

Antitrust/Competition & Marketing Bulletin

July 2009

Fasken Martineau DuMoulin LLP

Antitrust/Competition & Marketing Group 2008 Year in Review: Criminal Matters and Other Competition Law Developments

Authors: Huy A. Do, Neal J. Smitheman and Mark D. Magro

This bulletin is the second in a series of bulletins on developments in competition and foreign investment review law during 2008.

Criminal Matters

- [Cases](#)
- [New Bulletins and Guidelines](#)
- [Policy Developments](#)

Other Developments

- [Updated Information Bulletin on Corporate Compliance Programs](#)
- [Draft Information Bulletin on Trade Associations](#)
- [Departure of Sheridan Scott as Commissioner of Competition](#)
- [Competition Policy Review Panel Report and Proposed Changes to the *Competition Act*](#)
- [Competition Bureau's Follow-up Report on Generic Drug Competition](#)

Vancouver

Calgary

Toronto

Ottawa

Montréal

Québec City

London

Johannesburg

Criminal Matters

Cases

In terms of criminal matters, 2008 saw a number of new cases being brought by the Competition Bureau with criminal charges being laid and convictions being obtained. In keeping with announced Bureau priorities, the Bureau brought on domestic and international cartel cases, bid-rigging cases, as well as cross-border telemarketing and fraud cases.

In terms of cartel cases, the most notable was the Bureau's uncovering and prosecution of an alleged domestic cartel fixing retail gasoline prices in Quebec. To date, eight individuals and five companies have pleaded guilty in this matter, with fines totaling over \$2.7 million. Of the eight individuals that pleaded guilty, four have been sentenced to terms of imprisonment totaling 44 months.

2008 also saw another conviction (by way of a guilty plea) in relation to the Bureau's investigation into an alleged international cartel fixing hydrogen peroxide prices. On November 21, 2008, Akzo Nobel Chemicals International BV pleaded guilty to a conspiracy offence under section 45 of the *Competition Act* and was fined \$3.15 million.

On the telemarketing and fraud front, the Bureau's enforcement efforts resulted in criminal convictions and jail time, including significant jail time in the US for Canadian individuals extradited from Canada for their roles in cross-border telemarketing frauds.

New Bulletins and Guidelines

2008 was a busy year for the Bureau in terms of its issuance of new bulletins and guidelines, which included the following:

- Draft Multi-level Marketing and Scheme of Pyramid Selling: Sections 55 and 55.1 of the *Competition Act* (April 1, 2008) (this bulletin was issued in final form in April 2009);¹
- Bid-Rigging: Awareness and Prevention On-line Tool (April 8, 2008);
- Information Bulletin on Sections 15 and 16 of the *Competition Act* (re search and seizure) (April 25, 2008);
- Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (April 28, 2008) (a revised draft of the bulletin was released for further public consultation in March 2009);

¹ The final bulletin is on the Bureau's website at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03035.html>.

- Predatory Pricing Enforcement Guidelines (July 21, 2008); and
- Draft Information Bulletin on Trade Associations (October 23, 2008).

Policy Developments

On the policy front, June of 2008 saw the release of the report of the Competition Policy Review Panel, which was established in the previous year by the Ministers of Industry and Finance. The final report, titled *Compete to Win*, recommended significant changes to the *Competition Act*.

These recommendations have been acted upon by the Harper Government with the passage of *Bill C-10* on March 12, 2009.² For further information, see our past bulletins on the *Bill C-10* amendments and their implications for business.³

² Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2d Sess., 40th Parl., 2009 (assented to 12 March 2009).

³ "Investment Canada Act Amendments May Increase Foreign Investor Uncertainty" (May 2009), http://www.fasken.com/acm_may2009/.

"Substantial Changes to the *Competition Act* and *Investment Canada Act* Enacted – Businesses Must React" (March 2009), http://www.fasken.com/acm_march2009/.

"Dramatic Changes to Canada's Competition and Foreign Investment Review Laws Proposed in Bill C-10" (February 2009), http://www.fasken.com/acm_bulletin_february2009/.

"Re-election of Conservative Government Brings Proposed Changes to Canadian Competition and Foreign Investment Laws Closer to Reality" (November 2008), http://www.fasken.com/november_2008_acm_bulletin/.

Also of significance was the release in August 2008 of the *Gover Report* which examined the Bureau's use of section 11 orders to obtain information and records in the course of its investigations. While the impetus for, and the principle focus of, the *Gover Report* was the use of section 11 orders in the context of the Bureau's civil merger inquiries, it also considered the use of such orders in the context of criminal inquiries. The *Gover Report* recommends that section 11 orders in furtherance of a criminal inquiry should not be sought against a person who is a suspect at the time of the section 11 application because it is questionable whether this would comply with sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*.

Other Developments

Updated Information Bulletin on Corporate Compliance Programs

In October, the Bureau released an information bulletin on corporate compliance programs that updates a previous bulletin released in 1997.⁴ The updated bulletin covers compliance in respect of the *Competition Act*, and other Acts the Bureau is responsible for enforcing. The core elements of a credible and effective compliance program remain unchanged; namely: (i) senior management involvement and support; (ii) compliance policies and procedures; (iii) training and education; (iv)

monitoring, auditing and reporting mechanisms; and (v) consistent disciplinary procedures. However, the updated bulletin offers more detailed guidance on how these core elements should be instituted and contains a corporate compliance program framework, a template certification letter for employees to sign, and a due diligence checklist.

The establishment of a credible and effective compliance program is important for a number of reasons, including the following:

- it can be instrumental in the early detection and minimization of infractions;
- it can be an important factor in establishing a due diligence defence; and
- it may be considered a mitigating factor in reducing a penalty recommended by the Commissioner to prosecutors.

Draft Information Bulletin on Trade Associations

In October, the Bureau released a draft information bulletin on trade associations.⁵ As recognized by the Bureau, apart from the benefits trade association activities provide, they also can sometimes be a forum for anticompetitive conduct. The draft bulletin addresses the following activities that in certain circumstances can risk contravention of the *Competition Act*:

- information sharing and collection;
- association membership rules and criteria;
- discipline of association members;

"Prime Minister's First Response to the Report of the Competition Policy Review Panel" (September 2008), http://www.fasken.com/competition_policy_response_sept2008/.

"Competition Policy Review Panel Proposes National Competitiveness Agenda" (July 2008), http://www.fasken.com/competition_policy_review/.

⁴ The updated bulletin is available on the Bureau's website: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02732.html>.

⁵ The bulletin is available on the Bureau's website: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02730.html>

- creation of fee guidelines by professional associations;
- association advertising and restrictions on advertising by association members;
- restrictions imposed by self-regulated associations;
- use of voluntary codes of conduct; and
- standard setting.

The draft bulletin elaborates on when the foregoing activity raises anticompetitive concerns, and identifies certain “best practices” for trade associations to follow. Chief among these practices is the recommendation that trade associations adopt a competition compliance program. The draft bulletin also contains best practices that should be considered when creating a compliance program for a trade association.

Departure of Sheridan Scott as Commissioner of Competition

In December, Sheridan Scott announced that she was stepping down after serving five years as Commissioner of Competition. Effective January 12, 2009 former Senior Deputy Commissioner of Competition Melanie L. Aitken was appointed as Interim Commissioner. A public selection process undertaken by the federal government will determine who the next Commissioner will be.

Competition Policy Review Panel Report and Proposed Changes to the *Competition Act*

In July 2007, as part of its long-term economic plan, *Advantage Canada*, the Conservative Government appointed the Competition Policy Review Panel to review Canada’s competition and foreign investment policies. The panel released its final report, *Compete*

to Win, in June: http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html (the “Wilson Report”).⁶ The Wilson Report offered a number of recommendations in respect of the *Competition Act*, the *Investment Canada Act*, and foreign ownership restrictions in relation to certain industries. Prior to the re-election of a Conservative minority government in October, the Conservatives announced plans to amend fundamental provisions in the *Competition Act* and *Investment Canada Act*, implementing many of the recommendations in Wilson Report. Most of these proposed amendments became reality after the passage *Bill C-10* (see our discussion of *Bill C-10* above).

Competition Bureau’s Follow-up Report on Generic Drug Competition

In November, the Bureau released its report *Benefiting from Generic Drug Competition in Canada: The Way Forward* as a follow-up to its October 2007 *Generic Drug Sector Study*.⁷ The 2007 study was initiated in response to several studies that found prices for prescription generic drugs to be higher in Canada relative to other countries. In the 2007 study, the Bureau found that while competition was strong in the supply of many generic drugs, the benefits from such competition were not reaching the Canadian public in the form of lower prices. A principal finding of the Bureau was that although the design of public and private drug plans allowed competitive rebates to be provided to pharmacies by manufacturers, there was little incentive for pharmacies to pass these savings on to plan sponsors.

⁶ For further discussion about the Wilson Report, see our bulletin, “Competition Policy Review Panel Proposes National Competitiveness Agenda”: http://www.fasken.com/competition_policy_review/.

⁷ The report is available on the Bureau’s website: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02753.html>.

The 2008 follow-up report provides an update to the framework for generic drug pricing in Canada, outlines recent drug plan developments, and offers recommendations for public and private drug plans to realize the benefits of greater competition.

The follow-up report recommends that public drug plans do the following:

- introduce mechanisms (e.g. competitive tendering, competitive price monitoring, and sequential formulary listing) for reimbursing pharmacies for the true competitive cost of drugs;
- separate the reimbursement for pharmacy services (e.g. patient counseling and dispensing drugs) from the reimbursement for drug costs;
- provide incentives for the dispensing of lower-priced generic drugs in the place of their interchangeable brand products; and

- participate in inter-provincial coordination of generic pricing and reimbursement policies to ensure that they promote and sustain effective generic drug competition.

The follow-up report's recommendations for private drug plans are as follows:

- develop preferred pharmacy networks, whereby pharmacies compete to belong to a network by offering discounts off of drug wholesale prices to plan providers in order to increase their numbers of prescriptions;
- promote greater use of mail-order pharmacies; and
- provide patients with incentives to seek lower prices, e.g., by encouraging purchases through preferred provider networks.

For more information on the subject of this bulletin, please contact the authors.

Our Antitrust/Competition & Marketing Group

Vancouver

Don M. Dalik
604 631 4739
ddalik@fasken.com

Toronto

Anthony F. Baldanza*
416 865 4352
abaldanza@fasken.com

Ottawa

Leslie J. Milton
613 236 3882
lmilton@fasken.com

Montréal

René Cadieux
514 397 7591
rcadieux@fasken.com

London

Stuart Richards
+44 207 917 8577
srichards@fasken.co.uk

Johannesburg

Al Gourley
+ 27 11 658 0804
agourley@fasken.co.uk

* Chair, Fasken Martineau Antitrust/Competition & Marketing Law Group

This publication is intended to provide information to clients on recent developments in provincial, national and international law. Articles in this bulletin are not legal opinions and readers should not act on the basis of these articles without first consulting a lawyer who will provide analysis and advice on a specific matter. Fasken Martineau DuMoulin LLP is a limited liability partnership and includes law corporations.

© 2009 Fasken Martineau DuMoulin LLP

Vancouver

604 631 3131
vancouver@fasken.com

Calgary

403 261 5350
calgary@fasken.com

Toronto

416 366 8381
toronto@fasken.com

Ottawa

613 236 3882
ottawa@fasken.com

Montréal

514 397 7400
montreal@fasken.com

Québec City

418 640 2000
quebeccity@fasken.com

London

44 (0)20 7917 8500
london@fasken.co.uk

Johannesburg

27 11 685 0800
johannesburg@fasken.com