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Collective Dominance In Canada: A New Direction

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I. INTRODUCTION

The October issue of *Global Competition Policy* contained an informative series of articles discussing the concept of "collective dominance," principally from a European perspective. In this article, we provide a Canadian epilogue of sorts to that discussion, as collective dominance is emerging as a hot-topic in Canada as well. Specifically, it appears that the Canadian Competition Bureau ("Bureau") will be taking a more aggressive approach than in the past to instances of what it regards as the collective (or "joint") abuse of dominance. This shift in approach is part of a broader effort by the Bureau to step up enforcement of the *Competition Act's* abuse of dominance provisions, in line with a renewed focus by competition authorities worldwide on the potentially anticompetitive effects of conduct by dominant firms.

II. BACKGROUND—ABUSE OF DOMINANCE UNDER THE COMPETITION ACT

The *Competition Act's* abuse of dominance provisions authorize the Bureau to apply to the Competition Tribunal ("Tribunal") for relief where (i) one or more persons substantially or completely control a class or species of business in all or part of Canada; (ii) the person or persons have engaged in, or are engaging in, a practice of anticompetitive acts (i.e., conduct the purpose of which is an intended predatory, exclusionary or disciplinary effect on competitors); and (iii) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially. Where an abuse of dominance is established, the Tribunal may issue an order prohibiting the person or persons from engaging further in the anticompetitive conduct at issue; directing any or all persons against whom the order is sought to take such actions as are reasonable and necessary to overcome the effects of the anticompetitive practice, including the divestiture of assets or shares; and/or imposing administrative monetary penalties ("AMPs") of up to CDN \$10 million for a first order and up to CDN \$15 million for any subsequent orders.

III. THE BUREAU'S EVOLVING POLICY ON JOINT DOMINANCE

The abuse of dominance provisions have not been enforced very frequently. Since the provisions were enacted in 1986, there have been only six contested proceedings decided by the Tribunal, with several additional matters resolved by way of settlement agreement on consent.

Moreover, to the extent that the abuse of dominance provisions have been enforced to date, virtually all of the cases have involved single-firm conduct. Notwithstanding that the

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provisions clearly contemplate that applications may be brought against multiple entities for an alleged joint abuse of dominance, there have been only a very limited number of cases in which the issue has been raised and there has never been a contested joint abuse of dominance case heard by the Competition Tribunal.

The principal Canadian case involving alleged joint abuse of dominance—and still the only Tribunal case to consider the issue—was a proceeding in which the Tribunal reviewed and approved a draft consent order requiring an association of Canadian financial institutions to modify certain by-laws that the Bureau claimed unfairly excluded non-member financial institutions from participating in the association's network of automated banking machines.² The Bureau also has considered the potential application of a joint abuse theory in several investigations (such as an inquiry into the exhibition and distribution of motion pictures in Canada³ and, as noted below, an investigation of the gasoline industry in Saskatchewan). However, none of these resulted in enforcement proceedings.

The lack of joint abuse cases in Canada is attributable, at least in part, to the Bureau's traditional view that a finding of joint dominance requires something more than mere conscious parallelism by the parties, although there need not be a conspiracy or explicit agreement. In the financial institutions case referred to above, for example, it was clear that the institutions were operating jointly through the vehicle of the association and its by-laws.

The requirement that there be some form of coordinated conduct upon which to base an allegation of joint dominance is enunciated in the Bureau's current Abuse of Dominance Guidelines⁴ and has been reaffirmed and re-stated in other contexts as well.

For example, in an investigation of possible anticompetitive conduct in the Saskatchewan gasoline industry, the Bureau stated that:

[i]n the case of joint dominance, it must be established that a group of firms of significant size to control the market are engaged in some form of coordinated activity which facilitates the exercise of market power and that

based on a review of related Canadian decisions regarding abuse of dominance and jurisprudence from other antitrust jurisdictions, a Tribunal finding that one or more parties jointly control a market would likely require evidence of some communication between the parties as well as some co-ordinated conduct beyond conscious parallelism resulting in a lack of competition between the parties. Conscious parallelism is defined as firms in an industry acting in a similar but independent fashion.⁵

² Canada (Director of Investigation & Research) v. Bank of Montreal (1996), 68 C.P.R. (3d) 527 (Competition Trib.)

³ Competition Bureau Backgrounder, *Inquiry into the Exhibition and Distribution of Motion Pictures in Canada*, December 12, 2002, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=800&lg=e>.

⁴ Canada, Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (July 2001), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/aod.pdf/\\$FILE/aod.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/aod.pdf/$FILE/aod.pdf).

⁵ Report on the Saskatchewan Gasoline Industry (November 30, 1999), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01613.html>.

Similarly, in a 2006 presentation at the Federal Trade Commission/Department of Justice Hearings on Single Firm Conduct, the former Commissioner of Competition stated the following in respect of joint dominance: "[I]n order for the Bureau to conclude that there has been a potential joint abuse of dominance, there must be evidence to show co-ordinated behaviour albeit short of 'conspiracy' covered by our criminal cartel provisions."⁶

The Bureau's position, as stated above, may not be quite as robust as the preponderant view adopted in European case law, namely that collective dominance requires evidence that the parties concerned were "presented on the market as a single entity." Nonetheless, it is based on the notion that some form of coordinated conduct is a pre-requisite for enforcement action.

All of the above statements notwithstanding, the Bureau now appears intent on removing the need to show some form of coordination as the underpinning for joint dominance. In its *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions* issued in January 2009 (the "Draft Abuse Guidelines"), the Bureau states that two or more firms can be found to exercise joint dominance in a market where they engage in "similar" anticompetitive practices and "together hold market power based on their collective share of the market, barriers to entry or expansion, and other factors."⁷ In other words, in a significant departure from its previous position on the issue, the Bureau now takes the view that it no longer needs to demonstrate any form of coordinated activity between firms in order to allege joint dominance. "Similar" conduct, even if entirely independent, may be sufficient (from the Bureau's perspective) to support a finding of joint dominance.

III. THE WASTE CONSENT AGREEMENT

The Bureau's revised view of collective dominance already appears to be influencing its enforcement approach. In June 2009, the Bureau entered into a consent agreement to resolve issues raised by the conduct of two unaffiliated waste removal firms on Vancouver Island, British Columbia.⁸ The Bureau alleged that the two companies, which collectively held a market share exceeding 80 percent, jointly engaged in an abuse of dominance by using similar long-term contracts and restrictive terms to lock in customers and exclude competitors. Significantly, the materials available on the public record do not indicate that there was any agreement, understanding or coordination between the companies with respect to their contracting practices.

⁶ Sheridan Scott, *Abuse of Dominance Under the Competition Act*, (Speaking Notes, delivered to FTC/DOJ Hearings on Single Firm Conduct—September 12, 2006) at p. 14, www.ftc.gov/os/sectiontwohearings/docs/SheridanScottSpeech060911.pdf.

⁷ Canada, Competition Bureau, *Updated Enforcement Guidelines on the Abuse of Dominance Provisions* (January 2009) at p. 15, [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf/\\$FILE/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf/$FILE/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf).

⁸ Commissioner of Competition v. Waste Services (CA) Inc. (June 16, 2009), Doc. CT-2009-008 (Competition Trib), http://www.ct-tc.gc.ca/CMFiles/CT-2009-003_Registered%20Consent%20Agreement_001_61_6-16-2009_7583.pdf.

The consent agreement, which was registered with the Competition Tribunal and is in effect for seven years, prohibits the companies from entering into any customer contracts that contain:

- an initial term of more than two years;
- renewal terms of more than one year;
- any limitation on the customer's ability to decline to renew the contract (other than having to provide 30 days' notice);
- a right of first refusal in favor of either company; or
- a requirement that the customer pay liquidated damages in excess of certain specified amounts.

The consent agreement also restricts the enforcement of existing contracts that are inconsistent with the above principles.

IV. IMPLICATIONS OF BUREAU'S NEW ENFORCEMENT APPROACH

Prior to the Bureau's shift in approach, Canadian businesses that were not themselves dominant in a market had little reason to concern themselves with the abuse of dominance provisions. The Bureau's new enforcement approach changes that, at least until the Tribunal has the opportunity to consider the matter in a contested application. Now, individual firms, even if they are only independently engaged in what has become commonplace industry practice, may be considered to be collectively abusing their dominance. As such, a much wider range of businesses may need to consider the market impact of common industry practices (e.g., bundling, exclusive dealing) where the purpose of these practices could be regarded as the "exclusion" or "discipline" of a competitor and the aggregate result is a substantial prevention or lessening of competition. This is not a simple exercise, particularly for businesses that do not have good insight into their competitors' practices.

The potential implications of the Bureau's new approach for joint dominance are particularly troubling in light of the fact that the Tribunal can impose significant administrative monetary penalties for breaches of the abuse of dominance provisions. It seems inherently unfair, in the absence of express or tacit coordination, that the Bureau would seek monetary penalties against parties that may not themselves be dominant and are only following the practices of market leaders. This would effectively criminalize conscious parallelism, which is something that has not been done otherwise under the *Competition Act's* criminal conspiracy provision.

The Bureau's more aggressive stance on joint dominance may be seen as part of a general effort to step up abuse of dominance enforcement activity in Canada. The Commissioner of Competition recently stated that the Bureau is "looking at a number of challenging issues" involving abuse of dominance and "expect[s] to be able to address some of

those challenges through the resolution of cases this year.”⁹ Similarly, in a recent presentation to the Canadian Bar Association, the head of the Bureau division responsible for enforcement of the abuse of dominance provisions stated that the Bureau is looking to bring cases to help clarify what would constitute a “substantial lessening of competition,” as well as cases involving regulated industries and the denial of access to essential facilities by a dominant entity.¹⁰

The Bureau's comments are consistent with increased abuse of dominance enforcement activity by the European Commission (e.g., the recent record fine against Intel) and statements by the new head of the Antitrust Division of the U.S. Department of Justice that it will be “aggressively pursuing such cases.” The consistent message emerging from antitrust authorities worldwide is that we are in a reinvigorated era of antitrust enforcement, particularly with respect to the activities of dominant firms. In Canada, this messaging may apply equally to both single- and collectively-dominant firms.

⁹ Melanie L. Aitken, (Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition, delivered at Canadian Bar Association, Competition Law Section, 2009 Spring Forum, Toronto, Ontario, May 12, 2009) at p. 2, <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03066.html>.

¹⁰ Richard Taylor, *Abuse of Dominance – Updated Enforcement Guidelines* (Presentation to CBA Competition Law 2009 Spring Forum, May 12, 2009) at p. 7.