



“Healthy Competition for Canada’s Health Care Markets:” A New Priority for the Competition Bureau

by Mark Katz

Davies Ward Phillips & Vineberg LLP

INTRODUCTION

Given the role of governments in running Canada’s health care (medicare) system, the Competition Bureau has not traditionally made the health care industry one of its enforcement priorities.

That situation has changed. Under the leadership of Sheridan Scott, Canada’s current Commissioner of Competition, the Competition Bureau has identified health care as one of a handful of industries on which to focus its efforts.¹

According to the Commissioner, this newfound attention is warranted because, at approximately 10 percent of GDP, the health care industry is of obvious importance to the Canadian economy. Moreover, contrary to the impression that many Canadians (and others) have, much of the health care sector actually operates in more or less competitive markets, involving the purchase and sale of a multitude of products and services. These include: hospital construction; medical equipment and supplies;

pharmaceuticals; professional services; and a vast array of health-oriented consumer products.

The Bureau’s goal in focusing on health care is to permit competitive markets, where they exist, to function effectively. Or, as the Commissioner has put it, to ensure that “Canada’s health care markets benefit from healthy competition.”²

The Bureau has organized its efforts in this regard around three broad categories: outreach to health care providers and consumers; targeted enforcement where the *Competition Act* has been breached; and advocacy work to promote change by legislators and regulators.

OUTREACH

The Bureau’s health care outreach efforts have focussed on educating stakeholders about potentially anti-competitive conduct in the procurement of goods and services. For example, the Bureau has held sessions with a variety of provincial health authorities to help them identify bid-rigging schemes

that target public procurement.³ The Bureau has also made presentations on potentially anti-competitive clauses in procurement contracts, such as exclusive dealing and tied selling clauses.⁴

The Bureau is trying to heighten consumer awareness about misleading claims in the health care sector.⁵ For example, the Bureau’s website contains a special section dealing with health fraud issues.⁶ The Bureau also has developed mock “teaser” internet sites in cooperation with partner agencies in the U.S. and Mexico that help warn consumers of deceptive practices.⁷ The Bureau’s recent focus has been on misleading claims involving diabetes and weight loss and it is now in the process of determining additional priority areas.

ENFORCEMENT

To date, the Bureau’s enforcement efforts in the health care sector have also been directed at combating misleading claims, particularly on the internet. As an initial step, the Bureau uses internet sweeps to help identify possible targets.⁸

¹ See Sheridan Scott, Comm’r of Competition, “Here to Help You: Healthy Markets for Healthy Canadians,” Info. Session with Nat’l Health Care Orgs., Ottawa, Ontario, Nov. 9, 2006 (hereinafter “Here to Help You: Healthy Markets for Healthy Canadians”), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02233e.html>; see also Sheridan Scott, Comm’r of Competition, “Speaking Notes on Competition Law Essentials,” The Continuing Legal Educ. Soc’y of British Columbia, Vancouver, British Columbia, Dec. 1, 2006, at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02239e.html>.

² Here to Help You: Healthy Markets for Healthy Canadians, *supra* note 1.

³ Section 47 of the *Competition Act* makes it a criminal offence to be a party to a bid-rigging agreement, defined as an agreement or arrangement whereby persons either undertake not to submit a bid, or to coordinate the terms of their bid, in circumstances where this arrangement is not made known to the person who put the bid out for tender.

⁴ Section 77 of the *Competition Act* makes it a civil reviewable practice to engage in exclusive dealing or tied selling where the result is to lessen competition substantially.

⁵ It is a criminal offence in Canada to “knowingly or recklessly” make a representation to the public that is false or misleading in a material respect (*Competition Act*, s. 52). The Bureau can also initiate civil proceedings for misleading representations where the “knowingly or recklessly” element is not present (*Competition Act*, s. 74.01).

⁶ See http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/h_01962e.html.

⁷ See *FatFoe Mock Teaser Website*: <http://wemarket4u.net/fatfoe/>; *Glucobate Diabetes Mock Teaser Website*: <http://www.wemarket4u.net/glucobate/>.

⁸ This is part of the Bureau’s “Project FairWeb.” For a more detailed description, see <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00237e.html>.

It then sends notices to the operators of these websites conveying its concerns. According to the Commissioner, over 80 percent of the businesses contacted take corrective measures in response. Where they do not, the Bureau will consider additional enforcement steps, such as contested court proceedings.

For example, the Bureau brought proceedings against a chain of weight-loss clinics in the Province of Québec, that resulted in the imposition of administrative monetary penalties and a 10-year prohibition order.⁹ The Bureau has also commenced proceedings against companies for making false or misleading claims about cancer treatments and the health benefits of indoor tanning.¹⁰

In addition, the Bureau has persuaded leading cigarette manufacturers in Canada to stop using “light” and “mild” descriptions for their products.¹¹

ADVOCACY

Advocacy efforts are a very important aspect of the Bureau’s health care agenda. These efforts involve both research into potential issues and submissions to relevant authorities about possible legislative changes. The two subject areas that the Bureau has focussed on in particular are generic drugs and professional services.

1. The Bureau's Generic Drug Study

The Bureau initiated a study in 2006 on the supply of generic drugs in Canada. Generics account for approximately 40 percent of all drugs dispensed through retail pharmacies in Canada and over

\$3 billion in spending. The purpose of the study was to investigate why prices for generic drugs in Canada tend to be higher than in comparable jurisdictions.

The Bureau’s study was released on October 29, 2007.¹² The Bureau found that strong competition exists among manufacturers in the supply of many generic drugs in Canada. This competition is reflected, among other things, in the rebates that manufacturers pay to pharmacies to have their products stocked. In provinces where such payments are permitted (they are not allowed in Ontario and Québec), rebates represent an average of 40 percent off the invoice price. However, because of the way government and private drug plans are structured in Canada, there is little incentive to pass these savings along to consumers. These plans are generally based on maximum allowable prices, both in terms of what manufacturers are paid and what pharmacies can charge consumers. For obvious reasons, actual prices tend to reflect these maximums.

The Bureau’s study offered several possible suggestions for changing this situation, including:

- providing manufacturers with incentives to be listed on plan formularies;
- using competitive tendering processes to determine the products that can be dispensed by pharmacies;
- monitoring the net price paid by pharmacies for generic drugs to

ensure the prices paid by plans reflect competitive conditions; and

- an increased role for private plans to obtain lower prices for their customers.

The Bureau acknowledges that implementing recommendations such as the foregoing would require important changes to the drug procurement system in Canada. It will continue to work with the drug sector to explore possible solutions.

2. Enhancing Competition Among Health Care Professionals

The Bureau is very interested in promoting greater competition in Canada’s professional services sector. The Bureau has noted that Canadian professions tend to be heavily regulated in comparison to other countries and that this may explain why Canadian professionals also tend to be less productive and efficient on average.

(i) Study of Self-Regulated Professions

Acting on these concerns, the Bureau conducted a study of the rules and regulations governing five specific professions in Canada. The purpose was to determine whether these professions employ restrictions that limit access to their businesses or control the competitive conduct of their members or related markets. The Bureau released its study on December 11, 2007, identifying several practices that it considers troubling and urging the professions under scrutiny (and others) to revise or repeal any anti-competitive restrictions.¹³

⁹ Competition Bureau, News Release, “Tribunal Decision Follows Competition Bureau Investigation into Bogus Claims” (Sept. 25, 2006), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02192e.html>.

¹⁰ Competition Bureau, News Release, “Fabutan Agrees to Stop Promoting Unproven Health Benefits of Indoor Tanning” (Feb. 27, 2006), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02027e.html>; Competition Bureau, News Release, “Criminal Charges Laid in Cancer Treatment Scam Following Competition Bureau Investigation” (Aug. 2, 2005), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01928e.html>.

¹¹ Competition Bureau, News Release, “Competition Bureau Reaches Agreement with the Three Major Cigarette Manufacturers to Stop Using ‘light’ or ‘mild’ on Cigarette Packages” (Nov. 9, 2006), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00306e.html>; Competition Bureau, News Release, “Competition Bureau Reaches Further Agreements with Six Cigarette Companies to Stop Using ‘light’ and ‘mild’ on Cigarette Packages” (July 31, 2007), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02383e.html>.

¹² Competition Bureau, *Canadian Generic Drug Sector Study* (Oct. 29, 2007), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02495e.html>.

¹³ Competition Bureau, *Self-Regulated Professions: Balancing Competition and Regulation* (Dec. 11, 2007), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>.

Two of the professions studied by the Bureau are part of the health sector: pharmacists and optometrists. Among other things, the study recommends that both of these professions (as well as others) discontinue publishing suggested fee schedules for their services. While fee schedules may not contravene the *Competition Act* so long as they are truly voluntary in nature, they remain a source of unease for the Bureau because of the risk of collusion that they create. The Bureau's investigation also did not disclose any rationale for the use of fee schedules that is linked to the public interest.

As with other professions, the Bureau's study also recommends that pharmacists and optometrists eliminate all restrictions on advertising that go beyond protecting consumers from false or misleading claims. For example, a number of provincial optometrist associations prohibit any form of price advertising or comparative advertising. Similar restrictions on comparative advertising are imposed by pharmacists' associations. In the Bureau's view, restrictions of this nature impede competition and reduce incentives to develop more efficient or innovative services.

The Bureau's study does not threaten enforcement proceedings. Rather, it is the Bureau's hope that provincial legislatures and professional associations in Canada will take the initiative to revise any rules and regulations that have anti-competitive effects. The Bureau does plan, however, to review in two years whether its recommendations for the professions covered by its study have been implemented.

(ii) Dental Hygienists

Another of the Bureau's concerns is that professions not unduly restrict competition from alternative service providers, such as other professions or quasi-professions. The Bureau has been particularly active in this regard in the dental sector, advocating to provincial governments that they permit dental hygienists greater scope to offer competing services to dentists.

In late 2005/early 2006, for example, the Commissioner sent letters to three provincial governments (Alberta, Nova Scotia and New Brunswick) regarding their respective proposals to permit dental hygienists to perform a number of authorized activities without the supervision of dentists ("self-initiate"), including prescribing certain drugs.¹⁴ These legislative proposals included plans to establish independent professional associations tasked with the governance of dental hygienists in the public interest. In January 2007, the Commissioner sent a similar letter regarding proposed changes to Ontario legislation.¹⁵

The Commissioner's objective in taking these steps was to ensure that each provincial government took competition considerations into account when implementing its proposal. In particular, the Commissioner's concern was that dentists not be allowed to retain some form of control over the activities of hygienists. The Commissioner acknowledged that there may be legitimate concerns about "fracturing the collaboration" between dental hygienists and dentists and the effect this may have on patient safety. However, she urged that any safety

issues be addressed through the supervision of dental hygienists by their own associations, rather than by giving dentists control over the freedom of dental hygienists to self-initiate. In the Commissioner's view, if dentists were allowed to limit the ability of dental hygienists to self-initiate, access to dental hygiene services for certain groups could be unnecessarily restricted.

The Bureau's efforts have met with some success. In 2006, for example, the government of Alberta enacted dental hygienist legislation that reflected suggestions made by the Commissioner.¹⁶ In October 2007, the Ontario government followed suit by passing its own legislation allowing dental hygienists to self-initiate independently of dentists.¹⁷ Finally, in November 2007, the Nova Scotia government introduced similar legislation to govern the relationship between dentists and hygienists in that province.¹⁸

CONCLUSION

The state of the Canadian medicare system is a contentious subject today, with serious debate surrounding whether it should remain publicly funded in its entirety or permit some form of private care. The Commissioner has been very clear that the Bureau does not wish to enter into this discussion. However, to the extent that the health care system already contains competitive elements, the Bureau will focus its enforcement efforts on ensuring that these markets deliver high quality, innovative and low cost products and services. ■

¹⁴ Sheridan Scott, Letter to Dona Carlson, Gov't of Alberta (Jan. 19, 2006), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02033e.html>; Sheridan Scott, Letter to Dennis Holland, Gov't of Nova Scotia (Dec. 22, 2005), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02035e.html>; Sheridan Scott, Letter to G. Robert Basque, Forbes Roth Basque (Jan. 27, 2006), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02034e.html>.

¹⁵ Sheridan Scott, Letter to Royal College of Dental Surgeons of Ontario, *et al.* (Jan. 18, 2007), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02278e.html>.

¹⁶ Competition Bureau, News Release, "Competition Bureau Supports Alberta Decision to Allow Greater Competition in Dental Hygiene Services" (Nov. 1, 2006), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02225e.html>.

¹⁷ Competition Bureau, News Release, "Competition Bureau Welcomes Greater Competition in Dental Hygiene Services" (Oct. 15, 2007), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02494e.html>.

¹⁸ Competition Bureau, News Release, "Competition Bureau Applauds Nova Scotia Move to Permit Greater Competition in Dental Hygiene" (Nov. 28, 2007), at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02522e.html>.