



9. Competition/Antitrust Law

Competition laws in Canada are contained in one federal statute, the *Competition Act* (Act). The Act is administered and enforced by the Commissioner of Competition (Commissioner) and the Commissioner's staff, the Competition Bureau (Bureau), which is part of the Innovation, Science and Economic Development Canada portfolio. Subject to certain limited exceptions, the Act applies to all business activities in Canada.

The Act has five principal categories of provisions: (i) merger provisions, including pre-merger notification; (ii) criminal offences in relation to competition, including provisions dealing with conspiracies/cartels and bid rigging; (iii) civil reviewable practices provisions, including those dealing with non-criminal agreements between competitors, abuse of dominant position, and other restrictive trade practices; (iv) various deceptive marketing practices (civil and criminal offences); and (v) a provision establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the Act or a breach of an order of the Competition Tribunal (Tribunal). Criminal matters and claims for civil damages are adjudicated before the courts. Civil reviewable conduct is dealt with by the Tribunal on application by the Commissioner or, in some cases, a third-party with the permission of the Tribunal. The Tribunal has the authority to issue a range of remedial orders and, in some cases, administrative monetary penalties.

We focus in this chapter on provisions that are relevant to parties expanding into Canada without necessarily investing into an existing Canadian business.

Conspiracies and Cartels

A conspiracy, agreement, or arrangement between competitors to fix prices, allocate markets, and/or restrict output is a criminal offence (cartel offence). Often referred to as the “supreme evil of antitrust,” the cartel offence is the cornerstone of the Act and a top enforcement priority of the Bureau. Proof of competitive harm is not required to establish the offence. The term “competitors” includes not just actual competitors, but potential competitors as well. The cartel offence prohibits the following categories of agreements:

- Price Fixing Agreements include any agreement between competitors to fix or control the price, or any component of the price, to be charged by competitors. The term “price” includes any discount, rebate, allowance, price concession, or other advantage in relation to the supply of a product.
- Market Allocation Agreements include, among other things, agreements between competitors not to compete with respect to specific customers, groups, or types of customers, in certain regions or market segments, or in respect of certain types of transactions or products.

- Output Restriction Agreements include, among other things, agreements between competitors to limit the quantity or quality of products supplied, reduce the quantity or quality of products supplied to specific customers or groups of customers, limit increases in the quantity of products supplied by a set amount, or discontinue supplying products to specific customers or groups of customers.

Bid-rigging is another criminal offence under the Act that is deemed illegal without proof of anticompetitive effects. Bid-rigging occurs where two or more persons agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, will withdraw a bid or will submit a bid arrived at by agreement.

The Act also contains criminal prohibitions against implementing a foreign conspiracy and sector specific offences, namely provisions prohibiting conspiracies involving federal financial institutions and conspiracies relating to professional sport.

The penalties for engaging in cartel offences are severe. They include substantial fines and, in the case of an individual, imprisonment. Further, the Act allows persons who have suffered loss or damage as a result of these criminal offences to bring civil damage claims in the courts. These claims are frequently brought as class actions, which can be expensive and time consuming to defend.

Civil Reviewable Practices

The Act contains a number of civil provisions, referred to as “reviewable practices”, which relate to ordinary, lawful business practices that may occasionally have anticompetitive effects on the Canadian economy and consumers. Such practices are presumptively lawful and may only be prohibited if there is proof of anti-competitive effects arising from such practices.

Non-Criminal Agreements Between Competitors

The Act contains a reviewable practice pertaining to agreements between competitors that are likely to cause a substantial prevention or lessening of competition (SPLC) in any relevant market. The Tribunal may, on application by the Commissioner, make remedial cease-and-desist orders in connection with agreements between competitors that cause an SPLC. In particular, joint ventures, strategic alliances, and similar collaborations between competitors may be subject to review, prohibition, or other order under these provisions.

Abuse of a Dominant Position

The abuse of dominance provisions in the Act provide that, where one or more persons have market power, and where such a person or persons engage in a “practice of anticompetitive acts” such that competition has been, is being or is likely to be substantially prevented or lessened in a market, the Tribunal may, on application of the Commissioner, issue prohibition and other orders in respect of the conduct, including orders for administrative monetary penalties of up to \$10,000,000 for an initial order and up to \$15,000,000 for any subsequent order.

Restrictive Trade Practices

Restrictive trade practice rules apply to unilateral conduct, namely refusals to deal, resale price maintenance, exclusive dealing, tied selling, and market restrictions.

- **Refusal to deal** is a refusal to supply a would-be customer under certain specific circumstances. While there is no absolute obligation on any business to supply to any particular customer(s) or would-be customer(s), in certain circumstances, where the would-be customer is willing and able to meet the supplier’s usual trade terms, is unable to obtain adequate supplies elsewhere, and the impact would

be that the would-be customer is unable to carry on business as a result (or would be otherwise substantially affected by the refusal), the refusal may be subject to review. Further conditions would also need to be met in order for the Tribunal to issue an order requiring that a supplier accept the customer (i.e. the product must be in ample supply and the refusal to supply must have had, or be likely to have, an adverse effect on competition in a market).

- **Price Maintenance** is where a person either influences upward or discourages the reduction of another person's selling prices by means of agreement, threat, promise, or any like means or refuses to supply or otherwise discriminates against a person because of that person's low pricing policy, in each case with the result that competition in a market is likely to be adversely affected.
- **Exclusive Dealing** occurs where a supplier requires or induces a customer to deal only, or mostly, in products supplied by the supplier or someone designated by the supplier.
- **Tied Selling** occurs when a supplier, as a condition of supplying a particular product, requires or induces a customer to acquire a second product, or prevents the customer from using or distributing another product with the supplied product.
- **Market Restriction** occurs when a supplier requires a customer to sell specified products in a defined market or penalizes a customer for selling outside of a defined market.

Where any of the aforementioned practices are viewed by the Commissioner as likely to have a substantial or adverse effect on competition in a market (depending on the provision in question), the Commissioner may apply to the Tribunal for an order to cease the practice. Subject to obtaining the permission of the Tribunal, private litigants may also bring cases to the Tribunal under these restrictive trade practices provisions.

Deceptive Marketing Practices

The Act contains both criminal and civil (reviewable) provisions to address deceptive marketing practices. The making of materially false or misleading representations to the public for the purpose of promoting a product, service, or business interest is both a criminal offence and a reviewable practice under the Act. The Commissioner has the discretion to choose which track (i.e. criminal or civil) to pursue with respect to suspected false and misleading representations. Specific provisions pertaining to marketing representations remove the requirement for the Commissioner to prove materiality where the representation at issue was contained in the sender information or subject matter of an electronic message. The Act also contains a number of more specific criminal offences and reviewable practices in connection with deceptive marketing, some of which are set out below for illustrative purposes:

Criminal Offences

- **Deceptive Telemarketing:** It is an offence where interactive telephone communications are used to make false or misleading representations in promoting the supply of a product or a business interest.
- **Double Ticketing:** It is an offence for a business to put two prices on a product, and charge the higher of the two prices.
- **Pyramid Selling:** It is an offence to engage in a multi-level marketing plan with certain characteristics. At a general level, multi-level marketing plans whereby participants generate earnings through recruitment as opposed to the supply of products that consumers are willing to purchase are subject to criminal prohibition.

Civil Reviewable Practices

- **Ordinary Price Claims:** The Act prohibits the making, or the permitting of the making, of any materially false or misleading representation, to the public, as to the ordinary selling price of a product, in any form. The ordinary selling price is determined by using one of two tests: either a substantial volume of the product was sold at that price or a higher price, within a reasonable period of time (volume test); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (time test).
- **Performance Representations:** The Act prohibits the making, or the permitting of the making, of a representation to the public, in any form, about the performance, efficacy, or length of life of a product, which is not based on adequate and proper testing. The onus is on the person making the representation to prove that the representation is based on an adequate and proper test, which must be conducted before the representation is made.

- **Bait and Switch Selling:** The Act prohibits a person from advertising, at a bargain price, a product or service that the person does not supply in reasonable quantities, having regard to the nature of the product in which the person carries on business, the nature and size of the person's business, and the nature of the advertisement.

The penalties for engaging in deceptive marketing practices are wide ranging and may include imprisonment, substantial fines, administrative monetary penalties, prohibition orders, the publication of a corrective notice, and/or restitution, depending on the conduct at issue and the Commissioner's enforcement approach.

Private Civil Actions for Damages

The Act contains provisions establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the Act or a breach of an order made by the Tribunal or another court under the Act. Note that the Act provides only for single, not treble, damages. There is also a provision for the recovery of the costs of any investigation and any civil proceedings.