

CPI Antitrust Chronicle

January 2013 (1)

Canadian Competition Law— Looking Ahead to 2013

Mark Katz
Davies Ward Phillips &
Vineberg LLP

Canadian Competition Law—Looking Ahead to 2013

Mark Katz¹

I. A NEW COMMISSIONER OF COMPETITION FOR CANADA

The year just ended witnessed a changing of the guard at Canada's Competition Bureau, with Melanie Aitken resigning as Commissioner of Competition in September 2012. Ms. Aitken was replaced on an interim basis by John Pecman, a seasoned Bureau veteran with over 28 years of enforcement experience. It is expected that a permanent replacement for Ms. Aitken will be appointed within the year.

Ms. Aitken only served roughly three years of her five-year term. In that relatively short period of time, however, she engaged in a vigorous—and successful—campaign to raise the profile of competition law enforcement in Canada. Ms. Aitken accomplished this objective by bringing more cases than her recent predecessors and by doing so in areas that matter to Canadian consumers: retail gas, real estate, airlines, telecommunication services, etc.

Can more of the same be expected in 2013 under the Bureau's new administration? All indications to date are that the answer to this question is "yes," and that Mr. Pecman intends to follow the course set by Ms. Aitken, although with a few variations of his own.

II. CONTINUED TOUGH ENFORCEMENT

Mr. Pecman certainly banged the enforcement drum in his first speech as Interim Commissioner in October 2012.² In those remarks, Mr. Pecman stated forcefully that "the Bureau's priorities were the right ones a few months ago and they will continue to guide us in the months ahead." According to Mr. Pecman, these priorities are:

1. "to achieve results for Canadians through active, targeted and principled enforcement;
2. to apply Canada's competition laws in a progressive and transparent manner that keeps pace with a changing marketplace; and
3. to cultivate a strong and agile enforcement capacity to deliver results that matter."

In a subsequent speech delivered in early December 2012, Mr. Pecman returned to this theme, commenting that the Bureau's "commitment to enforcement runs deep in my veins" and that "the Bureau's recent track record on enforcement mirrors my own as an enforcer at the Bureau."³ (Having been at the receiving end on a number of cases in which Mr. Pecman was involved, I can also vouch from personal experience that his commitment to aggressive enforcement is *bona fides*.)

¹ Mark Katz is a partner in the Competition & Foreign Investment Review practice in the Toronto office of Davies Ward Phillips & Vineberg LLP.

² Remarks by John Pecman, Interim Commissioner of Competition, Toronto, Ontario, (October 30, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02834.html>.

³ Remarks by John Pecman, Interim Commissioner of Competition, Vancouver, BC, (December 5, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03514.html>.

Indeed, as if to underscore the new Commissioner's tough message, the Bureau commenced an application on December 20, 2012 against two companies for alleged anticompetitive conduct in the rental of water heaters to residential customers in Ontario. The Bureau brought the case under the *Competition Act's* abuse of dominance (monopolization) provisions and claims that the companies engaged in a variety of restrictive practices designed to prevent customers from switching to competitors. Among other forms of relief, the Bureau is seeking "administrative monetary penalties" totalling CDN\$25 million from the defendant companies.⁴

III. CARTEL PROSECUTIONS

One area where there is sure to be continuity of approach under Mr. Pecman is cartel enforcement (criminal conspiracies and bid-rigging). Before being elevated to his new post, Mr. Pecman was in charge of the Bureau's Criminal Matters Branch and it is clear that prosecuting cartels will remain a priority under his administration. The Bureau is particularly interested in disclosing and prosecuting collusion with respect to public procurement and government contracts.

An important issue to watch out for in the cartel enforcement area is whether Mr. Pecman and the Bureau will push to prosecute individuals. Like his predecessor, Mr. Pecman is on record as favoring prison sentences for individuals in appropriate cases and has pointed with great approbation to recent comments by the Chief Justice of Canada's Federal Court that individuals convicted of cartel offenses in Canada should "face a very real prospect of serving time in prison."⁵ That said, there is no track record of individuals actually going to jail in Canada for cartel offenses and any serious effort by the Bureau to move in that direction would represent a significant change in how cartel cases are prosecuted in Canada. For one, any insistence on jail sentences could discourage parties from participating in the Bureau's leniency program and lead to more contested proceedings (which are essentially non-existent in Canada at this point).

IV. MISLEADING ADVERTISING

Misleading advertising is another enforcement area in which there should be a great deal of continuity under Mr. Pecman's leadership.

During her term in office, former Commissioner Aitken brought several high profile misleading advertising cases. For example:

- The Bureau entered into a consent agreement with a major Canadian telecommunications provider to remedy issues regarding that carrier's advertised pricing. The Bureau took the position that the carrier's advertising was false and misleading because the advertised prices did not clearly disclose all of the applicable mandatory charges and additional charges were "buried in fine print." The carrier agreed to pay an administrative monetary penalty of CDN\$10 million as part of its negotiated resolution with the Bureau.

⁴ *Competition Bureau Takes Action to Support Competition in Ontario's Residential Water Heater Market*, (December 20, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03520.html>.

⁵ *Her Majesty The Queen v. Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117, <http://decisions.fct-cf.gc.ca/en/2012/2012fc1117/2012fc1117.pdf>.

- The Bureau commenced proceedings against several companies and individuals for using misleading practices to deceive small- and medium-sized businesses into subscribing to their on-line directory. The Ontario Superior Court awarded over CDN\$9 million in administrative monetary penalties against the parties involved as well as an order for full restitution for victims.
- The Bureau commenced proceedings against a major Canadian telecommunications provider alleging that the carrier's performance-related claims were not adequately substantiated before being made and that its advertising conveyed a false or misleading impression. The Bureau is seeking both restitution to affected consumers and an administrative monetary penalty of CDN\$10 million.
- The Bureau commenced proceedings against three major telecommunications providers and an industry association alleging that the carriers and the association made or permitted other third parties to make false or misleading representations concerning premium text message programs. The Bureau is seeking a total of CDN\$31 million in administrative monetary penalties.

Misleading advertising cases are an excellent way for the Bureau to demonstrate its relevance to consumers, and so it is not surprising that Mr. Pecman has indicated that he intends to continue enforcement measures in this area. According to Mr. Pecman, the Bureau plans to focus on issues such as disclosure in the context of e-commerce and digital media, as well as misleading representations in more traditional forms of advertising, such as direct mail and telemarketing.⁶

V. TRADE ASSOCIATIONS/REGULATED CONDUCT

In his various remarks since becoming Interim Commissioner, Mr. Pecman has also evidenced an interest in trade and professional associations and regulated sectors in Canada. This is one area where Mr. Pecman seems to be departing somewhat from Ms. Aitken and returning to earlier Bureau enforcement priorities.

Under former Commissioner Sheridan Scott, who held that position before Ms. Aitken took office, the Bureau published a draft bulletin on its enforcement approach to trade association activities in Canada. The Bureau also undertook an in-depth study of various self-regulated professions in Canada, which covered much of the same ground as the draft trade association bulletin. Ms. Aitken, however, did not show the same enthusiasm for this topic when she took over as Commissioner. The draft trade association bulletin was quietly shelved and an announced study into the dental profession never got off the ground.

That is why it is particularly interesting to see Mr. Pecman raise these issues again. For example, Mr. Pecman deliberately elected in one of his speeches to highlight the current enforcement risks that trade associations face under the Competition Act, commenting that:

⁶ Pecman, *supra* note 3. See also Steve Szentesi, *Interim Commissioner of Competition Delivers Interesting and Wide Ranging Comments in Vancouver*, (December 5, 2012), <http://www.ipvancouverblog.com/2012/12/interim-commissioner-of-competition-delivers-interesting-and-wide-ranging-comments-in-vancouver/>.

[w]hile the Competition Bureau does not believe that trade associations are inherently bad, it is also clear to us that there are practices they engage in which raise significant risks. Indeed, meetings and relationships formed between competitors through trade associations provide the forum and the temptation to engage in anti-competitive activity.⁷

Mr. Pecman identified three types of association conduct that are particularly apt to attract Bureau scrutiny:

- restricting the types of services members can offer;
- using mechanisms such as fee schedules or standard setting to limit competition between members or to make entry more difficult; and
- engaging in conduct that reduces the incentives to compete vigorously, such as creating transparency between members through the vehicle of information exchanges.

Mr. Pecman also has confirmed that he is looking to expand the Bureau's efforts at increasing competition in regulated sectors in Canada.⁸ Interestingly, Mr. Pecman's comments came at approximately the same time that a leading Canadian think tank issued a report recommending that the Bureau "should actively engage in competition matters in regulated sectors of the economy, where anti-competitive conduct may be protected by government legislation or authority."⁹

Again, these areas of concern are not new. Indeed, two of the cases brought by Ms. Aitken during her tenure concerned the alleged effect on competition of restrictions placed by realtor associations on the service offerings of members. What *is* significant, however, is Mr. Pecman's decision to expressly renew the focus on trade association/regulated conduct and to emphasize that these areas will once more be enforcement priorities under his watch.

VI. CONCLUSION

Canadian competition law has enjoyed a bit of a renaissance in recent years, as former Commissioner Aitken successfully sought to raise the Competition Bureau's enforcement profile. The new Interim Commissioner, John Pecman, is equally committed to an aggressive enforcement agenda, one that both maintains certain of the priorities established by his predecessor as well as promotes new ones of his own.

⁷ Pecman, *supra* note 2.

⁸ Pecman, *supra* note 3. See also Szentesi, *supra* note 6.

⁹ C.D. Howe Institute, Report of the Competition Policy Council, *Closing the Back Door Route to Cartels: The Need to Clarify the Regulated Conduct Doctrine*, (November 20, 2012), http://cdhowe.org/pdf/Competition_Policy_Council_Nov_2012_Report.pdf.