AntitrustConnect Blog

Competition Law and Foreign Investment Review in Canada – Top 10 Issues for 2014

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In our annual forecast of the year ahead for Canadian competition and foreign investment review law, the Davies Competition Law and Foreign Investment Group outlines the “Top 10? key issues and trends to watch for this year.

1. A Green Light for Class Actions by Indirect Purchasers

The Supreme Court of Canada issued an important trilogy of decisions in October 2013 on competition class actions. Resolving a dispute between certain provincial courts of appeal, the Court held that indirect purchasers are entitled to assert claims for damages and restitution in class actions relying upon alleged competition law offences. (Indirect purchasers are entities that are one or more steps removed from defendant manufacturers and suppliers in the chain of distribution, such as retailers and consumers.) The Court also set a relatively low bar for certification of competition class actions.

While the Supreme Court of Canada acknowledged in its decisions that indirect purchaser claims raise evidentiary difficulties, it nonetheless held that the complexities involved in these claims do not justify either (a) denying indirect purchasers a right of action, or (b) refusing certification. The Court concluded that any evidentiary difficulties should be dealt with at or prior to a trial.

The Supreme Court of Canada decisions have been characterized by some as “plaintiff-friendly”. Indeed, the decisions may well lead to an increase in competition class actions in 2014 and beyond. However, while competition class action plaintiffs may welcome these decisions, it also must be emphasized that the Court has in no way absolved plaintiffs (indirect or otherwise) of the difficult burden of proving their claims at trial, including with respect to damages.

2. Supreme Court of Canada to Rule on Tervita Case – What Impact on Merger Reviews?

The Supreme Court of Canada will deal with another important competition law case in 2014 when it hears an appeal of the Federal Court of Appeal’s decision of July 2013 in the Tervita matter. The Court has been asked to determine whether the Federal Court of Appeal was correct in upholding an order of the Competition Tribunal from May 2012 requiring Tervita (formerly CCS) to divest the Babkirk hazardous waste landfill site following its acquisition of Complete Environmental Inc. This will be the first time that the Supreme Court of Canada has considered a merger review case since it decided the Southam matter in 1997.

One of the issues raised by the appeal is whether the Competition Tribunal erred in its approach to deciding that Tervita's acquisition of the landfill would prevent competition substantially by eliminating a prospective new entrant. The Court's decision in this regard could have important implications for the scope of the Competition Tribunal's inquiry in determining the likely effect of a proposed merger, including the limits, if any, on the Tribunal's assessment of future market outcomes. The Court will also consider the interpretation of the Competition Act's efficiency defence, which can permit mergers that otherwise would prevent or lessen competition substantially. Canada is one of the few jurisdictions to allow for such a defence, at least in express terms, and so the scope of its application is always of great interest.

3. Abuse of Dominance – Is a New Approach in the Offing?

The Competition Act's abuse of dominance provisions will also be the subject of an important court hearing in 2014, as the Federal Court of Appeal is scheduled to consider the Commissioner of Competition's appeal of the Competition Tribunal's April 2013 order in the Toronto Real Estate Board (TREB) matter. In this case, the Tribunal dismissed the Commissioner's application alleging that TREB had abused a dominant position in the market for residential real estate brokerage services by implementing rules that limit how member brokers and agents can provide certain information to consumers over the Internet. The Tribunal decided that the abuse of dominance provisions did not apply because TREB does not compete in any relevant market, and thus did not fit within the required elements of the abuse of dominance provisions. In particular, the Tribunal held that the conduct in question did not disadvantage any competitors of TREB, since TREB does not compete with its members (or anyone else) in the provision of residential real estate brokerage services.

The TREB appeal will require the Federal Court of Appeal to revisit its 2006 decision in Canada Pipe, where it held (agreeing with the Commissioner's submission at the time) that the abuse of dominance provisions require that the impugned conduct of a dominant party have (in object or effect) an "exclusionary, disciplinary or predatory" impact on the dominant party's competitors. It is evident that the Commissioner now regards this requirement as being too restrictive. The Commissioner has also expressed concern that, if the TREB decision is upheld, trade associations may be tempted to develop rules aimed at circumventing the abuse of dominance provisions. Indeed, Competition Bureau officials have stated that if the Bureau is unsuccessful on the TREB appeal, the Bureau may seek amendments to the abuse of dominance provisions to address the limitations it now perceives as having been imposed by Canada Pipe. Accordingly, 2014 may witness another important turning point for abuse of dominance enforcement in Canada.

4. Regulated Industries Under Scrutiny – Advocacy and Enforcement

The Commissioner placed a great deal of emphasis in 2013 on reigniting the Bureau's "advocacy" efforts, particularly in regulated sectors of the Canadian economy. For example, the Commissioner announced a Bureau initiative to solicit public input on the sectors of the economy in which the Bureau could play a targeted role in advocating for increased competition. The Bureau has also created a dedicated "Advocacy Portal" on its website to identify its efforts in this regard. Specific "advocacy" initiatives in 2013 included Bureau submissions on wireless telecommunications, website domain names and pharmacists (telecom, the digital economy, health care and self-regulated professions all being areas of particular interest to the Bureau). The Bureau is also reviewing advertising restrictions imposed by certain professional associations, and the Bureau has confirmed that it is studying the Ontario beer industry with a view to potentially advocating for

greater competition in how beer is sold at retail in that province.

In addition to continued advocacy efforts affecting regulated sectors, 2014 may see the Bureau take steps to clarify the so-called “regulated conduct defence”. This defence can apply in certain circumstances to shield from Competition Act review conduct that is directed or authorized by statute or regulation. For example, the Commissioner announced that the Bureau will be reviewing its Regulated Conduct Bulletin, which currently sets out a relatively narrower scope for the regulated conduct defence than many commentators argue is applicable. Participants in regulated sectors of the economy should also note that the Commissioner has intimated that the Bureau is looking for an appropriate case to help judicially clarify the scope of this defence.

5. Patent Assertion Entities – Will They Be an Issue in Canada?

Competition authorities and legislators in the United States have been paying close attention to the conduct of patent assertion entities, which are firms whose businesses focus on the acquisition and assertion of patents against parties who are already using the patented technology. Critics of patent assertion entities argue that they impede innovation and competition.

In the United States, for example, the Federal Trade Commission has considered the potential harm caused by patent assertion entities in various workshops and reports. The U.S. House of Representatives also passed the Innovation Act in December 2013, which introduces reforms aimed at curbing patent assertion entity activity. While the Competition Bureau has yet to engage in any public study or consultation on the impact of patent assertion entities in Canada, it has emphasized the digital economy as a priority, and the activities of patent assertion entities fall squarely within this space. The Commissioner has also indicated an intention to update the Bureau’s Intellectual Property Enforcement Guidelines (IPEG) in 2014. An update to the IPEG, which were issued in 2000, could open the door for the Bureau to clarify its position on the Competition Act’s potential application to anti-competitive conduct involving patents, including patent assertion entities.

6. “Pay-for-Delay” – Will the Bureau Take Action?

Pay-for-delay settlements, or “reverse payments”, saw significant attention from competition enforcement authorities in 2013. These arrangements typically involve consideration flowing from a branded drug manufacturer to a generic manufacturer in order to settle a patent challenge by a generic. Part of the settlement may involve a commitment by the generic manufacturer to enter the market at a later date than it might otherwise enter. A U.S. Supreme Court decision released in June 2013 held that pay-for-delay settlements have the potential to adversely affect competition, but are not per se illegal such that their full competitive implications must be assessed under a “rule of reason” analysis. The European Commission also imposed significant fines on several branded and generic pharmaceutical companies in 2013 for delaying the market entry of generic medicines through pay-for-delay settlements.

The Bureau did not take similar enforcement action in 2013 but has made it clear that the pharmaceutical sector is a priority area. In November 2013, for example, the Bureau held a workshop focused on competition issues in the pharmaceutical industry. The question for 2014 is whether the Bureau will now follow other competition enforcement authorities by taking action on pay-for-delay settlements and, if so, under which provisions of the Competition Act.

7. Continued Enforcement Activity in Misleading Advertising

The Bureau initiated or settled several high-profile marketing cases in 2013, including in the telecommunications sector and other consumer sectors such as automobiles, furniture and residential water heaters. The Bureau's focus on misleading representations in areas that "hit close to home for Canadians" will no doubt continue in 2014. Specific areas for potential Bureau enforcement in the coming year include the use of false or misleading testimonials or reviews on websites, improper disclosure of key pricing terms and ordinary sales price representations. The Bureau has expressly stated that it is seeing more complaints with respect to ordinary sales price representations and that retailers can expect to see more activity from the Bureau in this area.

One issue to watch for is whether the Bureau will continue to bring contested proceedings for alleged misleading representations (as it has in recent years) or whether it will return to favouring negotiated resolution of these cases. In August 2013, the Ontario Superior Court dismissed the Bureau's allegations of false and misleading advertising against Rogers Communications Inc. Two other contested misleading advertising cases initiated by the Commissioner currently remain before the Courts and could be decided in 2014. The outcome of these cases may go a long way towards influencing whether the Bureau will continue to aggressively litigate misleading advertising cases or be more willing to accept alternative forms of case resolution.

8. Civil Actions Alleging Conspiracy – New Grounds for Concern?

Amendments to the Competition Act effective in 2010 significantly altered the scope of the criminal conspiracy provisions in section 45 of the Act to change the offence from a prohibition on agreements that would unduly lessen competition to instead prohibit agreements between competitors on specified matters such as price fixing and market allocation without the need to prove competitive impact, but subject to a statutory defence for ancillary restraints reasonably necessary for the implementation of a broader (lawful) agreement. To date, most of the limited case law has taken a reasonable approach to the new conspiracy offence and interpreted it as not intended to prohibit common commercial conduct, e.g., in the context of franchise arrangements. However, in some recent cases, defendants have been unsuccessful in striking conspiracy claims or opposing class certification based on unusual allegations of violations of section 45 and/or common law conspiracy allegations.

In one case arising out of the Tervita acquisition of the Babkirk site noted above, Secure Energy, a competitor of Tervita in some areas and an unsuccessful bidder for Complete, the company that owned the Babkirk site, made a claim in a civil action that Tervita and Complete unlawfully conspired to cause Complete to abort its negotiations with Secure contrary to section 45, and to cause injury to Secure. An Alberta Court declined to strike either of these claims, holding that a determination of whether the relevant persons were "competitors" for the purposes of section 45 should be made after consideration of the evidence, and finding sufficient evidence to infer a predominant intention of the alleged conspirators to harm Secure for the purposes of the common law tort of conspiracy. Similarly, one of the above-noted class action cases considered by the Supreme Court, in which class certification was restored, involves an allegation that agreements between Microsoft Canada and its U.S. parent constituted a common law tort of conspiracy intended to injure indirect purchasers of Microsoft products (even though an agreement between a parent and a subsidiary is exempt from section 45 of the Act). These cases illustrate the uncertainty relating to the potential scope of section 45 and may signal a renewed interest in common law conspiracy claims. Particularly if they continue to survive preliminary challenges, the risk of such claims may increasingly factor into business decisions.

9. U.S./Canada Price Differentials – Is a Prohibition on Geographic Price Discrimination the Solution?

The Canadian government has been paying close attention to price differentials between Canada and the United States for consumer goods, which a Canadian Senate study found are, on average, 15% costlier in Canada. In the last federal budget, the government reduced import tariffs on certain consumer goods, a move it hoped would translate into lower retail prices. Further unspecified action was promised by the government to combat "geographic price discrimination against Canadians" in its latest Throne Speech, delivered in October 2013.

Potential changes to the Competition Act to address geographic price differentials are reportedly being assessed in light of international trade agreements. The government is expected to ask the Bureau how it could better address the cross-border price differences, although Bureau representatives recently reminded a Senate committee that they are not price regulators. Despite this statement, the Commissioner has indicated that he was pleased to see the government moving forward with further action to protect consumers and end price disparities. Legislation to address price discrepancies could well have popular appeal, but may add a new layer of regulatory complexity for cross-border businesses.

10. Foreign Investment Review – Continued Heightened Scrutiny

Following a number of high profile investments in Canada by foreign state-owned enterprises, the federal government passed legislation in 2013 that introduced a broad definition of "state-owned enterprise" (SOE) in the Investment Canada Act (ICA) and provided for a separate, lower net benefit review threshold that will be applicable to acquisitions of Canadian businesses by SOEs upon passage of implementing regulations. Where SOE control or influence is involved, the amendments also introduced new deeming powers for the Minister of Industry that could, with retroactive application, impose net benefit reviews on (i) direct acquisitions of control of Canadian businesses by entities that would otherwise qualify as "Canadian" under the ICA, and (ii) direct acquisitions of certain minority interests in Canadian businesses that would not previously have been subject to a net benefit review under the ICA.

In addition, in October 2013, Industry Minister James Moore announced that the Canadian government had, pursuant to the ICA, rejected the proposed acquisition by Accelero Capital Holdings of Allstream, a provider of telecommunications services to businesses in Canada, because of national security concerns. (The ICA's national security review process is distinct from the "net benefit" review process under that legislation, and involves separate considerations.) The Minister did not provide any detailed explanation for this decision, which appears to be the first time since the national security review provisions were added to the ICA in March 2009 that the Canadian government has publicly announced a prohibition of a proposed investment on national security grounds following a completed review.

The spotlight on the role of foreign investment in Canada is likely to continue in 2014, as the federal government grapples with the implementation of the new SOE rules and net benefit review thresholds, and further refines its use of the national security review process. This will take place in the context of continuing debate over whether the government's recent measures are inordinately discouraging foreign investment, particularly in the oil and gas sector. Foreign investors, most particularly foreign SOEs and potential investors in sensitive sectors, will have to continue to be mindful in 2014 of the ICA review processes and potential implications for proposed transactions.

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