Canada's Competition Law

Affleck Greene McMurtry LLP

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Canada's *Competition Act* applies to all businesses and business activities in Canada. All companies doing business in Canada need to be aware of the Act, as penalties for breach of its provisions can be quite severe. For example, the maximum penalty for price fixing is a fine of up to $25 million and 14 years in jail.

The *Competition Act* applies to three main areas of business conduct that can harm competition: coordinated conduct among competitors, abuse of dominance, and mergers. The Act also includes misleading advertising provisions.

Conspiracies and other coordinated conduct among competitors

Hard-core cartels involving price fixing, market allocation, and output restriction agreements between competitors are *per se* criminal offences in Canada, as is bid rigging. Other agreements between competitors that lessen or prevent competition substantially can be annulled by a special court, the Competition Tribunal.

The conspiracy provision (s. 45) makes it an offence for competitors, or potential competitors, to agree to fix, maintain or control prices for the supply of a product; to allocate customers, territories or markets; or to fix maintain, control, prevent, lessen the production or supply of a product. There is an important exception for restraints that are ancillary to a broader and otherwise legitimate agreement.

Penalties are severe: the offence is an indictable offence punishable by up to 14 years in jail, or a maximum fine of $25 million, or both. Private parties that are harmed by a conspiracy can sue for damages. Canada's competition authorities offer immunity to the first cartel participant to self-report, and leniency to participants who cooperate subsequently.

Many conspiracies are international in scope. Despite the absence of an express long-arm jurisdiction provision, Canadian authorities routinely investigate and penalize foreign conspiracies that have effects in Canada. As well, the Act makes it an offence for a corporation to implement a foreign conspiracy in Canada (s. 46), even if it did not know it was implementing the conspiracy.

Bid rigging is dealt with in a separate provision (s. 47), and carries equally stiff penalties: up to 14 years in jail, or a fine in the discretion of the court. Private parties that are harmed by bid-rigging can sue for damages.

Other agreements between competitors can be prohibited by the Tribunal if they lessen or prevent competition substantially (s. 90.1). The Act mandates a competitive effects analysis, including factors such as foreign competition, barriers to entry, removal of a renegade competitor, and change and innovation. Efficiency gains that outweigh any competitive harm provide a complete defence. No penalties or damages can be imposed on parties to such anti-competitive agreements; the only remedy is an injunction.

Abuse of dominance

Canada's *Competition Act* deals with anti-competitive conduct by large firms through a number of discrete provisions. These include a general abuse of dominance provision, and several specific provisions, the most important of which deal with exclusive dealing, tied selling, market restriction, and refusal to deal.

Abuse of dominance (s. 78-79) occurs where a firm that has market power (dominance) engages in a practice of anti-competitive acts, causing a substantial lessening or prevention of competition. Conduct is considered anti-competitive if it is intentionally exclusionary, disciplinary, or predatory. Examples of anti-competitive conduct include: margin squeezing, pre-emption, exclusionary contracting practices, and predatory pricing.

The principal remedy for abuse of dominance is an injunction. Where an injunction is not enough, the Tribunal can order the parties to take steps to restore competition, including divestitures. The Tribunal can also impose an administrative monetary penalty (AMP) of up to $10 million ($15 million for repeat offenders).

Exclusive dealing, tied selling, and market restriction are not illegal in Canada unless they harm competition, in which case the Tribunal can issue an injunction prohibiting the practice under a specific provision (s. 77). Since these practices can also constitute abuse of dominance, AMPs may be available under the general abuse of dominance provision. No damages are available.

The refusal to deal provision (s. 75) allows businesses that are substantially affected by a refusal to deal to obtain an order from the Tribunal forcing a supplier to resume supply in certain very limited circumstances. No damages are available, however.

Mergers and pre-merger notification

The *Competition Act* provides substantive remedies for mergers that harm competition, and procedural requirements to notify the Competition Bureau of mergers that exceed certain thresholds before the merger closes.

THE RULES

CONDUCT	RULE	REMEDIES
Price fixing, market allocation, output restriction	Unlawful - per se criminal	14 years prison / $25m fine / private action
Bid rigging		14 years prison / fine / private action
Other agreements between competitors	Not unlawful, but can be prohibited if competition lessened	Injunction
Price maintenance		
Abuse of dominance		Injunction / $10m AMP
Exclusive dealing		Injunction
Tied selling		
Refusal to deal		Mandatory injunction
Mergers		Injunction / divestitures / dissolution

The Bureau must be notified of a proposed merger, before it closes, where three conditions are met:

- The transaction involves an operating business in Canada
- The parties and their affiliates collectively have over $400 million in assets in Canada, or over $400 million in sales involving Canada
- The target firm has assets or sales involving Canada of over $87 million.

Once parties have notified the Bureau, they must wait 30 days to close the transaction. The Bureau can ask for more information through a supplementary information request, which extends the waiting period for 30 days after the parties supply the information.

When it finds that a merger is likely to lessen or prevent competition substantially, the Tribunal can prohibit the parties from closing the deal, or order them to dissolve the merger or (more commonly) divest assets or shares. Factors considered by the Tribunal include foreign competition, barriers to entry, removal of a renegade competitor, and change and innovation. Efficiency gains that outweigh any competitive harm provide a complete defence.

Misleading advertising and other marketing practices

The *Competition Act* contains a range of criminal and regulatory (civil) provisions prohibiting misleading advertising and deceptive marketing practices.

Criminal sanctions apply to deliberately false and fraudulent conduct. False advertising is a crime if done knowingly. Deceptive telemarketing, prize scams, and pyramid selling are also criminal offences. Sanctions include imprisonment for up to 14 years and fines.

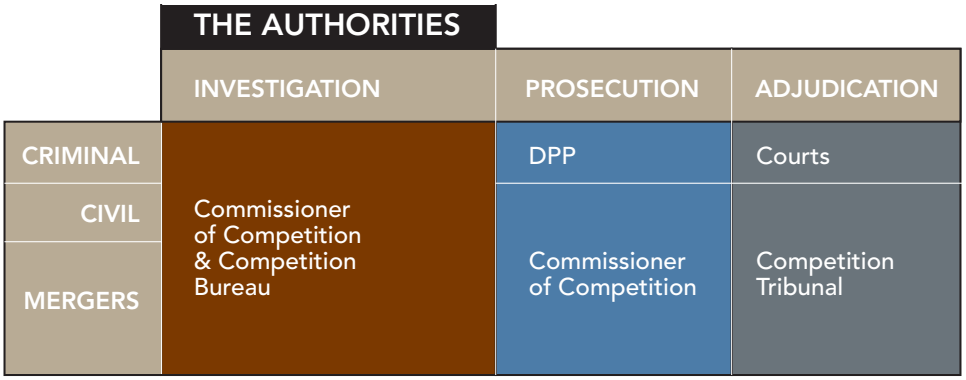
Most misleading advertising cases are dealt with under regulatory provisions and attract civil penalties, including a requirement to publish a corrective notice and pay AMPs of up to $10 million ($15 million for repeat offenders).

Competition authorities

Led by the Commissioner of Competition, the Competition Bureau is responsible for enforcing the Act. The Bureau investigates possible breaches of the Act, and can bring applications before the Competition Tribunal and the courts in civil, but not criminal, matters. The Bureau can apply to a court to use a broad range of formal investigative tools, including dawn raids (search warrants), production orders, orders for oral examinations, and even wiretaps.

The Director of Public Prosecutions is responsible for prosecuting criminal offences under the Act.

Criminal prosecutions can be brought before the superior courts in each province, as well as the Federal Court. A special administrative tribunal, the Competition Tribunal, has exclusive jurisdiction over most civil matters, including anti-competitive agreements, abuse of dominance, and mergers. The Tribunal and the courts share jurisdiction over civil misleading advertising cases.



We **defend**

businesses facing competition **investigations**, **prosecutions**, and **class actions**.

AGM's Competition and Regulatory Law Team

AGM's competition and regulatory law team is one of Canada's leading competition and regulatory law practices. We defend businesses and individuals facing investigations and prosecutions by the Competition Bureau and other regulatory authorities. We act for businesses involved in price fixing class actions and other private litigation. We prepare merger notifications. We help businesses comply with the *Competition Act*, the *Corruption of Foreign Public Officials Act*, Canada's anti-spam law, and other statutes.

We **advise**

businesses on **compliance** with the *Competition Act*.

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