Developments

CANADIAN COMPETITION LAW: THE YEAR IN REVIEW (2010-2011)

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En raison de la grande variété d'amendements apportés à la *Loi sur la concurrence* au cours des dernières années, de la vigueur renouvelée du Bureau de la concurrence dans l'application de la Loi, et d'un grand nombre de dossiers devant les tribunaux, 2010-2011 a été marquée par d'importants développements en droit de la concurrence au Canada.

2010-2011 was a busy year in Canadian competition law. The Commissioner of Competition ("Commissioner") launched several test cases under the recently-amended civil sections of the *Competition Act*[1] ("Act"), and the Competition Bureau ("Bureau") issued a steady stream of merger guidance, apparently stepping-up the level of enforcement activity in merger review. Criminal courts kept pace with a continued stream of deceptive marketing, cartel and bid-rigging convictions; while divergent civil court decisions regarding indirect purchaser claims for damages in cartel cases paved the way for a possible appeal to the Supreme Court of Canada. For a short period of time in the fall of 2010, however, the *Investment Canada Act*[2] stole the lime-light, as BHP Billiton eventually withdrew its unsolicited bid for Potash Corporation of Saskatchewan Inc. ("PotashCorp") in the face of the Minister of Industry's preliminary rejection of the bid under that statute.

Highlights of 2010-2011 included the following:

- Legislative changes were proposed that sought to modernize the provisions of the *Competition Act*; particularly in regards to e-mail, social networking and advanced technology;
- The above-noted decision by the Minister of Industry under the *Investment Canada Act* that the acquisition of PotashCorp by BHP Billiton was not likely to be of "net benefit" to Canada marked only the second such decision by that Minister in the history of that statute;
- The Commissioner's challenge of the acquisition of an unlicensed landfill site by CCS Corporation from Complete Environmental Inc. was noteworthy in that the transaction had not been subject to advance notification under the Act, had already closed, and was based solely on an alleged "prevention" of competition;
- A steady stream of merger guidance was issued by the Bureau, ranging from the Bureau's disclosure obligations in the context of a hostile takeover bid; draft revisions to the *Merger Enforcement Guidelines* ("MEG"s), an updated *Fee and Services Standards Handbook for Mergers and Merger-Related Matters* and an updated *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act;*
- Criminal enforcement was at centre-stage, as the Bureau obtained penalties in respect of cartels involving the chemicals, retail gasoline, refrigeration compressors and air cargo industries, as well as bid-rigging cases involving traffic lights and residential ventilation contracts, and issued new guidance in respect of its immunity and leniency programs;
- Deceptive marketing and misleading advertising remained a top priority for Bureau resources, resulting in both criminal and civil lawsuits, fines, and the extradition to the United States of Canadians alleged to be involved in fraudulent telemarketing schemes aimed at the U.S.;
- The Commissioner's strong focus on unilateral conduct was evidenced by two actions against the real estate industry alleging abuse of a dominant position in respect of the rules surrounding use of multiple listing services for residential real estate, and the launch of a price maintenance case that is ongoing against the VISA and MasterCard credit card networks (the first under the new civil resale

price maintenance provision). The Commissioner's challenge against Air Canada's alliance agreements with United Continental airlines also marked the first contested case under the new civil provision for anti-competitive agreements among competitors (s.90.1); and

- As noted above, divergent civil court decisions regarding indirect purchaser claims for damages in cartel cases paved the way for a possible appeal to the Supreme Court of Canada.

1. Legislative Amendments

There were two legislative endeavours in 2010-2011: the enactment of Bill C-28[3] and the proposed adoption of Bill C-51.[4] As compared with the overhaul of merger review and cartel enforcement in 2009-2010, the legislative changes proposed in 2010-2011 were relatively sparse but nonetheless important in terms of expanding the Bureau's enforcement powers.

(a) Bill C-28

Bill C-28, widely known as the anti-SPAM and anti-spyware law, received Royal Assent on December 15, 2010. The bill has a broad application, but in regards to the Act the amendments provide clarification on specific electronic issues. First, the Act now prohibits false or misleading commercial representations that are made electronically.[5] Second, the Act now clarifies that an act will be committed when a person sends a message and also when a person permits a message to be sent.[6] The definition of "telemarketing" has been expanded to include "any means of telecommunications" as opposed to "interactive telephone communications."[7] As a result, any means of telecommunications sent by way of a text, sound, voice or image message will fall within the purview of the Act. Fittingly, given Canadians' apparent love-affair with new media, messages sent *via* social networking sites such as Twitter and Facebook, along with text messages and instant messages are also now subject to the legislation.

(b) Bill C-51

Bill C-51, known by its short title *Investigative Powers for the 21st Century Act*, was re-introduced into the House of Commons on November 1st, 2010. The Bill had previously died upon prorogation in December 2009. The new Bill also died, however, with the call of the May, 2011 federal election. As of the time of writing, it had not yet been reintroduced. As implied by its title, the Bill had aimed to extend the current investigative powers of national law enforcement and security agencies for computer-related crimes to reflect the growing use of new communications technologies. Bill C-51 would have primarily affected provisions in the *Criminal Code* (the "Code"),[8] but there were important ramifications for the interpretation of the *Competition Act* and in particular for the investigative powers of the Commissioner. In the event that the Bill is reintroduced and passed (more likely with the new Parliamentary majority government), the Commissioner will be able to issue specific orders for the production of transmission data associated with telecommunications.[9] Although transmission data does not provide the content of the telecommunication, it indicates the origin, destination, date, time, duration, type and volume, thereby providing a much greater breadth of information for the Commissioner.

If enacted, the amendments will allow the Bureau to better address significant technology-related challenges that affect its ability to obtain evidence, particularly in regards to violations of the deceptive marketing and false or misleading representation provisions. Specifically, the Bill would replace the reference to "telephone" in the *Competition Act* as the means of committing the aforementioned offences with the term "any means of telecommunication" used for communicating orally,[10] which would significantly broaden the scope of its application. Other aspects of the Bill, however, have sparked debate.

(c) Merger Review Threshold Increased

The threshold for the minimum "size of target" for mandatory merger review in Canada under the Act increased on February 1, 2011. As a result, the threshold for the size of the assets or revenue of the "target" of acquisitions involving businesses in Canada is $73 million.[11] The threshold will be reviewed again in early 2012 and may be adjusted at that time in keeping with the rate of inflation.

2. Mergers

Several cases and consent orders in 2010-2011 reflected the newly-enhanced investigative powers of the Bureau with respect to mergers.[12] The Commissioner, Melanie Aitken, noted that merger review is now a more coherent process.[13] As can be seen from the pace of cases and consent agreements during the year, including in respect of non-notifiable transactions, 2010-2011 appears to forecast a movement toward more active merger enforcement in Canada, even as the *Investment Canada Act* bared some (very) rare teeth.

(a) BHP Billiton/ PotashCorp

On November 3, 2010, the Honourable Tony Clement, Minister of Industry, announced that he had sent a notice to BHP Billiton indicating that he was not satisfied that its proposed acquisition of control of Potash-Corp was likely to be of net benefit to Canada.[14] The *Investment Canada Act* requires the Minister of Industry to approve certain foreign acquisitions of control of Canadian businesses as being of "net benefit to Canada", prior to closing. In this instance, despite the offer by BHP Billiton of unprecedented undertakings, but in the face of vocal opposition from several provincial premiers, both federal opposition parties, as well as some Canadian business leaders, the Minister made a preliminary decision to decline approval. Although the Act requires the Minister to extend the review period by 30 days to allow investors to make additional representations, BHP Billiton walked away from its bid on November 14, 2010, thereby terminating the review process. No reasons were ultimately provided, but the Minister noted that the Government's policy continues to be favourable toward foreign investment.[15]

(b) Merger Policy Guidance

The Bureau released a statement on its disclosure policy in the context of hostile takeover bids on June 2, 2010. In a hostile bid, the Bureau can be put in an awkward position if disclosure to one party of information concerning its review is interpreted as giving that party an advantage in the bid process. According to the *Hostile Transactions* guideline, subject to the confidentiality restrictions in section 29 of the Act, when the Bureau provides pertinent information to one party in a hostile transaction, it will strive to disclose the information equitably to the other party. The policy indicates that the Bureau will disclose the complexity designation of the proposed transaction, the anticipated timing of the Bureau's review, the date upon which the other party has certified compliance of a response to a SIR, the Bureau's preliminary and final views on market definition and analytical factors involved in finalizing its views, and the Bureau's preliminary and final views on whether the proposed transaction is likely to prevent or lessen competition substantially.[16]

An updated *Fee and Services Standards Handbook for Mergers and Merger-Related Matters* was released on November 1, 2010. A key purpose of the new *Handbook* is to better align the Bureau's non-binding internal timelines for processing merger files with the statutory waiting periods. The classification of incoming merger files has been simplified to either "complex" (maximum 45-day timeline for review) or "non-complex" (maximum 14-day timeline for review), with the caveat that the normal 45-day timeline for a preliminary conclusion in a complex case is extended to the statutory waiting period if a SIR is issued.[17] The former system admitted of a third category of "very complex," which was seen to be inconsistent with the impact of SIRs on deal timing and the review period.

Also on November 1st, 2010, the Bureau released an updated *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*. The Guide provides logistical and administrative information about the filing of merger notifications and requests for advance ruling certificates ("ARCs") (including requested information and when customer contacts should be supplied in an ARC request), as well as advice about the timing of filings and supplementary / voluntary information requests. The *Procedures Guide* also provides a step-by-step flow chart that can be used to determine if a proposed transaction is notifiable under the Act.[18]

On June 27, 2011, the Bureau issued draft revisions to the *Merger Enforcement Guidelines* ("MEGs"). The MEGs were last revised in 2004, and the changes reflect current views on Canada's unique efficiencies defense as well as an expansion of the horizontal and vertical merger analysis. The proposed revisions reflect

some of the 2010 revisions to the U.S. *Horizontal Merger Guidelines* but fall short of espousing any particular mode of economic analysis. The proposed revisions to the MEGs do not indicate radical changes in approach to merger review; however, they do adapt to the more nuanced thinking and broader range of analytical tools that have become available to the Bureau since the MEGs were last revised. In keeping with the Bureau's recent enforcement tactics, they may reflect a more activist approach to merger review. The final revised MEGs are expected to be issued in the fall of 2011.

Some of the more significant proposed changes to the MEGs include:

- The Bureau may consider market definition and competitive effects concurrently, in a dynamic analytical process. Market definition, although often still performed, is no longer a necessary step in analyzing a merger's competitive effects (though it will still be used where feasible and useful). The new U.S. *Horizontal Merger Guidelines* contain a similar approach, likely motivated by an alternative "upward pricing pressure" ("UPP") test developed by Joseph Farrell and Carl Shapiro. UPP has become fairly widely used by the agencies in the United States, where appropriate, and is beginning to be used in appropriate cases in Canada.
- The draft revised MEGs contain an enhanced treatment of monopsony power; specifically, in reviewing buyer power the Bureau will consider factors such as whether the merged firm has an incentive to reduce its own output (and therefore its purchases), whether long-run supply is likely to be reduced if prices are pressed lower, and whether upstream supply is already competitive (*i.e.*, countervailing selling power). In short, the anti-competitive concern should not be present when a purchaser can negotiate lower prices that do not diminish the overall supply of the inputs in question.
- The revised MEGs contain additional detail concerning the Bureau's approach to minority interests and interlocking directorates, both of which may be reviewed if they are ancillary to a merger transaction or if they provide the party in question with an ability to materially influence the economic behaviour of the business of a competitor.
- A significant development is a change in the approach to assessing whether entry is likely to be "timely," by removing the 2-year time frame and referring back to whether such entry will likely occur soon enough to deter the exercise of market power.
- The revised MEGs will contain an expanded analysis of anti-competitive effects in non-horizontal mergers. Specifically, if the acquisition of a supplier or customer (a "vertical" merger) allows the merged firm to limit or eliminate rival firms' access to inputs or markets, thereby reducing or eliminating rival firms' ability or incentive to compete, the merger may be anti-competitive.
- The draft revisions contain a more nuanced approach to the analysis of "coordinated effects" in merger review, as well as an expanded treatment of the efficiencies defence that incorporates the *Efficiencies Bulletin* from 2009.[19]

(c) Specific Cases:

As noted above, on January 24, 2011 the Bureau applied to the Tribunal to dissolve the merger between CCS Corporation and Complete Environmental Inc., alleging that – absent the acquisition – Complete Environmental would have opened a new hazardous waste landfill. The Bureau alleges a substantial prevention of competition, in the first "pure" prevent case in Canada.[20] The merging parties argue in reply, *inter alia*, that Complete Environmental would not have been a vigorous and effective competitor, that its entry could not have been expected to reduce prices, that the Commissioner's market definition is flawed, that barriers to entry in the relevant market are not high, and that buyers are able to constrain any exercise of market power.[21] The case is currently pending before the Tribunal.

On June 27, 2011, the Bureau filed an application pursuant to the merger provisions of the Act seeking to prohibit a proposed joint venture between Air Canada and United Continental Holdings Inc. In the same application, the Bureau brought the first challenge to a competitor collaboration agreement under the civil section 90.1, in respect of three existing coordination agreements between the two airlines. The Bureau believes that the joint venture would allow the parties to set prices, capacity and schedules, thus resulting in a monopoly on several transborder routes, substantially reducing competition on additional routes and enabling them to impose significantly higher prices.[22] Air Canada and United Continental deny these allegations, and say that their cooperative relationship has provided more efficient and convenient service to customers.[23] The case is currently pending before the Tribunal.

The Bureau examined closely, but ultimately chose not to challenge, several media mergers in 2010-2011, including Shaw Communication's acquisition of Canwest Global Communications Corp., Canadian Satellite Radio Holdings Inc.'s acquisition of Sirius Canada and BCE's acquisition of CTV.[24] Notably, broadcasting mergers are also subject to concurrent review by the Canadian Radio-television and Telecommunications Commission (the "CRTC") on broad public interest grounds which include consideration of the competitive impact of the proposed transaction.

The renewed vigour of merger enforcement in Canada was also witnessed by the numerous consent agreements registered with the Tribunal in 2010-2011. For example:

- On June 29, 2010 the Bureau, IESI-BFC Ltd. and Waste Services Inc. ("WSI") entered into a consent agreement whereby WSI agreed to divest its commercial waste business in five cities.[25]
- On July 28, 2010, the Bureau reached an agreement with Nufarm Limited concerning its proposed acquisition of AH Marks Holding Limited.[26] The agreement addressed the Bureau's concern that there would be a substantial lessening or prevention of competition in the supply of certain herbicides in Canada. The Bureau and the United States Federal Trade Commission ("FTC") coordinated remedies in the case.
- A resolution was announced in a pharmaceutical merger on July 30, 2010 between the Bureau, Teva Pharmaceutical Industries Ltd. and the Merckle Group.[27] The Bureau required divestitures of assets and licenses relating to the sale and supply of certain dosages of oxycodone tablets and morphine sulphate tablets in Canada.
- Another divestiture was sought in the proposed merger of Novartis AG and Alcon, Inc. in August, 2010, related to several eye-related medical products. The agreement includes divesture of assets and associated licenses. The Bureau worked closely with the FTC and the Competition Directorate of the European Commission.[28]

Divestitures are not the only remedies at the Bureau's disposal. The Bureau also agreed to some behavioral remedies, as demonstrated in The Coca-Cola Company's consent agreement in relation to its acquisition of the North American business of its primary bottler, Coca-Cola Enterprises Inc. The Bureau feared that it would have lessened and/or prevented competition substantially in the supply of soft drinks in Canada. The Coca-Cola Company agreed to certain restrictions on the use of, and access to, Dr. Pepper Snapple Group's commercially sensitive information, including restrictions on access to relevant personnel.[29]

In August, 2011, the Bureau made public in summary form the results of a study of the efficacy of merger remedies between 1995 and 2005.[30] The study examined factors that were viewed to contribute to the success or failure of structural (divestiture) versus behavioural remedies in a variety of merger cases. The Bureau will now use the results of the study in order to update the *Information Bulletin on Merger Remedies in Canada*, as well as the consent agreement outline template contained in the appendix thereto.

3. Conspiracies and Bid-Rigging

Criminal enforcement was at centre-stage in 2010-2011, as the Bureau obtained penalties in respect of cartels involving the chemicals, retail gasoline, refrigeration compressors and air cargo industries, as well as bid-rigging cases involving traffic lights and residential ventilation contracts, and issued new guidance in respect of its immunity and leniency programs;

With the amendment of the cartel provisions and the finalization of the leniency program, the cartel enforcement regime has undergone a period of modernization in recent years. As a result, 2010-2011 highlighted the Bureau's focus on detecting and prosecuting cartels. In a speech, the Commissioner reinforced the fact that the conspiracy provisions are shifting towards a more aggressive recognition of criminal activities that includes jail time for individual conspirators.[31] This is evidenced by the imprisonment of an individual in the Quebec gasoline cartel case. In addition, the Bureau is increasingly using wiretaps in investigations.[32] As of September 30, 2010, the Criminal Matters Branch had 42 ongoing investigations, many of which involved a high degree of cooperation with other jurisdictions, including coordinated searches.

(a) Guidelines

In 2010, the Bureau released guidelines relating to both the immunity and the leniency programs. According to the Bulletin on the Bureau's *Immunity Program,* the Bureau will recommend immunity where the Bureau was unaware of or did not have enough evidence to recommend prosecution of an offence, and the party is the first to come forward to confess its role. The party must fully cooperate with the Bureau, must terminate its illegal activity and must not have played a role in coercing other parties to participate in the illegal activity.[33]

If immunity is not available, the *Leniency Program Bulletin,*[34] issued September 29, 2010, outlines factors the Bureau will consider when making sentencing recommendations to the Public Prosecution Service of Canada (PPSC) and the process for seeking a recommendation for a lenient sentence in criminal cartel cases.

The Bureau also released an updated Handbook to reflect amendments to the *Competition Act* and the Bureau's approach to applications for written opinions pursuant to section 124.1 of the Act. The changes cover the conspiracy provisions, competitor collaborations that prevent or lessen competition, and certain pricing practices.[35]

(b) Specific Cases

On May 12, 2010, Solvay Chemicals Inc. was fined $2.5 million by the Federal Court as a result of the company's price fixing conspiracy in relation to hydrogen peroxide sold in Canada.[36] Solvay is the second party to plead guilty to the conspiracy, as Akzo Nobel Chemicals International BV pleaded guilty in November 2008 and was fined $3.15 million for its involvement. The Bureau's investigation of other companies alleged to be participants in the price-fixing conspiracy remains ongoing.

On the domestic front, the Bureau continued its examination of the gasoline industry. New criminal charges were laid against 25 individuals and three companies involved in an alleged gasoline price-fixing case in Victoriaville, Thetford Mines, Magog and Sherbrooke, P.Q.[37] The charges marked the end of the largest criminal investigation in the history of the Competition Bureau, involving the search of over 90 locations, the interception of thousands of phone calls and the seizure of over 100,000 records. The first wave of charges had been laid in 2008 against an additional 13 individuals and 11 companies. Further, on May 30, 2011, the owner of a Petro-Canada service station in Quebec pleaded guilty to criminal charges for conspiring to fix the price of gasoline at the pump. The owner was sentenced to pay a fine of $20,000.[38]

On October 27, 2010, the Federal Court imposed a penalty of $1.5 million on Embraco for fixing the price of hermetic refrigeration compressors sold to the household refrigerator and freezer manufacturer in Canada.[39] Embraco and its competitor exchanged information on the industry and market intelligence, and reached an agreement to increase prices. On November 3, 2010, Panasonic Corporation also admitted guilt for its involvement in the conspiracy case and was fined $1.5 million.[40]

On October 28, 2010, Cargolux Airlines International pleaded guilty and was fined $2.5 million for its role in an international air cargo cartel affecting Canada. The Bureau determined that air cargo fuel surcharges for international air cargo transportation services from Canada had been fixed between 2002 and 2006.[41] In 2009, other airlines pleaded guilty to fixing air cargo surcharges for shipments on specific routes from Canada. To date, the Bureau has collected more than $17 million in fines from airlines involved in this conspiracy.

Finally, Kason Industries pleaded guilty to conspiring with Component Hardware Incorporated to lessen competition in Toronto and elsewhere in Canada in the sale of refrigeration and food service equipment components. Kason agreed to pay a fine of $250,000.[42]

(c) Bid-Rigging Cases

In *R. v. Électromega Limitée,*[43] a judgment released on May 5, 2010, Electromega was acquitted of bid-rigging in an alleged conspiracy to fix the prices of traffic lights in Quebec City. The court found, among other things, that the testimony of Crown witnesses was unreliable, as they could not accurately recall events that had occurred seven years prior to trial.[44]

On December 21, 2010, criminal charges were laid against 8 companies and 5 individuals for rigging bids in Montreal. The Bureau provided evidence to suggest that the companies coordinated their bids, pre-determining the winners of the contracts.[45] On July 19, 2011, Les Enterprises Promécanic, Ltée pleaded guilty to three charges of bid-rigging and was fined $425,000 for its role in the scheme.[46]

1) Deceptive Marketing Practices and Mass Marketing Fraud

Deceptive marketing practices continued to eat up a large portion of Bureau resources. A number of significant penalties were imposed on large corporations, while major consent agreements registered with various businesses effectively enforced the policies.

The Bureau brought claims against two major telecommunications conglomerates in Canada: Bell Canada and Rogers Communications. On November 19, 2010, the Bureau claimed that Rogers engaged in misleading advertising of its discount cell phone and text service. The legal proceedings are ongoing, and the Bureau is seeking a $10 million dollar administrative monetary penalty ("AMP"), the maximum amount allowed under the Act.[47] The Bureau brought a similar action against Bell Canada on June 28, 2011 and negotiated a consent agreement whereby Bell agreed to pay a $10 million AMP in respect of allegedly charging higher-than-advertised prices for some services.[48]

Other major national retailers, including Reitmans (Canada) Limited and Zellers Inc., also entered into consent agreements concerning false advertising. Smart Set, a division of Reitmans, advertised a $25 "Savings Pass" with a $50 purchase, but it did not publish the expiry date or additional purchase requirements anywhere except on the pass itself. Smart Set agreed to correct the problem by extending the expiry period, eliminating the additional purchase requirement, and notifying customers of the change through their website, store signage and email lists.[49] Similarly, Zellers advertised a $10 savings card for customers when a certain movie was purchased, but the Bureau complained that the advertisement did not clearly disclose the fact that a minimum $50 purchase was required. Zellers agreed to waive the minimum purchase requirement and to extend the redemption period.[50] After almost 400 customers of Whirlpool Canada had their mail-in rebates rejected, the Bureau required Whirlpool to reimburse each customer for up to $2000, depending on their purchases.[51]

The Bureau's ongoing examination of environmental claims by sellers of spas and hot-tubs continued to bear fruit. Adding to the nine consent agreements entered into in 2009, the EcoSmart Spas and Dynasty Spas agreed to cease claiming that the companies' hot tubs or insulation satisfied the criteria of the ENERGY STAR Program, and to pay an AMP of $130,000.[52]

In *R. v. Cheung*, the defendants were charged with deceptive telemarketing practices under ss. 52 and 52.1 of the *Act* and s. 380 of the *Criminal Code*. Employees allegedly called companies regarding a (false) registration in a business listing in order to sell the listing.[53]

On the class-action front, 2010-2011 saw two major developments. On January 7, 2011, the Ontario Superior Court of Justice approved a settlement in a class action alleging (among other things) breach of the criminal misleading advertising provisions in section 52(1) of the Act. The action related to various software problems with SureStep blood glucose self-monitoring devices. The settlement had a cash value of $2.75 million and a product value of $1.25 million. On March 7, 2011 the British Columbia Court of Appeal overturned a lower court decision which had denied class certification to purchasers of Toyota vehicles, finding that the appellants had shown proof of loss on a class-wide basis. The action relates to an allegedly misleading "Access Program" implemented by Toyota Canada Inc. which governed the sales process and pricing for the sale and lease of Toyota vehicles.

4. Deceptive Telemarketing Crack-down

The Bureau continued to work in cooperation with its international counterparts to combat deceptive telemarketing fraud. The Bureau participated in Fraud Prevention Month (a Canadian educational campaign focused on online fraud in 2011), as well as in an international sweep led by the International Consumer Protection and Enforcement Network ("ICPEN") to expose fraudulent and deceptive advertising on social

networking sites,[54] and a major investigation into cross-border deceptive business directory scams. Canadians extradited to the United States have faced significant jail time in relation to deceptive telemarketing prosecutions, and the Bureau has signalled its intention to apply Canadian law to combat fraudulent marketing practices regardless of whether the victims are located inside or outside of Canada.

5. Reviewable Distribution Practices: Refusal to Deal; Price Maintenance; Exclusive Dealing, Tied Selling and Market Restriction; Abuse of Dominance

(a) Refusal to Deal

On June 2, 2011, the Federal Court of Appeal released its decision in *Nadeau Poultry Farm Limited v. Groupe Westco Inc et al.*,[55] confirming the 2009 Tribunal decision to reject the appellant's complaint under s. 75, the Act's provision related to refusals to supply. As a result, the benchmark decision of the Tribunal, and its clarification of the concepts of "ample supply," "insufficient competition," "usual trade terms," and "adverse effect on competition," remain in place in the context of a supply-managed industry.

The Tribunal released a decision on March 4, 2011,[56] refusing to grant leave to Brandon Gray Internet Services Inc., an internet domain name registrar to bring a refusal to deal case against the Canadian Internet Registration Authority ("CIRA"). Only registrars certified by CIRA are permitted to register ".ca" domain names, so when it was refused re-certification, Brandon Gray was unable to register such domain names for its clients. The Tribunal found that Brandon Gray had not met the test to obtain leave because it had not provided any evidence showing how CIRA's alleged refusal to certify had led to an adverse effect on competition in a market. Brandon Gray had merely submitted an affidavit of a Senior Systems Administrator, wherein the administrator stated that he "verily believed" that the termination of Brandon Gray's relationship with CIRA would result in reduced competition in the ".ca" industry. This evidence was found to be insufficient.

On June 29, 2011, the Used Car Dealers Association of Ontario ("UCDA") sought leave from the Tribunal to bring an application against the Insurance Bureau of Canada ("IBC") alleging refusal to deal and retail price maintenance.[57] UCDA claims that IBC stopped supplying it with data on vehicle accident history and claims, which IBC compiles from its member insurers, and which UCDA relies on being able to purchase in order to supply vehicle accident history reports to its members. UCDA alleges that one of its competitors in the accident history report market, CarProof, has a significant business relationship with IBC, and that IBC is refusing to supply the insurance data because of UCDA's low pricing policy. On September 9, 2011, the Tribunal granted leave to UCDA to file an application pursuant to section 75.

(b) Price Maintenance

The Bureau filed its first application with the Tribunal under the new price maintenance provision in December, 2010, against the Visa and MasterCard card networks. The application claims that the two credit card companies enforce or continue agreements that influence upward, or discourage the reduction, of credit card merchant acceptance fees. When a customer pays by credit card, the merchant pays a fee that, by agreement with the accepting banks as a condition of their participation in the card network, the merchants are not permitted to pass on to the customers. Merchants are also not permitted to refuse certain cards. Since "premium" cards that provide cardholders with rewards such as travel miles charge higher merchant fees, this rule means merchants pay more when customers use such cards, but cannot pass on those fees. The Commissioner alleges that these credit card rules amount to price maintenance and have an adverse impact on competition, resulting in increased costs to both consumers and merchants.

Both credit card companies vehemently defend themselves. In separate responses, the credit card networks reply that the rules are pro-competitive, in that they prevent cardholders from unexpected surcharges by merchants, as well as protecting the card networks' brands. They also deny that the rules prevent merchants from charging different prices depending on the method of payment. The case is pending before the Tribunal.[58]

(c) Abuse of Dominance

With the power to impose administrative monetary penalties in respect of abuse of dominance came a renewed attempt to characterize an abuse of dominance as being capable of founding a civil claim for damages. In *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*,[59] the court found that the addition of AMPs to the remedies available for abuse of dominance did not change previous authorities holding that conduct alleged to constitute an abuse of dominance under the Act is not an unlawful act for the purposes of a tort claim in a private action, unless and until the Tribunal makes a prior determination of abuse of dominance.[60] Only when prohibited by Tribunal order does such conduct become unlawful for purposes of a tort claim. This decision is currently under appeal.

In 2010-2011, the Bureau took its first abuse of dominance case before the Tribunal since filing the application against *Canada Pipe* in 2002. In February 2010, the Commissioner commenced an application against the Canadian Real Estate Association ("CREA") alleging that CREA's rules regarding the use of its multiple listing service amounted to an abuse of a dominant position. CREA contested the case and pleadings were filed, but the Bureau and CREA entered into a consent agreement in October, 2010.[61]

The Bureau then filed a similar application in May, 2011 alleging an abuse of dominance by the Toronto Real Estate Board ("TREB") in light of the TREB's rules regarding the use of information available on its own multiple listing service.[62] TREB argues, among other things, that it is merely exercising its copyright in the proprietary database, therefore falling within the exception from the abuse of dominance provisions contained in subsection 79(5) of the Act. This litigation remains ongoing.

(d) Civil Proceedings against Competitor Collaborations

As noted above, on June 27, 2011, the Commissioner filed an application challenging a proposed joint venture between Air Canada and United Continental airlines under the merger provisions of the Act, and also challenging three "coordination agreements" between Air Canada and United Continental Holdings Inc. as anti-competitive agreements among competitors or potential competitors (s.90.1 of the Act). The Bureau alleges that the agreements allow the parties to implement joint pricing and scheduling of flights and to share revenue,[63] while the parties maintain that the arrangements are efficiency-enhancing and benefit customers.[64] This is the first case brought under the Act's new civil provision for agreements among competitors. As such, the Commissioner will be required to show a substantial lessening or prevention of competition, and the parties will be able to avail themselves of an efficiencies defence. The case is currently pending before the Tribunal.

6. Divergent Rulings in Indirect Purchaser Class Actions

A price-fixing class action was launched in 2010 across Ontario, BC and Quebec. A group comprised of Cadbury Adams Canada Inc., The Hershey Company, Hershey Canada Inc., Nestle Canada Inc., Mars Incorporated, Mars Canada Inc. and ITWAL Limited (collectively, "ITWAL"), was alleged to have fixed chocolate prices. Cadbury Adams Inc. paid $5.7 million to the plaintiffs in order to have itself removed from the action.[65] The other wholesalers remain in litigation.

On April 15, 2011, the British Columbia Court of Appeal released its reasons for judgment in two important class actions: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[66] and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*.[67] In the *Sun-Rype* case, the plaintiffs alleged that the defendants had fixed the price of corn syrup. Claims were asserted by both direct and indirect purchasers, but the Court of Appeal said there is no sound basis upon which a claim can be made for an illegal overcharge that is passed on to an indirect purchaser. Citing the Supreme Court of Canada's 2007 decision in a restitution case, *Kingswood Investments Ltd. v. New Brunswick (Finance)*,[68] the B.C. Court of Appeal held that since defendants cannot avail themselves of a "passing on" defence, it follows that indirect purchasers cannot sue to recover losses passed on to them by direct purchasers (permitting such claims could otherwise result in "double jeopardy" for the defendants). The majority used similar reasoning to reject certification against Microsoft. The action against Microsoft had previously been certified as a class proceeding. The plaintiffs alleged that Microsoft engaged

in anti-competitive behaviour that allowed it to overcharge for its products; specifically, they claimed that Microsoft conspired with computer manufacturers in schemes to exclude competition and keep prices high. The overcharges at the direct-purchaser level were allegedly passed through to the indirect purchasers. The B.C. Court of Appeal set aside the certification order, for reasons expounded in the *Sun-Rype* judgment. There were vigorous dissents in both cases, and they follow a 2009 decision by the same court that had granted certification of a class including both direct and indirect purchasers (see *Pro-Sys Consultants Ltd. v. Infineon Technologies AG).*[69] Leave has been sought to appeal both the latest *Pro-Sys* and the *Sun-Rype* cases to the Supreme Court of Canada.

Finally, in Ontario, the Superior Court of Justice approved a partial settlement against some (but not all) defendants in *Osmun v. Cadbury Adams Canada Inc.*[70] Consonant with the Bureau's immunity and leniency policies, the Court noted that a partial settlement is particularly beneficial in conspiracy actions where the defendants allegedly share a "dark secret", and obtaining the cooperation of some defendants can be of great tactical value in pursuing the others.

7. Conclusion

2010-2011 was an important year for the development of competition law in Canada, as the Bureau and the business community adjusted to new merger review procedures, more rigorous cartel enforcement, invigorated civil cases, as well as actions in respect of deceptive marketing and false or misleading representations. Many of the important cases are ongoing, however, and 2011-2012 will be a year to watch.

Endnotes

*The research assistance of Marisa Berswick, law student, is gratefully acknowledged. Susan Hutton is a partner of Stikeman Elliott LLP, and a member of its Competition and Foreign Investment Group.

[1] R.S.C. 1985, c. C-34, as amended (the "Act").

[2] R.S.C. 1985, c. 28 (1st supp.)

[3] Bill C-28, *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (in force December 15, 2010).

[4] Bill C-51, *An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act* (1st reading).

[5] *Supra note 2* at s. 74.011(1).

[6] *Ibid.* at s. 52.01(1).

[7] *Ibid.* at s. 76(1).

[8] R.S.C. 1985, c. C-46 (the "Code")

[9] *Supra,* note 3 at Form 5.007

[10] *Ibid,* at s. 24(d).

[11] Competition Bureau, "2011 Pre-Merger Notification Transaction-Size Threshold" (February 1, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03344.html>.

[12] Changes introduced in 2009 saw the elimination of a fixed, 42-day waiting period for a long-form notification and a 14-day waiting period for a short-form notification, replacing them with a U.S.-style, two-stage merger review process. There is a single notification form, the filing of which commences an initial 30-day waiting period. If the Bureau issues a supplementary information request ("SIR", known as a "second request" in the United States) in the first 30-days, however, the waiting period is automatically extended until 30 days following compliance.

[13] Competition Bureau, Speeches, "Remarks by Melanie L. Aitken, Commissioner of Competition" (September 30, 2010 at CBA Fall Competition Law Conference) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03306.html>.

[14] Industry Canada, "Minister of Industry Confirms Notice Sent to BHP Billiton Regarding Proposed Acquisition of Potash Corporation" (November 3, 2010), available at: <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06031.html>.

[15] Industry Canada, "Industry Minister Clement Confirms BHP Billiton's Withdrawal of its Application for Review under the Investment Canada Act" (November 14, 2010), available at: <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06068.html>.

[16] Competition Bureau, "Hostile Transactions: Bureau Policy on Disclosure of Information" <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03243.html>.

[17] Competition Bureau, Bulletins, "Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters" (November 1, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03295.html>.

[18] Competition Bureau, "Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the *Competition Act*" (November 1, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html>.

[19] Hutton, Susan M and Marisa Berswick. "Draft Revisions to Canadian MEGs Released for Comment" (July 4, 2011) <http://www.thecompetitor.ca/2011/07/articles/competition/merger-review/draft-revisions-to-canadian-megs-released-for-comment/#more>.

[20] *The Commissioner of Competition v. CCS Corporation et al.*, 2011 Comp. Trib. 5.

[21] See "Response of CCS Corporation, Complete Environmental Inc. and Babkirk Land Services Inc." (March 10, 2011), available at: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=336>.

[22] Competition Bureau, News Release, "Competition Bureau Seeks to Block Joint Venture between Air Canada and United Continental" (June 27, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03386.html>.

[23] Air Canada, "Air Canada Responses to Commissioner of Competition's Opposition to Canada-US Transborder Joint Venture" (Press Release) (June 27, 2011).

[24] See Competition Bureau, "Competition Bureau Clears Shaw's Acquisition of Canwest" (August 13, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03279.html>; Competition Bureau, "Competition Bureau Statement Regarding BCE's Acquisition of CTV" (February 1, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03346.html>; Competition Bureau, "Competition Bureau Statement Regarding Merger of XM Canada and Sirius Canada" (February 23, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03351.

html>.
[25] Competition Bureau, News Release, "Competition Bureau Requires Significant Divestitures in Waste Services Merger" (June 29, 2010) < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03256.html>.
[26] Competition Bureau, News Release, "Competition Bureau Requires Divestitures in Herbicide Merger" (July 28, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03264.html>.
[27] Competition Bureau, News Release, "Competition Bureau Requires Divestitures in Teva/Ratiopharm Merger" (July 30, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03271.html>.
[28] Competition Bureau, News Release, "Competition Bureau Secures Divestitures in Novartis' Acquisition of Alcon" (August 9, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03274.html>.
[29] Competition Bureau, News Release, "Competition Bureau Requires Remedy in Coca-Cola Acquisition" (September 27, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03290.html>.
[30] Competition Bureau, Announcements, "Competition Bureau Releases *Merger Remedies Study* Summary" (August 11, 2011) < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03399.html>.
[31] Competition Bureau, Speeches, "Remarks by Melanie L. Aitken, Commissioner of Competition" (May 17, 2010 at Remarks to CBA Spring Competition Law Conference) < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03247.html>.
[32] Competition Bureau, Speeches, "Remarks by Melanie L. Aitken, Commissioner of Competition" (September 30, 2010 at CBA Fall Competition Law Conference) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03306.html>.
[33] Competition Bureau, Bulletin, "Immunity Program under the *Competition Act*" (June 7, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>.
[34] Competition Bureau, "Leniency Program" (September 29, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html>.
[35] Competition Bureau, News Release, "Competition Bureau to Issue Revised *Fee and Service Standards Handbook* (November 22, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03312.html>.
[36] Competition Bureau, News Release, "Solvay Chemicals Fined $2.5 Million for its Role in a Price-Fixing Conspiracy" (May 12, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03228.html>.
[37] Competition Bureau, News Release "Criminal Charges Laid by Competition Bureau in Gas Price-Fixing Case" (July 15, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03262.html>.
[38] Competition Bureau, News Release, "Individual Fined in Quebec Gasoline Price-Fixing Cartel" (May 30, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03380.html>.
[39] Competition Bureau, News Release, "Embraco North America Inc. Pleads Guilty to Price-Fixing Conspiracy" (October 27, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03307.html>.
[40] Competition Bureau, News Release, "Panasonic Corporation Pleads Guilty to Price-Fixing Conspiracy" (November 3, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03310.html>.
[41] Competition Bureau, News Release, "Cargolux Pleads Guilty in Air Cargo Price-Fixing Conspiracy" (October 28, 2010) < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03304.html>.
[42] *Canada v. Kason Industries Inc.,* [2011] 2011 FC 281 (F.C.).
[43] *R. v. Électromega Limitée,* [2010] 2010 QCCS 2283 (C.S.).
[44] *Ibid.*
[45] Competition Bureau, "Charges Laid in Residential Construction Bid-Rigging Scheme in Montreal" (December 21, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03327.html>.
[46] Competition Bureau, "Guilty Plea and $425,000 fine for Bid-Rigging in Montreal" (July 19, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03391.html>.
[47] Competition Bureau, "Competition Bureau Takes Action Against Rogers Over Misleading Advertising" (November 19, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03316.html>.
[48] Competition Bureau, News Release, "Competition Bureau Reaches Agreement with Bell Canada Requiring Bell to Pay $10 Million for Misleading Advertising" (June 28, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03388.html>.
[49] Competition Bureau, "Reitmans Agrees to Correct Misleading Smart Set Promotion" (May 13, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03229.html>.
[50] Competition Bureau, "Zellers Agrees to Take Action to Correct Misleading Promotion" (June 29, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03255.html>.
[51] Competition Bureau, "Competition Bureau Requires Whirpool to Reimburse Customers for Misleading Rebate Program" (December 1, 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03320.html>.
[52] Competition Bureau, "Spa Retailers Required to Stop Making False ENERGY STAR Claims" (January 17, 2011) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03342.html>.
[53] *R. v. Cheung*, [2011] 2011 ABQB 225 (Q.B.).
[54] Competition Bureau, "Remarks by Melanie L. Aitken, Commissioner of Competition – ICPEN Keynote Speech" (May 5, 2010), available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03259.html>.
[55] *Nadeau Poultry Farm Limited v. Groupe Westco Inc et al., [2011] 2011 CAF 188.*
[56] *Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority*, 2011 Comp. Trib. 1.
[57] Used Car Dealers Association of Ontario, "Proposed Notice of Application Pursuant to Sections 75 and 76 of the *Competition Act*" (2011), available at: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=350>.
[58] Competition Bureau, "Visa and MasterCard's Anti-Competitive Rules" (December 2010) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03326.html>.
[59] *Ibid.*
[60] See generally, *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, [2010] 2010 BCSC 1030.
[61] *The Commissioner of Competition v. The Canadian Real Estate Association,* 10 CT-2010-002 (October 25, 2010).
[62] Competition Bureau, News Release, "Competition Bureau Sues Canada's Largest Real Estate Board for Denying Services Over the Internet" (May 27, 2011) <http://www.competitionbureau.gc.ca/eic/site/ cbbc.nsf/eng/03293.html>.
[63] *Supra,* note 23.
[64] *Supra*, note 24.
[65] *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (SCJ).
[66] *Pro-Sys Consultant Ltd. v. Microsoft Corporation,* [2011] 2011 BCCA 186 (C.A.).
[67] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company,* [2011] 2011 BCCA 187 (C.A.).
[68] [2007] 1 S.C.R. 3, 2007 SCC 1.
[69] 2009 BCCA 503.
[70] 2010 ONSC 2643.

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