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Most Significant Competition Act Changes In More Than 20 Years

February 9, 2009

Introduction

Usually the process of Canadian competition law reform is somewhat like the stereotypical Canadian: prudent, incremental and cautious. Usually, but not always. On Friday February 6, 2009, the Government tabled its Implementation Bill with respect to its January 27, 2009 Budget. The Bill contains the budget for the coming year, including the much-discussed stimulus package, as well as a host of other matters, including very significant changes to the *Competition Act*. However, while the *Competition Act* changes in the Bill are groundbreaking, they will probably not be the primary focus of debate on the Bill. Indeed, the Minister of Finance's press release with respect to the Bill contains sixteen bullet points; Competition *Act* reform is number fifteen. As well, budget bills are by definition confidence matters, and historically – and there is certainly reason to believe this will be the case this year – they pass relatively quickly, with limited study in committee.

All of this means that, **barring unforeseen occurrences, the most significant amendments to Canada's competition law since the enactment of the *Competition Act* itself in 1986 are likely to become law in a matter of weeks.** We all learned, in December of last year, that Canadian Parliamentary politics is not always predictable, and unforeseen occurrences are possible, but these amendments look to be a fairly safe bet.

As noted, not only is the process for these *Competition Act* amendments unusual, the amendments themselves are hugely far reaching, touching on virtually all the major pillars of the *Act*. They will fundamentally alter antitrust enforcement in Canada in ways which may be to some degree predictable, but which in other ways are unknowable at this point. It is going to be an exciting ride. In a note like this it is possible only to outline the highlights of the expected changes and offer some very preliminary commentary, so that is what we set out to do in this Alert.

Changes to the Conspiracy/Cartel Provision

It has been the fundamental tenet of Canadian competition law, since its original enactment in 1889, that agreements which *unduly* restrain or injure competition are illegal. The Bill proposes to alter this fundamental principle by **defining criminal cartels without reference to the need for "undue" effect, where agreements**

entered into between competitors or likely competitors deal with pricing, market allocation or output restrictions. There are limited exceptions for arrangements which are ancillary to broader agreements. In addition, there will be a **new civil reviewable regime under which other sorts of agreements will be analyzed to determine whether or not they are likely to lead to a substantial lessening or prevention of competition**, in which case it will be possible to enjoin them. The minimum penalties for price fixing would also be increased, from $10 million and five years imprisonment, to $25 million and 14 years.

This is an earth shaking change. How easy it will be to define when firms are "competitors" or likely competitors is not clear. How will the new civil reviewable provision operate – and what types of conduct it will catch that were not subject to challenge under the prior law? Situations in which firms both supply other companies and also compete with them at another level of the marketplace (dual distribution arrangements) will give rise to complex questions, as will the question of how the exemption related to ancillary agreements will work. These provisions will not come into force for a year, and there is a process by which firms may seek advisory opinions from the Competition Bureau – so we may see many requests for such opinions.

Repeal of the Price Discrimination and Predatory Pricing Provisions

For many years commentators, economists and business people have criticized the criminal price discrimination and, to a lesser degree, the criminal predatory pricing provisions of the *Competition Act,* found in sections 50 and 51. They are at odds with sound economic thinking, are costly to administer, and give rise to inefficient distribution arrangements. The Government apparently agrees, and **the Bill repeals the price discrimination and predatory pricing provisions**. Conduct involving price discrimination or predatory pricing can, in some cases, be challenged under the abuse of dominant market position provisions of the *Act*, and the Government's thinking is apparently that this is what should happen.

Criminal Price Maintenance

The criminal price maintenance provisions of the *Competition Act* have been subject to challenge over the years, on the basis that most vertical conduct (such as exclusive dealing, tied selling and market restriction) is subject to challenge only on a reviewable basis, and only if it can be shown to substantially lessen competition. By contrast, price maintenance arrangements between suppliers and customers are prohibited as criminal conduct. Even a refusal to supply customers who sell at low prices is criminal conduct. This has been thought to be inconsistent with other aspects of competition law, and also inconsistent with approaches to price maintenance in the United States, particularly after recent Supreme Court jurisprudence there. This Bill appears to

recognize those criticisms. **It repeals the current criminal law of price maintenance, but re-enacts the provision as reviewable conduct, subject to challenge before the Competition Tribunal if the conduct is found to have a "adverse" effect on competition.**

Merger Review

The merger review provisions of the *Competition Act* have been subject to occasional criticism for not affording the Competition Bureau sufficient time to review transactions in the most complex of cases. This issue came to a head over the last couple of years with respect to the *Labatt/Lakeport* transaction. **The Bill introduces an entirely new procedure to Canada, akin to the U.S. second request procedure.** Under the proposal, if the Competition Bureau has concerns with respect to a proposed merger, it can make a demand for documents of the merging parties, and the time clock, during which period the Bureau can review the merger and the parties cannot close a transaction, is halted until the parties fulfill the production requirement. This process, which is now unique to the United States, can be extremely time–consuming and expensive in some cases, but is thought to provide the reviewing agency with the materials it believes it requires.

Merger reviews will also be changed in other respects, the most significant of which is to **increase the "size of transaction" threshold for notifying the Competition Bureau of transactions, from $50 million to $70 million**, and to impose a **penalty of up to $10,000/day for failure to properly notify the Bureau of a transaction.**

The introduction of this process to Canada will represent a wholesale change to merger review timing, which will affect both domestic Canadian transactions and also international transactions in which filings are required in Canada.

Abuse of Dominant Market Position

The Bill does not propose amendments to the substantive law with respect to abuse of dominant market position, but it does introduce **Administrative Monetary Penalties – of up to $10 million ($15 million for repeated conduct) for those found to have abused their dominant market position**. Currently when a finding of abuse of dominant market position is made, the typical remedy is an injunction to prevent continuation of the conduct, although the *Act* does allow other orders, which might extend so far as ordering a divestiture of assets if that is believed to be necessary to remedy the situation. However, the current provision does not allow for either damages or penalties.

The debate on this question has historically been between those who argue that without monetary penalties there is no disincentive for dominant firms to engage in the anti-

competitive conduct, and those who argue that conduct which is injurious to competition rarely occurs – witness the very few cases that have been brought – but introducing significant financial penalties for having been found to have engaged in this conduct will cause firms which might have taken aggressive competitive positions to pull their punches and not compete as vigorously as they might have, which will reduce the vigor of competition in the marketplace.

Advertising and Marketing Changes

The Bill also introduces a series of changes with respect to the advertising and marketing provisions of the *Competition Act,* including:

- Raising **civil penalties for individuals to $750,000 for a first "offence" and up to $1 million for repeat "offences"**. Currently, penalties for individuals are capped at $50,000 for the first incident, and $100,000 for repeat conduct.
- Raising **civil penalties for corporations to $10 million for a first "offence", and up to $15 million for a repetition**. Currently, penalties for corporations are capped at $100,000, or $200,000 for repeat conduct.
- Increasing **maximum imprisonment terms** for criminal deceptive marketing from five years to **14 years**.
- Empowering the Competition Tribunal to require companies to pay **restitution to victims of deceptive marketing practices**.
- Empowering the Competition Tribunal to freeze **assets and prevent the disposal of property before a finding against the advertiser**, in cases where there is concern that money may not be available for redress to harmed consumers.

Summary

These amendments are the most significant change to Canadian competition law in over twenty years. They make meaningful changes to all of the key aspects of the law: Mergers; Conspiracy/Cartels; Abuse of Dominant Market Position/Monopolization; and Advertising and Marketing Law – as well as to many other aspects of the *Act*. To fully understand the implications of even one of these changes, let alone all of them, will be a complex process for firms and their advisors. Businesses will have to carefully review all their material agreements and areas of activity and consider how the new rules will apply. So, for everyone involved in or subject to Canadian competition law, it is going to be an interesting time. Stay tuned.

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