i | Competition and Antitrust Law

1. Overview

Competition law in Canada is set out in a single federal statute, the *Competition Act*. Related regulations, guidelines, interpretation bulletins and case law all provide guidance as to how the *Competition Act* is administered and enforced. The *Competition Act* is primarily administered and enforced by the Competition Bureau (the "Bureau") and the Department of Justice. Certain provisions of the *Competition Act* also allow private parties to initiate enforcement proceedings.

The purpose of the *Competition Act* is to maintain and encourage competition in Canada, and it addresses three categories of conduct: mergers, criminal matters and reviewable practices.[1]

2. Mergers

The *Competition Act* defines a merger as the acquisition or establishment — whether by purchase of shares or assets or by amalgamation, combination or otherwise — of control over or a significant interest in all or part of a business.

The Bureau has adopted an expansive interpretation of this definition. It has indicated that it will generally not consider the acquisition of less than 10 per cent of the voting shares of a corporation to be a merger. It may consider the acquisition of between 10 and 50 per cent to be a merger, depending on whether the applicable facts suggest that the purchaser will acquire the ability to materially influence the economic behaviour of the target. The Bureau has also taken the position that contractual arrangements, such as a shareholders agreement or management agreement, can also be considered a merger, provided they confer control over all or part of a business.

Unless the Bureau issues an advance ruling certificate (discussed later in this section), it has the right to challenge any merger prior to its completion and for one year following its completion. This right applies to all mergers, including those that do not exceed the mandatory pre-notification thresholds (also discussed later in this section). As a result, the Bureau has challenged some mergers that did not exceed the pre-notification thresholds, although this is uncommon.

a. Notifiable Mergers

Mergers that exceed certain thresholds must be pre-notified to the Bureau and may not be completed until either: (i) the waiting period has expired and the Bureau has not obtained an order prohibiting closing, or (ii) the Bureau has completed its review and rendered a disposition that permits closing.

b. Thresholds

Notification is required if both of the following thresholds are exceeded:

- Party Size: The parties, together with their affiliates, have assets in Canada or annual gross revenues from sales from or into Canada (exports and imports) that exceed $400 million; and
- Acquired Business Size: The aggregate value of the assets in Canada to be acquired, or the annual gross revenues from sales in or from Canada generated by such assets, exceeds $73 million.[2]

Additional thresholds apply to proposed acquisitions of equity securities or equity interests. For example:

- The proposed acquisition of voting shares of a publicly traded corporation will not be notifiable unless, following completion of the transaction, the purchaser will own more than 20 per cent of the voting shares (or more than 50 per cent if the purchaser already owns more than 20 per cent);
- The proposed acquisition of voting shares of a private corporation will not be notifiable unless the purchaser will own more than 35 per cent of the voting shares (or more than 50 per cent if the purchaser already owns more than 35 per cent).

The financial threshold analysis is based on the most recently available audited financial statements, provided that they are sufficiently recent. If audited financial statements are too old, do not exist or do not contain sufficiently granular information, the analysis is to be based on unaudited financial statements and internal books and records. The threshold analysis must be updated to reflect material developments (such as acquisitions, divestitures or writedowns) that occurred subsequent to the currency date of the financial statements on which the initial analysis was based.

[1] The *Competition Act* also contains civil and criminal provisions relating to advertising and marketing matters. For more information, see Section H, "Advertising and Marketing."

[2] The figure of $73 million applied in 2011. It is generally adjusted annually based on the change in Canada's GDP.

If a proposed transaction exceeds the thresholds, it is important to note the following:

- Notification is required even if the transaction obviously raises no substantive competition-law concerns; and
- Failure to comply with the pre-notification provisions can result in a substantial administrative monetary penalty and/or criminal conviction.

c. Notification Procedure

Notification can be effected in two ways: (i) the filing of a prescribed form by each of the parties, and/or (ii) requesting an advance ruling certificate. It is not uncommon to submit both types of notification.

i. Prescribed Form

The prescribed form requires information about the business of the parties and their affiliates, including a narrative description, financial statements, and customer and supplier lists. Strategic documents relating to the transaction — including business and marketing plans, board papers and competition analysis — must also be submitted. This should be kept in mind when such documents are being prepared.

The submission of complete prescribed forms, as determined by the Bureau, triggers a 30-day waiting period. During this time, the parties may not complete the transaction unless the Bureau completes its review in less than 30 days and renders a disposition that permits the parties to close.

During the initial 30-day period, the Bureau has the right to issue a supplementary information request (SIR). SIRs are generally reserved for transactions that appear to raise significant competition-law concerns. SIRs are relatively rare, with only about half a dozen issued per year. However, the Bureau only acquired the power to issue SIRs in 2009, so the sample period is still fairly short.

When they are issued, SIRs tend to require the production of substantial additional information. It usually takes the parties several months to respond to a SIR. The issuance of a SIR has the effect of extending the waiting period until 30 days after compliance with the SIR, as determined by the Bureau.

ii. Advance Ruling Certificate

Another way of effecting notification is to request an advance ruling certificate (ARC). An ARC request is a letter, typically submitted by the purchaser's counsel, that describes the parties, the transaction and the relevant industry, and explains why the transaction should not concern the Bureau. An ARC is the best possible outcome for the parties — especially for the purchaser, as it bulletproofs the transaction from subsequent challenge, provided the transaction is completed within one year of issuance of the ARC. Accordingly, the Bureau typically only issues ARCs in respect of transactions that do not raise material substantive concerns.

In situations where the information provided in an ARC request is sufficient for the Bureau to complete its review but where the Bureau is neither comfortable enough to issue an ARC nor concerned enough to challenge the transaction, the Bureau will typically issue a "no-action letter" (NAL) and waive the parties' obligation to submit prescribed forms.

A NAL essentially advises the parties that while the Bureau has no current plans to challenge the transaction, it reserves the right to do so within one year of closing. As a practical matter, parties can take a high degree of comfort from the issuing of a NAL, as it generally indicates that the transaction will not be subsequently challenged. Since 1986, when merger review was introduced in Canada, the Bureau has only challenged one transaction after issuing a NAL, and it subsequently aborted that challenge.

An ARC request does not trigger a statutory waiting period. However, the Bureau has issued guidance indicating that it will endeavor to complete its review of transactions that it considers to be "non-complex"

within 14 days of receiving a complete ARC request, and within 45 days of receiving a complete ARC request for transactions that it considers to be "complex."

Non-complex transactions are readily identifiable by the clear absence of competition issues and include transactions where there is no or minimal overlap between the parties. Complex transactions involve the merger of competitors or the merger of customers and suppliers where there are indications that the transaction may, or is likely to, create, maintain or enhance market power. The vast majority of transactions are classified as non-complex, with the Bureau completing its review within 14 days.

From the parties' perspective, particularly the purchaser's, closing after an affirmative clearance from the Bureau in the form of an ARC or a NAL is typically preferable to closing on the basis of the passive expiration of the waiting period before the Bureau has indicated whether it plans to challenge the transaction. However, parties have the right to close on the basis of the passive expiration of the statutory waiting period without confirmation as to what the Bureau may do.

d. Filing Fee

The filing fee is $50,000. This applies regardless of whether notification is effected by way of prescribed forms, ARC request or both. As to which party pays the filing fee, this is a matter of business negotiation and should be addressed in the purchase agreement. Common arrangements include the purchaser paying 100 per cent of the filing fee or the parties agreeing to each pay half.

e. Test

The test that the Bureau applies in determining whether to challenge a proposed transaction is whether the transaction would prevent or lessen (or be likely to prevent or lessen) competition substantially. This test, as judicially defined, seeks to determine whether the transaction would give the merged firm the ability to profitably raise prices in the post-merger competitive environment.

f. Possible Outcomes

The possible outcomes of a merger review can generally be summarized as follows:

- The Bureau renders a disposition that permits the parties to close on their desired schedule without any changes to the transaction. This occurs in the vast majority of cases;
- The Bureau takes longer than the parties would desire to complete its review. Closing is delayed but ultimately not challenged, without any substantive change to the transaction. While not uncommon, this is certainly not the norm;
- The Bureau agrees not to challenge the transaction on the basis of concessions made by the parties, such as the divestiture of certain assets. This is the normal outcome in relatively rare situations where the proposed merger raises significant competitive concerns; or
- The Bureau challenges the transaction before the Competition Tribunal (the "Tribunal"), a specialized quasi-judicial tribunal, by seeking an order to prohibit its completion. If the transaction is already complete, the Bureau seeks an order requiring that it be undone or requiring the purchaser to sell part or all of the acquired business to a third party. This is extremely uncommon.

3. Criminal Matters

As a result of significant amendments to the *Competition Act* that took effect in March 2009 and March 2010, several criminal offences were repealed and/or converted into reviewable practices. The *Competition Act* has effectively been left with only two criminal-offence provisions: conspiracies and bid-rigging.[3] Both are *per se* offences, meaning that the effect of the conduct on competition is irrelevant. The standard of proof is beyond a reasonable doubt.

The penalties for violating these provisions are severe. Conviction would likely involve some combination of a substantial fine for the corporation and culpable individuals, prison time for culpable individuals, class-action proceedings, civil damages awards and reputational damage. The trend in Canada appears to be toward more frequent prosecution, higher fines and more jail sentences.

Even an investigation or allegation that does not ultimately result in conviction can be, and usually is, costly, disruptive and damaging to reputations. Accordingly, it is generally prudent to avoid conduct that could give rise to even the appearance of a violation of the *Competition Act's* criminal provisions.

a. Conspiracy

It is unlawful for competitors to agree to:

- Fix, maintain, increase or control prices (including discounts, rebates, allowances, concessions or other advantages);
- Allocate sales, territories, customers or markets; or
- Fix or control the production or supply of a product.

A "competitor" is broadly defined to include any person who it is reasonable to believe would be likely to compete with respect to a product (in the absence of an agreement not to). The definition includes existing competitors as well as potential competitors.

The agreement need not be written (and often is not) and can be proved solely on the basis of circumstantial evidence. But there must be proof of an agreement in order for there to be a conviction.

The *Competition Act* sets out an ancillary restraint defence and a regulated conduct defence. The ancillary restraint defence applies where the challenged agreement is ancillary to, and necessary to give effect to, a broader agreement that is itself not unlawful. An example of this would be a temporary non-compete covenant in an asset purchase agreement, pursuant to which the seller agrees not to compete with the buyer with respect to the purchased business. The regulated conduct defence applies where conduct that would otherwise violate the *Competition Act* is authorized and specifically required by other legislation. An example of this would be a provincial agricultural marketing-board legislation that requires producers to limit quantities and sell at specific prices.

The penalty is a prison term of up to 14 years and/or a fine of up to $25 million.

b. Bid-rigging

Bid-rigging occurs when:

- Two or more persons agree that one or more of them will not submit a bid/tender, or will submit and then withdraw a bid/tender, in response to a request for bids/tenders; or
- Bids/tenders are submitted that are arrived at by agreement between two or more bidders;

unless the agreement is made known to the persons who requested the bids before the bids are submitted.

The penalty is a prison term of up to 14 years and/or a fine at the discretion of the court.

c. Immunity

The Bureau has established an immunity program under which the first conspirator to report a conspiracy may receive immunity from criminal prosecution (but

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[3] The price-discrimination, predatory-pricing and promotional-allowances provisions were repealed. The applicable conduct can still be challenged under the more general reviewable-practice provision relating to abuse of dominance. The price-discrimination provision was converted into a reviewable practice.

The *Competition Act* also contains criminal provisions that address false and misleading advertising. These provisions are discussed in Section H, "Advertising and Marketing."

not civil damages claims) if that conspirator, among other things, did not coerce others into participating in the conspiracy and cooperates in the prosecution of other conspirators. Subsequent immunity applicants may receive some form of leniency but will not normally qualify for full immunity.

d. Private Actions

The *Competition Act* provides private parties with a right to sue to recover actual damages suffered as a result of a violation of the *Competition Act's* criminal provisions. In theory, private parties have the right to initiate proceedings to prove both the violation of a criminal provision and their damages. As a practical matter, private parties tend to rely on convictions or guilty pleas that result from government (i.e., Department of Justice) enforcement to prove the violation, and their actions are limited to proving their damages. Private claims typically take the form of class actions.

4. Reviewable Practices

The *Competition Act's* reviewable-practices provisions address conduct that is presumptively lawful. Such conduct can only be prohibited if the Tribunal finds that it substantially prevents or lessens competition or has an adverse effect on competition, depending on the reviewable practice in question. The standard of proof is a balance of probabilities.

For all but one of the reviewable practices, the only remedy is a prohibition order. There can be no fine, prison sentence, civil damages award or administrative monetary penalty. The theory behind this is that parties should not be punished for engaging in conduct that is presumptively lawful. Abuse of dominance is the exception and can result in a divestiture order and a potentially significant administrative monetary penalty (and there is significant disagreement among competition law experts as to whether the latter is appropriate).

The Bureau may initiate proceedings before the Tribunal in respect of all of the reviewable practices. Private parties have the right to initiate proceedings before the Tribunal, with leave of the Tribunal in respect of some of the reviewable practices.

a. Competitor Agreements

This provision applies to all agreements between competitors other than those specifically covered by the criminal conspiracy provision previously discussed. Examples of such agreements include joint ventures and strategic alliances. Such agreements often promote competition and enhance efficiency but can be anti-competitive in some circumstances.

If, upon application by the Bureau, the Tribunal finds that a proposed or existing agreement between competitors has, or is likely to have, the effect of preventing or lessening competition substantially, the Tribunal may order that the agreement be terminated or amended.

The Tribunal may not make an order against an agreement that is likely to result in efficiency gains that will be greater than (and will offset) the effects of any prevention or lessening of competition, provided that such gains in efficiency would not likely be attained if the order were made.

b. Abuse of Dominance

At the outset, it is worth noting that dominance alone is not problematic under the *Competition Act*; it is the abuse of dominance that the *Competition Act* seeks to address. In order for the Bureau to succeed in an abuse of dominance case, it must convince the Tribunal that:

- One or more businesses have market power in one or more relevant markets in Canada or a part of Canada. Market power is the ability to profitably charge prices above competitive levels for a sustained period of time. A finding of market power generally requires the combination of a high market share and barriers to entry (e.g., high sunk costs or regulatory restrictions). There have been fewer than 10 cases under the abuse of dominance provision since it was added to the *Competition Act* in 1986, and nearly all

of them have involved a market share substantially above 50 per cent;

- The dominant business or businesses have engaged, or are engaging, in a practice of anti-competitive acts. To be considered anti-competitive, the intended purpose and effect of the acts must be exclusionary, disciplinary or predatory, and directed at one or more competitors. While a customer or supplier can be central to the facts of an abuse of dominance case, the anti-competitive act itself must be directed at a competitor (e.g., entering into a long-term exclusivity arrangement with a supplier for the purpose of rendering that supplier unavailable to a competitor or offering below-cost pricing to a critical customer of a competitor); and
- The anti-competitive acts are having, or will likely have, the effect of preventing or lessening competition substantially. This finding is based on a "but for" test (i.e., whether prices in the applicable market would be lower but for the conduct in question).

If the Tribunal finds abuse of dominance, it may order the transgressing business or businesses to cease the acts in question and/or to take certain actions, such as the divestiture of assets or shares, that the Tribunal considers necessary to overcome the effects of the anti-competitive practice.

The Tribunal may also impose an administrative monetary penalty of up to $10 million for an initial transgression and up to $15 million for each subsequent transgression. The power to impose an administrative monetary penalty was added to the *Competition Act* in 2009. Only one abuse of dominance case has been settled since then, and no administrative monetary penalty was imposed or sought.

As case law develops in this area, it is anticipated that the administrative monetary penalty provision may be the subject of a Constitutional challenge, particularly if the Bureau ever seeks a significant administrative monetary penalty, on the basis that such a penalty would amount to a criminal-like sanction without criminal-like

procedural protections and burden of proof. For the time being, dominant businesses should be aware of this potential sanction when devising their business practices.

c. Price Maintenance

Price maintenance occurs when a supplier — by agreement, threat or promise — influences upward or discourages the reduction of the price at which a seller sells, offers to sell or advertises a product within Canada. Price maintenance also occurs when a supplier refuses to supply a product to, or otherwise discriminates against, a seller because of the low pricing policy of that seller.

If a supplier suggests a minimum resale price to a reseller, that suggestion constitutes price maintenance unless the supplier also makes it clear that the reseller is under no obligation to follow the suggestion and that it will in no way suffer in its business relationship with the supplier if it fails to follow the suggestion.

If the Tribunal finds that price maintenance has had or is likely to have an adverse effect on competition in a market, the Tribunal may order the supplier to cease engaging in the challenged conduct and/or to accept the seller as a customer on usual trade terms. The Bureau or an affected seller may seek such an order from the Tribunal.

To date, there have been no decided cases under the reviewable-practice price-maintenance provision, which was enacted in 2009. As of September 2011, the Bureau is in the process of litigating a case against Visa and MasterCard before the Tribunal. The Bureau has alleged that the rules Visa and MasterCard impose on merchants who accept their credit cards are anti-competitive and has asked the Tribunal to strike them down. The rules challenged by the Bureau prohibit merchants from encouraging consumers to consider lower-cost payment options, such as cash or debit, and from applying a surcharge to a purchase on a high-cost card. In addition, once a merchant agrees to accept one of Visa or MasterCard's credit cards, that merchant must accept all credit cards offered by that company, including cards that impose higher costs on merchants, such as premium cards.

The former criminal price-maintenance provision was typically applied to the actions of a supplier directed at a reseller in relation to the resale of the supplier's own product. Apart from being the first case under the new civil price-maintenance provision, the Bureau's case against Visa and MasterCard is significant because it indicates the Bureau's willingness to use the provision to address conduct by suppliers that influences upward or discourages the reduction of prices other than the resale price of products supplied by the supplier.

d. Refusal to Deal

If a supplier refuses to supply a would-be customer, the Tribunal may order the supplier to supply the would-be customer on usual trade terms if the Tribunal finds that:

- The would-be customer is substantially affected in his or her business or is precluded from carrying on business due to an inability to obtain adequate supplies on usual trade terms;
- The reason that the customer or potential customer is unable to obtain adequate supplies is because of insufficient competition among suppliers;
- The customer or potential customer is willing and able to meet the usual trade terms of the supplier or suppliers of the relevant product;
- The relevant product is in ample supply; and
- The refusal to deal is having or is likely to have an adverse effect on competition in a market.

The Bureau or a would-be customer may seek such an order from the Tribunal.

e. Tied Selling

Tied selling is a form of refusal to deal in which a supplier agrees to supply a customer with a product only on the condition that the customer:

- Acquire a second product from the supplier; or
- Refrain from using or distributing, in conjunction with the supplier's product, another product that is not manufactured or designated by the supplier.

Tied selling includes inducing a customer to agree to these conditions by offering to supply the customer on more favourable terms. If the Tribunal finds that tied selling is engaged in by a major supplier or is widespread in a market and is likely to: (i) impede entry or expansion of a firm, (ii) impede introduction of a product or expansion of sales, or (iii) have any other exclusionary effect, with the result that competition is or is likely to be lessened substantially, the Tribunal may prohibit the continuation of the practice or impose any other requirement necessary to overcome the anti-competitive effects of the practice.

The Bureau or an affected customer may initiate proceedings before the Tribunal.

f. Exclusive Dealing

Exclusive dealing occurs where a supplier, as a condition of supply, requires a customer to deal only or primarily in products supplied or designated by the supplier, or refrain from dealing in a specified product except as supplied by the supplier. Exclusive dealing includes inducing a customer to agree to these conditions by offering to supply the customer on more favourable terms. The required proof and remedial action are the same as described under tied selling. As with tied selling, the Bureau or an affected customer may initiate proceedings before the Tribunal.

There have only been a few cases involving exclusive dealing and tied selling since these provisions were added to the *Competition Act* in 1976. The sparse case law suggests that these two practices must make it difficult or nearly impossible for a competing supplier to enter or exist in a market in order for the Bureau or an affected private party to have a viable case.

g. Vertical Market Restriction

Vertical market restriction occurs where a supplier, as a condition of supply, requires a customer to supply a product only in a defined market or exacts a penalty from the customer if the product is supplied outside a defined market.

If the Tribunal finds that the practice is engaged in by a major supplier or is widespread in a market and is likely to substantially lessen competition, the Tribunal may prohibit the continuation of the practice or impose any other requirement necessary to overcome the anti-competitive effects of the practice.

The Bureau or an affected customer may initiate proceedings before the Tribunal.

There have been no cases involving the direct application of the vertical market restriction provision since it was added to the *Competition Act* in 1976.

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