

## Competition Law

November 8, 2004

### Minister of Industry Tables Amendments to the *Competition Act*

On November 2, 2004, the Honourable David Emerson, Minister of Industry, tabled amendments to the *Competition Act*. The amendments introduce significant penalties for abuse of dominance in any industry and dramatically increase the penalties for deceptive marketing practices. In addition, the amendments would give the Court the power to order advertisers to pay restitution to consumers for false or misleading representations. These changes, if adopted, will increase the need for an effective competition law compliance program.

The amendments also propose to repeal the criminal pricing provisions relating to price discrimination, promotional allowances, predatory pricing and geographic price discrimination. To the extent such practices may be anti-competitive in a particular set of circumstances, they can be dealt with under the civil abuse of dominance provision.

Finally, the amendments remove the airline-specific provisions in the *Competition Act*. These provisions were designed to deal with competitive conditions in the Canadian airline industry following the merger of Canadian Airlines and Air Canada in 1999. Substantial changes have occurred in this industry since then, such as the entry and successful expansion of low cost carriers in domestic airline markets. As a result, the Government believes that industry-specific provisions are no longer justified.

The abuse of dominance provision relates to conduct by a dominant firm that is exclusionary, predatory or discipli-

nary in nature and that has had, is having or is likely to have the effect of substantially lessening or preventing competition. For example, contract terms that require customers to purchase all of their requirements from one firm may be problematic. Under the current law, if the Competition Tribunal finds that a dominant firm has engaged in a practice of anti-competitive acts which results in the anti-competitive effects noted above, it may order the firm to stop the offending conduct. The Government has argued that this remedial power provides insufficient deterrence since the firm can profit from anti-competitive conduct until ordered to stop and faces no financial penalty for having done so. The amendment establishes a maximum fine, called an administrative monetary penalty, of \$10 million, and \$15 million for each subsequent order. These significant fine levels should cause dominant firms to carefully evaluate potentially anti-competitive practices before engaging in them. In Europe, firms may be fined up to 10% of annual sales for similar conduct. Opponents to this change note that it blurs the distinction between the criminal and civil provisions by imposing fines without the usual level of procedural safeguards found in criminal process, including a higher standard of proof.

The amendments significantly raise the financial consequences for deceptive marketing practices. The maximum administrative monetary penalty for individuals would be raised from \$50,000 to \$750,000 for the initial order, and from \$100,000 to \$1,000,000 for each subsequent order. The maximum administrative monetary penalty for corporations would be raised from \$100,000 to \$10,000,000, and for each subsequent order from \$200,000 to \$15,000,000. In addition, a new power would be given to the Court to order restitution to consumers for false and misleading representations in an amount that would not exceed the amount paid for the products. The Court would also have the power to freeze assets in order to prevent the depletion of assets pending the completion of matter, including any remedial orders.

The Government has decided to not introduce any amendments at this time to section 45, the criminal conspiracy provision of the *Competition Act*. The Government has argued that section 45 should be amended to eliminate the

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need to prove anti-competitive effects for agreements among competitors that fix prices, allocate customers or markets or reduce supply. It is likely that section 45 will be featured in a future round of amendments.

Given the circumstances of a minority Government, there is no certainty that these amendments will become law. However, the Government indicated its desire to amend the *Competition Act* in the recent Speech from the Throne and has introduced these amendments very early in its mandate. These actions indicate that the Government is committed to changing the Act.

If you have any questions or, if you wish to discuss the proposed amendments to the *Competition Act*, please contact any member of the Goodmans' Competition Group.

**Richard Annan**

rannan@goodmans.ca 416.597.4272

**William P. Rosenfeld**

wrosenfeld@goodmans.ca 416.597.4145

**Daniel Gormley**

dgormley@goodmans.ca 416.597.4111

**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

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