

Overview of Canadian antitrust law

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The importance of Canada's competition laws continues to grow. The ever-increasing vigilance and enforcement activity of the Canadian competition authorities mandates that investors and businesses must, now more than ever, take the Competition Act into account in the conduct of their affairs and when considering investing in Canada.

The Competition Act

The Competition Act ('the Act') is the oldest antitrust statute in the western world, enacted in 1889 (one year before the Sherman Act in the United States). The Act comprehensively sets out the competition law of Canada, from hard-core cartels to merger review. With few exceptions, it applies to all businesses in Canada. In enacting the legislation, it was Parliament's intent to encourage competition, promote greater economic efficiency and enhance Canada's position in world markets.

The Act prohibits certain criminal offences (such as price-fixing and bid-rigging conspiracies, resale price maintenance, price discrimination and predatory pricing). The Act also contains non-criminal provisions which allow the Competition Tribunal ('the Tribunal') to review mergers and certain business practices (such as tied selling, exclusive dealing, refusal to deal and abuse of dominance), and, in certain circumstances, to issue orders prohibiting or correcting the conduct so as to eliminate or reduce its anti-competitive impact. Private parties may also apply to the Tribunal seeking a review of certain business practices (such as refusal to deal, tied selling and exclusive dealing). The Act also requires pre-merger notification.

Enforcement

The Commissioner of Competition

The Commissioner of Competition ('the Commissioner') is the most senior antitrust official in Canada, entrusted with the administration and enforcement of the Act. The Commissioner (Konrad von Finckenstein QC) recently resigned to become a judge of the Federal Court of Canada and it is expected that a new Commissioner will be appointed in the near future. In the meantime, the Senior Deputy Commissioner, Mr Gaston Jorré, has assumed the role of Acting Commissioner.

The Competition Bureau

The Commissioner has a staff of approximately 400 at the Competition Bureau ('the Bureau') that assist in the administration of the Act. The Bureau is divided into units that administer different aspects of the Act, including the following branches: mergers, civil matters, criminal matters and fair business practices. There is also a pre-merger notification unit. The Commissioner and the Bureau have published numerous bulletins, interpretation guidelines, press releases and updates in respect of the various aspects of Canadian competition law. The bulletins and guidelines, along with other useful publications, can be accessed on the web site maintained by the Bureau at <http://competition.ic.gc.ca>.

The Competition Tribunal

Applications to the Tribunal for remedial orders in respect of reviewable practices and mergers may be brought by the Commissioner. The Tribunal is a mixed quasi-judicial adjudicative body consisting of judicial and lay members. The Act provides for private access to the Tribunal (ie private litigants may apply to the Tribunal for a remedial order) for certain reviewable practices, such as refusal to deal, tied selling, exclusive dealing and market restriction. The Tribunal also maintains a useful website at <http://www.ct-tc.gc.ca>.

Attorney-General

Canada's Attorney-General prosecutes breaches of the criminal provisions of the Act in the criminal courts. Prosecutions are initiated on the recommendation of the Commissioner, pursuant to an investigation conducted by the Bureau.

Investigations

The Commissioner and the staff at the Competition Bureau have numerous tools at their disposal to investigate alleged breaches of the Act, reviewable practices and mergers. Usually, much of the information that the Bureau collects in the course of formal and informal inquiries is provided on a voluntary basis by the parties. There has, however, recently been an increase in use by the Commissioner of so-called Section 11 orders, which compel the production of documents and information (by parties under investigation and other parties who may possess relevant information). Responding to a Section 11 order can be onerous and very time-consuming. These orders are issued in respect of the criminal provisions of the Act, and also with respect to mergers and reviewable practices (such as abuse of dominance). In extreme cases, the Commissioner can avail himself of powers relating to search and seizure, and oral examinations under oath. Finally, wire-tapping is also available in respect of certain provisions.

International cooperation

The Commissioner has entered into cooperation agreements with the United States (1995), Mexico (2001), the European Commission (1999), and Australia and New Zealand (2000). The cooperation agreements provide for coordination among agencies, although do not provide for either the exchange of confidential information or local investigation (such as search and seizure) on behalf of a foreign authority. The Mutual Legal Assistance on Criminal Matters Treaty (MLAT) between Canada and the United States, which has been in force since 1990, allows Canadian and US officials to use their respective local investigative powers on behalf of the other jurisdiction in respect of criminal matters. The Act has also been recently amended to provide for a regime for international cooperation in the administration of civil competition law, allowing the gathering of evidence for and from foreign jurisdictions in a manner that mirrors existing arrangements in criminal matters.

Consequences of anti-competitive acts

The consequences of violating the criminal provisions of the Act can be severe. The Act makes certain types of criminal offences punishable by fines of up to C\$10 million and/or imprisonment for periods of up to five years. The Bureau has published an immunity programme which sets out its policy regarding recommending to the Attorney-General that immunity from prosecution be granted to parties to a criminal offence (under specified circumstances and on certain conditions including ongoing cooperation with the authorities). The Act also provides for the recovery of civil damages to compensate for harm suffered as a result of a violation of a criminal provision of the Act, or as a result of breach of an order of the Tribunal. The application of the non-criminal provisions of the Act can also have significant consequences since orders of the Tribunal can force businesses to put an end to some of their practices or to change them with the result that significant costs may have to be incurred (for example, if a merger is prevented or a distribution system must be changed).

Mergers

A merger is defined by the Act as the acquisition of control over, or of a significant interest in, the whole or part of a business. Canadian antitrust merger law consists of both substantive provisions that empower the Commissioner to challenge mergers that are anti-competitive and procedural provisions relating to pre-merger notification. Canadian merger control is discussed in greater detail in the chapter that begins on page 87. Canadian merger remedies are analysed in the chapter that begins on page 91.

Criminal offences: relations with competitors

The Act provides that it is an offence to ‘conspire, combine, agree or arrange’ with another person to prevent or lessen competition unduly. The classic and most obvious form of illegal conspiracy is price fixing. However, all agreements or arrangements that lessen competition can constitute a criminal offence. A formal or written agreement among competitors is not necessary to constitute an offence—an informal agreement, even with minimal communication between competitors, may suffice. Conspiracy is not a per se offence in Canada: the prosecution must establish that it results in an undue lessening of competition—ie that it confers a certain degree of market power. Some of the specific types of agreements that can constitute criminal offences are discussed below.

Price-fixing

Price-fixing agreements are those which most obviously can violate the Act. The offence extends not only to agreements setting prices, but also to arrangements which have the effect of influencing the prices at which products are sold, such as agreements on price formulas, transportation charges, credit terms or other terms and conditions of sale, price changes or discounts, agreements to end price wars or any agreement designed to stabilise or increase prices. The prohibition also extends to agreements among buyers on the price to be paid to suppliers or on means by which to reduce it.

Agreement concerning quantity or quality of product

Agreements among competitors relating to levels of production or quality of goods can obviously also have an anti-competitive effect and can violate the Act. The prohibition could also, for example, extend to agreements to produce or supply only certain sizes or types of a product.

Other conspiracy offences

Market sharing agreements to divide markets or customers, for example by agreeing not to solicit a competitor’s customers, and agreements to boycott certain customers or suppliers, can also constitute criminal offences under the Act.

Bid-rigging

Bid-rigging is an arrangement with any other person either not to bid or on the contents of the bid. While the general conspiracy offence discussed above requires proof that, as a result of the agreement, competition is lessened unduly (ie to a significant degree), bid-rigging is a per se offence.

Trade associations

In Canada, as elsewhere, trade associations are legitimate, as they perform many important and valuable functions. However, as with any other contact with competitors, trade associations present significant risk in relation to the Act, and extreme care should be taken both in setting up such associations and in attending meetings so as to avoid discussion of any competitively sensitive matter. As is the case elsewhere, it is strongly recommended that trade associations take steps to minimise the risks of violating the Act. They should, for example, have formal procedures which are carefully followed, including the preparation and circulation of written agendas and minutes of meetings. In addition, the activities of the association and any minutes and agendas should be periodically reviewed by counsel retained by the association to ensure that discussions are limited to legitimate issues such as lobbying, promoting the industry and environmental control. The exchange of information between members of a trade association is particularly delicate and should be discussed with counsel.

Criminal offences: relations with customers

Businesses are, generally speaking, free to choose their customers. However, once the customer relationship has been established, the Act imposes some important restrictions on the supplier which are criminal in nature. The Act contains four specific offences which deal with pricing practices: resale price maintenance, price discrimination, promotional allowances, and predatory pricing.

Resale price maintenance

The Act contains three important criminal prohibitions against practices in support of resale price maintenance.

- The Act prohibits encouraging an increase or discouraging a decrease in the price at which another person supplies or offers to supply a product within Canada, whether by agreement, threat, promise or similar means (prohibited conduct can therefore either constitute an agreement or be unilateral). Retail prices suggested by a supplier are deemed to constitute price maintenance unless the supplier can establish that it has made it clear that the purchaser is under no obligation to resell at the suggested prices and that there would be no sanctions against the purchaser in the event that it does resell at lower prices. A similar presumption can result from the advertising of retail prices by the supplier, unless the supplier can establish that it made clear that the product could be purchased for less. A supplier should always check the legality of any suggested pricing or price advertising.
- The Act prohibits refusal to supply a product to a purchaser because of the purchaser’s low pricing policy. Refusal to supply is not, in itself, an offence. One is entitled not to supply for valid business reasons—for example, because the purchaser has a poor credit rating or because the supplier is satisfied with its existing distribution network. The practice becomes illegal when its motivation is the purchaser’s low pricing policy.
- The Act prohibits inducing a supplier, as a condition of doing business with such supplier, to refuse to supply product to a person or class of persons because of their low pricing policy.

Price discrimination

It is an offence to adopt a practice of granting a discount, rebate,

price concession, allowance or any other price-related advantage to one customer that is not made available to competing customers who purchase like quantity and quality. Three important aspects of the offence should be noted. First, it only applies to sales to competing purchasers. It is, therefore, permissible to have different price structures for different categories of customers provided that they do not compete with one another. Second, the offence only requires that the same prices and discounts be made available in respect of sales of like quantity; this means that the granting of quantity discounts is legitimate as long as they are available to competing purchasers. Third, price discrimination is only illegal where there is a practice of discriminating. Accordingly, offering lower prices on a one-shot basis, such as to meet a competitor's price or for a special event such as a store opening or anniversary, does not constitute an offence.

Although the principle of price discrimination is similar in Canadian and US law, Canadian law is different in two important respects. In Canada, quantity discounts need not be justified by cost savings. Quantity discounts merely need to be 'available' to all competing purchasers. Also, there is no requirement in Canada that injury to competition result from the discriminatory practice.

Promotional allowances

Discounts, rebates, price concessions and other price-related advantages which are granted to one customer for advertising or display purposes must be proportionately offered to all competing customers. The allowances must be proportionate to the value of sales to such customers. Thus, a customer who purchases twice as much by dollar value as another customer must be offered a promotional allowance which is twice as great as that offered to that other customer. These allowances need not be offered at the same time to all competing customers, but must reach equivalent levels within a reasonable period of time.

Predatory pricing

Under the Act, it is a criminal offence to engage in a policy of selling at unreasonably low prices with a view to eliminating a competitor. Prices will not be seen as unreasonably low unless they are below cost, although the mere fact that they are below cost is not necessarily sufficient. Below-cost pricing can be legitimate in certain circumstances. Whether prices are unreasonably low will depend on how far below cost they are, and on the circumstances of each case. However, even very low pricing is not sufficient; there must be a policy of selling at unreasonably low prices. Isolated unreasonably low prices do not constitute a policy of predatory pricing as required by the Act. Temporary below-cost pricing can also be legitimate if designed to meet competition, keep existing customers or obtain new clients. In the guidelines on predatory pricing, the Commissioner has indicated that he will not bring proceedings alleging predatory pricing when the alleged predator has less than 35 per cent of the relevant market. His reasoning is that, unless a supplier has a strong market presence, the below-cost pricing is unlikely to substantially lessen competition or eliminate a competitor. As it is not always easy to distinguish legitimate from illegitimate situations, below-cost pricing should always be carefully considered before it is implemented.

A related offence makes it illegal to sell in one part of Canada at prices lower than those exacted by the supplier elsewhere in Canada, where the practice is intended to, or results in, a substantial lessening of competition or the elimination of a competitor in that part of Canada.

Reviewable trade practices (non-merger)

Relations between suppliers and their customers are also subject to the civil provisions of the Act. These provisions deal with certain trade practices which are not objectionable as such, and are there-

fore not prohibited. If certain conditions are fulfilled, however—notably, where the conduct has a substantially negative effect on competition—the Commissioner can refer the matter to the Tribunal for review. If the Tribunal finds that the conditions are met, it may issue an order prohibiting the continuance of such practice. The Act has recently been amended to afford private litigants a limited right to seek relief from the Tribunal, with leave, from certain reviewable practices (including refusal to supply, exclusivity, tied selling and market restriction). The following trade practices are subject to review.

Refusal to deal

If the Tribunal finds that there is a refusal to supply and that:

- the would-be purchaser is substantially affected in its business by the refusal,
- such person is unable to obtain adequate supplies because of insufficient competition among suppliers (for example, the refusing supplier has a monopoly or a very strong market position),
- such person is willing and able to meet the usual trade terms of suppliers,
- the product is in ample supply, and
- competition is adversely affected,

the Tribunal may order the supply of the product on usual trade terms. The Act does not prohibit a refusal to supply based on valid business reasons, such as the buyer not meeting the supplier's standard credit policies or the supplier having legitimately concluded that it has enough distributors in a given market.

It should be re-emphasised that certain refusals to deal may constitute criminal offences under the price maintenance or conspiracy provisions, discussed above.

Exclusive dealing

Exclusive dealing is the practice of requiring or inducing a customer to deal only or primarily in products of the supplier by means of more favourable terms or conditions. Exclusivity agreements are subject to review if:

- the supplier is a major supplier of the product;
- the practice impedes entry or expansion of a firm or product in a market or has some other exclusionary effect in the market; and
- the practice is likely to substantially lessen competition.

If the practice is carried on for a reasonable time only in order to facilitate entry of a new supplier or a new product into the market, the Tribunal will not prohibit the practice.

Tied selling

Tied selling is the practice of requiring or inducing a customer to buy a product as a condition of supplying the customer with another product. The Tribunal will not prohibit this practice unless the conditions referred to above relating to exclusive dealing are met. However, even if such conditions are met, no order will issue if the Tribunal finds that the practice is reasonable, having regard to the technological relationship between the products.

Market restriction

Market restriction is the practice of requiring a customer to sell a product only in a defined market as a condition of supplying that product. Again, if the practice is engaged in by a major supplier and is likely to result in the exercise of market power such that competition is substantially lessened, the Tribunal can put an end to the practice. It will not, however, make an order if the practice is engaged in for a reasonable period of time only to facilitate entry of a new supplier or a new product into a market.

Abuse of dominant position

In Canada, a monopoly is not in itself illegal. Abuse of a dominant position by resorting to anti-competitive acts in a market can, however, give rise to an order by the Tribunal if such abuse results in substantial restriction of competition.

In order for the Tribunal to issue an order in respect of abuse of dominance there are essentially three conditions that must be met:

- First, there has to be dominance of an entity or joint dominance by more than one entity.
- Second, there must be an abuse of such dominance, discussed below.
- Third, such abuse must have the effect of preventing or lessening competition substantially in a market.

The existence of a monopoly is not a prerequisite to establishing dominance, but there should be a relatively high market share allowing the firm (or firms) in question to substantially dictate market conditions and exclude competitors. The Commissioner has indicated in his Enforcement Guidelines on the Abuse of Dominance Provisions that the Bureau's general approach in evaluating allegations of abuse of dominance is as follows. A market share of less than 35 per cent will generally not give rise to concerns of mar-

ket power or dominance; a market share of 35 per cent or more will generally prompt further examination; and in the case of a group of firms alleged to be jointly dominant, a combined market share equal to or exceeding 60 per cent will generally prompt further examination.

The Act includes a non-exhaustive list of acts that could constitute anti-competitive acts that may result in an abuse of a dominant position. These include: a vertically-integrated supplier charging more advantageous prices to its own retailing divisions; selling at prices lower than the acquisition cost; inducing a supplier to refrain from selling to competitors; acquisition in advance of scarce resources; and certain anti-competitive acts or conduct of a person operating a domestic airline service. What characterises an anti-competitive act is that it is adopted with a predatory or exclusionary intent. This list has recently been amended to include specific acts relating to Canada's highly concentrated airline industry, and the Commissioner has special powers in respect of this industry.

Misleading advertising and other deceptive practices

The Act contains numerous and important criminal and civil provisions relating to misleading advertising and promotion. The Act also contains criminal provisions regulating deceptive telemarketing.

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With over 800 lawyers and offices in every major Canadian financial and business centre, McCarthy Tétrault LLP is Canada's largest law firm.

McCarthy Tétrault LLP's competition law group is an acknowledged leader in competition law. The firm's competition law practitioners combine a wide range of complementary legal talents in corporate and commercial business, mergers and acquisitions, banking, and litigation, enabling us to create effective, business-orientated solutions to complex competition law issues. The group advises on the possible application of the Canadian Competition Act to actual or proposed business activities such as M&A, pricing policies, trade practices and compliance programmes, and assists clients in their dealings with the Competition Bureau.

Three senior members of the competition law group, considered to be among the top competition law practitioners in Canada, published a book entitled *Droit de la concurrence au Canada* (Carswell), the first French language textbook on Canadian competition law.

McCarthy Tétrault LLP lawyers represent businesses, including financial institutions, during the process of acquiring or being acquired in domestic and cross-border transactions. They provide advice on a wide variety of competition-related issues. Members of the competition law group have participated in many major civil and criminal cases before courts of all levels as well as before the Competition Tribunal.