



2011 TRENDS

Blakes
CANADIAN LAWYERS

COMPETITION LAW AND FOREIGN
INVESTMENT REVIEW

2011 Top Trends in Competition Law and Foreign Investment Review

CLOSE SCRUTINY OF STRATEGIC M&A:

While strategic transactions are by no means restricted to periods of economic distress, the global financial downturn has created many opportunities for international players to grow their businesses by purchasing undervalued rivals. Not surprisingly, the Canadian Competition Bureau has vigorously enforced its mandate under the *Competition Act*, not hesitating to use the new tool of issuing a supplementary information request (SIR) if it believes one is warranted. To date, the Bureau has issued 10 SIRs (Blakes has handled seven of the 10). The Bureau has also brought its first full merger challenge since 2005. The challenge involves an already completed merger and asserts that the merger prevents future competition in the B.C. landfill market. In short, the Bureau has shown vigilance in reviewing acquisitions and should be expected to continue to do so in all future cases of significance. By corollary, mergers that do not raise serious issues are, in our experience, being cleared very quickly.

USE OF SUPPLEMENTARY INFORMATION REQUESTS AND TIMING AGREEMENTS:

Since the amendments that created the SIR process came into force in March 2009, the Bureau has issued 10 SIRs. The timeframe for compliance with a SIR has ranged from 23 days to 156 days. In addition, there has been an uptick in the Bureau's use of timing agreements. The Bureau uses timing agreements in two situations: (1) where the parties agree to answer questions and give the Bureau time to complete its review in lieu of the issuance of a SIR; and (2) where the parties comply with the SIR and in order to avoid litigation agree to a notice period before closing. Going forward, parties with commercial deadlines should be aware of such timing agreements, the practical effect of which may be to extend the period during which the parties may not close their transaction beyond the statutory timeframe set out in the *Competition Act*.

EVOLVING LANDSCAPE FOR PROCEDURAL AND SUBSTANTIVE REVIEW PROCESS:

Following the release of revised horizontal merger guidelines in the U.S., the Bureau announced that it would hold a series of roundtables and would solicit feedback on the topic of whether similar revisions were necessary in Canada. The Bureau completed the roundtables in December 2010. If it decides to proceed with a revision of its *Merger Enforcement Guidelines*, this ultimately could lead to further alignment between the Canadian and American substantive merger review processes.

INTERNATIONAL CO-OPERATION AMONG REGULATORS:

Given the continually expanding depth and breadth of international economic activity, the Bureau considers it increasingly important to co-ordinate its investigations with foreign antitrust agencies. The Commissioner has stressed that the Bureau frequently and closely co-operates with its U.S. and European counterparts. Such international co-operation gives rise to a host of strategic considerations for clients.

JUDICIOUS USE OF NATIONAL SECURITY REVIEW:

Following the federal government's interim determination that BHP Billiton's offer to acquire Potash Corporation of Saskatchewan was not likely to result in a "net benefit" to Canada (and BHP's subsequent withdrawal of its offer), some media commentators predicted the transaction was a harbinger of increasing opposition of foreign investment in Canada. However, the net benefit analysis under the *Investment Canada Act* had only been used once to reject a proposed foreign investment since the act's inception in 1985, and the government continues to make sparing use of the relatively new (2009) national security review mechanism (which was not used in the BHP review). At the same time, the government is expected to

continued on reverse.

provide clarification surrounding the net benefit test in the near future. The foregoing suggests that, while the government's preliminary response to BHP's offer does not foreshadow any significant change to its generally welcoming approach to foreign investment, such investment may be liable to attract heightened scrutiny, particularly when it raises issues of political significance.

BUREAU FOCUS ON UNILATERAL CONDUCT:

The Bureau has also increased its efforts to pursue potential violations of the *Competition Act* outside of the merger provisions. One example of this trend is the Commissioner of Competition's recent high-profile proceedings against the Canadian Real Estate Association (CREA), which was alleged to have abused its dominant position in the supply of real estate listings to home buyers and sellers via its proprietary Multiple Listing System (MLS). It also recently launched a case against MasterCard and Visa. The Bureau has been similarly vigilant in its pursuit of those engaged in misleading advertising and other misleading promotions throughout 2010 (one high-profile example is the Bureau's proceedings against Rogers Communications Inc.). Businesses that have a dominant position in any market or that offer products or services to the public through advertising or promotions would be prudent to keep apprised of this trend.

CARTEL ENFORCEMENT – PURSUING NAKED RESTRAINTS

With the amendment of the cartel provisions in Canada to render "naked restraints," such as price fixing, per se illegal and the finalization of the leniency program, the "modernization" of Canada's cartel enforcement regime is complete and ripe for enforcement action. The Criminal Branch's focus will be to continue to pursue both domestic cartels and bid-rigging, hoping to test the new provision, and reinvigorate its historic pursuit of international cartels by working even more co-operatively with other antitrust authorities, notably, the U.S. Department of Justice. Going forward, the convergence of Canada's cartel provisions with that of the U.S. and the many mutual legal assistance treaties should facilitate these efforts. So, the coming years should - with all the "ducks in a row" - be banner years for cartel enforcement with cartel conduct remaining the principle focus of the Bureau's enforcement efforts.

PRIVATE ACTIONS PREDICTED TO INCREASE

Private actions, particularly class actions in respect of alleged price fixing, have become common in Canada. Recent decisions, for example in DRAM in B.C. and hydrogen peroxide in Ontario, have appeared to lower the bar to class certification in indirect purchaser cases.