern, given that (1) there was strong industry support to allow the merger to proceed and thereby create a standard TAM system in Canada, as is the norm in the United States, Britain and Australia, and (2) the Bureau accepted that the transaction would likely "result in a decrease in the overall cost of TAM services for the majority of purchasers since the merger creates a corporation that will pass on savings to its members." The Bureau's apparently weak grounds for concern likely explain why it was prepared to accept a consent agreement consisting of behavioral remedies to resolve the case, notwithstanding its oft-stated preference for divestitures as a merger remedy (see below).[10]

Technical Backgrounders

In 2006, the Bureau increasingly followed the practice of publishing "technical backgrounders" to explain its decisions regarding mergers where it decided not to pursue remedies. Two of these are of particular interest. First in June 2006, the Bureau released a backgrounder explaining its decision in March 2006 not to challenge the acquisition of Maytag Corporation by Whirlpool Corporation **(Davies represented Maytag in this matter)**. The Bureau determined that the merged firm would have a market share "in the combined top and front load laundry segment" of more than 35% and "a still higher share" in the "top load washer segment." However, a more detailed consideration of other factors, notably ease of entry, remaining competition and countervailing buyer power, led the Bureau to conclude that the merger would not lessen competition substantially. The Bureau also noted that it was "conscious that there would be some efficiencies."

In August 2006, the Bureau issued a backgrounder explaining its decision not to challenge the acquisition by Rona Inc. of 51% of the operating businesses of Materiaux Coupal Inc. The analysis focused primarily on the impact of the merger on the sales of lumber and building materials to home building contractors in various local markets in and around Montreal. The highest local market share, approximately 50%, was in the Granby area. However, the Bureau examined other factors, notably the extent of remaining competition, conditions of entry and the impact on purchasing from suppliers and concluded that there was insufficient evidence to oppose the transaction. Nonetheless, the Bureau said that it would monitor the effects of the merger for three years to determine whether enforcement measures are required.

Remedies

On September 22, 2006, the Bureau released its "Information Bulletin on Merger Remedies in Canada."[13] This is the first document that systematically sets out the Bureau's position on merger remedies. The bulletin re-iterates the Bureau's stated preference for structural over behavioral remedies, indicating that the former are generally more effective and enforceable. The principal structural remedy of choice is divestiture of assets. Therefore, much of the bulletin deals with the terms the Bureau will seek in divestiture orders. Some notable considerations are

- divesting a stand-alone business from one of the merging parties is preferable to divesting a "mix and match" of assets from both parties;
- a "hold-separate" order will typically be required pending completion of the divestiture;
- "fix-it-first" solutions are encouraged—i.e., where the divestiture is executed prior to, or concurrently with, the merger;
- the merged entity will usually be given an "initial sale period" of three to six months to effect the divestiture;
- if assets are not divested within the initial sale period, a trustee appointed by the Bureau will take over the divestiture process and will effect the divestiture at no minimum price;
- the trustee may be able to add certain agreed-upon "crown jewel" assets to the divestiture package to ensure that a sale occurs; and
- although portions of the consent agreement may be confidential during the initial sale period, the Bureau will require full disclosure of the agreement upon completion of the divestiture or commencement of the trustee sale.

Efficiencies

In her speech to the Canadian competition bar on September 28, 2006, the Commissioner offered three observations on how the Bureau approaches efficiency claims in merger analysis. First, the Bureau is no longer seeking to amend the Act's efficiencies defense, but instead will evaluate efficiencies within the existing statutory framework and case law. Second, the Bureau encourages parties to make "robust and thoughtful" submissions regarding efficiencies and to not be deterred by "an unfounded notion that to do so is somehow an admission of anti-competitive concern." Third, the Bureau will make its own independent assessment of efficiencies and in "rare" cases may clear mergers on the basis of efficiencies without subjecting parties to the Tribunal process. These clarifications are welcome, although it remains to be seen whether efficiencies will have practical relevance in other than "rare" cases.

Investment Canada

An increasingly important aspect of the regulatory review of mergers in Canada is the role of the *Investment Canada Act* ("ICA"), pursuant to which foreign purchasers of Canadian businesses may be required to demonstrate that the transaction is of "net benefit to Canada" before they are allowed to proceed. In cases where prior approval is necessary, foreign investors are generally required to provide undertakings related to matters such as investment expenditures, employment and head office location.

The interplay of reviews under the ICA and competition laws has taken on increasing importance in Canada. Notably, the August 2006 acquisition by Xstrata plc of Falconbridge Limited was the culmination of a long-drawn-out take-over battle in which Xstrata required timely approval under the ICA, as well as competition approvals in Canada, the United States and Europe, at the same time that Inco Limited was securing competition approvals in the U.S. and Europe for its bid for Falconbridge. (Davies represented Xstrata in this matter). The recent, heightened pace of foreign acquisitions of major Canadian businesses suggests that the ICA may take on even greater prominence in the regulatory review of mergers in Canada.

Abuse of Dominance

Canada Pipe

The key development in 2006 relating to the Act's abuse of dominance provisions was the release of the Federal Court of Appeal's judgment in the *Canada Pipe* matter (Davies represents Canada Pipeline in this matter).[4] The court overturned a 2005 decision of the Competition Tribunal dismissing the Bureau's application and ordered the case back to the Tribunal for redetermination.

The case involves a form of "loyalty rebate" offered by Canada Pipe Company Ltd. to customers. Canada Pipe manufactures cast-iron drain, waste and vent ("DWV") products. To encourage sales of these products, customers are offered quarterly and annual rebates, as well as significant point-of-purchase discounts, should they purchase all of their cast-iron DWV requirements from Canada Pipe.

The Bureau applied to the Tribunal in 2002 for an order requiring that Canada Pipe's loyalty program (known as the "Stocking Distributor Program" or "SDP") be discontinued. Following a lengthy hearing, the Tribunal dismissed the Commissioner's application in February 2005. Although the Tribunal concluded that Canada Pipe was indeed the dominant supplier of cast iron DWV across Canada, it held that the SDP did not constitute an "anticompetitive act" and had not resulted in an actual or likely "substantial lessening or prevention of competition."

Among other things, the Tribunal found that the SDP had not prevented other manufacturers from entering the market and competing successfully against Canada Pipe. In fact, since the implementation of the SDP in 1998, imports of cast-iron DWV products into Canada had increased, and the first new domestic manufacturer of these products in 30 years had been established. There was also significant evidence of competitive pricing. The Tribunal also accepted that the SDP was necessary for Canada Pipe to maintain a full line of inventory, including smaller, less profitable items that were nonetheless important for its customers' businesses.

The Commissioner appealed the Tribunal's decision to the Federal Court of Appeal, arguing that the Tribunal had erred by applying the wrong legal tests to determine whether the SDP constituted an "anticompetitive act" and resulted in a "substantial lessening or prevention of competition." In a decision released on June 23, 2006, the court upheld the Commissioner's appeal and ordered the matter back to the Tribunal for redetermination based on the new legal standards articulated in its decision.

With respect to the "anticompetitive act" element, the court held that the Tribunal had erred by assessing whether the SDP had a negative impact on the general state of competition in the market, e.g., by considering if there had been a detrimental effect on pricing or competitive entry. The court stated that the Tribunal should have considered instead whether there was an intended negative effect on competitors, the impact on competition being properly addressed only at the final stage of the analysis, when determining whether there has been a substantial prevention or lessening of competition.

As to that latter element, the court held that the correct legal test for identifying a "substantial prevention or lessening of competition" is whether "the relevant markets—in the past, present or future—[would] be substantially more competitive but for the impugned practice of anticompetitive acts" (emphasis added). The court stated that the Tribunal had erred by focusing on the fact of successful entry by competitors without asking whether there would have been "significantly more" competitive entry "but for" the establishment of the SDP.

A majority of the court (2:1) also dismissed Canada Pipe's cross-appeal from the Tribunal's findings on market definition (Canada Pipe said the market should not be limited to cast-iron DWV products) and market power (Canada Pipe denied that it had such power). The majority held that the Tribunal's findings were reasonable and therefore should be upheld on the grounds of "curial deference."

Canada Pipe has applied for leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. This application is not expected to be decided until 2007.

Sectoral Studies

One of the shifts in emphasis introduced by the current Commissioner since she assumed office has been to focus more closely on the application of the Act to discrete sectors of the Canadian economy. As a result, at least two industries or cat-

egories of businesses will be coming under heightened Bureau scrutiny in the coming year: the pharmaceuticals industry and self-regulated professions.

Regarding pharmaceuticals, 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 launched a study in 2006 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 professions being studied are accountants, lawyers, optometrists, opticians, pharmacists and real estate agents.

The study into self-regulated professions follows several cases in which the Bureau took enforcement steps in this area (albeit in an advocacy rather than litigation role). For example, the Bureau sent letters to the governments of Alberta, Nova Scotia and New Brunswick in March 2006 setting out eight general guiding principles that they should follow in modifying their regulations for dental hygienists. These guidelines address issues such as market access, transparency, impartiality and periodic reassessment. In June 2006, the Bureau persuaded Alberta's Real Estate Council to eliminate rules prohibiting real estate brokers from offering cash incentives to buyers and to remove certain restrictions on the payment of referral fees.

The prospect of greater Bureau enforcement against self-regulated professions increases the likelihood of a clash between the requirements of the Act and the provincial legislation and regulations that apply to these professions. Traditionally, the interface between the Act and provincial laws has been governed by the "regulated conduct defense" (RCD), which provides a form of immunity to persons engaged in conduct that is directed or authorized by other validly enacted legislation. The Bureau has made it clear, however, that it will not be deterred by the RCD from using the Act's civil provisions to pursue anticompetitive conduct by self-regulated professions. This message is spelled out, for example, in a Technical Bulletin on the RCD which the Bureau released in June 2006. In fact, according to public statements by the Commissioner, the Bureau is actively seeking an opportunity to bring this type of issue before the Tribunal for adjudication. ■

1 http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2018&lg=e. Davies Ward Phillips & Vineberg LLP ("Davies") acted as counsel to one of the parties in this matter.

2 http://www.canlii.org/nl/cas/nlpc/2006/2006nlpc10069.html.

3 http://www.competitionbureau.gc.ca/PDFs/SpeechFallCBAConference_06-09-28e.pdf.

4 http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=142&lg=e. See also http://www.competitionbureau.gc.ca/pdfs/2006-cba-conference-en.pdf.

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