The Public Competition Enforcement Review

Eighth Edition

Editor
Aidan Synnott

Law Business Research

The Public Competition Enforcement Review

The Cartels and Leniency Review
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EDITOR'S PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention.

Cartel enforcement remains robust, particularly by the European Union and the United States, although the number of new enforcement decisions adopted by the EU dropped significantly in 2015. Other jurisdictions, including Greece and France, also report a decrease in the magnitude of fines or numbers of decisions rendered in cartel actions. China, however, saw a slight increase. In 2015, Australia, Brazil, China, Cyprus, the European Union, Germany and the United States have opened, continued or settled enforcement actions against automotive parts cartelists. Brazil, China, Germany, Spain, and Switzerland have each seen enforcement activity related to the distribution of automobiles. Additionally, several jurisdictions investigated food-related cartels in 2015, including dairy products (France and Spain), chocolate (Canada), eggs (Australia), poultry (France), bakeries (Finland), and sugarcane (Colombia).

In the area of restrictive agreements, several European jurisdictions (France, Germany, Italy and Sweden) moved against an online travel booking platform for its use of 'most-favoured nation' clauses with respect to the rates offered by hotels to the platform. However, as we see in the chapters that follow, the German authority did not accept the commitments made by the platform to the other jurisdictions, and required a more stringent remedy. These actions follow on a similar enforcement action in the United Kingdom in 2014. In addition, Brazil, France, and Sweden have examined taxi services. We also continue to see several examples of actions against manufacturer-imposed restrictions on retailer behaviour, particularly against resale price maintenance, including actions in Argentina (bleach), Colombia (rice), Switzerland (musical instruments), and the United Kingdom (refrigerator and bathroom suppliers). The apparent concern with resale price maintenance in these jurisdictions might be seen to contrast with the dearth of public enforcement actions against these arrangements in the United States, which itself may reflect a change in the interpretation of the relevant law by United States Supreme Court several years ago.

Merger review and enforcement activity remains robust, and the chapters that follow note activity in many sectors, including in the telecommunications area in the United

States, Spain, Greece, France, Croatia and Finland. We also see several reports of merger investigations in the healthcare area, including activity in Australia, Spain and the United States. Several of the reports, including the reports from the United States, Belgium and Germany, note enforcement activities arising out of merger process violations, such as the failure to properly report transactions.

Many jurisdictions continue to develop their approach to implementation of competition laws enacted in recent years. Of particular interest is the essay entitled 'The Damages Directive, in search of a balance between public and private enforcement of the competition rules in Europe,' which discusses the implementation of the 2014 European Commission Damages Directive.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2016

Chapter 6

CANADA

Cal Goldman, Richard Annan and Michael Koch[1]

I OVERVIEW

Competition and antitrust matters continue to attract significant attention in Canada.

Canadian Commissioner of Competition, John Pecman, has made a number of significant public statements outlining his approach to enforcement and administration of the Competition Act going forward, both domestically and internationally.

Commissioner Pecman has signalled a renewed focus on the use of statutory investigative powers, and also has indicated a greater willingness to cooperate with competition authorities in other countries in major international investigations. He has pointed to the importance of non-enforcement compliance tools, including corporate compliance programmes. Commissioner Pecman has also recently spoken about the importance of competition policy advocacy wherein the Canadian Competition Bureau provides policy advice to government regulators and policymakers to find ways to regulate industries in a manner that achieves the policy goals of the regulators but which is also least restrictive of competition. Such competition policy advocacy is increasingly important as new technologies produce new products and choices for consumers, but raise new challenges for regulators and incumbent competitors.

II CARTELS

Cartel and bid-rigging enforcement are top enforcement priorities of the Canadian Competition Bureau. The cartel (Section 45) and bid-rigging (Section 47) provisions of the Competition Act are indictable offences with serious monetary and jail penalties for convicted offenders. There is no limitation period for these offences.

1 Cal Goldman and Michael Koch are partners, and Richard Annan is counsel at Goodmans LLP.

Commissioner John Pecman, who is head of the Competition Bureau, has many years of criminal cartel enforcement experience, including as the Senior Deputy Commissioner of Competition in charge of the Criminal Matters Branch of the Competition Bureau.

i Significant cases

Recent cartel cases include a wide-ranging investigation into a number of auto part suppliers with sales into Canada; to date public proceedings reflect guilty pleas and fines totalling over C$56 million.

Other recent cartel cases that gave rise to guilty pleas have included chocolate confectionary (Hershey Canada paid a C$4 million fine), polyurethane foam (Domfoam International Inc paid a C$12.5 million fine) and a number of international airlines involved in a cartel over fuel surcharges for air cargo (fines total C$26 million to date).

In 2015 the Competition Bureau was unsuccessful in obtaining convictions in two cartel cases that were contested by some of the accused. In the *Durward* case[2] concerning alleged bid rigging for certain federal government information technology contracts, a jury rendered not-guilty verdicts against seven individuals and three companies, even though two leniency applicants had pleaded guilty. In the *Nestlé*[3] case, which related to an alleged cartel for chocolate confectionary products, the Public Prosecution Service of Canada decided to stay all charges against all remaining accused, including Nestlé, even though there had been an immunity applicant in that case and a leniency applicant that had pleaded guilty. These cases demonstrate that even with immunity and leniency applicants providing evidence, it should not be assumed in all cases that the prosecution will be successful in proving beyond a reasonable doubt that an offence has been committed. In remarks delivered by Commissioner Pecman at Goodmans on 8 December 2015, he said that while the Competition Bureau is considering what lessons can be learned from these two cases, the Competition Bureau continues to believe that its cartel enforcement efforts, including the immunity and leniency programs, continue to produce favourable results.[4]

In a separate decision, on 4 February 2015, the Ontario Superior Court in the *Nestlé* case held that 'factual information' provided to the Competition Bureau through the proffer process by the immunity or leniency applicant can be ordered to be produced to the accused co-conspirators in subsequent criminal proceedings after charges are laid in court proceedings. Factual information that could be required to be disclosed may include documents given to the Competition Bureau during the proffer process, as well as the Competition Bureau officers' notes of other potential evidence they were advised might be provided by the immunity or leniency applicant, such as a description of what potential witnesses may say about the events or documents related to the matter. This decision therefore raises this risk of production in those situations in which an immunity or leniency agreement is reached after the proffer of information in the immunity or leniency application process and charges are subsequently laid in court proceedings brought against the accused persons.

2 *R v. Durward*, 2014 ONSC 4194.

3 *R v. Nestlé Canada Inc,* 2015 ONSC 810 (Can LII).

4 'Cutting Through the Noise', Remarks by John Pecman, Commissioner of Competition, delivered at Goodmans LLP, 8 December 2015. This is available on the Competition Bureau's website at: www.competitionbureau.gc.ca.

ii Trends, developments and strategies

The Competition Bureau has effectively used its immunity and leniency programs, in conjunction with enhanced cooperation with major antitrust and competition law authorities internationally, to increase its enforcement efforts with respect to international cartels. In this regard, the Competition Bureau has a particularly close working relationship with the antitrust division of the United States Department of Justice in relation to cartel enforcement matters. It also has bilateral cooperation agreements with a number of counterpart competition authorities globally.

As each Competition Bureau cartel investigation needs to be assessed on the merits of all relevant facts applicable to that particular matter, all such investigations or possible investigations need to be taken very seriously from a private sector perspective. This principle applies from the outset when lawyers are first contacted.

In cases of possible international conduct, coordination with counsel in other jurisdictions should be considered as early as possible. It also should be noted that Canada has a mutual legal assistance treaty with the United States, as well as an extradition treaty with the United States which can be used in relation to cross-border criminal investigations.

While Commissioner Pecman has said that the Competition Bureau will try to coordinate with other antitrust authorities on both criminal investigations and remedies in areas where there are parallel investigations, there have been some past cases where fines in Canada and elsewhere have been based in part on the same volume of sales. In order to avoid this 'double counting' of sales for purposes of fines imposed, Matthew Boswell, the Senior Deputy Commissioner of the Cartels and Deceptive Marketing Practices Branch of the Competition Bureau said in 2015 that it is important that companies negotiate their fines with the Competition Bureau before agreeing to pay any fine based on such overlapping sales in another jurisdiction. In other words, if a company has already agreed to pay a fine in another jurisdiction for conduct related to sales which the Competition Bureau thinks are properly included as sales in or into Canada or with effects in Canada, Mr Boswell has said that the Competition Bureau likely will not agree to reduce the fine it recommends to the Public Prosecution Service of Canada due to double counting of the affected volume of commerce.

iii Outlook

As a result of cases such as *Nestlé*, companies must carefully consider (1) what information is provided to the Competition Bureau at the proffer stage; and (2) how the information is provided, since there is now a risk that such information could subsequently be ordered to be made available to, and used by, counsel for the accused in an open court proceeding and thereby potentially be made available subsequently for use in civil proceedings for damages in Canada.[5]

5 This was recently affirmed by the Supreme Court of Canada in *Imperial Oil v. Jacques*, 2014 SCC 66.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Competition Act contains non-criminal provisions relating to an abuse of dominance. These provisions make it a reviewable practice where a dominant firm or firms have engaged in or are engaging in a practice of anticompetitive acts and that practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

Commissioner Pecman has made enforcing the abuse of dominance provisions a significant priority and has been actively investigating a number of firms for the potential application of the abuse of dominance provisions, from the grocery industry to water heater rentals.

i Significant cases

On 3 February 2014 the Federal Court of Appeal ruled in the *Toronto Real Estate Board* case[6] that the abuse of dominance provisions can apply to a dominant firm engaged in anticompetitive acts even if those anticompetitive acts are directed toward firms that are not its competitors. In this case the Commissioner alleged that the Toronto Real Estate Board was abusing its dominant position because its rules negatively impacted the ability of discount real estate brokers to compete with higher priced full service real estate brokers. The Competition Tribunal in its initial hearing of the case dismissed the Commissioner's application because the Toronto Real Estate Board did not compete against discount real estate brokers, only its members did. The Federal Court of Appeal overturned this decision and sent the case back to the Competition Tribunal for redetermination. The importance of this decision is that it may open up the application of the abuse of dominance provisions to firms that are dominant in one market but engage in anticompetitive acts that lessen or prevent competition substantially in a market in which they do not directly compete. The scope of this remains to be determined in future decisions.

ii Trends, developments and strategies

In a January 2013 speech, then Interim Competition Commissioner Pecman emphasised the importance of using the most effective and efficient evidence-gathering tool available to the Competition Bureau in order to advance its investigations in a timely way. Going forward, therefore, Commissioner Pecman indicated that the Competition Bureau's first course of action in obtaining information from the target of a formal inquiry in non-criminal cases (excluding mergers) will be, for all but exceptional cases, obtaining a legally binding Section 11 order from the Court. These orders, including the Competition Bureau's supporting materials, are generally all on the public record in the Court.

Responding to Section 11 orders can be an invasive and time-consuming process that requires the target company and others involved in an inquiry to make extensive documentary production. The use of this investigative tool in all but exceptional cases clearly raises the costs for businesses of responding to Competition Bureau inquiries. It also increases the likelihood of greater public attention and interest to the Competition Bureau's inquiry, given the public filings in the Court's record.

6 *Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29.

The Competition Bureau will, where appropriate, seek cooperation with other competition authorities to advance its non-criminal investigations, such as where the alleged anticompetitive activity is occurring in Canada as well as in other jurisdictions outside of Canada.

In a recent speech this year,[7] Commissioner Pecman said that the Competition Bureau will consider both price effects and non-price effects, such as product quality, convenience, choice and innovation, in its analysis of non-criminal cases.

The Competition Bureau has working relationships with counterpart competition authorities in a number of jurisdictions across the globe. While the Competition Bureau is more often involved in parallel investigations of mergers, cartels and abuse of dominance cases with its counterpart competition authorities in the United States and the European Union, it also works with competition authorities in many other jurisdictions. This is increasingly so with competition authorities in Asia, Brazil and Australia.

Commissioner Pecman was recently quoted as stating, 'we are communicating regularly with partners in the U.S. and European Union – but also non-traditional partners like India and Brazil' in reference to one ongoing investigation. Commissioner Pecman noted that with the globalisation of business and trade, national authorities are increasingly cooperating on investigations, and estimated that a third of the Competition Bureau's cartel investigations involve international cartels, and a quarter of complex mergers involve some international dimension.[8]

iii Outlook

The Competition Bureau under Commissioner Pecman's leadership continues to be actively engaged in both the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) (where Commissioner Pecman is a member of the Competition Committee's leadership) and in the ongoing working groups of the International Competition Network (ICN) (where the Competition Bureau continues to serve as the Secretariat). Commissioner Pecman is also on the ICN's Steering Committee with specific responsibility for the interface between the ICN and the OECD.

The Trans-Pacific Partnership Agreement (which still needs to be ratified by the government of Canada) includes competition policy commitments to ensure that the parties to the Agreement will:

a adopt or maintain measures that proscribe anticompetitive business conduct;

b enforce these measures, in accordance with the principles of transparency, non-discrimination and procedural fairness;

c cooperate on matters pertaining to cross-border anticompetitive business conduct; and

d exempt competition policy provisions from dispute settlement under the Agreement.

7 'Emerging Competition Issues: Keeping Pace in a Changing World', Remarks by John Pecman, Commissioner of Competition, 19 January 2016.

8 Gordon Pitts, 'Competition Law: Global Consistency vs. National Interest', October 30, 2014.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

While the Competition Bureau is not currently conducting any public market investigations in regulated industries *per se*, it has demonstrated an ongoing interest in the intersection between intellectual property law and competition.

In September 2014, the Competition Bureau published its updated Intellectual Property Enforcement Guidelines (IPEGs), which are intended to provide an indication as to when the Competition Bureau will consider assertion of intellectual property rights to be anticompetitive.

Broadly speaking, the Competition Bureau indicated that, if the action in question involves the mere exercise of intellectual property rights, only in 'very rare circumstances' will competition issues be raised; and if, by contrast, the action involves something more than the mere exercise of intellectual property rights (for example, a merger or agreement between two companies), then the Competition Bureau will consider the matter for possible anticompetitive intentions or effects under the provisions of the Competition Act.

At a conference in October 2014 Commissioner Pecman remarked that the Competition Bureau will continue to focus enforcement efforts on evolving issues in the digital economy and cited several case examples in support of that statement.

In June 2015, the Competition Bureau released a further draft of the IPEGs for comment. The draft IPEGs address, among other things, the framework which the Competition Bureau would apply to a review of settlements between brand and generic pharmaceutical companies under the relevant regulations relating to patented medicines. This draft also includes further proposed guidelines on enforcement approaches to standard essential patents.

Stakeholders are continuing to provide comments to the Competition Bureau. The revised IPEGs are expected to be released in the spring of 2016.

V MERGER REVIEW

Merger enforcement is one of the main operating priorities of the Competition Bureau. The Bureau's Mergers and Monopolistic Practices Branch reviews a wide range of mergers across all markets in or in relation to Canada to determine whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. The Commissioner has up to one year after a merger is substantially completed to challenge it by filing an application with the Competition Tribunal for remedial relief, such as dissolution of the merger or divestiture of assets or shares, or on consent with the merging parties, any other action.

The merger provisions of the Competition Act apply to the acquisition of control over, or significant interest, in the whole or part of a business. Significant interest means the ability to materially influence the economic behaviour of the target company. The definition of 'merger' is broadly based to include the acquisition of shares or assets, amalgamations or combinations.

With limited exceptions, parties to a proposed merger of a certain size (summarised below) are required to file with the Commissioner certain information required by the Competition Act and the Notifiable Transaction Regulations made thereunder, and wait a certain period of time before being in a legal position to close the proposed merger. It

should be noted, however, that even in cases involving mergers below the statutory thresholds (summarised below) there is still jurisdiction under the Competition Act for such smaller mergers to be subject to review under the merger provisions, whether or not those mergers were the subject of voluntary notification to the Competition Bureau.

The merger notification provisions of the Competition Act contain a size of parties threshold and a size of transaction threshold, both of which must be met before such provisions will apply to require advance notification of a proposed merger. For the size of parties threshold, the parties to the proposed merger, together with their respective affiliates, must either have assets in Canada that exceed C$400 million in aggregate value, or had gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate value. In 2016, the size of transaction threshold with respect to the acquisition of assets in Canada of an operating business is that either the aggregate value of the assets in Canada being acquired exceeds C$87 million in aggregate value or the gross revenues from sales in or from Canada generated from the assets in Canada exceeds C$87 million in aggregate value. The dollar threshold of C$87 million is adjusted annually to account for inflation.

With respect to the acquisition of shares, the financial thresholds discussed above apply and in addition a shareholding threshold must be crossed. The shareholding threshold is that as a result of such proposed acquisition the buyer together with its affiliates would hold more than 20 per cent of the voting shares of a company whose shares are publicly traded, or more than 35 per cent of the voting shares of a company whose shares are not publicly traded. If the buyer already holds more than 20 or 35 per cent of the voting shares as applicable, but as a result of the proposed transaction would acquire more than 50 per cent of the voting shares of the target company, that proposed transaction would also be subject to merger notification if the financial thresholds above are met and the exemptions to merger notification do not apply.

The initial waiting period for a proposed merger subject to merger notification is 30 days after the required information is submitted to the Commissioner. This initial waiting period can be extended if the Commissioner issues a supplementary information request (SIR) to the parties to the merger before the expiry of the initial waiting period. If a SIR is issued, the new waiting period becomes 30 days after full compliance with the SIR. An SIR will likely be issued in cases requiring a very detailed examination to determine if significant competition issues arise from the proposed transaction. Such requests can be very extensive in nature.

i Significant cases

On 22 January 2015 the Supreme Court of Canada issued its decision in *Tervita Corp. v. Canada (Commissioner of Competition)*[9] *(Tervita)*. This decision provided important guidance for determining whether a merger is likely to prevent competition substantially, and for the proper application of the 'efficiencies defence' under Section 96 of the Competition Act.

In *Tervita*, the Supreme Court upheld the finding of the Competition Tribunal that a merger can be blocked based on a forward-looking analysis of whether, but for the merger, competition would likely be substantially greater. This 'but for' analysis can consider a range of evidence and the analysis is not entirely dependent on the parties' assets, plans and businesses at the time of the merger.

9 *Tervita Corp v. Canada* (Commissioner of Competition) 2015 SCC 3.

However, the Supreme Court overturned the Competition Tribunal and the Federal Court of Appeal on the correct application of the efficiencies defence under Section 96 of the Competition Act. Section 96 provides that the Competition Tribunal may not issue a remedial order where it finds a merger is likely to lessen or prevent competition substantially but the gains in efficiency resulting from the merger will likely be greater than and offset the anticompetitive effects and that such gains in efficiency would not likely be attained if a remedial order were made.

The Supreme Court held that where the anticompetitive effects of a merger are capable of being quantified, the Commissioner bears the burden of doing so, failing which the quantitative anticompetitive effects will be assessed at zero. Consequently, where some merger related efficiencies are proven by the parties to the merger, if the Commissioner fails to meet his legal burden of quantifying the anticompetitive effects that can be quantified, and the efficiency gains also offset the qualitative anticompetitive effects, an anticompetitive merger may be allowed to proceed.

The Supreme Court's decision therefore broadens the potential scope and applicability of the efficiency defence under the Competition Act. As a result of this decision, it can be expected that where parties intend to rely on the efficiencies defence, the Commissioner and the staff of the Competition Bureau may now demand considerable evidence and take more time to review a proposed transaction in order to properly quantify the possible anticompetitive effects of a proposed transaction.

ii Trends, developments and strategies

In merger cases that may raise public interest issues and related profile, it may be prudent to consider having a meeting with the Competition Bureau in advance of the public announcement of the transaction in order to provide the parties' perspectives on the proposed merger. These meetings can be done on a confidential basis with the Mergers and Monopolistic Practices Branch.

As with cartel and non-criminal investigations, the Competition Bureau also coordinates with other competition authorities with respect to the review of proposed mergers. In this regard, it is important for parties to a merger that has effects in a number of jurisdictions to ensure that their submissions and representations to the competition authorities that are reviewing the proposed transaction are consistent and not contradictory to the extent applicable having regard to the relevant facts in each case.

iii Outlook

The implications of the *Tervita* case are that parties planning a merger that has both significant competition issues and significant potential efficiencies ought to consider that even more time and work will likely be required to try to clear the proposed merger with the Competition Bureau. Therefore, greater advance planning with competition counsel and economic experts may be necessary.

VII CONCLUSIONS

Under Commissioner Pecman's leadership, the Competition Bureau's enforcement actions have been directed at furthering competition in a number of major areas of the Canadian economy, including the automotive, manufacturing, e-commerce, telecommunications and retail sectors. In addition, Commissioner Pecman has been responsible for reinvigorating

the Competition Bureau's role in advocating for Canadian consumers by promoting the benefits of increased competition in regulated sectors of the economy. He has realigned the Competition Bureau's internal structure to make it more efficient and effective in the future. Commissioner Pecman also has been active in strengthening the relationship of the Competition Bureau with counterpart competition authorities on a bilateral and multilateral basis.

Recent developments are likely to reverberate for some time in Canadian competition and antitrust law. Despite setbacks in several cartel cases, Commissioner Pecman has reaffirmed cartels as an area of continuing enforcement priority, both domestically and internationally. The extension by the Federal Court of Appeal of the abuse of dominance provisions to entities that are not, themselves, competitors, can be expected to lead to further litigation under these provisions, as the Competition Bureau and parties test the full extent of the application of that ruling. The Supreme Court's ruling in *Tervita* is likely to have a long-lasting impact on merger reviews, as parties to proposed transactions devote greater resources to ensure they advance all of the evidence necessary to take full advantage of the efficiencies defence under Canadian law.

Appendix 1

ABOUT THE AUTHORS

CAL GOLDMAN

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Cal Goldman is a partner and head of the competition, antitrust and foreign investment group at Goodmans LLP. His practice focuses on all aspects of Canadian competition law, including Canadian and international mergers, abuse of dominance, cartels and civil reviewable matters, as well as representation in foreign investment reviews under the Investment Canada Act. He is a former commissioner of the Canadian Competition Bureau. He is co-chair of the ICC's Task Force on the ICN and an executive member of the Competition Committee of the Business and Industry Advisory Committee to the OECD. He is a frequent lecturer on competition issues, co-editor of *Competition Law of Canada* and editor of *The Foreign Investment Regulation Review* (LBR). He is recognised in numerous publications including *Chambers Global,* Legal Media Group's *The Best of the Best;* Law Business Research's *Who's Who Legal of Competition Lawyers, The Best Lawyers in Canada,* and *The Legal 500 Canada*. He received his LLB from Osgoode Hall (gold medallist) and a LLM from Harvard.

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Richard Annan is a member of the competition, antitrust and foreign investment group and serves as counsel at Goodmans LLP. He specialises 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. He is recognised as a leading competition/antitrust lawyer by *Chambers Global* and *The Best Lawyers in Canada*. He was admitted to the Ontario Bar in 1985.

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