

Restraints of trade and dominance in Canada: overview

By Michael Kilby and Michael Rosenstock

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Practical Law™

Restraints of trade and dominance in Canada: overview

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RESTRAINTS OF TRADE

Scope of rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

Restrictive agreements and practices are regulated under both the criminal and reviewable practice provisions of the federal Competition Act. Criminal prosecution is typically reserved for the most serious offences ("naked restraints" or cartels), while the reviewable practice regime is more flexible and is intended to catch a broader spectrum of agreements, arrangements and other conduct (for example, competitor collaborations) that can prevent or lessen competition substantially in certain circumstances.

While Canada's provinces do not have competition laws, they have legislative powers in certain related areas, such as consumer protection.

Criminal provisions

The criminal conspiracy provisions under the Competition Act establish an indictable offence for conspiring, agreeing or arranging with a competitor to fix prices, allocate sales, territories, customers or markets, or to control supply of a product. Any such unlawful agreement or arrangement with a competitor is prohibited irrespective of whether it results in any competitive harm, subject to the defences and exceptions described below.

Reviewable practice provisions

Restraints of trade can be reviewed under the reviewable practice provisions of the Competition Act, which are subject to the civil standard of proof (balance of probabilities) and a rule of reason approach.

The Competition Act authorises the Competition Tribunal to make an order to prohibit or otherwise remedy an agreement or arrangement between competitors that substantially prevents or lessens competition (SPLC) in a market, or is likely to do so (the civil agreement provisions). The Competition Act provides a number of non-exhaustive factors that the Tribunal can consider in determining whether an agreement or arrangement results in SPLC, such as the degree of existing foreign competition, the availability of substitutes and barriers to entry.

Agreements in restraint of trade can also be civilly reviewed under the refusal to deal, price maintenance and exclusive dealing, tied selling and market restrictions provisions of the Competition Act.

Industry specific regimes

The Competition Act, together with guidelines published by the Competition Bureau, provides a specific framework for considering anti-competitive conduct related to intellectual property rights. The

Competition Act provides a special remedy in relation to the exercise of patents, trade marks and other intellectual property found to cause certain anti-competitive effects. Remedies related to anti-competitive intellectual property practices can also be obtained through the ordinary criminal and civil agreement provisions of the Competition Act.

Regulatory authority

The Competition Bureau is an independent law enforcement body and responsible for the administration and enforcement of the Competition Act. The Bureau, which is headed by the Commissioner of Competition, investigates both criminal matters and civilly reviewable practices under the Competition Act. The Public Prosecution Service of Canada prosecutes criminal matters.

See box, *The regulatory authority*.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

The Competition Act's criminal and reviewable practices regimes apply equally to formal and informal agreements or arrangements.

Exemptions

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

The criminal and reviewable practices provisions of the Competition Act generally exempt agreements or arrangements between affiliates.

The criminal conspiracy provisions of the Competition Act provide several defences, including where the:

- Conspiracy, agreement or arrangement is ancillary, reasonably necessary for giving effect to, and directly related to a separate agreement or broader agreement that, considered alone, does not violate the criminal conspiracy provisions.
- Conspiracy, agreement or arrangement is related only to the export of products from Canada.
- Conduct is required or authorised by federal or provincial law, in certain circumstances ("regulated conduct" defence).

The civil agreement provisions provide an efficiencies defence for arrangements and agreements that would otherwise be found anti-competitive. The Competition Tribunal cannot make an order where:

- The agreement or arrangement has brought, or is likely to bring about, efficiency gains that more than offset the prevention or lessening of competition resulting from the agreement or arrangement.

- The gains in efficiency would not have been attained if the order by the tribunal (for example, enjoining the agreement) were made.

Exclusions and statutes of limitation

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

Certain efficiency-enhancing specialisation agreements between parties can be excluded from the criminal conspiracy and civil agreement provisions of the Competition Act. In addition, many of the civilly reviewable practices such as price maintenance, exclusive dealing, tied selling and market restriction, could also be said to contain "exclusions" in the sense that they are only subject to an order from the Competition Tribunal if several conditions are met, including that the conduct in question results or is likely to result in an SPLC (see *Question 1*).

Statutes of limitation

There is no limitation period in respect of the criminal conspiracy provision of the Competition Act. However, no private action can be brought against a person related to a proceeding under the criminal provisions of the Competition Act after the later of two years from the day on which the conduct was engaged in, or the day on which any criminal proceedings relating to the conduct were finally disposed of.

There are no limitation periods in respect of the civil agreement provisions, nor do limitation periods apply to the refusal to deal, price maintenance and exclusive dealing, tied selling and market restriction provisions.

5. What are the notification requirements for restrictive agreements and practices?

Notification

There is no notification procedure for potentially restrictive agreements and practices.

Informal guidance/opinion

The Competition Act provides a mechanism by which any person can apply to the Commissioner, with supporting information, for a binding opinion on the applicability of any provision of the Competition Act or for conduct or a practice in which the applicant proposes to engage. This opinion remains binding on the Commissioner for as long as the material facts on which the opinion was based remain substantially unchanged and the conduct or practice is carried out substantially as proposed. The Commissioner can decide not to provide an opinion. This mechanism is very rarely relied upon in practice.

Responsibility for notification

Not applicable.

Relevant authority

A request for an opinion must be made to the Commissioner.

Form of notification

An application to the Commissioner for an opinion typically takes the form of a letter. The Competition Bureau has published a non-exhaustive list of information required to obtain a written opinion available at: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-fees-service-handbook-written-opinions-2017-e.pdf/\\$file/cb-fees-service-handbook-written-opinions-2017-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-fees-service-handbook-written-opinions-2017-e.pdf/$file/cb-fees-service-handbook-written-opinions-2017-e.pdf)

Filing fee

There is a CAD15,000 filing fee for a written opinion related to the criminal conspiracy and civil agreement provisions of the Competition Act. A fee of CAD5,000 applies to a written opinion on a practice related to refusal to deal, price maintenance or exclusive dealing, tied selling and market restriction. Fees are subject to applicable taxes. Again, the written opinion mechanism is very rarely relied upon in practice.

Investigations

6. Who can start an investigation into a restrictive agreement or practice?

Regulators

The Competition Bureau initiates investigations into allegedly restrictive agreements or practices. As a law enforcement agency, the Bureau has discretion with respect to the investigations it initiates. Investigations may follow a complaint from a third party, news reports or evidence obtained under the Bureau's immunity or leniency programmes.

Following a Bureau investigation, the Commissioner can apply to the Competition Tribunal for an order under the reviewable practices provisions of the Competition Act, or he can refer evidence to the Public Prosecution Service of Canada and recommend that charges be laid under the criminal provisions.

The Tribunal is the administrative body delegated with adjudicating reviewable practices under the Competition Act. By contrast, criminal proceedings are adjudicated by a court at first instance. The Commissioner must choose one route of enforcement, as the Competition Act prevents the Commissioner from seeking a civil order from the Tribunal on substantially similar facts to those underlying criminal proceedings, and vice versa.

Third parties

Investigations (also known as "inquiries") can technically be triggered automatically by way of a third-party complaint supported by at least six persons resident in Canada, although the Bureau has broad discretion in determining how intensively it will investigate such a matter. More commonly, information provided to the Bureau by third parties can lead to it deciding to open an investigation (or inquiry) under the criminal or reviewable practice provisions of the Competition Act.

The refusal to deal, price maintenance and exclusive dealing, tied selling and market restriction provisions of the Competition Act (but not the civil agreement provisions, see *Question 1*) also permit a third-party complainant to apply directly to the Tribunal for leave which, if granted, would allow the third party to apply directly to the Tribunal for an order against a person. The third party must be "directly affected" by alleged conduct to be granted leave and the decision to grant leave is at the Tribunal's discretion. Actions before the Tribunal by third parties are quite rare.

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Representations

A third party generally does not have a specific statutory right to make representations in the course of a Competition Bureau investigation, but the Bureau would typically be open to, and welcome, such representations.

Document access

Confidentiality restrictions under the Competition Act generally prevent third parties from accessing documents obtained by the

Bureau during its investigations. Where the Bureau brings proceedings in front of the Competition Tribunal, or where court proceedings are involved, such documents can become available in accordance with open court principles, subject to certain confidentiality orders and practices.

Be heard

A third party does not have a specific statutory right to be heard by the Bureau. However, the Bureau can invite comment from potentially interested third parties and frequently requests information from third parties in the course of its investigations. The Bureau also routinely agrees to meet with third parties. Where cases proceed to the Tribunal or the court, it may be possible for third parties to apply to participate as intervenors.

8. What are the stages of the investigation and timetable?

Where the Commissioner has reason to believe that a criminal offence has been committed under the Competition Act, or that grounds exist for making an order under the reviewable practice provisions of the Competition Act, he must start an inquiry into all matters he considers necessary with the view of determining the facts.

There are no pre-defined formal stages or strict timetables under which the Competition Bureau will carry out its investigations. Investigations may take months or years. However, the tribunal or court can impose specific timetables while adjudicating a dispute.

Publicity and confidentiality

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The Competition Act requires all inquiries by the Bureau to be conducted in private. Accordingly, the Competition Bureau typically does not publicly confirm the existence of an investigation unless the party or parties under investigation make this information known. The existence of an investigation, and certain details related to an investigation, can also be made public where the Bureau seeks orders or search warrants from a court or makes information requests of third parties.

Automatic confidentiality

Subject to certain exceptions, the Competition Act provides an automatic right of confidentiality to parties under investigation as well as to those who make complaints or provide information to the Bureau. The Competition Act expressly prevents Bureau personnel from communicating or allowing the communication of the identity of any person from whom information was obtained under the Competition Act, as well as information provided voluntarily pursuant to the Competition Act. However, such information may have to be disclosed as part of litigation processes.

Confidentiality on request

Parties can request that information be kept confidential, consistent with the confidentiality provisions of the Competition Act.

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The Competition Bureau has a range of fact gathering tools available to it including searches, production orders, orders requiring written responses to questions, oral examinations and wire tapping. The Bureau also operates an Immunity and Leniency Program in exchange for information about an offence or evidence leading to criminal charges.

Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

In the context of civilly reviewable practices, the typical settlement mechanism is known as a consent agreement, entered into between the Commissioner of Competition and the party. The consent agreement process is described further in *Question 12*. In the criminal conspiracy context, parties can negotiate guilty pleas with the Public Prosecution Service of Canada with such guilty pleas then being entered in court.

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

The Commissioner of Competition can privately negotiate and enter into a consent agreement with a party to resolve the Commissioner's concerns, with the party typically agreeing to conduct itself in a certain manner. A consent agreement is formally registered at the Competition Tribunal and then has the effect of a court order with its key terms being made public. The Commissioner generally prefers entering into consent agreements, where possible, rather than litigating matters fully. The Commissioner can only enter into a consent agreement with a party to address competition concerns if it has determined that the conduct could be the subject of an order against a party, which requires a determination that the conduct in question infringes the Competition Act.

Penalties and enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The reviewable practices provisions authorise the tribunal to make the following orders, which depend on the anti-competitive practice:

- **Civil agreement provisions.** The Tribunal can prohibit any person, whether or not a party to the agreement or arrangement, from doing anything under the agreement or arrangement and/or can require a person to take any other action with the consent of that person.
- **Refusal to deal.** The Tribunal can order a supplier to accept a person as a customer.
- **Price maintenance.** The Tribunal can make an order prohibiting the person from engaging in such conduct or

requiring them to accept the harmed person as a customer on usual trade terms.

- **Exclusive dealing, tied selling and market restriction.** The Tribunal can make an order prohibiting a person from engaging in such conduct and containing any other requirement that it considers necessary to restore or stimulate competition in the market.

Fines

A person convicted of an offence under the criminal conspiracy provisions of the Competition Act can be fined up to CAD25 million.

No fines can be levied against persons under the civil agreement provisions, or the refusal to deal, price maintenance and exclusive dealing, tied selling and market restriction provisions of the Competition Act.

Personal liability

Individual directors or managers convicted under the criminal conspiracy provisions of the Competition Act are liable to imprisonment or fines.

A person convicted for an indictable offence under these provisions can be imprisoned for up to 14 years.

Individuals can be subject to an order by the Tribunal under the reviewable practices provisions.

Immunity/leniency

The Competition Bureau operates an immunity programme, in which the first party to disclose an offence not otherwise detected, or to provide evidence leading to criminal charges, can receive immunity from prosecution. The Bureau also operates a leniency programme in which persons not eligible for immunity can be considered for lenient treatment in sentencing. These programmes are complex and specific legal advice should be sought in relation to any individual case.

Impact on agreements

The Tribunal can order a person to stop doing anything under an anti-competitive agreement or arrangement.

Third party damages claims and appeals

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages

Any person who has suffered loss or damage as a result of conduct that is contrary to the criminal provisions of the Competition Act can bring an action to recover those losses, together with any additional amount that the court can allow, not exceeding the full cost to him or her of any investigation.

Third parties cannot claim damages for losses suffered as a result of anti-competitive conduct under the reviewable matters provisions of the Competition Act.

Collective/class actions

A class action can be brought to recover damages associated with conduct that is contrary to the criminal provisions of the Competition Act. Under Canadian law, an action must first be certified by a court to proceed as a class action. Class actions often take many years to resolve.

Class actions are not permitted in respect of the reviewable matters provisions of the Competition Act.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

Decisions of courts in respect of the criminal provisions of the Competition Act, and decisions by the Tribunal in respect of the reviewable matters provisions of the Competition Act, can be appealed to a court of appeal. Depending on the circumstances, leave to appeal can be required.

Third party rights of appeal

Generally, no rights of appeal are available to third parties, except in situations where third parties apply to the Tribunal for an order in respect of refusal to deal, price maintenance and exclusive dealing, tied selling and market restriction conduct (see *Question 6*). Third parties can in some circumstances seek intervenor status.

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

Abuses of market power are regulated under the reviewable practices provisions of the Competition Act, in particular the abuse of dominance provisions.

Regulatory authority

The Competition Bureau is the regulatory authority that monitors and investigates alleged abuses of dominance.

17. How is dominance/market power determined?

Abuse of dominance is established where the following elements are established and a defence does not otherwise exist:

- A person (or persons) substantially controls a class of business.
- The person is engaging in anti-competitive acts (such as those described in *Question 18*).
- The practice results in a substantial prevention or lessening of competition in a market.

The bureau has published detailed guidelines setting out its analytical approach to abuses of dominance.

18. Are there any broad categories of behaviour that may constitute abusive conduct?

The Competition Act provides a non-exhaustive list of anti-competitive acts that can constitute abusive conduct, including:

- Squeezing of a downstream competitor.
- Acquisition of a customer or supplier that would otherwise be a competitor.
- Selective or temporary use of fighting brands.
- Buying up products to prevent price erosion.

- Below-cost pricing.

As a practical matter, most abuse of dominance cases have involved firms with large market shares allegedly engaging in exclusive or restrictive contractual practices that have the effect of impeding competitors from expanding or entering the market, to the detriment of consumers.

Exemptions and exclusions

19. Are there any exemptions or exclusions?

An act that is merely the exercise of intellectual property rights pursuant to federal legislation will generally be excepted from the Competition Act.

Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no notification procedure with respect to abuses or dominance. A person can obtain a binding opinion from the Competition Bureau in relation to proposed conduct (see *Question 5*), but this is rarely done.

Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

There are effectively no procedural differences between investigations into abuses of dominance and those related to civilly reviewable restrictive agreements and practices (see *Questions 6 to 9, 11 and 12*). Criminal conspiracies are dealt with in an entirely different manner (see *Questions 6 and 8*).

22. What are the regulator's powers of investigation?

The Competition Bureau has broad investigatory powers, including applying for the issuance of subpoenas (see *Question 10*).

Penalties and enforcement

23. What are the penalties for abuse of market power and what orders can the regulator make?

Under the abuse of dominance provision, the tribunal can do any of the following:

- Prohibit the anti-competitive conduct.
- Where prohibiting the anti-competitive conduct is unlikely to restore competition, take other reasonable and necessary actions, such as ordering the divestiture of shares.
- Order an administrative monetary penalty of up to CAD10 million (CAD15 million for subsequent orders).

Third party damages claims

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special

procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages

Third parties do not have access to the Tribunal in respect of alleged abuses of dominance.

Special procedures/rules

Not applicable.

Collective/class actions

Not applicable.

EU LAW

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

26. How are joint ventures analysed under competition law?

Provided certain conditions are met, joint ventures can be exempted from the merger provisions of the Competition Act. Legitimate joint ventures can be considered under the reviewable practices provisions (for example, abuse of dominance, civilly reviewable agreements). The Competition Bureau has published a Competitor Collaboration Guideline which details the Bureau's approach to joint ventures. In extreme cases, the Bureau could seek a criminal review of a joint venture.

INTER-AGENCY CO-OPERATION

27. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The Competition Bureau routinely co-operates with regulators in other jurisdictions in relation to infringements of competition law. The Bureau typically acts pursuant to non-binding memoranda of understanding it has reached with other regulators.

RECENT CASES AND TRENDS

28. What are the recent developments, trends or notable recent cases concerning abuse of market power?

In 2017, the Federal Court of Appeal upheld an order under the abuse of dominance provisions requiring a real estate board to remove restrictions on members' ability to display and use residential real estate data on virtual office websites, which the court found prevented innovative brokers from offering services over the internet. The real estate board has sought leave to appeal to the Supreme Court of Canada.

The Competition Bureau has identified innovation as a key competition concern, including in respect of big data and other non-price effects of anti-competitive conduct.

The Bureau issued draft enforcement guidelines on the abuse of dominance provisions in March 2018 that would replace the existing guidelines.

PROPOSALS FOR REFORM

29. Are there any proposals for reform concerning restrictive agreements and market dominance?

No significant reforms have been proposed related to restrictive agreements and market dominance.

ONLINE RESOURCES

Government of Canada – Justice Laws website

W [www.http://laws-lois.justice.gc.ca/eng/acts/C-34/FullText.html](http://laws-lois.justice.gc.ca/eng/acts/C-34/FullText.html)

Description. The full text of the Competition Act, maintained by the Government of Canada. Both the English and French versions are binding.

THE REGULATORY AUTHORITY

Competition Bureau

Head. Matthew Boswell (Interim Commissioner of Competition).

Contact details. Place du Portage I 50 Victoria Street, Room C-114 Gatineau, Quebec, K1A 0C9 T +1-819-997-4282 F +1-819-997-0324
W www.competitionbureau.gc.ca

Outline structure. The Competition Bureau is headed by the Commissioner of Competition and organised into four branches:

- Mergers and Monopolistic Practices Branch.
- Cartels and Deceptive Marketing Practices Branch.
- Competition Promotion Branch.
- Corporate Services Branch.

Legal support is provided to the Competition Bureau Legal Services (a section of the Department of Justice) and Public Prosecution Service of Canada, which is responsible for initiating and conducting criminal prosecutions on behalf of the Attorney General of Canada and for advising the bureau on criminal investigations.

Responsibilities. The Competition Bureau is responsible for the administration and enforcement of the Competition Act, the Consumer Packaging and Labelling Act (non-food products), the Textile Labelling Act and the Precious Metals Marking Act.

Procedure for obtaining documents. Bureau materials including guidelines, bulletins and press releases are publicly available on the bureau's website.

Competition Tribunal

Head. Mr. Justice Denis Gascon (Chairman)

Contact details. Thomas D'Arcy McGee Building 90 Sparks Street, Suite 600 Ottawa, ON, K1P5B4 Canada T +1-613-957-3172 F +1-613-957-3170 E tribunal@ct-tc.gc.ca **W** www.ct-tc.gc.ca

Outline structure. The Competition Tribunal is composed of up to six judicial members appointed from among the judges of the Federal Court and not more than eight lay members. The lay members provide expertise based on their individual backgrounds in economics, business, accounting, or marketing.

The members are appointed for fixed terms of up to seven years and can be re-appointed. One of the judicial members is appointed Chairman of the Tribunal and is responsible for directing the tribunal's work, including the allocation of case work to tribunal members.

Responsibilities. The tribunal has jurisdiction to hear and dispose of all applications made under the Competition Act's deceptive marketing practices and restrictive trade practices provisions. It also hears references filed in relation to inquiries undertaken by the Commissioner.

Procedure for obtaining documents. Most documents are available on the tribunal's website. Paper copies of documents can be obtained by contacting the Registry.

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Professional qualifications. Bar admission: Ontario, Canada (2016).

Areas of practice. Competition, foreign investment.

Non-professional qualifications. JD, University of Toronto; MA (Economics), University of Toronto; B.Arts.Sc., McMaster University.

Recent transactions. Lowe's Companies in its CAD3.2 billion friendly acquisition of Rona Inc by way of a plan of arrangement under the Business Corporations Act (Québec). Manitoba Telecom Services Inc in the acquisition of all its outstanding shares by BCE Inc by way of a plan of arrangement for approximately CAD3.9 billion.

Professional associations/memberships. Law Society of Ontario; Canadian Bar Association; American Bar Association.

Professional qualifications. Bar admission: Ontario, Canada (2016).

Areas of practice. Competition, foreign investment.

Non-professional qualifications. J.D., University of Toronto; M.A. (Economics), Queen's University; B.A., University of Winnipeg.

Professional associations/memberships. Law Society of Ontario; Canadian Bar Association; American Bar Association.

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