
COMPETITION / ANTI-TRUST

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INTRODUCTION

Among the major developments in Canadian competition law over the past year or so was the landmark merger review decision of the Competition Tribunal (the "Tribunal") regarding the acquisition of Lakeport Brewing Income Fund by Labatt Brewing Company Ltd., which suggests it is possible to close competitively complex transactions earlier than previously thought.

Other highlights include the issuance of several technical backgrounders for high profile transactions, such as acquisition of Maytag Corporation by Whirlpool Corporation, that provided valuable insight for businesses as to how the Competition Bureau (the "Bureau") will apply the revised Merger Enforcement Guidelines ("MEGs"), issued in September 2004. The Bureau has been active in various areas of competition law enforcement, particularly with respect to international cartels and consumer protection matters. There were further developments in the Canada Pipe abuse of dominance saga, and private applications to the Tribunal, in their limited scope, have continued to increase. Finally, policy initiatives regarding efficiencies and the "regulated conduct" defence have set the stage for additional amendments to the Act. Each of these developments is discussed briefly below.

MERGER MATTERS

Several consent agreements regarding notable transactions were registered with the Tribunal over the past year or so. Among them was the consent agreement filed with the Tribunal on December 20, 2006, with respect to Johnson & Johnson's acquisition of the consumer healthcare business of Pfizer Inc. Following its review of the transaction, the Bureau concluded that this merger would likely result in a substantial lessening of competition in the diaper rash ointment market. Pursuant to the consent agreement, Johnson & Johnson agreed to divest the Zincofax brand of diaper rash ointment. On May 29, 2007, the Commissioner of Competition (the "Commissioner") approved Johnson & Johnson's sale of the Zincofax's diaper rash ointment business and related assets to Squire Pharmaceuticals Inc., a wholly-owned subsidiary of Paladin Labs Inc. The Commissioner's approval was required by the consent agreement.

On April 18, 2007, the Bureau announced that Terminal West Ltd. was selected by Grant Thornton Limited as the purchaser of Agricore United's ("Agricore") AUV grain handling terminal in the Port of Vancouver. The divestiture is in

accordance with the October 2002 consent agreement between the Commissioner and United Grain Growers Ltd. ("UGG"), which required that one of its grain handling terminals in the Port of Vancouver to be divested in order to eliminate the substantial lessening of competition resulting from UGG's acquisition of Agricore in 2001. The purchase by Terminal West Ltd. was approved by the Commissioner, as required by the consent agreement. It should be noted, however, that the Vancouver Port Authority must still approve Terminal West as a lessee of the AUV Terminal premises.

As part of a policy of transparency regarding merger matters, the Bureau issued seven technical backgrounders in the past year to explain its analysis in some high-profile transactions. The first, released on March 6, 2006, the Bureau issued a technical backgrounder regarding the acquisition of Sogides Ltée by Quebecor Media Inc. The Bureau concluded in December 2005 that, subject to a consent agreement addressing possible information exchanges, the transaction would not result in a substantial lessening or prevention of competition in the publishing and distribution of French-language trade books, due to significant remaining competition and low barriers to entry.

The next technical backgrounder was issued on May 31, 2006, to explain the Bureau's clearance of the acquisition of Maytag Corporation ("Maytag") by Whirlpool Corporation ("Whirlpool"). The transaction combined two leading major home appliance manufactures. Although both Maytag and Whirlpool would have significant post-merger combined shares in the washer and dryer segment of the major home appliance market, the Bureau held that effective competition would remain after the acquisition. In its analysis, the Bureau decided that sales of appliances manufactured by Whirlpool or Maytag and sold under a retailer's house brand should not be attributed to the manufacturer, but should rather be treated as an independent competitor in the marketplace. This decision was made, in part, on the basis that a house brand is owned and controlled by the retailer and all pricing and marketing decisions are made solely by the retailer. Other factors influencing the decision were that the retailer is often responsible for its own warehousing and distribution, and also provides its own product warranties and servicing for its house brands. There would also be several remaining manufacturers available to compete for house-brand supply contracts and the ability for retailers to switch from one appliance manufacturer to another, where no long-term manufacturing contract was in place.

On June 19, 2006, the Bureau issued a technical backgrounder on its review of the acquisition of ID Biomedical Corporation by GlaxoSmithKline Inc. While both companies are active in the development and marketing of vaccines, the Bureau concluded in November 2005 that the transaction would not likely result in a substantial prevention or lessening of competition in the vaccine market in Canada.

Later, on August 14, 2006, the Bureau released a technical backgrounder summarizing the findings of its review of the acquisition of control of Matériaux Coupal Inc. by RONA Inc. In notifying the Bureau of the proposed transaction, the parties requested that the Bureau not communicate with third parties immediately. The Bureau exceptionally agreed to this request, but subject to an undertaking by the parties not to close the merger without giving the Bureau six weeks notice. The transaction was made public in early February and the Bureau

commenced its calls to third parties. Although the Bureau had concerns about the impact of the merger, particularly in the Granby region, the Bureau found that sufficient grounds did not exist to challenge the transaction. Even though the Bureau issued a no-action letter, the Commissioner decided to use the three-year period provided under section 97 of the *Competition Act* (the "Act") within which a merger may be challenged for the purposes of monitoring the relevant markets, and in this regard sought RONA's cooperation in obtaining information that would be needed to monitor the competitive effects of the merger.

On August 22, 2006, the Bureau released its Technical Backgrounder on its analysis of the asset acquisition by PaperlinX Canada Ltd. ("PaperlinX") from Cascades Resources Fine Papers Group Inc. The Bureau concluded that the transaction would likely prevent or lessen competition substantially in the distribution of fine paper by full-line merchants to commercial printers in regional western Canadian markets. On February 28, 2006, PaperlinX and the Commissioner entered into a consent agreement requiring PaperlinX to divest all of the Cascades assets relating to the fine paper merchant business in British Columbia and Alberta.

The Bureau also issued a technical backgrounder on October 31, 2006, summarizing the findings of its review of the acquisition of Arcelor SA by Mittal Steel Company NV. The Bureau focused its review on flat carbon steel, the principal area of overlap between the parties, and in particular coated cold-rolled steel, which is generally used to produce exposed automotive steel and packaging made from tin mill products ("TMP"). While the market share of the merged parties was over 35 per cent for the TMP and automotive exposed steel markets, the Bureau concluded that post-transaction, there will remain four North American suppliers with substantial excess capacity in the TMP segment and advised the parties that grounds did not exist at that time to challenge the proposed transaction.

Finally, on November 14, 2006, the Bureau issued a Technical Backgrounder explaining its analysis of the Amalgamation of Alderwoods Group, Inc. with a wholly-owned subsidiary of Service Corporation International. The Bureau concluded that the transaction would not likely result in a substantial lessening or prevention of competition in the relevant geographic markets for funeral products and services, cremation services and burial services. However, the effect of certain legislative changes in Ontario relating to the *Funeral, Burial and Cremation Services Act* and the effect of recent entry and evolving product offerings in British Columbia were difficult to predict, and the Bureau advised the parties that it would revisit the case within two years to assess the competitive effects of these recent developments. Should the Bureau's assessment at that time reveal that the merger has resulted in a substantial lessening or prevention of competition in any of the relevant markets, the Bureau would then consider appropriate remedial action.

On September 22, 2006, the Bureau published its *Information Bulletin on Merger Remedies in Canada* (the "Bulletin"). The Bulletin sets out the Bureau's current policy and general principles applied by the Bureau in respect of merger remedies and marks an intended tightening of the Bureau's stance toward divestitures. On May 1, 2007, the Bureau published an *Outline Consent Agreement* to complement the Bulletin and provide direction to parties on negotiating consent

agreements with the Bureau. The *Outline Consent Agreement* is a generic model that will serve as a starting point from which the Bureau will prepare future consent agreements with merging parties.

Another major development occurred on April 11, 2007, with the Bureau's decision to appeal the Tribunal Decision in the Labatt-Lakeport merger. On March 28, 2007, the Tribunal denied the Bureau's request for an extension and interim Order preventing Labatt Brewing Company Ltd. from completing its acquisition of Lakeport Brewing Income Fund ("Lakeport") for 30 days after. The Tribunal found that the Commissioner had not met the burden of establishing that closing the transaction would substantially impair the ability to remedy a substantial lessening of competition. The decision makes clear that if the Bureau refuses to negotiate or to accept a hold separate prior to closing of the transaction and seeks an injunction preventing the merger, the Tribunal will closely examine the Bureau's approach and determine if it is reasonable to delay the closing pending completion of the Bureau's review. As a result of this decision, it may be possible to close complex transactions earlier than was previously thought as the Commissioner may well be held to the statutory waiting period where she is unable to show that there is no effective post-closing remedy. The Bureau has since announced that it has filed a notice with the Federal Court appealing the Tribunal's decision. Stikeman Elliott LLP led the regulatory team for Lakeport.

ABUSE OF DOMINANCE

The Canada Pipe abuse of dominance saga continued into 2006 with the Federal Court of Appeal (the "FCA") issuing its decisions and reasons in the appeal by the Commissioner and the cross-appeal by Canada Pipe Company Ltd. ("Canada Pipe") from an earlier ruling by the Tribunal in February 2005, dismissing the Commissioner's abuse of dominance and exclusive dealing case against Canada Pipe. The appeal marked the first time the FCA was asked to consider the application of the abuse of dominance and exclusive dealing provisions under the *Act*.

The Commissioner first began the formal investigation into the Stocking Distributor Program ("SDP") of Canada Pipe's Bibby Ste-Croix Division in 2000. The SDP is a loyalty program comprised of rebates and discounts to distributors who agree to stock only Canada Pipe's cast-iron drain, waste and vent ("DWV") products. In October 2002, the Commissioner filed an abuse of dominance application against Canada Pipe, alleging that it was dominant in the relevant Canadian markets for the sale and supply of DWV products, and that Canada Pipe was engaged in a practice of anticompetitive acts (primarily through the SDP). The Tribunal dismissed the Commissioner's application on February 3, 2005, noting that, while Canada Pipe possessed market power in the relevant markets, the SDP had not substantially lessened or prevented competition and, therefore, did not constitute a practice of anticompetitive acts.

The Commissioner's appeal of the Tribunal's decision with the FCA was heard on February 7, 2006.⁴ The FAC allowed the appeal and denied the cross-appeal. In its decision, the FAC considered each of the specific elements the Commissioner must address under the abuse of dominance and exclusive dealing provisions under the *Act* and found errors of law in the way the Tribunal had framed and conducted its analysis under the sections. The case has been sent back to the Tribunal for re-determination.

CONSPIRACIES AND OTHER CRIMINAL MATTERS

International and domestic cartels continue to be the primary enforcement priority for the Bureau.⁵

On August 28, 2006, the Bureau obtained a five year prohibition order against the international auction house, Sotheby's, and its Canadian subsidiary, Sotheby's (Canada) Inc. ("Sotheby's Canada") following an investigation into an international price-fixing conspiracy and its effects on auction services supplied to Canadian clients (the "Order"). Under the Order, Sotheby's and Sotheby's Canada are required to pay investigative costs of just less than \$800,000.

On October 30, 2006, the Bureau announced that following its investigation, two of Quebec's main suppliers of light-emitting diode traffic lights and two of their directors were charged with bid-rigging. Electromega Limited and its President, Alain Lamoureux, and Tassimco Technologies Canada Inc. and its Vice-President, Conrad DiPietro, were charged with bid-rigging under section 47 of the Act following Quebec City's call for tenders for the supply of traffic signals.

There have also been several developments over the course of the last year in respect of the telecommunications industry, many with a view to encouraging greater reliance on market forces. Among these developments is the Bureau's *Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (the "Draft Bulletin"), published on September 26, 2006. The Draft Bulletin sets out the Bureau's approach to reviewing complaints under the abuse of dominance provisions of the Act in respect of conduct that is not regulated by the Canadian Radio-television and Telecommunications Commission (the "CRTC"). While the Draft Bulletin is sector-specific, nothing in the Draft Bulletin deviates from the general enforcement approach outlined in the *Enforcement Guidelines on the Abuse of Dominance Provisions* published in 2001.

Another development specific to the telecommunications sector happened on November 15, 2006, when the Governor in Council (effectively, the federal Cabinet) exercised its power under the *Telecommunications Act* to vary the CRTC's 2005 Voice over Internet Protocol ("VoIP") decision.⁶ The Cabinet ordered the CRTC to forbear from economic regulation in respect of access-independent VoIP services provided by incumbent local exchange carriers in their incumbent territories. This decision effectively supports the increased reliance on market forces to regulate conduct in the telecommunications industry.

Shortly after the decision by the Cabinet to vary the CRTC's VoIP decision, the Canadian Minister of Industry tabled Bill C-41 on December 7, 2006. Bill C-41⁷ included telecommunications-specific amendments to the Act, which would extend the Tribunal's power to impose administrative monetary penalties in respect of abuse of dominance to telecommunications services providers.

Following the Commissioner's comments on April 4, 2007, it is apparent that telecommunications will be one of the Bureaus top priorities as the government moves ahead and accelerates the deregulation of the local telecommunications sector.

MISLEADING REPRESENTATIONS & DECEPTIVE MARKETING PRACTICES

Under the Act, misleading advertising is regulated under a

dual criminal/civil regime. The criminal provisions of Part VI of the Act are reserved for the most egregious conduct committed knowingly or recklessly, while all other deceptive marketing practices are covered by the civil regime under Part VII.1. In the past year, the Bureau devoted significant resources to the Fair Business Practices Branch, resulting in a number of high-profile investigations, convictions and penalties. The Bureau continues to make the combating of fraudulent mass marketing a priority.⁸

The Ordinary Selling Price provisions in subsections 74.01(2) and 74.01(3) are part of the deceptive marketing practices provisions of the Act, and are designed to ensure that when products are promoted at sale prices, consumers are not misled as to the amount they are saving by reference to inflated regular prices.

On July 27, 2006, the Bureau announced that it reached a settlement in the form of a consent agreement with Grafton-Fraser Inc. ("Grafton-Fraser") resolving the Bureau's concerns over the company's pricing practices. Grafton-Fraser is a retailer of men's apparel operating over 180 corporate stores under the banners of George Richards Big & Tall, Grafton & Co. (Stonehouse), Mr. Big & Tall, the Suit Exchange, Timberland and Tip Top Tailors. The Bureau had launched an investigation into allegations that Grafton-Fraser had significantly inflated the regular price of certain garments sold in its stores, which resulted in an overstatement of the savings to consumers when these garments were "on sale." The Bureau concluded that Grafton-Fraser was engaged in reviewable conduct under the ordinary price provisions of the Act. Grafton-Fraser and Glenn Stonehouse, President, CEO and majority shareholder of Grafton-Fraser are parties to the consent agreement and subject to its terms and conditions. The consent agreement requires the payment of an administrative monetary penalty and costs totalling \$1.2 million.

Given the increasingly multi-jurisdictional nature of fraud cases, Bureau investigations may often involve cooperation with law enforcement agencies from other countries. For example, on October 19, 2006, the Bureau announced that it, along with Health Canada, had joined forces with counterpart agencies in the US and Mexico in compliance and enforcement actions against companies promoting bogus Diabetes products and services.

PRIVATE ACTIONS

Private parties are able to seek relief under the Act with respect to certain types of conduct. Section 36 allows for a party to sue for damages for a breach of the criminal provisions of the Act. While a previous conviction under the Act is not required, it is generally easier to obtain damages once the offence in question has already been proven in a criminal court.

Section 36 is the only avenue under which a private party may sue for damages for a breach of the Act. However, under section 103.1, a private party may apply directly to the Tribunal for a remedy to address an alleged breach of section 75 (refusal to deal) and 77 (exclusive dealing, tied selling and market restriction). Before actually arguing for a remedy from the Tribunal, however, the party must first obtain leave.

There were a few noteworthy developments with respect to private party access to the Tribunal in the past year. On March 23, 2007, the Tribunal dismissed an application for leave alleging breach of section 75 in *Sears Canada Inc. v. Parfums*

Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd. Another application for leave alleging breach of section 75 was made against the same Respondent in *London Drugs Limited v. Parfums Givenchy Canada Ltd.*, however, this application was withdrawn by the Applicant on May 4, 2007. One additional application for leave alleging breach of section 75 was made on March 22, 2007, in respect of *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.* however, this application is still ongoing and no decision has been rendered.

POLICY DEVELOPMENTS

In the wake of the Supreme Court of Canada's decision in *Garland v. Consumers' Gas Co.*,⁹ the Commissioner commenced a consultation process in October 2004 regarding the "regulated conduct defence" ("RCD") and the intersection of sector-specific regulations and competition law. Following the consultations, on June 29, 2006, the Bureau released the final version of its Technical Bulletin on "Regulated Conduct" (the "*Regulated Conduct Bulletin*"). The *Regulated Conduct Bulletin* limits the RCD's potential application to allegations of criminal anti-competitive conspiracy to section 45 of the Act. However, even though the Bureau will refrain from investigating the conduct as a criminal conspiracy under section 45 of the Act, the Bureau takes the position that it will retain jurisdiction to investigate such conduct as a potential violation of any other provision of the Act, provided that it determines that Parliament intended for the Act to apply to the conduct.

As noted earlier, the Bureau often works in conjunction with foreign law enforcement agencies in pursuing cross-border competition law violations. In May 2006, the Bureau announced that an agreement had been signed with the Korean Fair Trade Commission to improve enforcement in areas such as cartels and deceptive marketing. Pursuant to the increasingly international nature of competition law enforcement, the Bureau has similar arrangements with competition agencies in various jurisdictions.

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³*Commissioner of Competition v. Canada Pipe Ltd.*, 2005 Comp. Trib. 3 (February 3, 2005).

⁴*Canada (Commissioner of Competition) v. Canada Pipe Ltd.*, Court File A-106-05.

⁵See "Competition Bureau Priorities," speaking notes for Sheridan Scott, Commissioner of Competition, Competition Bureau, Canadian Bar Association Spring Conference on Competition Law, Toronto (May 26, 2006), available at www.competitionbureau.gc.ca.

⁶Telecom Decision CRTC 2005-28, *Regulatory framework for voice communication services using Internet Protocol*, 12 May 2005 (VoIP Decision).

⁷*An Act to amend the Competition Act*, 39th Parl., 1st Sess., 7 December 2006.

⁸See "Competition Bureau Priorities," speaking notes for Sheridan Scott, Commissioner of Competition, Competition Bureau, Canadian Bar Association Spring Conference on Competition Law, Toronto (May 26, 2006), available at www.competitionbureau.gc.ca.

⁹[2004] 1 S.C.R. 629, 2004 SCC 25 ("*Garland*"). In *Garland*, the applicable federal statute was the *Criminal Code*, not the Act.

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