

## Competition Law

May 2004

### Current Developments in Canadian Competition Law

There are four aspects of Canadian Competition Law which are now under public or parliamentary review. In only one might there be change in the law or administrative practice in the immediate future. The others merit observation because suggested changes could definitely modify either the law or administrative practice.

The areas under consideration are:

1. Bill C-249 which, if enacted, would change the law on the treatment of efficiencies;
2. Merger Enforcement Guidelines as applied to a Bank Merger with respect to which public comment was requested on November 5, 2003;
3. Options for amending the *Competition Act* with respect to which public comments were requested on June 23, 2003 and upon which the Public Policy Forum has reported on April 8, 2004;
4. Merger Enforcement Guidelines on which the Competition Bureau sought public comment on March 25, 2004.

#### Bill C-249

Because Bill C-249 is now before the Senate, having been passed by the House of Commons, it is quite possible that it will become law. But hearings before the Senate Committee, and the prospect of an election present real uncertainties. If passed, the effect of the change will be that the earlier distinctive treatment of efficiencies found in Section 96 of the *Competition Act* will no longer be the law. Pursuant to Section 96 efficiencies could “trump” anti-competitive effects in a merger. After the passage of Bill

C-249, efficiencies would be afforded less weight in merger review. Bill C-249 would also require that for efficiencies to be positively evaluated, they must result in some consumer benefit.

While significant in the context of recent Canadian merger review, Bill C-249 would bring Canadian law on efficiencies more closely into alignment with that of the U.S. and of the EU.

For greater detail, please see *Global Competition Review, Vol. 6, Issue 9, October 2003*.

#### Bank Merger Enforcement Guidelines

In its request of November 5, 2003 for comment on the Bank Merger Enforcement Guidelines, no revised draft was provided. The Bureau indicated at the start of the consultation that it would issue its revised bank merger guidelines on June 30, 2004. This date was intended to coincide with the announcement of the overall policy framework that the federal government would apply to large bank mergers. If as widely expected, a general election is called before the end of June, it is very likely that the policy framework will be delayed, with the consequence that the Bureau guidelines will also be delayed.

#### Options for Amending the Competition Act

While the June, 2003 discussion paper on Options for amending the Competition Act suggested amendments ranging over a wide field, including the further introduction of Administrative Monetary Penalties, Civil Rights of Action, Decriminalization of Price Provisions, and the creation of “per se” offences, the path towards legislative amendment remains tortuous and unclear. The Public Policy Forum was retained to request and review comments on the proposed changes. That itself was a lengthy process, the results of which are chronicled in the Final Report of PPF of April 8, 2004. That Report, while comprehensive, does little to clarify the situation. PPF reviews submissions and arguments put forward with respect to each of the proposed changes and effectively summarizes those positions. But it does not evaluate the effectiveness of the arguments, choosing instead to count the submis-

# Goodmans<sup>LLP</sup> Update

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sions and indicate the number that were “for” and those “against” each specific proposal.

No further timetable is available and there has been no articulation from the Competition Bureau or from Government as to which, if any, of the suggested changes might find their way into legislation. Those with an insatiable appetite for detail should refer to: [http://www.ppforum.com/competitionact/final\\_report.pdf](http://www.ppforum.com/competitionact/final_report.pdf).

## Merger Enforcement Guidelines

With the March 25, 2004 request for public comments, the Competition Bureau did release draft revised merger enforcement guidelines.

The revised draft is a positive and effective step in providing coherent guidelines on the context in which merger review is undertaken by the Bureau. The draft guidelines are a distinct improvement on the Merger Enforcement Guidelines of 1991. The Competition Bureau has indicated an intention to issue the MEGs in final form in the summer of 2004.

But while they are clear, and frequently very helpful, the draft seeks to recast the treatment of efficiencies in light of the Federal Court rulings in Superior Propane. There a merger to monopoly was permitted on the basis of efficiencies having offset any substantial lessening of competition. The difficulty in anticipating rapid promulgation of the draft MEGs in final form is that Bill C-249, noted above, would change the law on efficiencies and would consequently require a reconsideration of the reconsideration of efficiencies. This may be a garbled way of stating

that the draft MEGs may not assume final shape until after the fate of Bill C-249 is known.

For lawyers there is much to read; for economists much to consider. For business and, more particularly bank and other merger proponents, it appears not much can be done except wait.

### William P. Rosenfeld

wrosenfeld@goodmans.ca 416.597.4145

### Bob Vaux

rvaux@goodmans.ca 416.597.6265

### William V. Alcamo

wvalcamo@goodmans.ca 416.597.4100

### Robert Malcolmson

rmalcolmson@goodmans.ca 416.597.6286

### Michael Koch

mkoch@goodmans.ca 416.597.5156

### Justin Beber

jbeber@goodmans.ca 416.597.4252

### Peter Ruby

pruby@goodmans.ca 416.597.4184

### Gesta Abols

gabols@goodmans.ca 416.597.4186

### Yasmin Shaker

yshaker@goodmans.ca 416.597.5499

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