A Practical Guide to Recent Competition Law Developments

January 18, 2012

Goodmans LLP

Goodmans LLP

Contents

About Goodmans

Goodmans is recognized as one of Canada's leading business law firms offering market-leading expertise in specialties such as mergers and acquisitions, corporate finance, securities, corporate/commercial, banking and finance, private equity, REITs and income securities, tax planning, restructurings, litigation and commercial real estate. Founded in 1917, Goodmans has offices in Toronto and Vancouver with over 200 lawyers.

Goodmans provides a complete range of legal advice and representation to domestic and foreign business clients ranging from entrepreneurial businesses to multinational corporations, financial institutions, pension funds and governments across a wide range of industries.

Our lawyers are consistently recognized by leading industry arbiters, and in various surveys of clients and peers conducted by *Lexpert*, *Lexpert/American Lawyer Media*, *Chambers and Partners*, *Practical Law Company*, *Euromoney*, *International Financial Law Review, Law Business Research* and *Best Lawyers in Canada*. According to *Chambers and Partners*, as Canada's 21st largest law firm, Goodmans ranks solidly first in Canada on the proportion scale with over 20% of our lawyers recognized as the best in their fields.

Below is a sampling of our recent accolades:

- The Lexpert/American Lawyer *Guide to the Leading 500 Lawyers in Canada* (2012 edition) lists 22 Goodmans partners among the leading Canadian lawyers excelling in 16 practice areas of law.
- The *Canadian Legal Lexpert Directory 2011* recognizes 40 Goodmans lawyers as being top-tier in their fields and leaders in 26 distinct areas of law.
- Chambers Global's *Guide to the World's Leading Lawyers 2011* ranks 41 individual Goodmans lawyers among Canada's finest. Goodmans' Restructuring/Insolvency Group stands alone as Number 1 in Canada for the 10th consecutive year and the Corporate M&A, Real Estate and Telecommunications practices are also ranked top-tier.
- In 2008 and 2009, Goodmans was named "National Law Firm of the Year for Canada" at *International Financial Law Review's* Americas Awards.
- *PLC Which Lawyer? Yearbook* ranks Goodmans in their top category in capital markets and restructuring and insolvency and "highly recommended" for banking and finance, construction, corporate real estate, corporate mergers and acquisitions, dispute resolution, private client, private equity/venture capital, tax and telecoms and media.
- *International Financial Law Review* 1000 ranks our M&A and insolvency and restructuring practices top tier and also recognizes our strength in capital markets and bank lending.
- *The Best Lawyers in Canada 2012* ranks 54 Goodmans lawyers across 27 practice areas, as among the best lawyers in Canada.

Competition

Along with one of the most active M&A practices in the country, Goodmans enjoys an extremely strong Competition Law practice, placing a particular emphasis in the mergers area. Our Competition Law practice is a development from our corporate and M&A practice. Goodmans' lawyers have been involved in many of the largest and most complex mergers in Canadian business including Newmont Mining/Franco-Nevada Mining Corp. Ltd. and Normandy Mining Ltd., Co-Steel/Gerdau S.A., Mackenzie Financial Corporation/C.I. Fund Management Ltd./Sun Media/Quebecor, Schneider Corporation/Smithfields and Norske Canada/Pacifica Papers Inc. Our competition lawyers are able to quickly gain an understanding of a proposed transaction and the business purposes behind it, as well as the businesses of the parties involved. We can then analyze the competitive aspects of a transaction and assist in structuring it to address competition law concerns. Thereafter, we are able to present cogent arguments to the Competition Bureau on the pro-competitive effects of the transaction.

We also assist clients in opposing mergers that are anti-competitive and detrimental to their interests and we have acted in a wide range of cases in which the Bureau has investigated anti-competitive practices.

We regularly advise clients in contentious matters where there is an ongoing or threatened investigation and/or prosecution relating to criminal offences and civil provisions under the *Competition Act*, including conspiracy, abuse of dominance, resale price maintenance, refusal to deal, advertising and marketing offences. We also advise clients on continuing compliance policies and issues which those clients encounter in their specific industries.

Goodmans has extensive industry-specific expertise in financial industries, manufacturing, real estate, telecommunications, airlines, entertainment, broadcasting, newspaper publishing, pulp and paper, forestry and mining sectors. This expertise enables us quickly to identify and resolve competition law issues. Our commitment to assisting clients in attaining their objectives gives us a distinctive competition law focus: we are there to "get the deal done".

We co-operate with the Competition Bureau in reviewing and commenting upon proposed changes to the *Competition Act*. We write in specialized and general publications on competition law matters.

We have represented, among others:

- Palm Dairies with the first merger to be contested following the overhaul of the Competition Act in 1986
- The Competition Bureau with the proposed mergers of Royal Bank with Bank of Montreal and Toronto Dominion Bank with Canadian Imperial Bank of Commerce
- Clearwater Seafoods Limited Partnership with respect to the acquisition of the Primary harvesting and processing business of High Liner Foods
- Abitibi-Consolidated Inc. in its $7.1 billion acquisition of Donahue Inc.
- Fletcher Challenge Canada Ltd. with the Seaspan case, one of the few mergers to have been contested before the Competition Tribunal. Our defence resulted in the removal of Fletcher Challenge from the case
- Various financial institutions in a successful attempt to gain access to Interac, an ATM system controlled by Canada's major banks
- Sun Media in mounting a successful competition law defence to Torstar's attempted takeover

- Schneider Corporation in response to the hostile takeover bid by Maple Leaf Foods and the subsequent sale of Schneider to Smithfield Inc.
- Norske Skog Canada Ltd. with its $905 million acquisition of Pacifica Papers Inc.
- The Competition Bureau with a major tobacco industry merger
- DreamWorks LLC with the Competition Bureau's investigation of the Canadian movie industry
- FPI Ltd. with the proposed acquisition of the fishing business of Clearwater Fine Foods Inc.
- Onex Corp. in its acquisition of Loews Cineplex
- Bell Globemedia Inc.'s sale of its 40% interest in CTV SportsNet Inc. through its wholly owned subsidiary, CTV Inc., to a subsidiary of Rogers Broadcasting Limited
- CTV Inc.'s acquisition of NetStar Communications Inc.
- CTV Inc. on its acquisition and disposition of various broadcasting entities and interests therein, including ROB TV, CFCF TV and CTV Sportsnet
- BCE Inc.'s acquisition of CTV Inc.
- Shaw Communications Inc.'s acquisition of Western International Communications Ltd. (WIC).
- Star Choice Communications Inc. in its merger with Canadian Satellite Communications Inc. (CANCOM) (two major satellite carriers)
- British Telecom in the sale of its interests in Rogers AT&T Wireless and AT&T Canada Corp.
- Retirement Residences REIT and CPL Long Term Care REIT in their agreement to combine to create Canada's third largest REIT and largest provider of senior care and accommodation with a market capitalization of over $800 million and assets of approximately $1.9 billion
- Syndicate of operating lenders including The Toronto-Dominion Bank, Canadian Imperial Bank of Commerce and Societé Générale (Canada) in the sale of substantially all of the Canadian assets of Consumers Packaging Inc. to O-I Canada Corp. for $230 million
- Mackenzie Financial Corporation's successful defence of the $3.5 billion hostile takeover bid by C.I. Fund Management Ltd. and the subsequent $4.2 billion friendly bid by Investors Group Inc., a subsidiary of Power Financial Corp.
- The Cadillac Fairview Corporation Limited and Ontrea Inc., subsidiaries of the Ontario Teachers' Pension Plan Board, in its $1 billion acquisition of the interests of TD Realty Limited and its parent The Toronto-Dominion Bank in various Canadian office and retail projects, including the Toronto Eaton Centre, Toronto-Dominion Centre, 250 Yonge Street and 95 Wellington Street West, Toronto, Ontario and Pacific Centre, Vancouver, British Columbia.
- Battle Mountain Gold and Battle Mountain Canada with their U.S.$542 million merger with Newmont Mining Corp.
- Rexel S.A. in its $987 million acquisition of Westburne Inc. and in Rexel Canada's $550 million sale of its plumbing, HVAC and industrial productions distribution operations to the North American subsidiaries of Wolseley PLC
- Newmont Mining Corporation's acquisitions of Franco-Nevada Mining Corp. Ltd. and Normandy Mining Ltd. in a three-way, multinational transaction that created the world's largest gold producer, with a market capitalization of more than US$12 billion
- Co-Steel Inc. in its $1.34 billion combination with Gerdau S.A.'s North American steel operations, creating the second largest North American run mill steel producer
- Fletcher Challenge Ltd. in the U.S.$2.5 billion sale of its Paper Division to Norske Skogindustrier ASA of Norway

- Pechiney S.A. as Canadian counsel in the estimated CDN$6 billion unsolicited hostile takeover bid by Alcan Inc. for Pechiney S.A. Goodmans also acted for Pechiney in the proposed 1999 US $20 billion three-way transaction between Alcan, Alusuisse and Pechiney which ultimately resulted in the combination of Alcan and Alusuisse, but not Pechiney as a result of EU competition concerns
- Acquisition of the assets of Regal Greetings & Gifts division of MDC Corporation Inc. by McGuggan LLC
- Canadian counsel to Apollo Management, L.P., a U.S. private investment firm in its U.S. $610 million acquisition of United Agri Products, Inc., a U.S. and Canadian crop inputs business from ConAgra Foods, Inc., one of North America's largest packaged food companies
- Clover Leaf Seafoods, L.P. in the acquisition of the Canadian assets and operations of Bumble Bee Seafoods Inc. from ConAgra Foods, Inc.
- Amdocs Ltd. in connection with its acquisition of Bell Canada's interest in Certen

We also advise a wide variety of clients in the retail, manufacturing and IT industries on trade practices and advertising.

Goodmans LLP Presents...

A Practical Guide to Recent Competition Law Developments

Our Panellists

Richard Annan

Michael Koch

Introduction

- **Significant amendments made to the *Competition Act* (the "CA") in 2009/2010**
- **Amendments to a certain extent "Americanized" the CA; also reflect the Conservative government's law and order agenda**
- **Commissioner Melanie Aitken, too, has pursued a more aggressive enforcement agenda:**
  - Criminal Cartels
  - Civil Matters
  - Merger Review
- **Private actions also have increased as a result of greater criminal enforcement and availability of class actions**
- **What are the most significant developments and trends for corporations to be aware of and best practices to adopt in this new environment?**

Agenda

- **Criminal Conspiracy**
- **Civil Agreements**
  - Other civil matters:
    - Deceptive Marketing Practices
    - Abuse of Dominance
    - Price Maintenance
- **Practical Compliance Advice**
- **When Compliance Fails**
- **Private Actions for Criminal Conduct**
- **On the Road to U.S.-style Merger Review?**
- **Conclusion**
- **Questions**

Criminal Conspiracy

- **Significant change to the criminal conspiracy provision became effective in 2010**

- **Pursuant to Section 45 of CA, agreements between competitors are illegal with few exceptions:**

> Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (*a) to fix, maintain, increase or control the price for the supply of the product;*
>
> *(b) to allocate sales, territories, customers or markets for the production or supply of the product; or*
>
> *(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.*

Criminal Conspiracy (cont'd)

- **Amended law makes it much easier to obtain convictions since anti-competitive effects need not be proven at all, let alone beyond a reasonable doubt**
  - ➢ No longer necessary for Crown to show agreement would result in undue prevention or lessening of competition

- **The offence is entering into the agreement *per se*, regardless of effect and whether implemented or not**

- **Agreement need not be in writing and is usually inferred from circumstantial evidence**
  - ➢ Critically important for corporations to put in place compliance programs that avoid circumstances or conduct that could lead to an inference of agreement
  - ➢ Experience suggests it is not all that uncommon for sales personnel to "trade notes" with competitors - trade associations and industry conferences require special vigilance

Criminal Conspiracy (cont'd)

- **Over-breadth of language under provision necessitated guidance from Competition Bureau ("Bureau")**
- ***Competitor Collaboration Guidelines* ("*Guidelines*") clarify criminal conspiracy provision reserved for "naked restraints" on competition, i.e. agreements relating to price, market or customer sharing or output**
- ***Guidelines* suggest Bureau will not deal with buyer agreements under criminal provision**
- ***Guidelines* address whether the Commissioner would commence an inquiry in respect of collaboration**
  - Do not bind third parties who are free to pursue litigation under Section 36 of the CA to recover damages suffered as a result of criminal conduct

Criminal Conspiracy (cont'd)

- ***Guidelines* indicate when Section 45 will apply, as opposed to other provisions, such as**
  - Bid-rigging (Section 47)
    - Agreement or arrangement between or among two or more persons whereby one or more agrees or undertakes not to submit or to withdraw a bid in response to a call for bids
    - Submission, in response to a call for bids, of bids arrived at by agreement or arrangement between or among two or more bidders
- ***Guidelines* address Commissioner's approach to defence for ancillary agreements under Section 45(4), which must be**
  - Ancillary to broader agreement or arrangement
  - Directly related to, and reasonably necessary for giving effect to objective of broader agreement

Criminal Conspiracy (cont'd)

- **Commissioner has taken the amendment as a mandate from Parliament to increase enforcement of the criminal conspiracy provision**
  - Shift from primary focus on multinational cartels to include local cases
  - Common situations increasingly targeted: e.g. alleged price-fixing in gas retailing and bid-rigging in relation to construction contracts
  - Backed by regional office staffing for local cartel investigations
- **Increased penalties provided for by CA and being sought by Commissioner:**
  - Liability on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both
  - Trend towards pursuing individuals
- **Increased enforcement activity elevates importance of every-day compliance and planning in the event of a failure**

Civil Agreements

- **In addition to offence of criminal conspiracy, CA contains civil prohibition on agreements between competitors that substantially lessen or prevent competition**
- **Commissioner must elect between criminal or civil path, can not attack the same conduct under both provisions**
- **Bureau guidance suggests civil track will be used to consider agreements or arrangements that are not of the "hard-core" cartel variety, such as:**
  - Joint ventures where integration/sharing of resources
  - Production swap or joint production agreements
  - Dual distribution
  - Joint selling agreements
  - Buying groups

Civil Agreements (cont'd)

- **Will be analyzed under a very similar framework as mergers**
  - Market definition
  - Market share and concentration
  - Barriers to entry or expansion
  - Assessment of competitors outside the agreement
  - Efficiencies defence
- **Air Canada/ United Airlines Alliance case**
  - First application to the Competition Tribunal under the civil agreements provision
  - Attacks alliance agreements dating from 1995, despite Bureau review of the earlier alliance agreement
  - In addition, the Commissioner is using the merger provisions to attack the most recent expansion of the alliance via a transborder joint venture

Deceptive Marketing Practices

- **Increased enforcement focus on deceptive marketing practice, including higher penalties**
- **Like agreements between competitors, dual criminal/civil track**
- **Penalties available now include:**
  - Significant administrative monetary penalties-up to $10 million for an initial order, or up to $15 million for a subsequent order (e.g., Bell Canada case)
  - Restitution
  - Corrective notice

Abuse of Dominance

- **If firm has a significant market share (i.e. more than 50%) of a relevant market, it may be considered a dominant firm, in which case certain conduct that is otherwise permissible may come under scrutiny if it substantially lessens or prevents competition**
  - Exclusive dealing
  - Tied selling
  - Exclusionary rebate programs
  - Long term customer contracts
  - Predatory pricing
  - Conduct that is exclusionary, predatory or disciplinary in nature

Abuse of Dominance (cont'd)

- **Law amended to include administrative monetary penalties – up to $10 million for an initial order and up to $15 million for a subsequent order**

- **CREA case**
  - Settled by consent agreement
  - Related to CREA rules that allegedly eliminated access to the MLS system by discount real estate brokers who do not offer full service models
  - Ongoing case against TREB

Price Maintenance

- **Formerly a criminal provision out of step with U.S. market and out of step with economic theory**
- **Law amended to now require that the conduct will adversely affect competition**
- **Creates more opportunity to influence customer's pricing behaviour, e.g. :**
  - provide incentives to dealers to provide service
  - use pricing to reinforce brand image

Practical Compliance Advice

- **Training of personnel, in particular sales and marketing personnel, is a critical component of a successful competition law compliance program**
- **Towards this end, a handout with practical advice for CA compliance, is found at tab 3 of the materials**
- **Experience suggests that "buy-in" by senior corporation officials will be necessary for the effectiveness of any compliance program**
- **The existence of, and proper administration of a compliance program will be considered in sentencing if a violation occurs; it can also be relevant to a leniency application**

When Compliance Fails

- **Consider Bureau's immunity and leniency programs**
- **Immunity - must be the first company to approach the Bureau - if your are being searched, it is too late to participate**
  - Immunity normally extends to the company and its current and former employees
  - Immunity will require substantial cooperation with prosecution
  - Immunity will generally not be granted to the instigator of a cartel
- **Leniency- can get substantial credit for cooperation, but credit lessens for each company that has cooperated before you do**
- **Immunity program places a premium on thorough internal investigations of any suggestion of wrongdoing**
  - If potential wrongdoing is "swept under the rug", the opportunity to be "first in" and obtain immunity may be lost

When Compliance Fails (cont'd)

- **How to respond to a Competition Bureau search**
  - Read the search warrant carefully for correct company names, locations to be searched and types of documents
  - Ask Bureau officers to wait until counsel is present before commencing search
  - Instruct staff to retain all documents and freeze all normal document destruction protocols
  - Instruct staff not to volunteer any company information or surrender objects or documents – insist on formal seizure
  - Need to begin immediately your own due diligence process to determine the nature and extent of the problem
  - Depending on the facts, individual employees may need to hire their own independent counsel

Private Actions for Criminal Conduct

- **Section 36 of CA creates a private right of action for loss or damage suffered as a result of:**
  - Criminal conduct under the CA; or
  - Failure to comply with an order of the Competition Tribunal or a court under CA
- **Conviction not required; however, generally used in "follow-on" to cartel convictions**
  - Evidence in criminal proceeding or agreed statement of facts supporting plea can be used as evidence of conduct
  - Lower civil burden of proof available
  - Possibility of follow-on action to be taken into account when negotiating plea documentation in criminal matter
  - Also available in relation to criminal deceptive advertising, i.e., "knowingly or recklessly make a representation to the public that is false or misleading in a material respect"

Private Actions for Criminal Conduct (cont'd)

- **Not a new provision; however, steadily increasing number of claims as a result of:**
  - Increased enforcement activity by Commissioner
  - Numerous plea agreements for large amounts due to success of immunity and leniency programs internationally
  - Greater openness of Canadian courts to certifying class actions generally
- **Continued increase in number and size of claims going forward tied to availability of class actions for indirect purchasers**
  - Large classes of consumers consist most often of indirect purchasers
  - Courts divided on whether plaintiffs who did not purchase directly from conspirators can recover damages as a result of cartel activity
  - Supreme Court of Canada has granted leave to appeal from BCCA in *Sun-Rype* and *Pro-Sys* cases to finally determine this issue

On the Road to U.S.–Style Merger Review?

- **Law amended to adopt merger process more similar to U.S. merger process**
  - Initial 30 day waiting period that can be extended by the issuance of a Supplementary Information Request (SIR)
  - If SIR issued, statutory waiting period is extended to 30 days from full compliance with SIR
- **Will not affect timing of non-complex cases that clearly raise no competition issues- expect these to be completed in about 3 weeks**
- **If your deal does raise competition issues and a SIR is issued, timing will depend on the extent of the SIR but can be 4 months or longer in cases raising significant competition concerns for the Commissioner to indicate whether she will challenge the merger absent a consent agreement**

On the Road to U.S.–Style Merger Review? (cont'd)

- **What type of case is a candidate for a SIR?**
  - Merger party market shares greater than 50% or typically greater than 35% if coordinated behaviour a concern and a small number of competitors
  - Evidence of barriers to entry
  - Lack of effective competition remaining
  - Target firm is a maverick
  - Customers are concerned about anti-competitive effects of the proposed merger
- **About 15 SIRs issued to date, about 6 per year**
  - Roughly one-half of SIRs have lead to cases where remedies were required
- **Commissioner can and will challenge a small merger that is not subject to merger notification**
  - BC hazardous waste case
  - Underlines need for purchasers to do a competition risk assessment even for small deals

On the Road to U.S.–Style Merger Review? (cont'd)

- **If remedies required, Bureau guidance and templates narrow discretion to craft remedies and terms of the consent agreement**
  - Once divestitures agreed upon, Purchaser will have a narrow window to sell to a buyer that has been approved by the Bureau, typically 3 to 6 months
  - If assets to be divested do not sell during initial sale period, reverts to a trustee who can sell with no minimum price
  - Crown jewel provisions - if asset package doesn't sell in the initial sale period, Purchaser may need to add other valuable assets to ensure a package that will sell

Conclusion

- **Recent amendments reflect government's law and order agenda**
- **Bureau now has stronger conspiracy laws that make conviction much easier than previously**
- **Coupled with more aggressive enforcement policy and rise in private actions**
- **All of these developments create greater imperative for proactive compliance strategy**
- **Bureau also has more control over merger review which can increase deal timing and uncertainty**

Questions?

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Practical Advice for Competition Act Compliance

The following guidelines are provided to help you remember the *Competition Act* provisions during your day-to-day business activities. Keep them in mind, whether speaking or writing correspondence and memoranda, including electronic mail. These guidelines are general by nature, and in many circumstances will require adaptation to particular circumstances; if you have any questions about their application in specific circumstances please contact the [appropriate company officer].

DO make all pricing decisions independently of agreements or arrangements with competitors or others outside the Company. Pricing decisions should be based on costs, general market conditions and competitive prices.

DO NOT participate in any meeting with competitors that does not have a stated agenda and **DO NOT** participate in any business related discussions, however informal, not on the agenda.

DO NOT enter into any discussion with a competitor on the following subjects:

- Prices, discounts or other terms of trade
- Warranties
- Costs, margins or profits
- Business or marketing strategies
- Terms or conditions of sale
- Market shares
- Sales territories or customers

DO NOT remain at any meetings with competitors (including informal social gatherings) where any of the forbidden subjects noted above are discussed and if those subjects are raised without advance notice **DO** leave but do not do so quietly; rather make your departure known so people will remember it, and promptly report the incident to the [appropriate company officer].

DO NOT enter into any discussion with anyone outside the company, other than the party calling for the bid and its advisors, on any bid or intention to bid or not to bid, without discussing the situation with the [appropriate company officer] in advance.

DO document the source of any competitively sensitive information you may obtain about a competitor to avoid any later inference that the information was improperly obtained.

DO NOT obtain information about a competitor's business, including price lists, directly from the competitor.

DO obtain information about competitors from public sources or from customers (other than information sharing where the customer is deliberately used as an information conduit among competitors), and document where you obtained it.

DO NOT provide business information to a competitor. You obviously may provide customers with price information, even though competitors may also obtain it, but be sensitive to communications with customers that may create an impression that the customers are being used as conduits for the exchange of competitively sensitive information among competitors.

DO NOT indicate to customers that you are following "industry suggested prices" or "industry price schedules". **DO NOT** describe competition as "unsettling the market" or refer to a competitor's price reduction as "unethical" or "stealing a customer", or use similar language.

DO NOT ask suppliers to refuse to supply particular competitors due to that competitor's low pricing policy.

DO NOT ask suppliers to force up the prices of competitors.

DO NOT discriminate in price or other terms of trade without first discussing the matter with the [appropriate company officer].

DO NOT price any contracts at prices lower than cost without first securing the approval of the [appropriate company officer].

DO NOT make statements - orally or in writing - that exaggerate the Company's market position or competitive power or that might suggest a predatory intent or an agreement with competitors.

DO NOT write reports that expressly suggest the Company can project sales or profits or raise prices regardless of the existence of marketplace competition.

DO NOT write or say anything that reflects and clearly suggests an intent to monopolize, capture a dominant share of the market, or drive competitors out of business.

DO NOT express your sales objectives in negative terms; that is, the stated objective should be to increase the Company's sales rather than to reduce the sales of someone else.

DO NOT use fighting rhetoric. No "macho" boasting "we're going to kill those guys"; "we've got a dominant position"; "we control this market".

DO NOT write or send electronic mail when you can talk. Casual statements that are unobjectionable when written may later be misinterpreted, and the Company will be forced to explain what you wrote rather than what you actually did. In conversation and in writing, comply with the following guidelines:

- DO NOT exaggerate.
- DO NOT use words you would not want disclosed in court or printed in a newspaper.
- DO NOT use words suggesting guilty behaviour, such as "destroy after reading".
- DO NOT speculate as to the legality of business conduct.
- DO NOT use words suggesting collusive conduct, such as "industry policy".

All documents are potentially at risk of being produced to the Competition Bureau or private plaintiffs, including drafts of letters, memoranda, handwritten notes, email messages and attachments, phone messages, diaries, date books and calendars.

DO notify the [appropriate company officer] immediately if any of the following occur:

- you receive an inquiry from a government agency or a lawyer who purports to represent a competitor, customer or supplier with a complaint relating to conduct discussed in this guide.
- you are concerned about a discussion with, or a document of, a competitor.
- you want to meet with a competitor, particularly if you want to discuss a sensitive topic.
- you have any questions about the contents of this guide, or any behaviour of yourself, a colleague, a competitor, supplier or customer.

Goodmans LLP Update

Mergers and Acquisitions and Competition Law

October 12, 2011

Recent Developments of Importance

Anti-trust regulators' review of the competitive impact of proposed business transactions can be significantly complicated by the unique dynamics of an unsolicited or "hostile" takeover bid (a "**hostile transaction**"). Among other things, parties can seek to use the process to obtain useful information and/or timing advantages to support its strategic objectives, and considerations about confidentiality take on a different dimension in the context of hostile transactions.

Mindful of these factors, on July 21, 2011, the Commissioner of Competition (the "**Commissioner**") issued two new interpretation guidelines outlining certain procedural considerations relating to hostile transactions.

Background

The Competition Act (the "**Act**") requires that, where a proposed transaction exceeds certain monetary thresholds (a "**Notifiable Transaction**"), notice with prescribed information must be given to the Commissioner, and a waiting period is imposed before the Notifiable Transaction can be completed.

The Act generally requires the Competition Bureau (the "**Bureau**") to keep confidential any information that has been provided to or obtained by it in the course of the administration or the enforcement of the Act, subject to certain exceptions. In the context of a Notifiable Transaction that is a share acquisition (including a hostile transaction), the Act requires the Commissioner to immediately notify the target corporation that it has received information from the acquiror, and within ten days of being so notified, the target corporation must itself supply the Commissioner with certain prescribed information.

Highlights of the New Guidelines

Hostile Transactions Interpretation Guideline 1: Bureau Policy on Disclosure of Information

In the case of a Notifiable Transaction that is a non-hostile transaction, the Bureau is generally prepared to speak with counsel for both parties, separately or together (as may be requested by the purchasing party), on the progress of its review.

The guideline on disclosure of information emphasizes the Bureau's discretion in the sharing of information concerning hostile transactions, having regard to the complexities of those deals. In respect of a hostile transaction, the Bureau has determined that where it shares certain pertinent information (i.e., its complexity designation, the anticipated timing of its review, the date upon which the other party has certified completeness of any supplementary information request (an "**SIR**") response, the Bureau's preliminary and final views on market definitions and relevant factors, as developed, and its preliminary and final conclusions regarding a potential prevention or lessening of competition) with one party to the transaction, it will "strive" to communicate such pertinent information "equitably" with the other party, subject to its confidentiality obligations under the Act. As a practical matter, this highlights the need, when engaged in discussions with the Bureau concerning a hostile transaction, to consider the strategic implications of regulatory disclosure and to address disclosure considerations with the Bureau.

Hostile Transactions Interpretation Guideline 2: Bureau Policy on Running of Subsection 123(1) Waiting Periods

The Act imposes a 30-day waiting period before parties may complete a Notifiable Transaction, and provides for a further 30-day waiting period if an SIR is made. The initial waiting period generally begins on the day after which all prescribed information has been

received by the Commissioner from both the acquiror and the target, and any SIR-related waiting period generally commences after both parties have certified the completeness of their responses, provided that the Commissioner has not challenged the completeness of the responses.

The Act prescribes a different framework for hostile transactions to ensure that a target corporation of a hostile transaction is not able to influence the timing of the commencement of the relevant waiting periods. In the context of a hostile transaction, the Act provides that any waiting period will begin without reference to the day on which prescribed information or supplementary information (if so requested) is received by the Commissioner from the target corporation. In other words, the initial 30-day waiting period will begin after the Commissioner receives the prescribed information from the bidder and similarly, where the Commissioner has issued an SIR, the subsequent 30-day waiting period will begin after the Commissioner has received such supplementary information from the bidder and the bidder has certified that its response is correct and complete in all material respects, provided that the Commissioner has not challenged the completeness of the responses.

Interpretation Guideline #2 clarifies how the rules will be applied where transactions that started as hostile transactions become friendly. In essence, if during a waiting period a hostile transaction becomes friendly, that waiting period will not be affected.

In net effect:

- In a hostile transaction, the initial waiting period will commence on the date the bidder submits its notice with prescribed information, and that timing will not be affected if the transaction becomes friendly during that period.
- If the Bureau issues an SIR and the transaction is still hostile at the time that the bidder certifies the completeness of its response and the Commissioner is so satisfied, then the period will commence at the time of that certification even if the transaction subsequently becomes friendly.
- Conversely, if prior to the initial submission by a bidder (or, in the case of an issuance of an SIR, if prior to the certification of its response by the bidder) the transaction becomes friendly, the waiting period will commence when *both* parties have filed (and certified and the Commissioner has not challenged the response, as applicable).

Please contact any member of the Goodmans Mergers and Acquisitions Group, or the Competition Law Group to discuss the implications of these new guidelines.

Goodmans LLP Update

Competition Law

January 12, 2010

Competition Bureau Provides Guidance Regarding Enforcement of New Criminal Conspiracy and Civil Agreements Provisions

The Competition Bureau ("Bureau") has published guidelines regarding its enforcement of the new criminal conspiracy and civil agreements provisions (the "Guidelines"), clarifying that it will generally not seek to apply the new criminal law to dual distribution and franchise agreements. As reported in earlier updates, the criminal conspiracy provision of the *Competition Act* has been substantially changed to bring the law into closer conformity with U.S. cartel law. Effective March 12, 2010, all conspiracies, agreements or arrangements between competitors on price, output or sharing of markets (with limited exceptions) will potentially be subject to criminal prosecution, regardless of the actual or potential effect on competition. In addition, all other types of agreements or arrangements between competitors will be subject to a new civil law provision that provides for remedial action where such an agreement or arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

The new criminal conspiracy provision has created considerable uncertainty as to its potential scope as a literal reading of the provision could lead to its application to situations that are competitively benign or even procompetitive. Although not binding, the Guidelines provide important guidance regarding the Bureau's enforcement stance in relation to some of the more problematic areas raised by the breadth of the provisions. For example, with respect to dual distribution agreements, where a manufacturer both supplies distributors and competes with distributors for end customers, the Bureau has indicated that it will not review such agreements under the criminal law except in limited circumstances. Similarly, with respect to franchise agreements, it generally will not apply the criminal law to legitimate franchisor-franchisee relationships. In terms of buying groups, the Bureau has indicated that it will not attack such agreements or arrangements under the criminal law, but could review them under the civil provisions.

However, much uncertainty remains as to how the new law will be applied in practice. The criminal law contains a defence for restraints that are ancillary to a main agreement and that are directly related to, and reasonably necessary for giving effect to, the objective of that main agreement. These words create broad latitude for interpretation. For example, a standard non-compete clause in a purchase and sale agreement makes sense to protect the value of what is being bought. However, if the non-compete provision is for a very long period of time or concerns products not subject to the purchase and sale agreement, the defence will likely not be available. The Guidelines also indicate that if other practical, significantly less restrictive alternatives were reasonably available when the agreement was entered into, the Bureau's view is that the defence would not apply.

It also must be borne in mind that private litigants are in no way bound by the Guidelines or by the Bureau's approach to enforcement generally. Such parties may use the strategic opportunities created by the new criminal law to find creative ways to attack agreements between competitors and seek damages, even where the Bureau has declined to proceed.

The Government has purposefully postponed implementation of the new conspiracy law until March 12, 2010 in order to provide companies with a grace period in which to review existing agreements and bring

them into conformity with the new law. Companies should now be reviewing all of their agreements and arrangements with competitors, even where there appears to be little competitive effect, to ensure compliance with the new law. After March 12, 2010, the grace period will be over and continuing conduct pursuant to existing agreements and arrangements could be subject to criminal or civil law scrutiny under the new provisions.

We would be pleased to provide further information and guidance about the new law on an individual client basis. For further information, please contact Richard Annan or Michael Koch or any other member of Goodman's Competition Law Group:

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Goodmans LLP Update

Advertising & Marketing

April 1, 2009

A clarified standard of proof and increased penalties for deceptive marketing and misleading advertising

Amendments to the *Competition Act* (the "Act") have recently come into force which include significant changes regarding deceptive marketing and misleading advertising.

Q. Have the amendments changed the nature of the marketing and advertising practices prohibited by the Act?

A. No. The Act still prohibits the making of any representation to the public that is false or misleading in a material respect for the purpose of promoting the supply or use of a product (knowingly or recklessly doing so, in the case of a criminal offense). However, the amendments have made it clear that in order to establish a deceptive marketing or misleading advertising offence it is <u>not</u> necessary to show that:

- any person was deceived or mislead by a representation;
- any member of the public to whom the representation was made was within Canada; or
- the representation was made in a place to which the public has access.

The amendments have codified the case law that a representation can be misleading or deceptive if someone was *likely* to be mislead or deceived (as opposed to actually mislead or deceived). In addition, the amendments appear to extend considerably the notion of "public" both beyond Canadian borders (such that Canadian businesses that advertise outside of Canada must now ensure that their international advertising and marketing practices comply with Canadian law in this regard) and what are conventionally considered to be "public" places (e.g. capturing misleading representations made in an office, not just those displayed on a billboard).

Q. Have the amendments changed the penalties for deceptive marketing and/or misleading advertising?

A. Yes. Penalties for these offences have increased significantly. For example, the penalty for a corporation engaging in a first time non-criminal offence has increased by 100 times, to a maximum of $10,000,000, while repeat corporate offenders can be fined up to $15,000,000. For indictable offences, the prison term has increased from 5 to 14 years.

Q. Do the amendments give the Competition Tribunal any additional powers with respect to deceptive marketing and/or misleading advertising?

A. Yes. Offending advertisers can be required to pay restitution to victims of non-criminal deceptive marketing practices and, in order to ensure funds are available for restitution, an advertiser's assets can be frozen and disposal of property prevented, in advance of a finding that it has engaged in offending conduct.

If you have any questions about these changes, or deceptive marketing and misleading advertising generally, please contact one of the Goodmans lawyers listed below:

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Goodmans LLP Update

Competition Law

March 16, 2009

Amendments to the *Competition Act* and the *Investment Canada Act* Granted Swift Passage

On March 12, 2009 major changes to Canada's competition law and foreign investment review process became law. These changes, which were described in our February 11, 2009 Client Update, have important implications for current business practices and transactions.

Competition Act

The new law has substantially altered the merger notification process to parallel in many respects the current U.S. system. There is now only one type of notification form with a waiting period of 30 days. Like the U.S., the 30 day waiting period can be extended if the Commissioner of Competition issues a request for additional information. If the U.S. experience is any guide, it can be expected that this second request for information will be very extensive, increasing compliance costs and delaying timing for proposed transactions that require a more in-depth examination. However, as the overwhelming majority of mergers do not raise any substantial competition issues, the second request should not be issued frequently. Most mergers should continue to be reviewed within a 30 day time period.

A positive change for business is the reduction, from 3 years to 1 year, of the period during which the Commissioner of Competition may challenge a merger after it has been substantially completed. As well, unlike the U.S., it is still the case that parties may be exempted from notification by either receiving an advance ruling certificate or being granted a waiver from notification because substantially similar information was supplied with the request for an advance ruling certificate.

The new law also contains a major reform of the criminal conspiracy provision. Now agreements between competitors that relate to fixing prices, allocating customers or markets or agreeing on supply, will be illegal regardless of the effects on competition. All other types of agreements between competitors would be reviewed under a new civil provision where remedial action could only be taken if such agreements would or would likely lessen or prevent competition substantially.

This new criminal conspiracy provision raises a host of questions as to how it will operate in practice and will create a period of uncertainty. For example, an agreement between a manufacturer and a wholesaler that limits where the wholesaler may sell could be problematic if the manufacturer also competes with the wholesaler. Although such a situation is clearly not anti-competitive in most cases and is far removed from the "hard core" criminal cartel activity that the new *per se* law is designed to attack, it may nevertheless be caught by the strict wording of the new criminal conspiracy provision. Further, while a new defence has been created for "ancillary restraints", it is not at all clear how such a provision will be applied in practice. In light of the new criminal law, businesses will need to review their agreements with competitors to see if changes should be made.

Implementation of the new criminal and civil conspiracy provisions have been delayed by one year in order to allow businesses some time to review their conduct and hopefully for the Commissioner of Competition and the Director of Public Prosecutions to provide some practical guidance on how the new law will be enforced.

In other changes, the elimination of the criminal price discrimination, promotional allowance, price mainte-

nance and predatory pricing provisions should provide many businesses with greater flexibility in terms of the pricing practices and policies they may choose to pursue. For example, resale price maintenance programs are no longer *per se* criminally illegal, but will be reviewed under a new civil provision and must be shown to have or likely to have an adverse effect on competition before a remedial order could be granted. Similarly, businesses that are not dominant in any market may be less concerned with offering different pricing and terms of trade to customers that compete with one another and that are purchasing similar quantity and quality of goods.

On the other hand, firms that are dominant in their markets will need to review their current practices and policies in light of the addition of new significant administrative monetary penalties to the abuse of dominance provision. The Competition Tribunal may now order penalties of up to $10 million for an initial order and $15 million for a subsequent order for anti-competitive conduct by a dominant firm that has had, is having or is likely to have the effect of substantially lessening or preventing competition.

Investment Canada Act

In general, the significant increase in the size of the thresholds for the review of direct acquisitions of control (albeit on the new basis of as yet undefined "enterprise value" and not book value) should significantly reduce the number of transactions that will be subject to review. The amendments also now eliminate the special review threshold for businesses engaged in transportation, financial services and uranium production, although the review threshold for cultural businesses has not been changed. This is a positive development for timing and certainty in respect of acquisitions of Canadian businesses by foreign purchasers. The changes to the threshold limits are not yet in force and will only be in force when the Government decides to implement them, likely when regulations defining "enterprise value" are ready to be implemented.

On the other hand, the new power to review transactions based on their impact on national security raises uncertainty as to when and how it will be used. This power applies to transactions regardless of size and in some cases even where there may not have been a change of control. It is expected that it will not be used very often and would need to involve genuine national security concerns to be consistent with Canada's international trade obligations.

Conclusion

With unprecedented speed, significant changes to Canada's competition and foreign investment laws have been made. While some of these changes provide more flexibility and certainty, other changes have created potential new risks that should be evaluated in the context of current conduct, agreements and practices. In particular, businesses will need to review their agreements with competitors to see if these require amendments to ensure they do not run afoul of the new criminal conspiracy provision.

If you have any questions about the new provisions of Canada's competition or foreign investment laws, please contact Richard Annan, Michael Koch or Joel Schachter, or any other member of Goodmans' Competition Group:

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Goodmans LLP Update

Competition Law

February 11, 2009

Significant Changes Proposed to the *Competition Act* and the *Investment Canada Act*

In a move that took many by surprise, the Canadian Government last week proposed significant changes to the country's competition law and foreign investment review process. These measures were introduced as part of the Government's budget implementation legislation, and accordingly, will be considered as part of the Government's economic stimulus package. If passed, these measures will substantially remake the Canadian regime in the image of U.S. antitrust law.

Competition Act

The Government is proposing a long-debated reform to the cornerstone criminal conspiracy section by removing the requirement to show that an agreement among competitors would lessen or prevent competition unduly. Under the new provision, which will make such agreements "per se" illegal, competitors who agree, conspire or arrange among themselves to fix, maintain, increase or control prices or fix, maintain, control, prevent, lessen or eliminate supply of a product or allocate sales, territories, customers or markets for the production or supply of a product, are guilty of a criminal offence. Penalties will be increased to a maximum of $25 million for each count and up to 14 years of imprisonment. A new defence has been created where the agreement is ancillary to a broader agreement and is reasonably necessary to give effect to the broader agreement, provided that the broader agreement when considered alone would not contravene the criminal conspiracy provision. In addition, the common law principles that relate to a defence for regulated conduct will continue to apply to the new provision.

In respect of merger review, the Government is proposing to adopt a U.S. style merger notification system with a single 30 day waiting period which can be extended if the Commissioner of Competition issues a request for additional information. If the U.S. experience is any guide, it can be expected that this second request for information will be very extensive, increasing compliance costs and delaying timing for proposed transactions that require a more in-depth examination. When a second request for information is issued, parties will not be able to complete a transaction until 30 days after the information requested has been received by the Commissioner of Competition. The Government is also increasing the size of target threshold somewhat to $70 million in assets in Canada or $70 million in gross revenues from sales in or from Canada, with a subsequent yearly inflation adjustment. The potential consequences for non-compliance with the notification regime have increased dramatically, with penalties of up to $10,000 for each day of non-compliance following completion of a transaction that should have waited the applicable period prior to closing and the risk of a court order requiring the dissolution of the merger or the divestiture of assets.

The proposed amendments have also created a civil law conspiracy provision. This provision gives the Competition Bureau the new option of applying to the Competition Tribunal to seek a remedy for any agreement among competitors that prevents or lessens competition substantially. The new "per se" criminal conspiracy provision and the new civil conspiracy provision will become law one year after the bill receives royal assent. During this transition period, parties to a pre-existing agreement can apply to the Commissioner

of Competition without any payment of a fee for a binding opinion on the application of the new conspiracy provisions to their agreement.

The criminal provisions for predatory pricing, price discrimination, promotional allowances and price maintenance will be repealed. In the case of price maintenance, a new civil provision has been added that applies where price maintenance is likely to have an adverse effect on competition.

New administrative monetary penalties have been added to the abuse of dominance provision. This provision concerns anti-competitive conduct by dominant firms that substantially lessen or prevent competition. Currently, the Competition Tribunal has the power to stop the conduct or order the taking of other actions, including the divestiture of assets, if reasonable and necessary to remedy the anti-competitive effects of the conduct. Under the new proposal, however, the Competition Tribunal could also impose penalties of up to $10 million for an initial order and $15 million for a subsequent order.

Penalties for misleading advertising too would be dramatically increased from $50,000 to $750,000 for an initial order against an individual and from $100,000 to $10,000,000 for an initial order against a corporation. In addition, the Competition Tribunal would be empowered to order restitution be paid to victims of deceptive marketing practices.

Investment Canada Act

The Government is also proposing to significantly amend the *Investment Canada Act*, including adding a new power to block any investment by any non-Canadian on the basis that it could threaten national security. This, too, is similar to a power in the United States currently exercised by the Committee on Foreign Investment in the United States, known as "CFIUS".

The Government is proposing to raise the thresholds for review. For investors based in WTO member nations, the thresholds for the review of direct acquisitions of control is to increase from the current $312 million (based on book value) to $600 million (to be based on the "enterprise value" of the Canadian business) for the two years after the bill becomes law, to $800 million in the following two years and then to $1 billion for the next two years. Thereafter, the threshold is to be adjusted to account for inflation. In addition, the current low thresholds for transportation, financial services and uranium mining are to be eliminated and will be the same as for any other industry. However, the current $5 million (book value) asset threshold for review of cultural industries remains unchanged.

Many of these concepts still require definition and details of how these new changes will be implemented have yet to emerge. The proposed amendments however represent a significant change to Canada's regulation of foreign investment.

Conclusion

Bill C-10, Budget Implementation, 2009 received first reading in Parliament on February 6, 2009. With a minority Parliament, there are no guarantees that Bill C-10 will become law, but by incorporating these proposed amendments as part of its budget, the Government has thrown its full weight behind them, making it difficult for the opposition to insist on significant amendments. We will be monitoring the bill as it passes through the Parliamentary process and keep you informed of significant developments. These provisions will create significant changes in the application of competition law and foreign investment review in Canada and will require careful review of current conduct and practices if the proposed changes become law.

If you would like to know more about this subject, please contact Richard Annan, Joel Schachter, Michael Koch or any member of Goodmans' Competition Group.

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Profile

Richard Annan heads the Competition Law Group and serves as counsel at Goodmans. Richard specializes in competition law, having served 22 years with the Canadian Competition Bureau. He was the Major Case Director and Strategic Policy Advisor of the mergers branch and most recently acted as Assistant Deputy Commissioner of Competition responsible for Division A of the mergers branch and the Mergers Notification Unit. Richard joined Goodmans in 2004.

Richard has led the examination of many significant mergers in a wide range of industries under the Competition Act. In 1998, he led the examination of the proposed mergers between the Royal Bank of Canada and the Bank of Montreal and between the Toronto-Dominion Bank and the Canadian Imperial Bank of Commerce, the largest and most complex merger examinations ever undertaken in Canada. In 1999, he led the examination of the merger between Air Canada and Canadian Airlines. Richard was the investigative team leader in the Gemini I and II cases that were resolved through Competition Tribunal proceedings. While acting Assistant Deputy Commissioner, Richard was the responsible manager for a number of high profile cases, including General Electric/Honeywell, British American Tobacco/Rothmans International, Coca Cola/Cadbury Schweppes, General Electric/Instrumentarium, Great West Life/Canada Life, Rona/Réno-Dépôt, Canadian National/B.C. Rail, and Manulife/John Hancock.

Recent matters that Richard has worked on to obtain Competition Act clearance include:

- Acted for Ontario Teachers' Pension Plan Board, Providence Equity Partners Inc., Madison Dearborn Partners, LLC and Merrill Lynch Global Private Equity, Inc. in their $52 billion offer for BCE Inc.
- Acted for UAP Holding Corp. in its US$2.65 billion sale to Agrium Inc.
- Acted for Onex Corporation in its $960 million acquisition of Husky Injection Moldings Systems Ltd. and in its $2.78 billion acquisition of the Health Group of Eastman Kodak Company
- Acted for OJSC MMC Norilsk Nickel in its $6.8 billion acquisition of LionOre Mining International Ltd.
- Acted for Four Seasons Hotels Inc. in connection with its privatization by Isadore Sharp and his holding company Triples Holdings Limited, Kingdom Hotels International and Cascade Investment, L.L.C., valued at US$3.8 billion.
- Acted for ATI Technologies Inc. in its US$5.4 billion acquisition by Advanced Micro Devices, Inc.

Richard is recognized as a leading competition/antitrust lawyer by Chambers Global *The World's Leading Lawyers*, Practical Law's *Which Lawyer?* and *The Best Lawyers in Canada.*

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Michael Koch is a partner in the Competition and Communications law groups of Goodmans LLP. His practice is focused on competition work and regulatory, strategic and intellectual property advice and representation regarding the communications industries.

Michael has undertaken extensive counsel work and representation before courts at all levels including the Supreme Court of Canada, as well as numerous administrative tribunals and government departments, including the Competition Bureau, Canadian Radio-Television and Telecommunications Commission (CRTC), the Copyright Board of Canada and Industry Canada. Michael has particular expertise in litigating regulatory issues, including the review of actions of administrative bodies, including the CRTC (in some instances, representing the regulator), the Competition Tribunal and the Commissioner of Competition, as well as foreign regulatory bodies.

Michael has advised and represented companies in the following industries in respect of competition matters, including price-fixing, mergers, civil matters such as abuse of dominance, inquiries, criminal prosecutions and false and misleading advertising:

- tractors
- computer (direct sales)
- airline
- petroleum refining and marketing
- fisheries
- real estate
- Internet
- broadcasting and specialty services
- telecommunications
- commercial printing
- advertising
- cement

Michael was seconded to CRTC as Legal Counsel in 1993/94. Since returning to private practice from government, he has played a role in each of the major proceedings to establish competitive framework for the Canadian telecommunications industry, drawing on his expertise in communications, competition and copyright law fields.

He has written and spoken on administrative law, communications law, competition law and copyright law both nationally and internationally.

Education

Michael attended University of Western Ontario and University of Toronto Faculty of Law 1980-86 (LLB) and was called to the Bar in 1988.