



Canada and the U.S.
Differences In Competition Law

General

- *Competition Act* is a federal statute administered by the Competition Bureau; there is no other related federal or provincial legislation.
- Act distinguishes between conduct which is a criminal offence subject to fines, imprisonment and private actions for damages and conduct which is a civil reviewable practice subject only to a remedial order (except for abuse of dominant position which may also be subject to an administrative monetary penalty) geared primarily to prohibiting conduct (i.e., no fines, imprisonment or private actions for damages).
- Criminal offences include agreements between competitors which unduly lessen competition* and bid-rigging; civil reviewable practices include mergers, abuse of dominant position (monopolization), refusal to deal, price maintenance, tied selling, exclusive dealing and vertical market restriction; criminal offences are dealt with by the Courts while civil reviewable practices are dealt with by the Competition Tribunal.
- *Act* provides for private right of action for actual damages only and only in respect of conduct prohibited by the criminal offences. An application to the Tribunal may only be instituted by the Bureau except for the civil reviewable practices of refusal to deal, price maintenance, tied selling, market restriction and exclusive dealing which may also be initiated by an affected party.
- Price discrimination (different pricing to competing purchasers) is not proscribed by the *Act*.

Agreements Between Competitors*

* These provisions will be replaced on March 12, 2010 with a dual-track approach to agreements between competitors, with a *per se* criminal offence (effect on competition test is removed) to address hard core cartel conduct (price fixing, divvying up markets and output restriction) and a civil reviewable practice provision to address other agreements that substantially lessen or prevent competition. Under the criminal provision, maximum fine will be Cdn. \$25 million per count and individuals will be subject to a fine and/or imprisonment up to 14 years.

- With the exception of bid-rigging, agreements between competitors (such as price fixing, market or customer allocation, profit sharing, output restriction and boycotts) are not *per se* unlawful, being subject to an undue lessening of competition (rule of reason) analysis; while the competitive effects test allows some flexibility in competitor joint ventures and strategic alliances, hard-core cartel activity should be treated as if it is *per se* unlawful.
- Maximum fine is Cdn. \$10 million per count and individuals are subject to a fine and/or imprisonment up to 5 years.

Price Maintenance

- Specific civil reviewable practice which involves agreement, threat or promise influencing upward or discouraging the reduction of the price at which another person supplies or advertises a product, or refusing to supply or otherwise discriminating against another because of the other's low pricing policy, and, the conduct has or is likely to have an adverse effect on competition.
- Supplier is permitted to influence downward, or to discourage the increase of, prices of another person.
- Tribunal may prohibit supplier from continuing to engage in the conduct or require supplier to accept another person as a customer on usual trade terms.

Mergers

- *Act* broadly defines a merger as the acquisition of control over or significant interest in the business of another.
- Bureau generally may only challenge a proposed or completed merger prior to or within 1 year of transaction completion.
- Substantive law as to whether a merger is likely to "substantially lessen competition" is similar. However, the *Act* provides an efficiency defence if the gains resulting from a merger would be greater than and offset its likely anticompetitive effects.
- Merger pre-notification process is similar but notification form is different. Waiting period is 30 days subject to receipt of a supplementary information request which extends the waiting period to 30 days following provision of all additional information requested. Basic threshold requirements for pre-notification are: (i) that the parties to the transaction, together with their affiliates, have assets in Canada or annual gross revenues from sales in, from or into Canada exceeding Cdn. \$400 million, (ii) the transaction involves a business that has an undertaking in Canada or controls a company that carries on such an undertaking; and (iii) the Canadian assets directly or indirectly being acquired, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds Cdn. \$70 million. There are additional thresholds and

exceptions applicable depending upon the type of merger – share acquisition, asset acquisition, amalgamation or combination (other than through a company). The filing fee is Cdn. \$50,000. plus applicable taxes.

- *Act* allows the Bureau to issue an advance ruling certificate in respect to a proposed transaction which would have little or no effect on competition. Except for the filing fee, the pre-notification requirements need not otherwise be complied with when a certificate has been issued.

Abuse of Dominant Position

- Specific civil reviewable practice whereby one or more persons that substantially or completely control a class of business have engaged in a practice of anticompetitive acts (essentially conduct directed at a competitor that is predatory, exclusionary or disciplinary) having or likely to have the effect of preventing or lessening competition substantially.
- Tribunal may prohibit engaging in such practices or direct the taking of action, including the divestiture of assets or shares, as is reasonable and necessary to overcome effects of the practice, and, may impose an administrative monetary penalty not exceeding Cdn. \$10 million for an initial transgression and not exceeding Cdn. \$15 million for each subsequent transgression.

Refusal To Deal

- Specific civil reviewable practice whereby Tribunal may order one or more suppliers to accept person as a customer on usual trade terms upon proof that person is substantially affected or precluded from carrying on business, insufficient competition among suppliers, product is in ample supply and refusal has or is likely to have an adverse effect on competition.

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