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Competition Law in Canada: The Top 10 Issues for 2013

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This is a post of an article written by my partners Anita Banicevic, Richard Elliott, Charles Tingley and me

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2012 was a busy year for competition law and policy in Canada. Below we consider how some of the important developments in 2012 will shape the enforcement of Canadian competition law in 2013.

1. Will the New Interim Competition Commissioner Stay the Enforcement Course?

In September 2012, the Commissioner of Competition resigned and was replaced on an interim basis by John Pecman, a seasoned Bureau veteran with over 28 years of enforcement experience. While a permanent replacement is expected to be appointed within the year, many have asked whether the Commissioner's departure will result in a different enforcement approach to the one taken during her tenure, which saw a number of high-profile proceedings initiated before the Competition Tribunal and courts. That seems unlikely.

In Mr. Pecman's first speech as Interim Commissioner in October 2012, he stated "the Bureau's priorities were the right ones a few months ago and they will continue to guide us in the months ahead." In a subsequent speech delivered in early December 2012, Mr. Pecman returned to this theme, commenting that the Bureau's "commitment to enforcement runs deep in my veins", and that "the Bureau's recent track record on enforcement mirrors my own as an enforcer at the Bureau." More importantly, as discussed below, Mr. Pecman has commenced two significant enforcement proceedings before the Competition Tribunal during his interim tenure, and has continued a number of enforcement proceedings commenced by his predecessor. Based on these initial indications, companies operating in Canada should not expect any relaxation in the Bureau's enforcement approach in the year ahead.

2. Criminal Offences – Will there be a "Sea Change" in the Prosecution of Cartels?

As former head of the Bureau's Criminal Matters Branch, it is not surprising that prosecuting criminal offences such as cartels and bid-rigging will remain a priority under Mr. Pecman's administration. Taking his cue, in part, from comments about the gravity of cartel conduct made by

Chief Justice Crampton of the Federal Court of Canada in a recent sentencing decision, Mr. Pecman expressed his view that there has been a "sea change" in the way that cartel offences and other white-collar crimes are now viewed in Canada. Other developments in 2012 also tend to support this trend. For example, legislation that came into effect in November 2012 has eliminated the availability of some permissive types of "conditional sentences" for persons who have violated the Competition Act's conspiracy and bid-rigging offences (these "conditional sentences" usually consist of house arrest or community service). In addition, the federal government recently tightened its procurement rules, such that companies convicted of conspiracy/bid-rigging and certain other federal offences will be disqualified from bidding on government contracts even if they pleaded guilty and cooperated under the Bureau's leniency program.

If there really is going to be a "sea change" in cartel enforcement in 2013, one area to watch closely will be the level of fines sought and obtained against accused parties. In 2012, a total of approximately CDN$22.2 million in fines was imposed on parties convicted of violating the Competition Act's conspiracy offence. While the magnitude of cartel fines imposed in 2012 was up significantly from 2011 (approximately CDN$295,000) and 2010 (approximately CDN$8 million), the amounts are still modest when compared to cartel fines in other jurisdictions, particularly the United States, where the U.S. Department of Justice obtained US$1.13 billion in criminal antitrust fines in FY 2012.

The other key indicator of a change in approach will be whether the Bureau actively pursues jail sentences for individuals who participate in cartels. Mr. Pecman is on record as favouring prison sentences for individuals in appropriate cases, and has pointed to the supporting comments by Chief Justice Crampton that individuals convicted of cartel offences in Canada should "face a very real prospect of serving time in prison." That said, the Bureau will not have an easy path if it decides to insist on jail sentences for cartel participants; there is a limited track record of individuals serving time in jail in Canada for cartel-related offences, and any shift in this direction is likely to be resisted by defendants. 2013, therefore, could see fewer plea agreements for cartel-related offences and more contested proceedings, including the first defended case under the per se cartel provisions that came into effect in March 2010. This would mark a fundamental shift in the nature of cartel prosecutions in Canada.

3. A New Standard for Misleading Representations?

According to Mr. Pecman, the Bureau will continue to actively pursue misleading advertising cases in 2013, with a particular focus on appropriate disclosure of key terms and pricing in the e-commerce and digital media areas. This should serve as a signal to companies marketing online or in digital media to ensure that their advertising is compliant.

Of course, compliance depends to some degree on the standard that ought to be used when evaluating whether a representation is misleading. In Richard v. Time, a decision released in February 2012, the Supreme Court of Canada held that the appropriate standard for assessing the general impression of representations under the Quebec Consumer Protection Act is from the perspective of a "credulous and inexperienced" consumer. This is quite different from the generally accepted approach under the Competition Act, which was to assess the general impression from the perspective of the average consumer, having regard to the characteristics of the consumer that is targeted by the representation. Since the Time decision, the Competition Bureau has shifted its approach and taken the position in a case before the Ontario Superior Court that the Time standard should apply equally in the competition law context. If the Court agrees with the Commissioner on

this issue, this will have important implications for how companies approach their advertising in Canada.

4. Abuse of Dominance – Is More Guidance on the Horizon?

The Bureau issued new (and long-awaited) abuse of dominance enforcement guidelines in September 2012. However, these pared down guidelines arguably had the effect of reducing transparency on many important aspects of abuse of dominance enforcement in Canada, a problem that the Bureau now proposes to address by issuing supplementary FAQs. More guidance on abuse of dominance (and the related area of price maintenance) should also be available from the Competition Tribunal, with decisions expected in the Toronto Real Estate Board (TREB) case regarding rules restricting TREB member brokers from providing consumers with direct access to certain online data from TREB's Multiple Listing Service, and the Bureau's case against Visa and MasterCard in relation to merchant restraints alleged to maintain the price of credit card acceptance fees. The Bureau also brought two new applications under the abuse of dominance provisions at the close of 2012 against each of two suppliers of water heaters in Ontario regarding allegedly restrictive practices designed to prevent customers from switching to competitors. The Bureau is seeking the maximum financial penalties available in those cases (a total of $25 million against the two parties), which underscores the stakes involved when alleged abuses of dominance are at issue.

5. Patents and Competition Law– Will the Bureau Jump into the Fray?

In recent years, the Bureau has shown relatively little enthusiasm, at least publicly, for enforcement action in relation to the potential anti-competitive use of patents – an area that has generated significant debate and scrutiny amongst antitrust regulators in other countries. That said, an abuse of dominance investigation involving a pharmaceutical company that has recently become public appears to be based on concerns of patent leverage. Based on public documents, the Bureau has also asked the target to produce copies of settlement agreements it has entered into regarding patent litigation.

6. Continued Merger Scrutiny

In May 2012, the Competition Tribunal issued its first decision in a fully contested merger case in over a decade, ordering CCS Corporation to divest its interest in an acquired company that owned a landfill site in British Columbia. While the Competition Tribunal agreed with the Commissioner's basis for challenging the transaction, it refused to order dissolution of the merger (as had been requested by the Commissioner) but required the parties to divest the assets at issue, allowing the vendors in that case to breathe a momentary sigh of relief – at least until the appeal of the Tribunal's decision is resolved. Regardless of how this issue is dealt with on appeal, the other main lesson from the CCS case is that the Competition Bureau intends to closely review and challenge even relatively small and non-notifiable transactions, including circumstances where the parties have never previously competed, if it believes that they may substantially lessen or prevent competition.

7. Joint Ventures and Alliances – Lessons from the Airline Industry

In October 2012, the Bureau entered into a Consent Agreement with Air Canada and United Continental that precluded the airlines from coordinating on certain matters on 14 transborder routes. Interestingly, the Bureau challenged existing agreements between the parties under both section 90.1 of the Act, the relatively new civil provision governing agreements between

competitors, and the merger provisions in section 92 of the Act. Section 90.1, unlike the Competition Act's merger provisions, has no limitation period, allowing the Bureau to challenge agreements that had been in place for many years and raising the prospect of long-term scrutiny of joint ventures and alliances that may be functionally similar to mergers. With the settlement of the Air Canada/United Continental transaction, the Bureau may be on the lookout for a new joint venture case to test the scope of section 90.1.

8. Regulated Conduct Redux?

In recent comments, Mr. Pecman and other Bureau officials have expressed a renewed interest in competition in regulated sectors in Canada. This was a priority under former Commissioner Sheridan Scott, who, among other things, issued a study in 2007 on self-regulated professions in Canada and devoted considerable resources to educating legislators and regulators on the benefits of competition. It seems that the Bureau now intends to pick up, at least to some degree, the advocacy role that lay largely dormant during the last Commissioner's tenure.

9. Spotlight on Trade Associations

In a similar vein, the Bureau has gone out of its way recently to highlight competition issues raised by trade association activities, such as information exchanges and restrictions on the types of services members can offer. Reports also indicate that the Bureau is currently investigating the role of a trade association in facilitating alleged price-fixing in the construction of concrete foundations for residential homes in the Toronto area. The upshot is that trade and professional associations should brace themselves for a heightened level of scrutiny in 2013.

10. Red Light or Green Light for Indirect Purchaser Claims?

In October 2012, the Supreme Court of Canada heard appeals (two from British Columbia and one from Quebec) from conflicting appellate decisions about whether indirect purchasers are barred as a matter of law from suing for damages in antitrust claims. The cases involve claims by downstream purchasers of products (software, sweeteners and computer memory) allegedly subject to upstream price-fixing conspiracies. The Court is expected to decide on the appeals later this year and will have to grapple with the merits of a rule, like the one developed by the U.S. Supreme Court, prohibiting claims by those who are not the immediate victims of an antitrust violation but who instead claim to have paid an overcharge passed-on by direct purchasers.

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