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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CANADA

-- 2014 --

27-28 October 2015

This report is submitted by Canada to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2015.

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Executive Summary

1. This report summarizes the main activities of Canada's Competition Bureau (the "Bureau") during the 2013-14 fiscal year (April 1, 2013 to March 31, 2014).
2. In June 2013, John Pecman was appointed Commissioner of Competition for a five-year term.
3. The Bureau continued to deliver on its mandate to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace through a mix of enforcement, suasion and advocacy.
4. During this fiscal year, the Bureau developed and focused on three priorities: benefitting Canadians through focused enforcement and strategic regulatory interventions; applying Canada's competition laws in a transparent and predictable manner; and building trust through enhanced collaboration with stakeholders and enforcement partners.
5. Strong enforcement remained the Bureau's top priority, and the Bureau achieved strong outcomes in the 2013-14 fiscal year: 233 merger reviews concluded; seven consent agreements reached; criminal charges laid against five individuals and four companies; twelve guilty pleas or criminal convictions obtained; and approximately CAD\$55 million in criminal fines imposed.¹
6. While strong enforcement remained the top priority, the Bureau also expanded on its advocacy work, including by increasing its input into other regulatory proceedings. For example, the Bureau made a submission to the Canadian Radio-television and Telecommunications Commission consultation on wholesale mobile wireless roaming services. In addition, the Bureau increased its collaboration with partners and stakeholders, including other government departments in Canada and competition agencies abroad.
7. For additional information on the activities described throughout this report, including information notices, news releases and backgrounders, please visit the Bureau's website at: www.competitionbureau.gc.ca.

¹ Please note that these statistics have been adjusted from standard Bureau reporting to remove deceptive marketing practices matters, which fall outside the scope of this report.

1. Changes to Competition Laws and Policies, Proposed or Adopted

1.1 Amendments to the Competition Act or Labelling Statutes

8. There were no amendments to the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, or the *Precious Metals Marking Act* during the period covered by this annual report.

9. No new legislation came into force, and the Bureau did not appear before any Parliamentary Committees during fiscal year 2013-14.

1.2 Publications and Consultations

10. In the spring of 2013, the Bureau unveiled its *Action Plan on Transparency*. It is the Bureau’s plan to promote the development of a more cost-effective, efficient and responsive agency, while providing Canadians with more opportunities to learn about its work. The plan lists a series of strategies for achieving the Bureau’s goals, including consulting with stakeholders on important issues, developing new bulletins and guidelines, publicizing the outcomes of inquiries, and establishing guiding principles for stakeholder and investigation-related communications.

11. In fiscal year 2013-14, the Bureau promoted transparency by communicating with stakeholders and providing them with current information and guidance, including 169 presentations by Bureau officials, and 21 publications. The following is a sample of guidance documents and consultations conducted during the reporting period.

1.2.1 Guidance documents

Information Bulletin on the Communication of Confidential Information under the *Competition Act*

12. The *Information Bulletin on the Communication of Confidential Information under the Competition Act* was updated on September 30, 2013, and sets out the Bureau’s approach with respect to the communication of confidential information obtained in the course of the administration or enforcement of the Act. The purpose of the Bulletin is to set out the Bureau’s policy on the communication of confidential information and to assure parties providing confidential information to the Bureau, whether voluntarily or pursuant to a specific provision of the Act, that the Bureau takes seriously its duty to protect this information.²

Revised Immunity and Leniency Frequently Asked Questions (“FAQs”)

13. The Bureau published revised FAQs related to its Immunity and Leniency Programs in September 2013. These Programs deliver strong incentives for organizations and individuals to come forward and cooperate with the Bureau’s investigations. The updated FAQs provide additional guidance to market participants and address topics such as how the Bureau treats immunity and leniency markers in the context of investigations that it does not intend to pursue. The FAQs also expand on and clarify existing topics, such as the proffer process, indirect sales, and how the Bureau determines its fine

² The full text of the Bulletin can be found on the Bureau’s website at:
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03597.html>.

recommendations. The FAQs, along with the Programs themselves, provide a comprehensive picture of the Bureau's approach to immunity and leniency applications.³

1.2.2 Consultations

Information Bulletin on Communication during Inquiries

14. In October 2013, the Bureau published a draft Information Bulletin on *Communication during Inquiries* for public comment. The draft Bulletin summarizes how and when the Bureau generally communicates with parties under inquiry to promote transparency and compliance with the Act.

Workshop on Antitrust Issues in the Pharmaceutical Sector

15. In November 2013, the Bureau held a workshop to explore competition issues in the pharmaceutical sector. The workshop was attended by approximately 100 representatives from domestic and international government agencies, such as Health Canada and the United States Federal Trade Commission, the pharmaceutical sector, the legal community and academia. This workshop enabled participants to share their perspectives on potential competition law implications of practices that could impact competition between branded and generic pharmaceuticals.

Enforcement Guidelines — Price maintenance (Section 76 of the Competition Act)

16. In March 2014, the Bureau also sought input on the draft Enforcement Guidelines entitled *Price Maintenance (Section 76 of the Competition Act)*. The draft Price Maintenance Guidelines describe the Bureau's general approach to enforcing section 76 of the Act, including with respect to common business practices, such as minimum resale pricing, manufacturer-suggested resale pricing and minimum advertised pricing.

2. Strategic Regulatory Interventions

17. Sections 125 and 126 of the Act grant the Bureau a statutory right to make representations regarding competition before federal and provincial regulatory boards, commissions or other tribunals. The Bureau has endeavored to increase its level of regulatory interventions to encourage fair and competitive practices. The following are examples of the regulatory interventions that occurred during the reporting period.

Canadian Radio-television and Telecommunications Commission ("CRTC") Wireless Roaming

18. In January and February 2014, the Bureau provided written submissions to the CRTC regarding the effect that roaming agreements have on competition in Canadian wireless markets. These submissions observed that the terms and conditions imposed in mobile wireless roaming agreements, including the rates charged by Canada's largest wireless companies to new entrants, were being used as a strategic tool to reduce the new players' ability to offer competitive prices and alternative choices to consumers. Taking note of the Bureau's position on the competitive impact of these roaming agreements, the CRTC took steps

³ The FAQs can be accessed from the Bureau's website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03609.html>.

to address the pricing behaviour of the three incumbent wireless companies with regard to wholesale roaming.⁴

City of Toronto Taxicab Industry Review

19. In February 2014, the Bureau provided a submission to the City of Toronto as part of its Taxicab Industry Review. The submission advocates for a regulatory framework that would benefit Canadians by providing them with more urban transportation options at competitive prices.⁵

3. Collaborative Initiatives

Domestic

20. In 2013-2014, the Bureau facilitated closer collaboration with national and provincial partners by negotiating a number of Memoranda of Understanding (“MOU”) or similar arrangements. For example, a Letter of Agreement with the CRTC facilitates closer cooperation between the Bureau and the CRTC on matters affecting the telecommunications and broadcasting sectors. An MOU with the CRTC and the Office of the Privacy Commissioner of Canada sets out a framework for information-sharing and coordinated enforcement related to Canada’s new Anti-Spam Legislation,⁶ and an MOU with the Department of Public Works and Government Services Canada (PWGSC) allows the two organizations to strengthen their collective ability to prevent, detect, report and investigate possible cartel activity affecting Canadians.

21. At the provincial level, the Bureau entered into an MOU with the Market Surveillance Administrator of Alberta (MSA) that provides for continued and more detailed cooperation between the two agencies in relation to the energy sector in that province.

International

22. The Bureau worked to strengthen existing relationships and build new partnerships with its counterpart agencies in other countries. For example, the Bureau, together with the United States Federal Trade Commission and United States Department of Justice Antitrust Division, jointly published a set of Best Practices on Cooperation in Merger Investigations⁷ promoting effective coordination between the agencies.

23. The Bureau also participated in the work of a number of multilateral organizations, including the Organisation for Economic Co-operation and Development’s Competition and Consumer Protection Committees, the International Competition Network and the International Consumer Protection and Enforcement Network, among others.

⁴ The full text of the submissions can be found on the Bureau’s website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03649.html> and <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03661.html>.

⁵ The full text of the submission can be found on the Bureau’s website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03667.html>.

⁶ The Anti-Spam legislation was passed in 2010 and came into force on July 1, 2014.

⁷ See: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03704.html>.

4. Enforcement of Competition Laws and Policies

24. The following section provides a non-exhaustive overview of the Bureau's significant enforcement actions during the fiscal year 2013-14.

4.1 Action against anti-competitive practices

4.1.1 Abuse of dominance

Toronto Real Estate Board ("TREB")

25. TREB is the largest real estate board in Canada. It owns and operates the Toronto Multiple Listing Service system (the "Toronto MLS system"), which contains current property listings and historical information about the purchase and sale of residential real estate in Toronto and the surrounding area. The vast majority of local real estate transactions make use of the Toronto MLS system, which is an essential tool for agents to help customers buy and sell homes. The Bureau's investigation concluded that TREB restricts how its member agents can provide information from the Toronto MLS system to their customers, thereby denying member agents the ability to provide innovative brokerage services over the Internet.

26. The Bureau brought the case to the Competition Tribunal ("Tribunal") in May 2011. In 2013, the Tribunal dismissed the Bureau's application for an order against TREB under section 79 of the Act, holding that TREB does not compete with its members and, therefore, the restrictions on the use of the Toronto MLS system are not an abuse of dominance. The Bureau appealed the decision, arguing that the Tribunal relied on an overly narrow interpretation of section 79 of the Act. In February 2014, the Federal Court of Appeal overturned the Tribunal's decision, agreeing with the Bureau that the Tribunal erred in its decision; it returned the Bureau's case against TREB to the Tribunal for re-consideration.

Residential Water Heaters

27. In December 2012, the Bureau filed applications with the Tribunal against Reliance Comfort Ltd. Partnership ("Reliance") and Direct Energy Marketing Ltd. ("Direct Energy") related to practices that were alleged to intentionally suppress competition and restrict consumer choice in the water heater industry.

28. After an investigation, the Bureau determined that Direct Energy and Reliance each engaged in practices that intentionally suppress competition and restrict consumer choice. Specifically, each company implemented water heater return policies and procedures aimed at preventing consumers from switching to competitors. As a result of these anti-competitive practices, many customers had little choice but to continue their rental agreements even if they wanted to purchase a new water heater or switch to another rental provider.

29. In March 2013, the Tribunal denied Reliance's request for an order striking or amending the application filed against it. Reliance was of the view that the Commissioner's application was too vague and failed to disclose a cause of action. The Tribunal found that the Commissioner pleaded the material facts to support each element of the application and thus Reliance's request was dismissed. In August 2013, Reliance's appeal of the decision was denied, as was its application for leave to appeal to the Supreme Court of Canada. As of March 31, 2014, the proceedings against both Reliance and Direct Energy continued before the Tribunal.

4.1.2 Price maintenance

Visa and MasterCard

30. In December 2010, the Bureau filed an application with the Tribunal to strike down restrictive rules that Visa and MasterCard imposed on merchants who accept their credit cards. The Commissioner alleged that these rules had effectively eliminated competition between Visa and MasterCard for merchants' acceptance of their credit cards, resulting in increased costs to businesses and, ultimately, consumers.

31. In July 2013, the Tribunal dismissed the Bureau's application on the basis that there was not a "resale" of a product, but found that Visa's and MasterCard's conduct influenced upwards the price of credit card services in Canada and had an adverse effect on competition. The Tribunal noted that regulation of the industry would provide a more appropriate solution than any remedy that it could impose.

32. Following a careful review of the Tribunal's decision, the Bureau decided not to appeal, instead focusing its efforts on identifying alternate means of addressing competition issues in the supply of credit card network services in Canada. The Government of Canada committed in its 2014 budget to "work with stakeholders to promote fair and transparent practices and to help lower credit card acceptance costs for merchants, while encouraging merchants to lower prices to consumers". As of March 31, 2014, the Government of Canada was preparing to engage stakeholders

4.1.3 *Price-fixing*

Chocolate

33. In June 2013, a Bureau investigation led to criminal charges against four companies and three individuals for conspiring to fix the price of chocolate confectionary products in Canada. Hershey Canada Inc. pleaded guilty before the Ontario Superior Court of Justice and was fined CAD\$4 million; the case against the individuals and the other companies—Nestlé Canada Inc., Mars Canada Inc. and ITWAL Limited—remained active as of March 31, 2014.

34. Airline Cargo

35. During the 2013-14 fiscal year, the Bureau's work in the airline cargo industry continued. Cathay Pacific Airways Limited ("Cathay") and LATAM Airlines Group S.A. ("LATAM") both pleaded guilty to engaging in price-fixing agreements and were fined CAD\$1.5 million and CAD\$975,000, respectively, by the Ontario Superior Court of Justice. To date, the Bureau's air cargo surcharges investigation has resulted in nine criminal convictions and fines of over CAD\$25 million. In addition to Cathay and LATAM, Cargolux, Air France, KLM, Martinair, Qantas, British Airways and Korean Air have also pleaded guilty to fixing one or more air cargo surcharges for shipments on certain routes from Canada.

4.1.4 *Bid-rigging*

Motor Vehicle Components

36. In 2013-2014, the Bureau's most extensive bid-rigging investigation to date made headlines when the Ontario Superior Court of Justice fined Yazaki Corporation CAD\$30 million for its part in an international bid-rigging cartel. This investigation involved motor vehicle components supplied to Honda and Toyota, two of Canada's most popular vehicle brands. That particular fine was the largest levied for bid-rigging in Canadian history. Four other companies (Furukawa Electric Co., Ltd.,⁸ JTEKT Corporation,⁹

⁸ See: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03555.html>.

⁹ See: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03583.html>.

NSK Ltd.,¹⁰ and Panasonic¹¹) were also fined during the reporting period, for a combined total of CAD\$49.2 million. During the course of the investigation, the Bureau received invaluable assistance from antitrust partners in Australia, Europe, the United States and Japan. The information sharing that resulted from collaboration with the Bureau's international partners played a pivotal role in the success of the Bureau's investigation.

4.2 Mergers and Acquisitions

4.2.1 Statistics on Mergers Examined under the Competition Act

37. During fiscal year 2013-14, the Bureau concluded 233 merger examinations, with 15 examinations ongoing as of March 31, 2014. Of the 233 examinations that were completed at the end of the fiscal year:

1. the Bureau issued supplementary information requests in 10 cases;
2. four consent agreements were registered with the Tribunal;
3. no transactions were abandoned by the parties as a result of the Bureau's concerns regarding the competitive effects of the merger or for reasons unrelated to the Bureau's position regarding the competitive effects of the merger;
4. the Bureau concluded that 221 of the 233 examinations completed by the end of the fiscal year did not raise significant competition issues under the Act, and issued an Advance Ruling Certificate ("ARC") in 106 of these transactions¹² and a No Action Letter ("NAL") in 107 of these transactions;¹³
5. one case was before the Tribunal at the end of the fiscal year.

38. The Bureau published 11 position statements describing its analysis of merger cases during the reporting period.

4.2.2 Summary of significant cases

Agrium/Glencore

¹⁰ See: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03652.html>.

¹¹ See: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03669.html>.

¹² An ARC may be issued by the Commissioner to a party or parties to a proposed merger transaction who want to be assured that the transaction will not give rise to proceedings under the merger provision, section 92 of the Act. Section 102 of the Act provides that an ARC may be issued when the Commissioner is satisfied that there would not be sufficient grounds on which to apply to the Tribunal for an order against a proposed merger. The issuance of an ARC is discretionary. An ARC cannot be issued for a transaction that has been completed, nor does an ARC ensure approval of the transaction by any agency other than the Bureau.

¹³ Pursuant to paragraph 123(1)(a) of the Act, parties are legally prohibited from closing the transaction for an initial 30-day waiting period, unless the Commissioner notifies the parties that he does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction. Such notice is commonly referred to as a NAL.

39. In September 2013, a consent agreement was reached to address concerns that Agrium Inc.'s ("Agrium") proposed acquisition of the majority of Viterra Inc.'s retail agri-products business from Glencore International plc would likely lead to a substantial lessening or prevention of competition. These companies operate in the retail supply of fertilizers to farmers in certain areas of Alberta and Saskatchewan. Under the terms of the consent agreement, Agrium was required to divest seven retail stores and nine anhydrous ammonia businesses—which it did in March 2014. Agrium is also required to supply anhydrous ammonia to the purchaser of the divested assets for up to four years at prices not to exceed those charged to its retail outlets in Alberta and Saskatchewan.

Cineplex-Landmark/Empire

40. In June 2013, Empire Theatres Ltd. ("Empire") announced it had reached an agreement with Cineplex Inc. ("Cineplex") for the sale of 24 Empire theatres in Atlantic Canada, as well as two theatres in Whitby and Kanata, Ontario. At the same time, Empire announced it had reached a separate agreement with Landmark Cinemas ("Landmark") for the sale of 20 theatres in various other cities in Ontario and Western Canada. The Bureau found that Cineplex's proposed acquisition of the Whitby and Kanata theatres would likely lead to a substantial lessening of competition in those markets. Advised of the Bureau's concerns, the parties engaged in further negotiations that led to Empire selling its two Ontario theatres to Landmark. Consequently, the Bureau provided NALs in October 2013 to both Cineplex and Landmark for their revised transactions, permitting the mergers to proceed.

Sobeys/Canada Safeway

41. In October 2013, a consent agreement was reached to address concerns that Sobeys Inc.'s ("Sobeys") proposed acquisition of the assets of Canada Safeway might reduce consumer choice and raise retail grocery prices in parts of Western Canada. The agreement required Sobeys to divest 23 grocery stores in Alberta, British Columbia, Manitoba and Saskatchewan. As of March 31, 2014, all but one of the stores had been sold and the Bureau expected the remaining Sobeys grocery store (in Winnipeg, Manitoba) to be sold in accordance with the consent agreement.

Loblaw/Shoppers Drug Mart

42. In March 2014, a consent agreement was reached to address concerns that Loblaw Companies Ltd.'s ("Loblaw") proposed acquisition of Shoppers Drug Mart Corporation would likely increase prices, decrease services and reduce product variety and innovation in the retail sale of pharmacy products and drugstore-type merchandise in certain local markets in Canada. The agreement also addressed concerns that the transaction might lead to higher wholesale prices paid by other retailers to suppliers. It required the sale of 18 retail stores and nine pharmacies within Loblaw's stores to independent operators and contained certain behavioural restrictions on Loblaw's programs and agreements with suppliers for up to five years from the date of closing the proposed transaction. As of March 31, 2014, the Bureau continued to investigate Loblaw's programs, agreements and conduct related to pricing strategies and programs with suppliers that reference competitor prices.

5. Resources of Competition Authorities

5.1 Bureau operations

43. The Bureau's budget for 2013-14 was CAD\$48.8 million, including CAD\$10.5 million from user fees. The Bureau's expenditures for 2013-14 were CAD\$47 million and consist of CAD\$33.6 million in salaries for 362 full-time equivalents, and CAD\$13.4 million in non-salary.¹⁴

44. The Bureau has administrative responsibility for collecting fines imposed by the courts, as well as Administrative Monetary Penalties ("AMPs") issued by the Tribunal or the courts. In 2013-14, approximately CAD\$55 million in fines were imposed and CAD\$0.5 million in AMPs were issued. Fines and AMPs are not considered Bureau revenue and instead are remitted to the Government of Canada's Consolidated Revenue Fund (i.e., into general government revenues).

5.2 Legal support

45. The Bureau receives legal support from the Competition Bureau Legal Services Unit of the Department of Justice (the "DOJ") and the Public Prosecution Service of Canada (the "PPSC").

46. Legal fees are an important budgetary consideration, and the Bureau has realized savings by implementing an ongoing strategy to build a strong in-house legal team within the DOJ and through reduced reliance on external legal counsel.

47. The DOJ's Competition Bureau Legal Services Unit is responsible for providing legal services to the Commissioner, and for representing the Commissioner on all matters, other than criminal matters, for which the PPSC is responsible. The Competition Law Section of the PPSC is responsible for initiating and conducting criminal prosecutions on behalf of the Attorney General of Canada, and for advising the Bureau on criminal investigations.

5.3 Period covered by the above information

48. April 1, 2013 to March 31, 2014.

¹⁴ It should be noted that these numbers are for the Bureau as a whole, including the Fair Business Practices Branch, which carries out consumer protection activities outside the scope of this report.