

THE LITIGATOR

COMPETITION LAW UPDATE

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THE YEAR IN REVIEW

BY MICHAEL OSBORNE, JENNIFER CANTWELL, PAUL EMERSON, AND ANGELA YADAV

TOP STORIES

Tread carefully when advertising "sale" prices: In January 2005, the Tribunal ruled that **Sears Canada Inc.** exaggerated savings in ads for tires. The "regular" prices advertised by Sears were not genuine and bona fide because Sears sold less than 2% of the tires at those prices before putting them on sale. The Tribunal also upheld the constitutionality of the ordinary price provisions of the Act.*

Dominant firms can have loyalty and rebate programs that encourage exclusivity, the Tribunal found in its February 2005 decision rejecting the Commissioner's allegations that **Bibby**, a division of **Canada Pipe**, abused its dominant position. Bibby dominates the market for cast iron drain, waste and vent pipes. Its loyalty program encourages distributors to stock its products exclusively, but it does not bind customers to long-term contracts or impose penalties for switching. The program had a reasonable business justification: by encouraging large volumes, it made it possible for Bibby to maintain inventories of unusual sizes of pipe fittings. Crucially, the program did not prevent the entry of a new competitor. The Tribunal also suggested that the program might be the result of Bibby's superior competitive performance as a Canada-wide supplier with a broader array of products than its competitors. The Bureau is appealing the decision.*

Proposed amendments currently before Parliament (Bill C-19) propose **restitution orders** against parties guilty of making false or misleading representations; **administrative monetary penalties** ("AMPs") of up to \$10 million for civil abuse of dominant position, and \$15 million for each subsequent order, and increased AMPs for deceptive

marketing practices; and repealing criminal price discrimination, predatory pricing, geographic price discrimination and promotional allowances provisions, as well as the airline-specific provisions.


Private applicants must show evidence of adverse affect on competition, the Federal Court of Appeal held in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*. In considering whether to grant leave to make private applications, the Competition Tribunal must consider all the elements that must be proven in the application, including whether there is an adverse effect on competition caused by a refusal to deal.

Barcode distributed Symbol's barcode equipment in Western Canada until its supply was cut off in March 2003. Barcode has been given leave to apply for an order that Symbol resume supplying it.

In dismissing Symbol's appeal, the court found evidence that Symbol's refusal to deal with Barcode could have an adverse effect on competition.

Tribunal orders Deely to supply Harley Davidson merchandise and parts, in the first ever interim supply order. Quinlan of Huntsville is challenging the refusal of Fred Deeley Imports Ltd., Harley Davidson's exclusive Canadian distributor, to continue supplying it.

Quinlan's loss of Harley-Davidson sales and goodwill of its Harley-Davidson customers constituted irreparable harm, the Tribunal held. Deeley must supply Quinlan's with non-seasonal general merchandise and parts and allow it to buy motorcycles from other dealers.



Assignments of patent rights cannot be an “undue” lessening of competition under the Competition Act’s conspiracy provisions because s. 50 of the Patent Act allows patents to be assigned.

MERGERS

On January 10, 2005, **Rona** applied under s. 106 to be relieved of its 2003 agreement to sell a **Réno Dépôt** store in Sherbrooke. Rona had agreed to sell the store as a condition of obtaining approval of its acquisition of Réno Dépôt. Rona claims that **Home Depot** is about to open a store in Sherbrooke, changing the competitive landscape and making the divestiture unnecessary.

West Fraser agreed to a consent agreement requiring it to sell sawmill interests and timber harvesting rights as a condition of merging with **Weldwood**. However, Weldwood’s joint venture partner **Burns Lake Native Development Corp.** and a local Indian Band launched a challenge to the consent agreement in February 2005. Burns Lake says that the consent agreement affects aboriginal rights to economic autonomy and self-government and terminates a successful 30 year commercial relationship. They are also challenging the consent agreement process under the *Canadian Bill of Rights*.

Lumber company **Tolko Industries Ltd.** acquired **Riverside Forest Products Ltd.** in October and has agreed to hold three Riverside mills in Okanagan separate pending further review by the Bureau. Earlier in 2004, Tolko acquired another lumber company, **Lignum Ltd.**, as well as a mill from **Weyerhaeuser**.

Canfor’s acquisition of **Slocan Forest Products** raised competition concerns that were settled by Slocan’s divestiture of a sawmill north of Prince George.

Reducing waste: The **Canadian Waste Services** saga came to an end with the sale of the Ridge Landfill in January, 2005. In November, 2004, the Federal Court dismissed CWS’ appeal from the Tribunal’s rejection of its application to rescind the Tribunal’s October 2001 divestiture order.*

Despite its concerns of reduced competition in the wiener market, the Bureau did not challenge **Maple Leaf Foods’** acquisition of the **Schneider Corporation**.

CN’s acquisition of **BC Rail** and a lease to operate on a BC Rail bed was saved by safeguards to promote competition such as liberal publication of shipping rates, price protection, and maintenance of existing rail services.

In September, the Bureau released new **Merger Enforcement Guidelines** outlining the framework for merger review in Canada. The Bureau also launched a consultation on the role of **efficiencies** in merger review.

CRIMINAL

Big fines for obstruction: the **Morgan Crucible Company** and its Canadian affiliate, **Morganite Canada**, were fined a total of \$1 million for obstructing a Bureau investigation into price-fixing by manufacturers of carbon brushes and current collectors used in transit vehicles. Morganite Canada also pleaded guilty to implementing the conspiracy in Canada.

Several companies pleaded guilty and were fined for conspiracy. **Crompton Corporation** was fined \$9 million for conspiring to fix prices and share customers in the rubber chemicals market. **Nippon** (NDK) of Japan, and **VAW Carbon** of Germany paid fines of \$225,000 and \$500,00 respectively for conspiring to increase prices of cathode block, a product used in aluminium production.

Nothing runs like a Deere? **John Deere** agreed to rebate \$1.19 million to settle allegations that it maintained prices on the sale of 8,600 tractors.

Royal Group Technologies was fined \$200,000 after pleading guilty to price maintenance.

Morgan Crucible & Morganite Canada were fined \$1 million for obstruction and conspiracy.



CIVIL REVIEWABLE MATTERS

The Bureau and **Air Canada** settled their litigation before the Tribunal into allegations that Air Canada had abused its dominant position by engaging in anti-competitive practices against low cost carriers **WestJet** and **CanJet** in 2000 and 2001. In July 2003 the Tribunal found that Air Canada had priced below avoidable costs on two routes.

The Bureau concluded that the *Competition Act* is not the appropriate vehicle to resolve complaints by generic drug companies against the practice of “**evergreening**” patents by **brand name pharmaceutical companies**.

“Evergreening” occurs when patents are added to the patent register for a given medicine to delay the introduction of competing generic versions.

MARKETING PRACTICES

Forzani Group Inc.’s “sale” prices no deal: Forzani agreed to pay a record AMP of \$1.2 million plus \$500,000 in costs, to stop inflating regular prices in its ads, and to publish corrective notices.

Goodlife Fitness Clubs Inc. agreed to pay an AMP of \$75,000 for failing to disclose additional mandatory fees that made the actual price of its memberships higher than its ads led consumers to believe.

Several other companies agreed to pay AMPs for civil deceptive marketing practices **Teleresolve Inc.** (pre-paid long distance cards - \$750,000); **Urus Industrial Corporation** (unsupported weight loss claims - \$75,000).

Performance Marketing Ltd. agreed to pay refunds to purchasers of its diet patches and post a corrective notice. This marked the Bureau’s first investigation under **Project Fairweb**, its new Internet surveillance and enforcement program.

The Federal Court of Appeal upheld the Tribunal’s 2003 finding that claims of fuel savings from the “Platinum Vapour Injector” by **PVI International Inc.** were false.

Bureau – Federal Trade Commission (FTC) co-operation led to fines in two deceptive telemarketing cases. **Medical Discount Inc. (Canada)** paid \$125,000 in Canada and faces a consumer protection action in the US. **Hanson Publications Inc., Associated Merchant Paper Supplies Inc., Copier Supply Centre Inc. and OS Networks Inc.** must pay US\$853,000 for consumer redress, and their directors are prohibited from selling directories or non-durable office supplies in the U.S.

Petnet was fined \$150,000 for criminal misleading advertising. Petnet advertised a microchip pet identification service for a one time, lifetime fee with no annual renewal fee, but later administered an additional annual administration fee for old and new registrants alike.

PRIVATE ENFORCEMENT

Assignments of patent rights cannot be an “undue” lessening of competition under the *Competition Act*’s conspiracy provisions, because s. 50 of the Patent Act allows patents to be assigned, the Federal Court held. The court dismissed **Apotex’s** claim that **Eli Lilly** violated the conspiracy provisions by buying a “process patent” needed to make the antibiotic Cefaclor.

Free but not predatory: the Federal Court dismissed aviation publication author **Michael Culhane’s** predatory pricing action against **ATP Aero Training Products Inc.** Culhane complained that ATP was giving his publications away for free. But he was unable to show that ATP’s give-away substantially lessened competition or eliminated a competitor, or even caused his own losses.

Multi-millions for multi-vitamins: a global settlement of \$132.2 million to settle several class actions involving international conspiracies to fix prices for various vitamins was announced in November. Earlier, a separate class action involving MSG and nucleotides settled for \$6.9 million.

The Tribunal granted leave to make private applications relating to refusals to deal in several cases. As a result, **Morgan's Furniture** is seeking an order that **La-Z-Boy Canada Ltd.** resume supplying chairs. **Robinson Motorcycle** wants **Fred Deely Imports** to resume supplying it with Harley-Davidson motorcycles. (Barcode's and Quinlans' applications are summarized above.)

However, four drug stores were refused leave to make an application against pharmaceutical manufacturers **Pfizer**, **Wyeth** and **Novartis**, which stopped supplying them because of their internet export sales. The Tribunal found the four did not lead enough evidence of an effect on their business. In early 2003, the Bureau declined to act in a similar matter against **GlaxoSmithKline** because exports of drugs from Canada to the US are illegal under US law, and the refusal to deal had no impact on Canadian consumers.

THE LONG ARM OF US ANTITRUST LAW

Foreign purchasers cannot sue in the US for damages for international price fixing conspiracies unless their damages are not "independent" of the effects of the conspiracy in the US, the US Supreme Court determined in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*

The Ontario Court of Appeal refused to enforce a settlement of an Illinois class action against **McDonalds** that included Canadians in the plaintiff class, on February 16, 2005. McDonalds sought to enforce the settlement to

block a proposed class action in Ontario. The court held that foreign class action judgments would be enforced in Canada if the foreign court validly assumed jurisdiction and the non-resident class members were adequately represented and accorded procedural fairness, including adequate notice. The court held that Canadian class members were not given adequate notice. *

In *Intel Corp. v. Advanced Micro Devices, Inc.*, the US Supreme Court held that a complainant in a European Union competition investigation could apply for production of documentary discovery from a private antitrust lawsuit filed in the US, even though the EU was not seeking the information itself.

Don't call US: The FTC is enforcing its national Do Not Call Registry against Canadian telemarketers who call into the US. In several recent FTC targeted telemarketing schemes, FTC complaints allege violations of the US Telemarketing Sales Rule and National Do Not Call Registry.

INTERNATIONAL AFFAIRS

In October, Canada and the US signed a "positive comity agreement" to enhance co-operation in competition law enforcement, allowing each to request the other to investigate and remedy anti-competitive activities

The Bureau signed information-sharing protocols with **UK** and **Australian** competition authorities.

The **International Competition Network (ICN)** adopted new Recommended Practices for merger notification and created a new working group on cartels. Canada's Commissioner of Competition, **Sheridan Scott**, was named a vice-chair of the ICN Steering Group.

*see online at www.agolaw.com for further analysis.

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Contact us about:

- competition law: competition@agolaw.com
- commercial litigation: litigation@agolaw.com
- The Litigator: thelitigator@agolaw.com