InfoPAK<sup>SM</sup>

Canadian Competition Law

Sponsored by:

OSLER

Osler, Hoskin & Harcourt LLP
Canadian Competition Law

Updated May 2011

Provided by the Association of Corporate Counsel
1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036 USA
fax +1 202.293.4107
www.acc.com

This InfoPAK℠ explores Canadian competition law, examining Canada’s Competition Act and appropriate case law. Canada’s Competition Act is similar in many respects to its U.S. counterpart, the Sherman Antitrust Act. However, there are important differences that American companies, doing business in Canada, must take into consideration.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of Osler, Hoskin & Harcourt, LLP or any of its lawyers, or of ACC or any of its lawyers, unless expressly stated. Further, this InfoPAK is not intended as a definitive statement on the subject and should not be construed as legal advice, but is intended to serve as a tool for readers, providing practical information to the in-house practitioner.

This InfoPAK was developed by Osler, Hoskin & Harcourt, LLP. For more information about the firm, please see the “About the Author” section of this InfoPAK, or visit the firm’s website at www.osler.com.

ACC and Osler, Hoskin & Harcourt, LLP wish to thank the ACC Ontario Chapter for their contribution to the development of this InfoPAK.
## Contents

I. Introduction ........................................................................................................................................... 8
   A. Historical Development of Competition Law in Canada ................................................................. 8
   B. Significant Amendments to the Competition Act in 2009 ............................................................ 8
   C. Overview of the Competition Act .................................................................................................... 9
      1. Criminal Provisions ....................................................................................................................... 9
      2. Reviewable Practices Provisions .................................................................................................. 10
   D. Key Players ....................................................................................................................................... 10
      1. Commissioner of Competition and the Competition Bureau ...................................................... 10
      2. Public Prosecution Service of Canada ............................................................................................ 11
      3. Competition Tribunal .................................................................................................................. 11
   E. Enforcement and Remedies ............................................................................................................. 11
      1. Criminal Matters ............................................................................................................................ 12
      2. Reviewable Practices .................................................................................................................... 12
   F. Canada’s Immunity Program ............................................................................................................ 12
   G. Distinguishing Features of Canadian Competition Law ................................................................. 13
      1. Conspiracies Have Historically Been More Difficult to Prosecute, But This Has Now Changed ................................................................................................................................. 13
      2. Penalties in Criminal Cases are Considerably Less Severe ........................................................... 13
      3. Government and the Courts Tolerate Higher Market Shares and Concentrations ....... 13
      4. Enforcement Activity Relies More Heavily on Voluntary Compliance ....................................... 14
      5. Private Litigation is Different ....................................................................................................... 14
      6. Competition Law and Enforcement are Solely Federal Matters ............................................... 14
      7. Jury Trials ..................................................................................................................................... 15

II. Conspiracy and Bid Rigging .................................................................................................................. 15
   A. Conspiracy ....................................................................................................................................... 15
      1. New Conspiracy Provisions—The Dual-Track Approach ............................................................... 15
      2. Existing Conspiracy Provisions—Competitive Effects Test ......................................................... 18
      3. Foreign Directives ........................................................................................................................ 19

For more ACC InfoPAKs, please visit http://www.acc.com/infopaks
B. Bid Rigging ......................................................................................................................... 19
C. Individual and Corporate Liability ..................................................................................... 20
D. Geographic Scope of Application ......................................................................................... 20
E. Penalties ............................................................................................................................... 21
F. Canada’s Immunity Program ................................................................................................. 22
G. Trial and Plea Practices ......................................................................................................... 23

III. Distribution Practices ......................................................................................................... 24
A. Refusal to Deal ....................................................................................................................... 25
   1. Elements of the Practice ................................................................................................. 25
   2. Compliance and Enforcement ......................................................................................... 25
   3. Relevant Case Law ........................................................................................................... 25
B. Exclusive Dealing .................................................................................................................. 28
   1. Elements of the Practice ................................................................................................. 28
   2. Compliance and Enforcement ......................................................................................... 29
   3. Relevant Case Law ........................................................................................................... 29
C. Tied Selling .......................................................................................................................... 29
   1. Elements of the Practice ................................................................................................. 29
   2. Compliance and Enforcement ......................................................................................... 30
   3. Relevant Case Law ........................................................................................................... 30
D. Price Maintenance ................................................................................................................ 31
   1. Elements of the Practice ................................................................................................. 31
   2. Use of Suggested Retail Prices and Disclaimer Requirements ......................................... 31
   3. Refusals to Supply ............................................................................................................ 31
   4. Secondary Boycotts .......................................................................................................... 32
   5. Comparison to U.S. Law ................................................................................................. 32
E. Other Distribution Practices ................................................................................................ 32
   1. Market Restriction ............................................................................................................ 32
   2. Delivered Pricing ............................................................................................................. 33
   3. Foreign Refusal to Supply ............................................................................................... 33

IV. Mergers ................................................................................................................................. 33
A. Pre-Merger Notification ....................................................................................................... 34
V. Abuse of Dominance

A. Differences Between Canadian and U.S. Abuse of Dominance Law
   1. Abuse of Dominance is Not a Criminal Matter
   2. No Offence of Attempted Monopolization
   3. Administrative Monetary Penalties ("AMPs")
   4. No Private Right of Action
   5. Effect on Competition Must be Shown
   6. Superior Competitive Performance Must be Considered
   7. Does Not Apply to Intellectual Property

B. What is Dominance?
   1. Basic Test
   2. Market Share and Concentration Safe Harbours
   3. The Bottom Line

C. Measuring Dominance

D. Distinguishing Anti-Competitive Acts from Legitimate Competition
   1. What Constitutes a Practice?
   2. Subjective and Objective Intent
   3. Legitimate Business Justification
   4. Types of Anti-Competitive Practices
   5. Targeted Responses
   6. No General Requirement to Assist Competitors
   7. Exercise of Intellectual Property Rights

E. Substantially Preventing or Lessening Competition
VI. Misleading Advertising and Deceptive Marketing Practices ........................................53

A. Misleading Representations .........................................................................................54
   1. Key Elements of the Offence ......................................................................................54
   2. Liability for Misleading Representations ..................................................................55
   3. Rebate Offers .............................................................................................................56
   4. Performance Claims .................................................................................................57
   5. Disclaimers and Qualifications ................................................................................58
   6. Fines and Other Penalties .........................................................................................58
   7. Tests and Testimonials ...............................................................................................59

B. Pricing ..........................................................................................................................59
   1. Ordinary Price Claims ...............................................................................................59
   2. Bargain Prices and Bait and Switch Selling ...............................................................60
   3. Sale Above Advertised Price ....................................................................................61
   4. Double Ticketing .......................................................................................................61

C. Contests .......................................................................................................................62
   1. Competition Act Provisions .......................................................................................62
   3. Quebec Requirements ...............................................................................................63

D. Telemarketing ...............................................................................................................63

E. Pyramid Selling ............................................................................................................66

VII. Investigatory Powers and Confidentiality of Information .........................................67

A. Evidence Gathering ......................................................................................................67
   1. Section 11 Orders ......................................................................................................67
   2. Search and Seizure ....................................................................................................68

B. Interception of Private Communications: Wiretapping ...............................................69

C. Confidentiality of Information Obtained During an Investigation ..............................70
VIII. Private Competition Litigation.................................................................72
A. Historical Development of Private Litigation in Canada...............................73
   1. Private Actions for Damages ...............................................................74
   2. Class Actions .................................................................................77
B. Private Applications to the Competition Tribunal .......................................84
   1. Private Actions Related to Reviewable Practices ................................84
   2. Leave Requirement ........................................................................84
   3. Current Private Enforcement Record ................................................84
   4. Intervention by the Commissioner of Competition .............................85
IX. About Osler, Hoskin & Harcourt, LLP .......................................................86
   A. The Firm .......................................................................................86
   B. Competition & Foreign Investment Group ........................................86
X. Additional Resources ..................................................................................88
   A. Legislation ....................................................................................88
      1. Federal .....................................................................................88
      2. Provincial ................................................................................88
   B. Competition Bureau Publications ....................................................88
      1. Information Bulletins .................................................................88
      2. Guidelines ...............................................................................90
XI. Sample Form ............................................................................................92
   A. Search and Seizure Checklist ............................................................92
XII. Endnotes ................................................................................................94
I. Introduction

Canada’s *Competition Act*, R.S.C., ch. C 34 (1985) (“Competition Act” or “the Act”) applies to mergers, cartels, abuse of dominance (the Canadian equivalent of the American concept of monopolization) and a variety of pricing and distribution practices, as well as misleading advertising and deceptive marketing practices. While the Canadian law is similar in many respects to its U.S. counterpart—the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (“Sherman Act”)—it is different in a number of important ways, with U.S. enterprises doing business in Canada should bear in mind. One point to mention at the outset is that Canadians generally use the term *competition law* rather than *antitrust law*, which is more common in the U.S.

A. Historical Development of Competition Law in Canada

Canadian competition law has a venerable heritage, going back more than a century. Indeed, the precursor of the current *Competition Act* predates the *Sherman Act* by one year. However, for a variety of reasons—such as uncertainty about the federal government’s constitutional authority to legislate in the area of business competition—the Act’s development was hampered for much of this time. It is only within the last few decades that the *Competition Act* has become a modern statute.

One significant factor in the development of the Act is that until 1976, it was exclusively criminal in nature, meaning that criminal provisions covered even mergers and monopoly. The criminal law requirement of proof beyond a reasonable doubt, which is difficult to achieve in areas such as mergers, abuse of dominance, and distribution practices, resulted in significant enforcement difficulties. The Canadian government gradually replaced many of these criminal prohibitions with civil law-based remedial provisions and remedies. However, the *Competition Act* continues to include a number of important criminal provisions relating to matters such as conspiracy and bid rigging.

For many years, private parties had no ability to enforce any provisions of the *Competition Act*. The enforcement authority rested exclusively with the Commissioner of Competition (“Commissioner”) and the Attorney General of Canada. Again, legislative changes in more recent times have allowed private enforcement, although in a more limited form than in the U.S.

The fact that there is little competition law jurisprudence in Canada reflects the early stage of the Act’s evolution, the limited enforcement resources of the federal Competition Bureau (“Bureau”), and other factors, including the reality that even, today, private competition law litigation is relatively rare in Canada (other than private and class actions for the recovery of damages, which are becoming more common).

B. Significant Amendments to the *Competition Act* in 2009

In March 2009, important changes were made to the *Competition Act* through the passage of Bill C-10, The Budget Implementation Act (2009) (“Bill C-10”). The amendments introduced by Bill C-10 have brought about the most significant changes to the *Competition Act* in over two decades.

The amendments fundamentally restructure Canadian conspiracy laws (introducing a dual track