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Recent headlines in Canadian competition law

Lower thresholds for both *Competition Act* and *Investment Canada Act* in 2010

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Unless changed by regulation, the "size of target" threshold for advance notification under the *Competition Act* of transactions involving Canadian businesses will likely be reduced to C\$67 million, in accordance with the GDP indexing provisions which were introduced in amendments to the Act last March. The amount will be official once published by the Minister in the Canada Gazette, and until then the previous C\$70 million threshold continues to apply.

Meanwhile, Industry Canada has published the new *Investment Canada Act* threshold for review of direct WTO Investor acquisitions of control of Canadian businesses for transactions closing in 2010. The new review threshold will be C\$299 million, based on the book value of assets of the Canadian business. Draft regulations that would see the threshold increased to C\$600 million and based on the "enterprise value" of the Canadian business have not yet been passed, and are being reviewed following receipt of comments by the Minister.

Both thresholds are indexed to Canadian GDP, which fell during 2009 due to the global recession.

Canada's Competitor Collaboration Guidelines issued in final form

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The Canadian Competition Bureau published the promised *Competitor Collaboration Guidelines* on December 23, 2009, less than three months before the coming into force of the new, stricter, criminal cartel provisions and their companion civil provisions applicable to non-criminal, but anti-competitive, competitor agreements. The *Guidelines*, which were preceded by an earlier consultation draft, published in May 2009, answer several questions raised by the new sections 45 and 90.1 of the *Competition Act*, but (unavoidably) leave many more to be clarified by the courts. Anyone doing business in Canada will wish to take stock of their dealings with competitors prior to the implementation of the new law on March 12, 2010. Seemingly innocuous agreements that did not appear to have a significant adverse effect on competition may now attract criminal (and civil) liability.

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This newsletter was prepared by members of the Competition/Antitrust Group at Stikeman Elliott.

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As described in previous issues of this newsletter,¹ starting March 12, 2010, agreements between competitors (which the new provisions define to include potential competitors) to fix prices, to allocate sales customers or markets, or to fix or control production or supply of a product will be illegal – full stop. No longer will the Crown be required to prove the anti-competitive effect of such agreements in order to obtain a conviction in so-called “hardcore” cartel cases.

The new provisions will nevertheless recognize that not every agreement or arrangement containing such restraints constitutes a hardcore cartel. An “ancillary restraints” defence will be available if the parties to the impugned agreement can show that the restraint in question is ancillary to a broader or different agreement, that such main agreement is not itself illegal under section 45, and that the restraint on prices, sales, markets, customers, output or supply is directly related to, and reasonably necessary for, giving effect to the broader objective of the main agreement.²

Along with the *per se* criminal prohibition against hardcore cartel activity also come increased penalties: fines of up to \$25 million for all accused (up from a previous maximum of \$10 million), and prison sentences of up to fourteen years for individuals (previously, a maximum of five years).

The more stringent approach to competitor agreements reflected in the new section 45 is accompanied by an alternative, civil track for non-hardcore cartels: agreements between competitors that are not appropriate for criminal prosecution but may nonetheless have anti-competitive effects. The new section 90.1 of the *Competition Act*, which will also come into effect on March 12, 2010, creates a civilly reviewable matter in respect of existing or proposed agreements between persons, two or more of whom are “competitors,” that prevent or lessen competition substantially (or are likely to do so). The factors to be considered by the Competition Tribunal in undertaking this assessment are effectively the same as those applicable to the existing merger review provisions (*i.e.*, effective remaining competition, barriers to entry, change and innovation, *etc.*). In terms identical to the existing merger review provisions, an efficiencies defence will apply if the agreement brings about “gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition” and if the efficiency gains would not be attained if a prohibition order were issued. In contrast to section 45, available remedies under section 90.1 are purely injunctive in nature, and no private actions for damages are available for alleged “breaches” of section 90.1.

One concern expressed in relation to the dual-track approach to cartels was that it could permit the Bureau to delay choosing between the criminal and civil tracks, and use the threat of criminal prosecution to encourage civil settlements. To address this concern, the *Guidelines* state that “at no time will the Bureau use the threat of criminal prosecution to induce settlement in cases proceeding by way of the civil track.”³ The *Guidelines* also state that “the Bureau will make every effort to arrive at a timely decision on the appropriate section to be applied in evaluating an agreement.” This leaves the door open to alternative settlements for potentially criminal cases, but only prior to the laying of charges – the *Guidelines* make it clear that after the laying of charges only the Director of Public Prosecutions (who is responsible for the conduct of federal public prosecutions, including under the *Competition Act*) is permitted to engage in plea and sentencing discussions.

As to the oft-discussed question of “what is an agreement?”—the *Guidelines* take the position that both explicit and tacit agreements can violate the criminal prohibition against price-fixing and other hardcore cartel behaviour. Accordingly, while so-called conscious parallelism (each of a few competitors independently deciding, for example, not to compete on the basis of price since to do so would only incite a price war) is recognized not to be illegal, the *Guidelines* state that conscious parallelism *plus* facilitating practices, such as sharing sensitive pricing information, could be enough to prove the existence of an agreement between the parties.

A positive aspect of the *Guidelines* is the explicit recognition that the Bureau will not view market restriction elements of dual-distribution agreements⁴ or franchise agreements as potentially subject to criminal prosecution under section 45 (provided, of course, that such agreements are truly limited to the supplier/distributor or franchisor/franchisee in question, and do not mask a broader conspiracy among suppliers, distributors, franchisors or franchisees). Gone from the draft *Guidelines*, however, is similar recognition (included in the consultation draft) that a trademark license confining use of the mark to a limited territory should likewise be exempt from criminal prosecution.

The Guidelines also contain a useful discussion of potential pitfalls involving certain common types of agreements, such as joint ventures, and circumstances under which they may raise issues under the new civil agreement provisions of section 90.1: commercialization and joint selling agreements, information-sharing agreements (benchmarking), research-and-development agreements, joint production agreements, and joint purchasing agreements and buying groups are all discussed in some detail.

A consistent theme throughout the *Guidelines* is that the Bureau regards section 45 as applying only to so-called “naked restraints” on competition, which it describes as “restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture.” Such an enforcement approach is welcome, and is reflected in the hypothetical examples included in the *Guidelines*. Unfortunately, however, these hypothetical examples avoid some of the more difficult questions involving the application of the new provisions to such agreements. For example, the *Guidelines* address a situation where parties establish a joint venture to develop a product and then set a common price for a product unrelated to the joint venture. The Bureau’s view that such a restraint, absent evidence that it is reasonably necessary to give effect to the joint venture agreement, would not fall within the scope of the ancillary restraints defence is not surprising. More interesting, we would have thought, might have been a discussion of the Bureau’s approach to the parties setting a common price for the product developed by the joint venture.

The Competition Bureau has said that, although it intends to use its new powers to act against hardcore cartel activity, it is nonetheless looking for test cases to clarify the extent of the new law. In addition, it is important to note that the *Guidelines* reflect the enforcement approach of the Bureau, and are not binding on private litigants or, indeed, the courts, which will have the ultimate say on the meaning of the new competitor agreement provisions. Contact any member of the Stikeman Elliott Competition Group for assistance.⁵

¹ See Hutton and Rushton, “Primer on amendments to Canada’s Competition Act and Investment Canada Act,” March, 2009, at <http://www.stikeman.com/cps/rde/xcchg/se-en/hs.xsl/12203.htm>.

² Traditional defenses to allegations of anti-competitive agreements between competitors also remain. Specifically, the new section 45 remains subject to exemptions for agreements between affiliates, for agreements between federal financial institutions to which subsection 49(1) of the *Competition Act* applies, and for agreements that relate only to the export of products from Canada (so long as they do not reduce the real value of exports, restrict anyone from entering into or expanding the business of exporting products from Canada, or relate only to the supply of services that facilitate exports from Canada). The amended section 45 also explicitly recognizes the existence of the regulated conduct doctrine, and its potential application to shield competitor agreements from criminal prosecution if such conduct is regulated by another federal, provincial or municipal law or legislative regime, despite the deletion of the word “unduly” from the provision (the word had been held to be determinative to the application of the doctrine in *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 629).

³ This statement did not appear in the first draft of the *Guidelines*, issued in May, 2009.

⁴ The term “dual-distribution agreement” refers to an agreement between a supplier and a distributor, where the supplier also sells directly to certain customers. The distribution agreement therefore commonly restricts the distributor from selling to certain customers or markets, which are reserved for the supplier or for other distributors. The *Guidelines* state that this would not be viewed as an agreement between competitors (the logic being that the supplier and the distributor would not be competitors but for the distribution agreement in question – alternatively, even if viewed as an agreement between competitors, the ancillary restraints defence would apply).

⁵ Up until March 12, 2010, when the new provisions come into force, businesses can seek free advisory opinions from the Competition Bureau on the legality of existing agreements entered into prior to March 12, 2009 (the day the bill enacting the amendments received Royal Assent). Parties are also free, for a fee, to request an advisory opinion in respect of proposed agreements (after March 12, 2010, advisory opinions will only be available in respect of proposed agreements).

New legislation to improve protection and efficiency in electronic commerce

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On December 1, 2009, Bill C-27, also known as the *Electronic Commerce Protection Act*, passed through first reading in the Senate. Its objective is to regulate certain activities that discourage reliance on electronic means of carrying out commercial activities, such as spam, spyware and internet fraud, in order to promote efficiency and adaptability in the Canadian economy. More specifically, it will prohibit the sending of commercial electronic messages without the prior consent of the recipient, as well as provide rules governing the sending of those types of messages and a mechanism for withdrawing consent. It will also prohibit practices relating to the alteration of data transmission and the unauthorized installation of computer programs. When implemented, Bill C-27 will amend the *Canadian Radio-television and Telecommunications Commission Act*, the *Competition Act*, the *Personal Information Protection and Electronic Documents Act* and the *Telecommunications Act*.

The *Electronic Commerce Protection Act* defines both express and implied consent for receipt of electronic messages. Where express consent is required, commercial communications may not take place unless the person or corporation in question “opt-in” to being contacted. Conversely, implied consent is acceptable under circumstances where it can be deemed that the person or corporation might be interested; however, the recipient must be given the ability to “opt-out” of the communications. Under the new legislation, implied consent will be assumed in cases where there is an existing business or non-business relationship that meets specified criteria. In the absence of such an existing relationship, the sender must obtain express consent to send unsolicited commercial electronic messages.

Amendments to the *Competition Act* include the addition of new criminal and reviewable conduct provisions under sections 52 and 74, which broaden the scope of misleading representations and telemarketing to better address online activity. Through these changes, it will become an offence to promote, directly or indirectly, any business interest or the supply or use of a product, whether knowingly or recklessly, that includes a false or misleading representation in the sender or subject matter information, the electronic message or the locator. Noteworthy is the distinction made for the electronic message itself, which states that only “material” false or misleading representations will be caught by the criminal and reviewable provisions of the *Competition Act*. There is no similar materiality threshold for the sender or subject matter information, or the locator. As with the other provisions in the *Competition Act* on misleading advertising, proof that a person was misled by the representations is not required to constitute an offence. The proposed legislation also introduces a mechanism for the Commissioner to conduct investigations and share information with foreign states in order to assist in their investigations of misleading advertising.

The proposed amendments will also change the standard of review for the issuance of temporary orders under section 74 of the *Competition Act*. The current standard to be met is a strong *prima facie* case that a person is engaging in reviewable conduct. Under these amendments, the standard of review will be reduced to the mere appearance to the court of reviewable conduct.

With regard to penalties, under the *Electronic Commerce Protection Act*, a new private right of action will be created with a three-year limitation period, granting affected individuals the right to apply to the court for an order of compensation in an amount equal to the actual loss or damages suffered. Under section 74 of the *Competition Act*, the amendments grant a court the ability to issue: (a) a compensatory order and (b) a fine (or administrative monetary penalty) of as much as \$200 per contravention up to a maximum \$1,000,000 per day, even if the application by the private person did not allege a violation under the new provision.

The Government believes that the new legislation and related amendments will boost Canadians’ confidence in online commerce by cracking down on internet fraud, spam, spyware and other related threats.

Federal Court of Appeal clarifies misleading advertising provisions

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On October 15, 2009, the Federal Court of Appeal allowed the Commissioner of Competition's appeal of a Competition Tribunal decision involving misleading representations by a Vancouver career-consulting business.

The principal issue in the case, *The Commissioner of Competition v. Premier Career Management Group Corp. and Minto Roy*, 2009 FCA 295, was "whether ... representations to certain individuals, though made individually and in private, were nevertheless made 'to the public'" within the meaning of the *Competition Act*. The Court also addressed the issue of whether or not the representations in question were false and misleading and, if yes, whether they were false and misleading in a material respect.

In its decision, the Tribunal had identified three types of representations made by the respondents to prospective customers: a "screening representation," whereby clients were told during an initial meeting that only qualified applicants would be invited for a second meeting; a "contacts representation," whereby clients were told, for example, "that the respondents had a wide network of personal contacts with leaders and business executives at companies that were hiring" and access to a "hidden job market"; and a "90 Day/Good Job Representation" to the effect that clients "would very likely find good jobs within ninety days, should they engage [the respondents'] services." The Tribunal had found that each of these representations was false and misleading, but that only the "contacts representation" and the "90 Day/Good Job Representation" were false and misleading in a material respect (there being no evidence that the screening representation had "motivated" clients to purchase the respondents' services).

The Tribunal ultimately dismissed the Commissioner's application on the basis that the representations, which were made in the course of private meetings between the respondents and prospective clients, were not made "to the public" within the meaning of the *Competition Act*. The Federal Court of Appeal disagreed. Noting that the respondents had admitted in oral argument that the representations would have been made "to the public" had they been made to a group of prospective clients together, Sexton J.A., speaking for the Court, said he "[could not] accept that because the representations were made to individuals of the public in a private place, this means that they were not made to the public." While the Tribunal had stressed that "personal matters" were discussed during some of the meetings, Sexton J.A. noted that such matters would have been raised by clients, not the respondents, and that "[a]t issue in this case are representations made *by* the respondents *to* the customers" (emphasis in original). In determining whether a representation was made to the public, the important question, according to the Court, is "to whom were the representations made, and under what circumstances?" In this case, the Court answered that question as follows: "the representations were made to a significant section of the public who had been invited by advertising to attend at the offices of the respondent."

CANADIAN COMPETITION LAW *IN THE NEWS*

DECEMBER 22, 2009 – The Competition Bureau released new *Guidelines* on "Product of Canada" and "Made in Canada" claims for non-food products.

DECEMBER 18, 2009 – Husky Energy Inc. was approved as the acquirer of ninety-eight retail gas stations in Southern Ontario, as part of the resolution of the Bureau's concerns with the merger of Suncor and Petro-Canada earlier in the year.

DECEMBER 15, 2009 – Adam Fanaki, former Senior Deputy Commissioner in charge of the Mergers Branch at the Competition Bureau, left for private practice. He was replaced on an interim basis by Ann Wallwork, long-time Assistant Deputy Commissioner in the Branch.

One of the interesting features of the *Competition Act's* misleading-advertising provisions is the fact of their presence in Canada's competition legislation, the purpose of which, as set out in section 1.1 of the *Competition Act*, the Court described as "not to foster competition for its own sake, but rather to promote derivative economic objectives, such as efficiency, global participation, high quality products, and competitive prices." While, unlike other provisions of the *Competition Act*, harm to competition is not listed as an element of the misleading-advertising provisions, the Court noted that "it is a truism that the *Act* always seeks to prevent harm to competition" and, that being the case, it is "presumed that whenever the elements of paragraph 74.01(1)(a) are made out, there is *per se* harm to competition." The Court therefore accepted the Commissioner's submission that, "when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the *Act* is rightly engaged, given its stated goals." Thus, while focused on the consumer, the real purpose of the *Competition Act's* misleading advertising provisions is not to protect consumers, but rather to contribute to the "ultimate objective" of "maintaining the proper functioning of the market in order to preserve product choice and quality."

For these and other reasons, the Court allowed the Commissioner's appeal, and remitted the matter back to the Tribunal for an appropriate order to be made under section 74.1 in accordance with Court's findings.

For more information, please contact your Stikeman Elliott representative, any author listed above, or any member of our Competition/Antitrust Group listed on the following page.

Stikeman Elliott's Competition/Antitrust Group is a highly regarded market leader in Canada, consistently recognized nationally and internationally for its in-depth knowledge and expertise in the practice of competition law.

The Group has extensive experience acting on major national and international transactions, criminal investigations, class and other civil actions, Competition Tribunal proceedings regarding mergers and other reviewable matters, and day-to-day compliance in a wide range of industries, including the airline, wine and spirits, entertainment, financial services, stock exchange, forestry, pipeline, waste management, mining, metals, telecommunications, construction aggregates and foodservice sectors.

Canadian and international corporations frequently seek the Group's counsel on high-profile mergers in which coordinated resolution of regulatory issues is critical. When corporations find themselves subject to proceedings under the *Competition Act*, either before the courts or the Competition Tribunal, the Group has unmatched experience and expertise to effectively represent them. In criminal and class and other private actions, Stikeman Elliott's lawyers successfully represent Canadian, American, European and Asian corporations in the negotiation and implementation of advantageous settlements.

The Group's global reach allows members to work closely with M&A attorneys in the Canadian, European, U.S. and Pacific Rim offices of Stikeman Elliott, and collaborate effectively with colleagues in leading U.S. and European law firms.

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