

focus

on

Competition

The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a blue square background, with a thin blue arc below it.

FRASER MILNER CASGRAIN LLP

May 2005

Canadian Competition Law 2004: The Year in Review

Significant developments in Canadian competition law in 2004 and early 2005 included the introduction of new legislation and Merger Enforcement Guidelines, an increase in private applications to the Competition Tribunal, and landmark U.S. cases with potential ramifications for parties in Canadian international cartel litigation.

PROPOSED CHANGES TO THE COMPETITION ACT

On November 2, 2004, Bill C-19 was tabled for first reading. The Bill proposes some significant amendments to the *Competition Act* (the "Act") including:

- The imposition of significant administrative monetary penalties in certain abuse of dominance cases;
- A substantial increase in the administrative monetary penalties currently in place for deceptive marketing practices;
- The availability of restitution and freezing orders as remedies in misleading representation cases;
- Repeal of the criminal pricing provisions, including price discrimination, geographic price discrimination, predatory pricing and promotional allowances;
- Repeal of the airline specific amendments enacted in 2000.

Committee hearings on Bill C-19 are ongoing. Looking towards future changes to the Act, the Competition Bureau ("the Bureau") also held public consultations on the regulated conduct defence and the treatment of efficiencies in mergers.

MERGERS

Merger Enforcement Guidelines

After thirteen years, the Bureau released new merger enforcement guidelines ("MEG'S") in September 2004 which include the following changes:

- Clarification of the Competition Bureau's position on what constitutes a "significant interest" for merger review purposes;
- An expanded definition of when a transaction may be considered to substantially "prevent" competition;
- A modified price influence test;
- A market definition analysis that focuses solely on demand-side substitution;
- Additional discussion of when a merger may raise the risk of co-ordination among competitors;

- Identification of long-term exclusive contracts as a barrier to entry in a market;
- A new discussion on countervailing market power;
- Modifications to the discussion on the treatment of efficiencies to conform with the outcome of the *Superior Propane* case.

Canadian Waste

In November 2004, after years of proceedings in the courts and the Competition Tribunal (the “Tribunal”), the Federal Court of Appeal dismissed the latest attempt by Waste Management of Canada Corporation (“WMCC”) to overturn the Tribunal’s Order requiring WMCC to divest its Ridge landfill site in Ontario. The Bureau originally obtained the Divestiture Order in 2001 to address concerns resulting from the 2000 merger of Canadian Waste Services Inc. (predecessor to WMCC) and Browning Ferris Industries Limited. The divestiture of these assets was completed in January, 2005.

Forestry Industry

In November 2004, the Commissioner filed a Hold Separate Agreement with respect to the proposed acquisition of Riverside Forest Products Limited by Tolko Industries Limited to preserve its ability to order appropriate relief pending completion of the Bureau’s review of the transaction. In another industry merger, a Consent Agreement was filed with the Tribunal at the beginning of December, 2004 permitting the merger between West Fraser Timber Company Limited and Weldwood of Canada Limited, with conditions.

Other Merger Matters

In October, the Commissioner obtained an order from the Competition Tribunal amending the time for divestiture of operations in Sherbrooke, Quebec set out in the 2003 Consent Agreement with respect to the RONA/Rona-Depot Inc. merger. In January 2005, RONA filed an application with the Competition Tribunal for an order under s. 106 to annul the Consent Agreement and relief from its divestiture obligation. The basis for the application is the existence of a new entrant in Sherbrooke. A hearing was held in April 2005 and a decision of the Tribunal is pending.

In the music recording business, the Bureau decided not to challenge a proposed joint venture between Sony Corporation and Bertelsmann AG, in spite of the continuing concentration in this industry. In communications, the Bureau approved the proposed acquisition of Microcell Telecommunications Inc. by Rogers Wireless Inc.

REVIEWABLE PRACTICE CASES

Canada Pipe

In February 2005, the Tribunal held that Canada Pipe did not abuse its dominant position with respect to a rebate program designed to promote exclusivity in the distribution of cast iron drain, waste and vent pipe, fittings and couplings. Canada Pipe marked the Commissioner’s first loss in an abuse of dominance application, and provides some encouragement for firms in Canada with significant market positions that they can engage in vigorous competitive activity without crossing the line to anti-competitive practices. Although the Tribunal held that Canada Pipe had sufficient market power to exercise market control (i.e. was dominant), and used tactics designed to promote exclusivity from distributors, the rebate program did not constitute a practice of anti-competitive acts or have the requisite negative effect on competition to constitute abuse. The Commissioner of Competition has appealed the Tribunal’s decision and Canada Pipe has launched a cross-appeal of the Tribunal’s finding of market power.

In May 2005, the Tribunal ordered the Commissioner to pay party costs in accordance with the Federal Court Tariff up to the date of Canada Pipe’s settlement offer and 150% of the Tariff amount thereafter. In addition, the reasonableness of Canada Pipe’s disbursements (including significant expert costs) is to be determined by an assessment officer.

Air Canada

In October 2004, approximately one month after Air Canada emerged from bankruptcy protection, the Commissioner and Air Canada settled their abuse of dominant position application, citing significant positive changes in Canada’s airline industry since the start of Tribunal proceedings in March 2001. The Tribunal had concluded in June 2003, in Phase I of the

proceedings, that Air Canada had committed anti-competitive acts by operating below avoidable cost on two sample routes in Atlantic Canada. Phase II of the case would have determined whether Air Canada's anti-competitive acts led to a substantial lessening of competition, and whether Air Canada had a legitimate business justification for operating below avoidable cost.

Other Abuse of Dominance Matters

The Bureau opened and quickly closed its inquiry into broadcasting rights to the 2010 and 2012 Olympic Games, finding no evidence that a Bell Globemedia/Rogers Media Inc. partnership would impair the ability of CBC/Radio-Canada's ability to compete for the Games, and no evidence that competition would be substantially lessened. The Bureau also resolved complaints of abuse of dominance in the insurance industry related to increases in car, property and commercial insurance premiums in Canada, concluding that there was no evidence of abuse.

CIVIL DECEPTIVE MARKETING PRACTICES

Sears Canada

On January 24, 2005, the Tribunal released its decision allowing the Commissioner's application against Sears Canada with respect to tire advertisements run in 1999, in which Sears advertised prices discounted from its "regular" tire prices. The Tribunal concluded that those ads violated the "ordinary selling price" provisions of the Competition Act and issued a ten year prohibition order against Sears. The Tribunal declined to require Sears to issue corrective notices. In April 2005, Sears agreed to pay a \$100,000 administrative monetary penalty (AMP's) and \$387,000 towards the Commissioner's legal costs.

The Tribunal rejected Sears' constitutional challenge to the validity of subsection 74.01(3) of the Act and held that Sears had not offered the tires at the advertised regular or ordinary price "...in good faith for a substantial period of time...". In rejecting Sears' argument that its representations were not materially false or misleading, the Tribunal held that the existence (or not) of consumer harm was irrelevant.

Forzani

In a consent agreement filed with the Tribunal in July, the sporting goods retailer agreed to pay an administrative monetary penalty of \$1.2 million (12 times the maximum AMP available under the Act) and the costs of the Bureau's inquiry totalling \$500,000. It is anticipated that the Competition Bureau will increasingly seek to collect for the costs of its investigation, although its right to do so has not yet been dealt with by the Tribunal.

Other Deceptive Marketing Matters

In December 2004, the first case under the Bureau's new internet surveillance and enforcement program called Project FairWeb was resolved when Performance Marketing entered a Consent Agreement and agreed to refund consumers the full value of their purchases for false claims about Zyapex and Dyapex Diet Patches.

CRIMINAL CASES

There were no major contested criminal proceedings in Canada in 2004. The Bureau settled a price maintenance case against John Deere Limited, resulting in \$1.19 million in rebates to Canadian consumers of certain John Deere lawn tractors. A phony invoice scam in the *yellowbusinessdirectory.com* case led to jail time and fines for four individuals found to have violated the false or misleading representations provision of the Act. Six individuals and four telemarketing firms pled guilty to deceptive telemarketing contrary to s.52.1 of the Act and Global Online Systems Inc. ("GLOS") pleaded guilty to pyramid selling for health-related products marketed by Herbalife Canada Ltd.

International Cartels

International enforcement authorities continued to increase cooperation efforts through the International Competition Network. Crompton Corporation, in May 2004, paid the most significant fine (\$9 million) for its part in an international price-fixing scheme in the supply of rubber chemicals. Fines and guilty pleas were also imposed on: VAW Carbon and Nippon Electrodes Company Limited for their role in a conspiracy to fix the price of cathode blocks; Morgan Crucible Company for obstruction of the Bureau's investigation into allegations of price fixing in carbon brushes and current collectors used in public transit vehicles; and Morganite Canada Corp. (an affiliate of Morgan Crucible) for unknowingly implementing pricing directives from a foreign affiliate in Wales.

INDUSTRY SPECIFIC EXAMINATIONS

The Competition Bureau conducted industry specific examinations with respect to allegations of collusion in the petroleum industry and allegations of collusion and abuse of dominance in the beef packing industry. The Competition Bureau concluded in March and April 2005 respectively that there was no evidence of collusion or abuse of dominant position in either industry. Although no official “inquiries” were opened, the Competition Bureau conducted extensive examinations as a result of complaints from consumers and concerns raised by parliamentary committees. The examinations sought voluntary information and cooperation from industry participants, rather than using the compulsory court-sanctioned investigation methods provided for in the Act.

PRIVATE ACTIONS

Private Access to the Tribunal

In October 2004, the Federal Court of Appeal partially clarified the test for leave under subsection 103.1(7) of the Act for private parties to bring applications before the Tribunal. In the *Barcode* decision, the Federal Court of Appeal held that while the leave threshold is low, the applicant must demonstrate that it is **directly and substantially affected** in its business and the Tribunal must have reason to believe that the alleged practice **could be subject to an order** under that section. That means that applicants must adduce some evidence of all elements of the practice in question, including the requisite competitive effects.

In November 2004, the Tribunal made an interim order against Harley Davidson, the respondent in a private refusal to deal application by Quinlan’s, requiring it to reinstate supply of some merchandise and parts pending the outcome of the application. This was the first interim order granted by the Tribunal in a private access application and may act as a precedent for future applications.

Eli Lilly v. Apotex

In June 2004, the Federal Court of Appeal shed new light on the interface between intellectual property rights and competition law. In a patent infringement action, one of the parties alleged that the assignment of a process patent constituted a conspiracy

under section 45 of the Act. The Federal Court Trial Division dismissed the claim summarily. The Court of Appeal reversed, holding that the assignment of a patent, where it leads to an undue lessening of competition, could constitute “something more than the mere exercise of an intellectual property right”, and a potential conspiracy. The Trial Division then held on rehearing the summary judgment motion, that as long as the assignment is specifically authorized by the *Patent Act*, it will be exempt from section 45. That decision is under appeal to the Court of Appeal.

Vitamins Class Actions

Settlements of the numerous vitamins class actions were approved by courts in Ontario, British Columbia and Quebec in the spring of 2005. The settlements, to which most, but not all, defendants are parties, provide for the payment of \$132.2 million, including interest and costs to be shared among direct purchasers, distributors, intermediate purchasers, consumers and plaintiffs class counsel.

U.S. CASES WITH CANADIAN RAMIFICATIONS

Empagran

The June 2004 decision of the U.S. Supreme Court in the *F. Hoffman LaRoche Ltd. v. Empagran S.A.* case is of significant interest to Canadian plaintiffs hoping to seek treble damages from foreign companies by suing in the United States. The Court held that foreign plaintiffs cannot sue foreign defendants in the United States under the domestic-injury exception to the *Foreign Trade Antitrust Improvements Act* of 1982 (“FTAIA”), unless they are able to demonstrate that the price-fixing conduct of the defendants significantly and adversely affected customers within the United States and that the effect on the foreign plaintiffs is not independent of the adverse domestic effect. The U.S. Supreme Court stopped short of determining whether the foreign plaintiffs in *Empagran* satisfied the test. That issue was argued before the U.S. Court of Appeals in April 2005 and is on reserve.

Intel

Another 2004 U.S. Supreme Court decision of interest to Canadian plaintiffs in civil actions and complainants in competition investigations is *Intel Corp. v. Advanced Micro Devices, Inc.* The Court held that a complainant in a European Commission competition investigation had standing to apply to a U.S. court for production of documents in U.S. civil litigation that were relevant to the European complaint, even though the European Commission had declined to seek the information itself. The U.S. Supreme Court did not order production but remanded the issue back to the District Court, which ultimately denied the application for production in that case. Since *Intel*, plaintiffs in jurisdictions outside the U.S. (including Canada) have been using the Supreme Court's reasons to seek disclosure of discovery materials in private actions in the U.S. or to seek orders for discovery from U.S. courts with varying degrees of success.

For further information, please contact **Randy Hughes, Don Houston, Barry Zalmanowitz** or any other member of the **FMC Competition Law Group**:

John F. Blakney (613) 783-9602
john.blakney@fmc-law.com

Nicole A. Brown (416) 863-4368
nicolea.brown@fmc-law.com

Paul F. Dingle (514) 878-8803
paul.dingle@fmc-law.com

Pascale Dionne-Bourassa (514) 878-5844
p.dionne-bourassa@fmc-law.com

Andrea Feltham (416) 367-6816
andrea.feltham@fmc-law.com

Margaret Forbes (416) 863-4390
margaret.forbes@fmc-law.com

Donald B. Houston (416) 863-4620
don.houston@fmc-law.com

Randal T. Hughes (416) 863-4446
randy.hughes@fmc-law.com

Neil Katz (514) 878-8883
neil.katz@fmc-law.com

Tracey Patel (416) 863-4587
tracey.patel@fmc-law.com

Susan Paul (416) 863-4461
susan.paul@fmc-law.com

Jeanne L. Pratt (416) 367-6806
jeanne.pratt@fmc-law.com

Denise M. Prokopiuk (780) 423-7176
denise.prokopiuk@fmc-law.com

Jennifer S. Trent (416) 361-2312
jennifer.trent@fmc-law.com

Barry Zalmanowitz, Q.C. (780) 423-7344
barry.zalmanowitz@fmc-law.com