



***COMPETITION LAW
CONSIDERATIONS FOR
JOINT VENTURES AND
OTHER COLLABORATIONS***

**Federated Press
Partnerships, Limited Partnerships
and Joint Ventures**

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DAVIES

APPLICABLE PROVISIONS

- Joint venture collaborations may be subject to *Competition Act* provisions dealing with:
 - Mergers
 - Agreements with competitors (criminal/civil)



MERGERS

MERGER REVIEW

- Two aspects
 - Pre-Merger Notification
 - Substantive Review

PRE-MERGER NOTIFICATION

- Part IX of the *Competition Act*
- Applies, where relevant thresholds are met, if transaction involves:
 - Acquisition of assets
 - Acquisition of shares
 - Amalgamation
 - Formation of non-corporate "combination"; or
 - Acquisition of interest in non-corporate "combination"

PRE-MERGER NOTIFICATION: EXEMPTIONS

- Exemption available from pre-merger notification for non-corporate combinations where certain criteria are satisfied:
 - Written agreement
 - Obligation to contribute assets
 - Continuing obligation between the parties but no change in control
 - Activities of combination are restricted
 - Orderly termination

SUBSTANTIVE REVIEW

- Section 91 of *Competition Act* defines "merger" broadly as:

"the acquisition or establishment, direct or indirect, by one or more persons... of control over a significant interest in the whole or a part of a business of a competitor, supplier, customer or other person"

- "Significant interest" = ability to materially influence the economic behaviour" of a business (*Merger Enforcement Guidelines*)
 - Example: Bureau challenged Air Canada/United Continental joint venture under the merger provisions even though there was no acquisition of an ownership stake

SUBSTANTIVE REVIEW

- Test: Is the joint venture (merger) likely to prevent or lessen competition substantially in a relevant market?
- Variety of factors will be considered (e.g., market shares, barriers to entry, nature of remaining competition)
 - Efficiencies defence
- Exemption for non-corporate combinations
 - Specific project or program of research and development which would not likely take place in absence of the combination
 - No lessening of competition except to extent reasonably required



AGREEMENTS WITH COMPETITORS

AGREEMENTS WITH COMPETITORS : CRIMINAL

- Prohibits agreements with competitors to:
 - fix prices
 - allocate markets
 - control production or supply
- No longer requirement to prove anti-competitive effect (*per se*)
- Agreement has very broad meaning – not limited to formal written contracts
- Arguably does not apply to agreements for the purchase of a product
- Penalties:
 - Imprisonment for a term not exceeding 14 years
 - Fine not exceeding \$25 million
- Limited "ancillary restraints" defence

AGREEMENTS WITH COMPETITORS : CRIMINAL

- Separate *per se* offence for bid-rigging
- Applies to agreements or arrangements:
 - Not to submit a bid
 - To withdraw a bid
 - To submit a bid agreed upon between bidderswhere the agreement or arrangement is not made known to the person calling for the bids or tender
- Fines in discretion of court/maximum imprisonment of 14 years

AGREEMENTS WITH COMPETITORS : CIVIL

- Applies to any agreement or arrangement between competitors likely to prevent or lessen competition substantially in a relevant market
 - Efficiencies defence also available
- Remedies:
 - Prohibit person from doing anything under the agreement
 - Require person to take any other action on consent

AGREEMENTS WITH COMPETITORS: BUREAU GUIDELINES

- According to its *Competitor Collaboration Guidelines*, Bureau is unlikely to pursue certain types of joint ventures criminally:
 - Joint purchasing/joint selling agreements
 - R & D agreements
 - Joint production agreements
 - Franchise agreements/dual distribution agreements
 - Non-compete clauses
- Guidelines not binding on Bureau, courts or private plaintiffs - private plaintiffs may bring an action for damages alleging a criminal offence

SOME RECENT EXAMPLES

- *321665 Alberta Ltd. v. Exxon Mobil Canada Ltd.*
- *Commissioner of Competition v. United Airlines/Air Canada*
- Chesapeake Energy/Encana Corp. (U.S.)

QUESTIONS TO ASK ABOUT JOINT VENTURES/COLLABORATIONS

- What is the purpose of the arrangement?
- Will the arrangement involve competitors agreeing to restraints on pricing, sales/markets, capacity/production, bids?
- Are these restraints necessary to the arrangement?
- Will the arrangement involve the exchange of competitively sensitive information between competitors (consider need for guidelines)?
- What is the parties' market position in the area of business subject to the arrangement?
- Is there any agreement/understanding with respect to other areas of the parties' businesses?
- Will anyone (customers, suppliers, competitors) object to the arrangement?



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