



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

16th 2009 Competition Law Fall Conference



Canadian Competition Law The Next 25 Years

Presented by the Canadian Bar Association's
National Competition Law Section and the
Continuing Legal Education Committee

September 24 and 25, 2009
Hilton Lac Leamy
Gatineau, Québec



Cole & Partners

MiCRA

The most important changes to Canadian competition law in almost 25 years have ushered in a new era of antitrust enforcement in Canada in cornerstone areas of the *Competition Act*, including anti-competitive agreements, deceptive marketing, abuse of dominance and merger review.

Important changes to the *Investment Canada Act* have added further complexity to the regulatory landscape for foreign capital pursuing acquisitions in Canada.

This year's Fall Conference will bring together an outstanding roster of leading Canadian and international competition lawyers, economists and government officials to discuss these changes and their implications for the future. Reflecting actual experience with the new provisions and published guidance and regulations, this will be the conference you cannot afford to miss!

Make sure to also register for the Competition Bureau's Second Annual Charity Golf Event to be held on Wednesday, September 23, 2009!



Agenda

Wednesday, September 23, 2009

1200 | 2100 COMPETITION BUREAU CHARITY GOLF EVENT

Location: The exclusive Rivermead Golf Club in Gatineau, Québec
Event: Space is extremely limited. This event includes a round of golf, a shared power cart, practice balls for the driving range and a bag drop service, with a reception and dinner to follow. Proceeds will be donated to the Government of Canada Workplace Charitable Campaign. **Register on the attached registration form.**

Thursday, September 24, 2009

0830 | 0900 REGISTRATION & CONTINENTAL BREAKFAST

0900 | 0915 WELCOME & INTRODUCTION

R. Jay Holsten, 2009 Conference Chair, Partner, Torys LLP
Paul Collins, Section Chair, Partner, Stikeman Elliott LLP

0915 | 1045 PLENARY SESSION

THE GREAT AMENDMENT DEBATE

Moderator: **James Musgrove**, Partner, Lang Michener LLP
Panelists: **Neil Finkelstein**, Partner, McCarthy Tétrault LLP
Katherine L. Kay, Partner, Stikeman Elliott LLP
John B. Laskin, Partner, Torys LLP
Leslie J. Milton, Partner, Fasken Martineau Dumoulin LLP
John F. Rook, Partner, Bennett Jones LLP
Kent E. Thomson, Partner, Davies Ward Phillips & Vineberg LLP

The March 2009 amendments to the *Competition Act* made the most significant changes to our competition legislation in almost 25 years, and they will shape competition law enforcement in Canada for years to come. While some of the changes may have clarified the law, others raise difficult issues of applicability, interpretation and scope.

This session will provide a unique opportunity to hear six of Canada's leading competition counsel debate the extent to which the amendments brought about by Bill C-10 add clarity or confusion to our competition law.


This entertaining and informative debate, following a structured format, will be conducted subject to strict time limits on main arguments and rebuttals, and will include ample time for audience participation.

1045 | 1100 REFRESHMENT BREAK

1100 | 1215 PLENARY SESSION

COMMISSIONER'S SHOWCASE PANEL – CONVERGENCE AND CO-OPERATION IN THE 21st CENTURY

Moderator: **Melanie L. Aitken**, Interim Commissioner of Competition, Competition Bureau
Panelists: **Nadia Calvino**, Deputy Director-General of Competition, Mergers and Antitrust, DG Comp, European Commission
William F. Cavanaugh Jr., Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice
John Fingleton, Chief Executive, UK Office of Fair Trading



This panel will bring together senior antitrust/competition officials from Canada, the United States, the European Union and the United Kingdom to discuss international coordination and cooperation trends in antitrust enforcement. The ever-increasing levels of integrated investigative and enforcement efforts, among a broader network of agencies, is unprecedented and enormously valuable. In particular, it is allowing agencies to be more effective as they seek to optimize the deterrence of cartel behaviour, and efficiently review merger activity and other civil conduct. There are direct benefits for consumers and businesses from the synergies that flow from an open dialogue among agencies. Topics will include coordination in enforcement action and advocacy, the sharing of relevant information and applicable theories of harm, and the important role played by networks of competition authorities.

1215 | 1400 **LUNCHEON**

Sponsored by Analysis Group

This year's Thursday luncheon will feature a keynote address by William F. Cavanaugh, Jr., Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice. Mr. Cavanaugh's remarks will address U.S. antitrust enforcement under the Obama administration, with particular emphasis on enforcement in areas such as merger review and monopolization. There will also be a short presentation introducing the Section's new website.

1415 | 1530 **CONCURRENT SESSIONS**

MERGER REVIEW: THE NEW "NEW PARADIGM"

Moderator: **Peter H. G. Franklyn**, *Partner, Osler, Hoskin & Harcourt LLP*

Panelists: **Denis Gascon**, *Partner, Ogilvy Renault LLP*

Steve Peters, *A/Assistant Deputy Commissioner of Competition, Mergers Branch, Competition Bureau*

Paul Yde, *Partner, Freshfields Bruckhaus Deringer LLP*

The adoption of a US-style merger review regime in Canada is likely to have significant repercussions for our merger review process. While, in some cases, it may encourage merging parties to work closely and cooperatively with the Bureau with a view to expediting the process and limiting review time and expense, in other cases it may encourage a strategy of compliance solely for the purpose of holding the Bureau to its statutory review timelines.

This session will discuss the new requirements of Part IX of the *Competition Act* and the amended Notifiable Transactions Regulations, and explore the strategic issues that competition counsel will need to consider when advising their clients on Part IX compliance in a post-Bill C-10 world.

PLUGGING THE GAP? AGREEMENTS UNDER SECTION 90.1

Moderator: **Neil Campbell**, *Partner, McMillan LLP*

Panelists: **Adam Fanaki**, *A/Senior Deputy Commissioner of Competition, Mergers Branch, Competition Bureau*

David I. Gelfand, *Partner, Cleary Gottlieb Steen & Hamilton LLP*

Initially conceived as part of a "two-track approach" for the review of competitor agreements, section 90.1 of the *Competition Act* – which will come into force in March 2010 – could represent an important new weapon in the Competition Bureau's arsenal to challenge arrangements between competitors. Will it lessen the "chilling effect" that some believe pre-amendment section 45 had on otherwise pro-competitive competitor collaborations, or will it continue to discourage these arrangements by providing the Competition Bureau with new latitude to challenge non-structural arrangements between competitors that may (or may not) also raise issues under section 45? This session will explore the scope of section 90.1 and the circumstances in which it is likely to be applied.

DEALERS MAY (NOT) SELL FOR LESS!

Moderator: **Yves Comtois**, *Partner, McCarthy Tétrault LLP*

Panelists: **Anthony F. Baldanza**, *Partner, Fasken Martineau Dumoulin LLP*

Martine Dagenais, *Assistant Deputy Commissioner of Competition, Civil Matters Branch, Competition Bureau*



Agenda

The repeal of criminal prohibitions against price discrimination, unfair promotional allowances and price maintenance, and the enactment of a civil price maintenance provision, have important implications for distribution arrangements subject to the *Competition Act*. In what circumstances can price discrimination or the granting of promotional allowances still be problematic? What is the scope of new section 76, and when will price maintenance be regarded as having an “adverse effect” on competition in a market? This panel will discuss these and other issues, including developments in U.S. price maintenance jurisprudence post-*Leegin*, and their implications for distribution arrangements in North America.

1530 | 1545 **REFRESHMENT BREAK**

1545 | 1700 **CONCURRENT SESSIONS**

SPOTLIGHT ON: IN-HOUSE COUNSEL

Moderator: **Barry Zalmanowitz**, *Partner, Fraser Milner Casgrain LLP*

Panelists: **George N. Addy**, *Partner, Davies Ward Phillips & Vineberg LLP*

Barry D. Gilchrist, *Associate General Counsel, EnCana Corporation*

David Zender, *Director, Legal-Canada, Home Depot of Canada Inc.*

This year’s “Spotlight On” panel will focus on the issues facing in-house legal counsel as they grapple with a rapidly evolving antitrust landscape. Change is coming from every direction, including fundamental changes to competition law and policy in Canada, the U.S. and abroad, and an increasingly aggressive enforcement attitude on the part of antitrust regulators worldwide. How best to manage these developments? What is the skill-set that in-house counsel look for when retaining outside counsel to assist them in negotiating the antitrust landscape? This panel will discuss these and other issues, providing perspectives from both sides of the table.

PRESCRIPTIONS FOR THE FUTURE

Moderator: **William L. Vanveen**, *Partner, Gowling Lafleur Henderson LLP*

Panelists: **Marimichael O. Skubel**, *Partner, Kirkland & Ellis LLP*

Dr. Andrew Tepperman, *Principal, CRA International*

J. Kevin Wright, *Partner, Davis LLP*

The pharmaceutical sector has been the subject of much debate and study in recent years. While the Canadian Competition Bureau, like its European counterpart, has conducted studies of various issues in the pharmaceutical sector – including generic drug pricing – there has been little apparent inquiry into or enforcement activity in respect of matters such as IP settlements involving branded and generic companies, a hot topic in the United States.

Are things about to change in Canada? Do the amendments to the *Competition Act* brought about by Bill C-10 increase the likelihood of enforcement activity by the Competition Bureau in the pharmaceutical sector? This session will explore these and other pharma-related issues.

LITTLE WHITE LIES AND INDICTABLE OFFENCES

Moderator: **Daniel G. Edmondstone**, *Partner, Lang Michener LLP*

Panelists: **Kim D.G. Alexander-Cook**, *Partner, Stikeman Elliott LLP*

Carol Anne O’Brien, *Partner, Cassels Brock & Blackwell LLP*

Andrea Rosen, *Deputy Commissioner of Competition, Fair Businesses Practices Branch, Competition Bureau*

Fourteen year jail terms, \$10 million AMPs, new restitution and asset preservation orders? It seems the Competition Bureau takes misleading advertising very seriously these days. But what exactly will the impact be of the increased penalties for deceptive marketing brought about by Bill C-10? Do they signal an even more aggressive approach to clamping down on “deceptive” marketing practices and, if so, exactly what constitutes deceptive marketing? In what circumstances does “deceptive” marketing cross the line between reviewable conduct and a criminal offence? This panel will discuss these and related marketing issues, including how to best advise clients to avoid liability in advertising their products and services.

1700 | 1830 **COCKTAIL RECEPTION**
Sponsored by CRA International

1830 | 2200 **DINNER**
Sponsored by Cole & Partners
For ticket holders only

2200 | 2330 **YOUNG LAWYERS' RECEPTION**
Open to all

Friday, September 25, 2009

0830 | 0930 **CONTINENTAL BREAKFAST**

0930 | 1100 **CONCURRENT SESSIONS**

ANCILLARY RESTRAINTS AND THE SCOPE OF SECTION 45

Moderator: **Robert E. Kwinter**, *Partner, Blake, Cassels & Graydon LLP*

Panelists: **John Pecman**, *A/Senior Deputy Commissioner of Competition, Criminal Matters Branch, Competition Bureau*

Linda M. Plumpton, *Partner, Torys LLP*

John Roberti, *Partner, Mayer Brown LLP*

Section 45 of the *Competition Act* – as amended by Bill C-10 – is expected to usher in a new era of cartel enforcement in Canada. But section 45 has the potential to apply to a variety of “competitor collaborations” that are far less egregious than “naked” price fixing arrangements. What is the scope of the ancillary restraint defence provided for in new subsection 45(4) and will it be sufficient to ensure that criminal liability does not arise when competitors pursue arrangements they believe will increase economic output and efficiency? This panel will discuss these and related issues, including the scope of the ancillary restraint defence that has developed in U.S. antitrust jurisprudence and that some believe will guide the interpretation of the defence in Canada.

WHY SO HOSTILE?

Moderator: **John D. Bodrug**, *Partner, Davies Ward Phillips & Vineberg LLP*

Panelists: **Peter L. Glossop**, *Partner, Osler, Hoskin & Harcourt LLP*

Deborah Salzberger, *Senior Associate, Stikeman Elliott LLP*

Ann Wallwork, *Assistant Deputy Commissioner of Competition, Mergers Branch, Competition Bureau*

Hostile takeover bids have been a frequent acquisition strategy in Canada in recent years, and the current economic environment – in which many company market valuations have been pushed to unprecedented lows – makes further hostile activity likely. This panel will explore the unique merger review issues to which hostile transactions give rise, including offensive and defensive strategies, information access, and designing and implementing effective remedies to address SLC issues. The panel will also discuss the observations and recommendations of the recent CBA/Competition Bureau task force that studied hostile transactions and the issues to which they give rise.

I HEAR YOU KNOCKIN', BUT YOU CAN'T COME IN - SOVEREIGN WEALTH FUND, SOE AND NATIONAL SECURITY REVIEWS UNDER THE ICA

Moderator: **Brian A. Facey**, *Partner, Blake, Cassels & Graydon LLP*

Panelists: **Oliver Borgers**, *Partner, McCarthy Tétrault LLP*

John B. Reynolds, *Partner, Wiley Rein LLP*

Agenda

Times have changed. Canada needs foreign investment like never before, and sovereign wealth funds and state-owned enterprises (SOEs) are increasingly a source of patient money looking for strategic acquisitions. At the same time, however, investments by SOEs raise political issues and government and public relations challenges. So too do investments that may be “injurious to national security”, the review of which is now provided for in the *Investment Canada Act (ICA)*. But what does this phrase mean and how will these reviews be handled by the Investment Review Division?

This panel will address the complex legal and governmental relations framework circumscribing these investments. It will include a discussion of the SOE guidelines under the ICA, and the recent amendments to the ICA and the recommendations of the Wilson Panel that preceded them all, with a view to providing ICA counsel with practical guidance on how to best handle SOE and national security reviews. It will consider process, timing and substantive issues and explore the similarities and differences in review processes and standards in Canada and the United States.

1100 | 1245 **PLENARY SESSION**

BRUNCH WITH THE BUREAU

Sponsored by MiCRA

Moderator: **Paul Collins**, *Partner, Stikeman Elliott LLP*

The closing panel and highlight of this year’s Fall Competition Conference will be a brunch buffet featuring the Commissioner of Competition’s annual address to the CBA Competition Law Section, followed by an “open-mike” session with the Commissioner and Deputy Commissioners responsible for the Competition Bureau’s Mergers, Criminal Matters, Civil Matters and Fair Business Practices branches.

This will be your opportunity to hear the Commissioner discuss the Bureau’s activities over the past year, its priorities for the year ahead, and to engage the Bureau’s senior staff in a dialogue regarding issues relevant to the competition bar and the practice of competition law in Canada.

1300 **CONFERENCE CONCLUDES**



This program has been accredited by the Law Specialty Committee of the Law Society of Upper Canada for 6.5 hours towards the professional development requirement for certification.



This program has been approved for 9 hours of recognized Professional Development by the Barreau du Québec.

SPEAKERS HAVE BEEN CONFIRMED AT TIME OF PRINTING. ALL LISTINGS SUBJECT TO CHANGE.