Competition Law Developments

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There are two important areas of development in competition law which require close attention.

I. Bill C-249

The first issue is the role of efficiencies in merger review under the *Competition Act.* Canada has been unique in having the provision, under s.96(1) of the Act, which emphasises efficiencies so that if gains in efficiencies "will be greater than, and will offset, the effects of any prevention or lessening of competition that will result", then the merger must be allowed.

The case of Superior Propane has taken that simple, if difficult, proposition and rendered it quite incomprehensible. Two hearings before the Competition Tribunal and two appeals to the Federal Court of Appeal have left the law in a sufficiently confused state that a Private Member Bill, C-249, has been introduced into the House of Commons, passed by that body and is now (November 2003) before the Senate for its consideration, to change and simplify the law.

Initially the Competition Tribunal determined that while there was likely to be substantial lessening of competition as a result of the merger between Superior Propane and ICG Propane, given the efficiencies introduced by that merger, pursuant to s.96(1) the merger should not be dissolved.

The Federal Court of Appeal disagreed. It found serious defects in the reasoning of the Competition Tribunal, determined that the standards for the measurement of efficiency had been incorrectly applied by that Tribunal, and redirected the case for rehearing to the Tribunal.

In a surprising manner, on the rehearing, the Competition Tribunal took exception with the conclusions of law reached by the Court of Appeal and again determined that the efficiencies in the transaction were greater than, and offset the effects of, any substantial lessening of competition.

While many lawyers asked what might have happened to the fundamental principle of judicial precedence, the Court of Appeal on subsequent reference to it, determined that the Competition Tribunal had reached a correct result on its second hearing.

In a strong dissenting opinion, Létorneau J.A. stated emphatically that "I remain convinced that the creation of monopolies is the ultimate adverse, anti-competitive effect which defeats the very purpose of the Act … in the name of economic efficiencies the Act allows for a substantial lessening of competition, but it does not authorize its elimination all together."

It is not, therefore, surprising that the Commissioner of the Competition Bureau determined that further appeal from the second Court of Appeal judgment was not useful. He stated that "further litigation would not have clarified the efficiency defects. Only a legislative solution is workable."

Bill C-249 would replace s.96(1) in its entirety and thereby remove the efficiency defence from the Act. In its place, the Bill would provide that the Competition Tribunal, in determining whether a given merger is likely to prevent or lessen competition substantially might "have regard to whether the merger or proposed merger has brought about or is likely to bring about gains in efficiency that will provide benefits to consumers … that would not likely be attained in the absence of the merger or proposed merger."

Bill C-249 is a pointed reaction to the torturous result achieved in Superior Propane. It swings from a unique position on efficiencies to something close to the U.S. view of efficiencies expressed in the U.S. Horizontal Merger Guidelines where it is stated that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies are not great. Efficiencies almost never justify a merger to monopoly or nearly monopoly."

In the event that Bill C-249 is passed by the Senate, we will have in Canada a regime in which efficiencies will be considered in merger reviews but we will not again have the judicial progression which has provided the virtually incomprehensible result of Superior Propane.

Nonetheless, for virtually all merger participants the impact of Bill C-249 will not make much difference. Efficiencies will always be considered by the Competition Bureau in any merger review as a positive factor, but no merger will be approved by the Bureau where the merger proponents argue that those efficiencies outweigh a substantial lessening of competition. Only a hearing before the Competition Tribunal could establish that position under the present law, and very few merger proponents have the stomach for the necessary magnitude of legal fees.

II. Proposal for Amending the Competition Act

The second development is that, in a June, 2003 Discussion Paper, further important amendments to the *Competition Law* are proposed for consideration.

Civil Administrative Monetary Penalties

Perhaps the most important proposal raises the prospect that Administrative Monetary Penalties for Civil Reviewable Matters, such as abuse of dominant position, under Part VIII of the Act be introduced.

This change is designed to address a serious question in Part VIII of the Act. At the present time, for companies with no objection to becoming involved in legal proceedings with the Commissioner, there is very little discouragement to engaging in anti-competitive practices. There is always the chance that no one will challenge the conduct, and there is the virtual certainty that if the conduct is challenged it will take a very long time for any remedial order to be obtained. While proceedings are ongoing, the conduct can be continued and if the Commissioner or a private applicant succeeds, the worst that is likely to happen to the anti-competitive party is that its conduct will have to be stopped. In the meanwhile, the respondent will have reaped the benefit of conduct that is found to be anti-competitive.

If AMPs are introduced into the Act, it will become increasingly important, indeed imperative, to have internal policies and procedures which ensure that a company is not engaged

in reviewable practices which could have an anti-competitive effect. This will impose significant challenges for counsel, both internal and external, to ensure that the full implications of anti-competitive behaviour are widely understood.

It is certainly to be hoped that if the law is amended, AMPs will only be imposed where the person engaged in the objectionable practice knew or ought reasonably to have known that the practice was likely to have the effect of lessening or preventing competition substantially in a relevant market.

AMPs for Civil Reviewable Matters under Part VII.1

Similarly, AMPs are proposed to be available to the Courts in the case of deceptive marketing practices. In addition, it is proposed that offenders be required to effect restitution to consumers on application by the Commissioner. Asset freezing orders are also proposed to support the AMP and the restitution regime with respect to deceptive marketing practices.

Again, counsel will have to be vigilant in ensuring that clients are educated with respect to the onerous implications which might follow upon a finding that a client has engaged in deceptive marketing practices.

Civil Courses of Action

An amendment with dramatic implications is the suggested amendment to s.36 of the Act which would allow businesses and individuals to sue for damages suffered as a result of conduct which becomes the subject of an order under Part VII.1 (deceptive marketing) or Part VIII (reviewable practices).

If adopted, this suggestion would provide to those who had been injured by deceptive marketing or reviewable practices the ability to seek recovery without further intervention by Government. It should not, however, result in the proliferation of U.S. type litigation because the Canadian practice of awarding costs against an unsuccessful litigant would remain, and there would be no concept of "triple damages" which adds a lottery like effect to U.S. private anti-trust litigation.

Nonetheless, the introduction of civil remedies would require heightened effectiveness of the internal policies and procedures of companies to ensure compliance with competition law.

Further Changes

There are further changes suggested to the Act, including amendments to the criminal conspiracy provisions, removing criminal sanctions from price discrimination, and the institution of references on general issues to the Canadian International Trade Tribunal.

It will be important to follow these developments. Your clients do not enjoy being surprised.