A PRACTICAL GUIDE TO *COMPETITION ACT* COMPLIANCE IN THE OIL AND GAS INDUSTRY

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Compliance with the Competition Act *is important to the oil and gas industry. The authors provide an overview of select issues under the* Act *and practical guidance on how to manage these issues.*

The article provides a framework for the oil and gas industry to use in dealing with competitors, customers, and the Competition Bureau. The authors provide an overview of competition law compliance programs and note the impact of regulation.

Dans le secteur pétrolier et gazier, il est important de respecter la Loi sur la concurrence. *Les auteurs donnent un aperçu de certaines questions en vertu de la Loi ainsi que des conseils pratiques pour gérer ces questions.*

Cet article énonce un cadre que le secteur pétrolier et gazier peut utiliser avec ses concurrents, ses clients et le Bureau de la concurrence. Les auteurs donnent un aperçu des programmes de conformité de la loi sur la concurrence et en précisent l'effet sur la réglementation.

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I. INTRODUCTION

This article will provide an overview of select issues under the *Competition Act*[1] that are applicable to oil and gas industry participants and provide practical guidance on how to manage such issues.[2]

A brief history and overview of the *Competition Act*, and of investigations commenced under the *Act* into oil and gas industry activities, including the various examinations into retail gasoline pricing practices, will be provided.

The article then goes on to explain and provide guidance to participants engaged in activities with competitors and with customers, with a focus on those provisions in the *Competition Act* dealing with the following issues: conspiracy (such as agreements to fix prices or limit production and other agreements to limit competition), bid-rigging in response to a request for bids, price maintenance, abuse of dominance, and mergers. In addition, this section of the paper will examine specific types of arrangements with competitors, such as joint ventures, supply arrangements, exchange of information, participation in trade associations (including lobbying activities), and pricing practices with customers.

From there, the article examines the regulated conduct defence as it applies to oil and gas industry participants.

The latter part of this article provides advice to oil and gas industry participants who are either subject to an investigation by the Competition Bureau (the Bureau) as a target, or as a third party who has relevant information in connection with either a formal notification of a proposed merger or an investigation into the conduct of an industry participant that may offend the *Competition Act*. Practical advice will be provided with regard to the purpose, establishment, and effectiveness of *Competition Act* compliance programs with a view to

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1 R.S.C. 1985, c. C-34 [also referred to as the *Act*].

2 Papers presented at previous Canadian Petroleum Law Foundation conferences that have addressed competition law issues in the context of the oil and gas industry include: William R. Prueter, "Resource Sector Perspectives on Canadian Competition Policy" (1979) 17 Alta. L. Rev. 26; Calvin S. Goldman, "A Perspective on Merger Review and Other Current Topics Under the Competition Act" (1991) 29 Alta. L. Rev. 171; Harry Chandler, "Competition Law Issues in the Upstream Oil and Gas Industry" (1993) 31 Alta. L. Rev. 72.

ensuring that both external and internal communications do not inadvertently appear to provide evidence of an offence under the *Act*.

II. HISTORICAL PERSPECTIVE

A. HISTORY OF THE *COMPETITION ACT*

The regulation of commerce and competition has a long history that dates back to England in the Middle Ages. Canada inherited a great deal of common law regarding the restraint of trade even before the country first enacted legislation in 1889. The first legislation, *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*[3] was enacted under Parliament's criminal law power to remedy perceived shortcomings of the common law as they related to the restraint of trade.[4]

The 1889 *Act* was repealed in 1892, and the prohibition against combinations was included in the *Criminal Code*..[5] In 1910, Parliament introduced *The Combines Investigation Act*,[6] which enabled the Minister of Labour to investigate suspected combines and to obtain necessary evidence. In 1919, the *Combines and Fair Prices Act, 1919*,[7] and *The Board of Commerce Act*[8] were enacted, which were replaced in 1923 by *The Combines Investigation Act, 1923*.[9] The 1923 *Act* largely remained in force until 1952, when Parliament enacted a new C*ombines Investigation Act*,[10] which was a major overhaul of competition law in Canada. Competition law again faced major overhauls in 1976 and 1986 when the *Combines Investigation Act* was repealed and replaced by the *Competition Act*,[11] which applies today.

B. COMMISSIONS, INQUIRIES, AND INVESTIGATIONS

Over the years, the oil and gas industry has been the subject of several commissions, inquiries, and investigations concerning competition within the industry and many technical, economic reports, including those in respect of the price volatility of oil and gas in Canada vis-à-vis world prices, and of the impact of independents in an area on the price of gasoline.[12]

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3 52 Vict. 1889, c. 41.

4 John M. Magwood, *Competition Law of Canada* (Toronto: Carswell, 1981) at 42.

5 S.C. 1892, c. 29.

6 9-10 Edw. VII, 1910, c. 9.

7 9-10 Geo. V, 1919, c. 45.

8 9-10 Geo. V, 1919, c. 37.

9 13-14 Geo. V, 1923, c. 9.

10 R.S.C. 1952 (1st Supp.), c. 314.

11 *Supra* note 1. For an overview of the history of the *Act*, see John D. Bodrug & Calvin S. Goldman, *Competition Law of Canada* (Huntington, N.Y.: Juris, 1995).

12 Competition Bureau, *The Effects of Recent Volatility in International Petroleum Markets on Canadian Wholesale and Retail Gasoline Prices*, Prepared by Frank Roseman (March 2005), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00185e.html>; Anindya Sen, "Does Increasing the Market Share of Smaller Firms Result in Lower Prices? Empirical Evidence from the Canadian Retail Gasoline Industry" (2005) 26 Review of Industrial Organization 371; Competition Bureau, "Annex: Update of Four Elements of the January 2001 Conference Board Study: 'The Final Fifteen Feet of Hose: The Canadian Gasoline Industry in the Year 2000'" (5 May 2003), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01433e.html>; Competition Bureau, "Gasoline Empirical Analysis: Update of Four Elements of the January 2001 Conference Board Study: 'The Final Fifteen Feet of Hose: The Canadian Gasoline Industry in the Year

These include the following papers:

(1) Alberta's Royal Commission on Matters Connected with Petroleum and Petroleum Products issued its report in 1940, which examined a wide range of issues relating to how the Alberta petroleum industry operated and considered the desirability of either nationalizing the oil resources or regulating the prices of the market participants;[13]

(2) The 1958-59 Royal Commission on Energy (referred to as the Borden Commission) which ultimately led to the creation of the National Oil Policy, the precursor to the National Energy Program;[14]

(3) *The State of Competition in the Canadian Petroleum Industry*, also known as the Green Book, submitted by the Director of Investigation and Research to the Restrictive Trade Practices Commission on 27 February 1981;[15]

(4) The *1986 Restrictive Trade Practices Commission Report on Competition in the Petroleum Industry* pursuant to which the Restrictive Trade Practices Commission held a series of hearings across Canada to assess complaints regarding, among other matters, the retail price of gasoline, the degree of vertical integration, and alleged collusion among participants (including, for example, supply arrangements among refiners to allegedly restrain price competition in the retail marketing sector);[16]

(5) The Parliamentary Report *Gasoline Pricing in Canada*, issued in November 2003 by the Standing Committee on Industry, Science and Technology of Parliament, which considered allegations of collusion and price volatility of crude oil, rack (or wholesale), and retail gasoline from 2002-2003;[17] and

(6) Numerous investigations and examinations conducted under the *Competition Act* and its predecessor legislation into allegations of collusion with respect to the retail gasoline industry, including six major investigations conducted by the Bureau from

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2000'" (March 2005), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00223e.html>.

13 Alberta, Royal Commission to Inquire into Matters Connected with Petroleum and Petroleum Products, *Alberta's Oil Industry: Report of a Royal Commission to Inquire into Matters Connected with Petroleum and Petroleum Products* (Edmonton: King's Printer, 1940) (Chair: A.A. McGillivrary).

14 Royal Commission on Energy, *Second Report* (Ottawa: Queen's Printer, 1959).

15 Robert J. Bertrand, Director of Investigation and Research Combines Investigation Act, *The State of Competition in the Canadian Petroleum Industry: Statement of Evidence and Material Submitted to the Restrictive Trade Practices Commission in Connection with an Inquiry under Section 47 of the Combines Investigation Act*, vol. 1 (Hull, Que.: Supply and Services Canada, 1981).

16 Restrictive Trade Practices Commission, *Competition in the Canadian Petroleum Industry*, (Ottawa: Minister of Supply and Services Canada, 1986) (Chair: O.G. Stoner) [*Restrictive Trade Practices Commission Report*].

17 House of Commons Debates, Standing Committee on Industry, Science and Technology, "Gasoline Pricing in Canada" in *Official Report of Debates* (*Hansard*), No. 153 (7 November 2003) at 9320.

1990 through 2007,[18] in which the Bureau did not find any evidence of conspiracy, and instead concluded that price increases were caused by market forces, such as supply and demand, and rising crude prices.

Notwithstanding the significant scrutiny of the oil and gas industry over the years by various government entities, including the Bureau, the only successful prosecutions have been for price maintenance in the retail gasoline industry in various local markets.[19] In addition, in 1990 there was a consent order granted by the Competition Tribunal (the Tribunal) in respect of the 1989 acquisition of Texaco Canada Inc. by Imperial Oil Limited.[20] In 2000, an application for a consent order was refused by the Competition Tribunal in connection with the proposed acquisition by Ultramar Ltd. of a petroleum product terminal facility and wholesale supply business operated by Coastal Canada Petroleum Inc.[21]

III. OVERVIEW OF THE *COMPETITION ACT*

A. PURPOSE OF THE *ACT*

The *Competition Act* is a federal statute that is designed to promote competition in Canada. The purpose of the *Act* is to: maintain and encourage competition in Canada

> in order promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and in order to provide consumers with competitive prices and product choices.[22]

B. ADMINISTRATION OF THE *ACT*

The *Act* is administered and enforced by the Bureau under the direction of the Commissioner of Competition (Commissioner).

The Bureau is an independent law enforcement agency that investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction. The Bureau also co-operates with its counterparts in other countries and participates in the activities of the International Competition Network (ICN) and the Organization for Economic Co-operation and Development (OECD), in order to develop and promote coordinated competition laws and policies.

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18 Competition Bureau, Backgrounder, "Discontinued Inquiries Concerning Canada's Gasoline Industry" (March 1998), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00826.html>; Sheridan Scott, Commissioner of Competition, "Fuel/Gasoline Prices in Canada," Speaking Notes for the Standing Committee on Industry, Natural Resources, Science and Technology, Ottawa (22 September 2005), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01946e.html>.

19 For further information, see Part V.B, below.

20 *Canada (Director of Investigation and Research) v. Imperial Oil Ltd.* (1990), 31 C.P.R. (3d) 284.

21 *Canada (Commissioner of Competition) v. Ultramar Ltd.*, 2000 Comp. Trib. 4, 6 C.P.R. (4th) 519.

22 *Supra* note 1, s. 1.1.

The Commissioner has the power to commence an inquiry whenever she has reason to believe that an offence has been or is about to be committed, that grounds exist for obtaining an order from the Tribunal, or that an order granted pursuant to the *Act* has been contravened. An inquiry must also be commenced by the Commissioner when directed by the Minister of Industry, or when an application for an inquiry has been sought by six Canadian residents pursuant to the provisions of s. 9 of the *Act*.[23] Inquiries are conducted in private.[24] Once an inquiry has been commenced, the Commissioner has very broad investigative powers, which are described in Part VII, of this article.

The Bureau investigates anti-competitive conduct, but when such conduct involves the criminal provisions of the *Act*, the matter will be referred to the Director of Public Prosecutions who then decides whether the matter will be prosecuted. The Commissioner has the power to bring civil matters before the Tribunal.

C. STRUCTURE OF THE *ACT*

The *Competition Act* relies upon a combination of criminal offences, civil reviewable practices, and private enforcement remedies to achieve its objectives.

1. CRIMINAL OFFENCES

The criminal provisions are contained in Part VI of the *Act*. Certain competitive practices, including conspiracies, bid-rigging, price maintenance, price discrimination, predatory pricing, and some forms of misleading advertising, constitute offences under the *Act*. The criminal law burden of proof applies in respect of these provisions and the prosecution is required to establish every element of an offence beyond a reasonable doubt in order to obtain a conviction. Both corporations and individuals can be charged under the *Act*, and the penalties upon conviction can involve fines up to CDN$10 million and/or jail terms of up to five years for each offence.

Some of these practices, such as bid-rigging and price maintenance, are prohibited regardless of the underlying business purpose or the absence of competitive injury. Others, such as conspiracies and predatory pricing, will only be objectionable if they fail a competitive effects test, that is, if they are likely to unduly or substantially prevent or lessen competition.

2. CIVIL REVIEWABLE PRACTICES

Other competitive practices, such as exclusive dealing and tied selling arrangements, market restrictions (including exclusive territories), abuse of dominant position, refusal to deal, and mergers, are governed by the civil provisions contained in Part VIII of the *Act*. These practices are reviewable by the Tribunal, which is a specialized tribunal comprised of a combination of Federal Court judges and lay members. The Tribunal also has jurisdiction

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23 *Ibid.*

24 *Ibid.*, s. 10(3).

under Part VII.1 of the *Act* to grant relief with respect to some forms of misleading advertising and other deceptive marketing practices.[25]

With respect to most reviewable practices, the primary remedies available to the Tribunal are granting orders that prohibit the conduct in question. In the case of abuse of dominant position, the Tribunal also has a broad power to order the parties to take actions that are reasonable and necessary to overcome the effects that the abuse of dominant position has had in the market.[26] In merger cases, the Tribunal can dissolve the merger, direct the parties to dispose of assets or shares, or take other actions with the consent of the parties involved.[27] Administrative monetary penalties are available in respect of certain provisions of the *Act*.[28] The Tribunal also has the ability to award costs.[29]

3. PRIVATE REMEDIES

A party who suffers loss or damage as a result of a breach of the criminal provisions in Part VI of the *Act* can bring a civil action for recovery, whether or not there was a prosecution.[30] A civil action cannot be brought under this section in respect of the reviewable practices in Part VIII of the *Act*, except where a person has suffered a loss or damage as a result of a breach of an order granted by the Tribunal in respect of a reviewable matter. In some circumstances, an injured party may also have other common law remedies available to them, such as the torts of conspiracy, restraint of trade, inducing breach of contract, or unlawful interference with contractual relations.

Previously, the Commissioner was the only entity who could bring applications to the Tribunal in respect of the reviewable practices in Part VIII of the *Act*. Since 2002, however, private parties can seek leave from the Tribunal[31] to bring applications in respect of the refusal to deal,[32] exclusive dealing, tied selling, and market restriction provisions only.[33] Private applications are not available in respect of the other reviewable practices in the *Act*, such as abuse of dominant position or mergers. Private parties are not entitled to seek damages, and are limited to the same remedies that would have been available if the application had been initiated by the Commissioner.

Unlike the United States, where private treble damages actions represent a significant part of antitrust law, private competition actions in Canada have historically tended to be rather limited. However, the availability of class actions in various provinces, including Ontario,

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25 *Ibid.*, s. 74.01-74.08.

26 *Ibid.*, s. 79(2).

27 *Ibid.*, s. 92(1).

28 In the case of deceptive marketing practices, the Tribunal can award administrative monetary penalties of up to CDN$50,000 for individuals ($100,000 for subsequent orders), or $100,000 for corporations ($200,000 for subsequent orders) pursuant to arts. 74.01(1)(c)(i)-(ii) of the *Competition Act*. Administrative monetary penalties of up to $15 million are also available for abuse of dominance by those who operate a "domestic service," as defined in s. 55(1) of the *Canada Transportation Act*, S.C. 1996, c. 10, pursuant to ss. 79(3.1)-(3.3) of the *Competition Act*.

29 *Competition Tribunal Act*, R.S.C. 1985 (2nd Supp.), c. 19, s. 8.1.

30 *Supra* note 1, s. 36.

31 *Ibid.*, s. 103.1.

32 *Ibid.*, s. 75.

33 *Ibid.*, s. 77.

Quebec, and British Columbia, has led to a significant increase in private litigation over the past few years.[34]

IV. DEALING WITH COMPETITORS

The nature of the oil and gas industry is such that participants frequently have occasion to deal with their competitors. While most of these dealings are benign or positive from a competitive perspective, some transactions can raise competitive concerns. The Bureau views anti-competitive horizontal arrangements amongst competitors, both domestic and international, as among its top enforcement priorities.[35] As a result, care should be taken in all dealings involving competitors in order to avoid both concerns under the *Act*, and the appearance of anti-competitive conduct.

Below is a summary of the principal provisions of the *Act* that may apply in dealings involving competitors, which are those provisions dealing with conspiracy, bid-rigging, price maintenance, abuse of dominance, and mergers. This is followed by some practical guidelines for dealing with competitors in a way that avoids triggering potential concerns under the *Act*.

A. PROVISIONS OF THE *ACT* APPLICABLE TO DEALINGS WITH COMPETITORS

1. CONSPIRACY

Cartel activity is prohibited by the conspiracy provisions contained in s. 45 of the *Competition Act*.[36] A conspiracy occurs when two or more persons enter into an agreement or arrangement that would result in an undue prevention or lessening of competition for goods or services in a market in Canada. For example, a conspiracy could involve:

(1) price fixing arrangements;

(2) production agreements to limit output or capacity;

(3) allocation agreements to divide markets or customers among competitors;

(4) standardization agreements to suppress quality competition (for example, agreeing to reduce service levels or the introduction of new products); or

(5) agreement to boycott or refusal to deal with certain suppliers or customers.

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34 See Michael Osborne, "And the Money Keeps Rolling (In and Out) - Conspiracy Class Action Settlements After *Chadha v. Bayer*" (2006) 22 Can. Comp. Rec. 115.

35 Sheridan Scott, Commissioner of Competition (Speaking notes for the Canadian Bar Association Annual Fall Conference on Competition Law, Hilton-Lac-Leamy, Gatineau, 28 September 2006) [unpublished].

36 *Supra* note 1, s. 45. For an overview of conspiracy law under the *Act*, see Brian A. Facey & Dany H. Assaf, *Competition & Antitrust Law: Canada and the United States*, 3rd. ed. (Markham: LexisNexis Butterworths, 2006) at 131-93; C.J. Michael Flavell & Christopher J. Kent, *The Canadian Competition Law Handbook* (Scarborough: Carswell, 1997) at 131-42; Robert E. Kwinter & Kikelomo Lawal, "Canadian Conspiracy Law" (Paper presented at the Insight Conference, Toronto, 26-27 May 2004).

An essential element of a conspiracy is an "agreement or arrangement," which has been interpreted broadly by the courts and includes both formal and informal agreements.[37] Illegal agreements can be written, oral, express, implied, or inferred from business conduct. An agreement does not necessarily require direct communication. In certain circumstances, merely exchanging sensitive information may be construed as evidence of an agreement.

Another essential element that must be established by the Crown in a successful conspiracy prosecution is that competition would likely be "unduly" lessened or that prices would likely be enhanced "unreasonably."[38] The courts have developed a two-part test to make this determination.[39] The first component involves an assessment of the market structure in the relevant geographic and product markets that would be affected by the agreement to determine whether the parties to the agreement have market power. Market power has been defined as the ability to behave independently of the market in a passive way, and depends upon a combination of factors such as the parties' market share, the number and concentration of other competitors, the presence or absence of barriers to entry, geographic distribution of market participants, the degree of product differentiation, countervailing power, and the cross elasticity of demand.[40]

The second component involves an examination of the nature of the agreement itself and the extent to which it contemplates behaviour likely to injure competition. This analysis will include consideration of the objects of the agreement, the manner in which it was to be carried out, and the dimensions of competition affected. Unlike the merger provisions of the *Act*, there is no formal defence for efficiency-enhancing elements of an agreement, although the presence of efficiencies could be considered in assessing whether the behaviour in question is injurious to competition.

As the offence is the agreement to unduly lessen competition, a person who agrees to carry out a conspiracy, but later refuses to put the plan into effect, is still guilty.[41]

The *Act* recognizes a number of permitted areas for communication and co-operation, and provides a defence in a conspiracy prosecution for arrangements or agreements that relate only to one or more of the following matters:

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37 Flavell & Kent, *ibid.* at 133-34.

38 *Competition Act*, *supra* note 1, s. 45(1).

39 See *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.R. 606.

40 *Ibid.*

41 For additional discussions of the conspiracy provisions of the *Act*, see D. Martin Low, "Cartel Enforcement, Immunity and Jurisdiction: Some Recent Canadian Developments" (Paper presented at the International Bar Association Communications and Competition Law Conference, Rome, Italy, 17-18 May 2004) [unpublished]; Russell W. Lusk & Craig R. Chiasson, "Criminal Investigations by the Competition Bureau" (Paper presented at the Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, 3-4 November 2005) [unpublished]; Donald G. McFetridge, "Horizontal Agreements as Reviewable Practices" (Paper presented at the Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, October 2002) [unpublished]; Lori A. Cornwall & Mark Katz, "Criminal Fundamentals: Horizontal Agreements Between Competitors" (Paper presented at the Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, October 2002) [unpublished].

(a) the exchange of statistics;

(b) the defining of product standards;

(c) the exchange of credit information;

(d) the definition of terminology used in a trade, industry or profession;

(e) cooperation in research and development;

(f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;

(g) the sizes or shapes of containers in which an article is packaged;

(h) the adoption of the metric system of weights and measures; or

(i) measures to protect the environment.[42]

However, the defence is quite limited as it is not available where the arrangement unduly lessens competition in respect of prices; quantity or quality of a production; markets or customers; channels or methods of distribution; or where the arrangement restricts entry or expansion in a trade, industry, or profession.[43]

While the conspiracy provisions in the *Act* prohibit agreements that would unduly lessen competition, it is difficult to determine whether this will occur in the circumstances of a particular case without conducting a complete market analysis. Further, the jurisprudence that has developed in the U.S. in respect of the *Sherman Antitrust Act*,[44] which prohibits combinations or conspiracies in restraint of trade, utilizes both a "*per se*" and a "rule of reason" approach to analyze different types of horizontal arrangements. Some arrangements, which are considered to lack any redeeming virtue, such as price fixing, market or customer allocations, or group boycotts, are conclusively presumed unreasonable and illegal without further enquiry. Other arrangements are assessed using the "rule of reason" approach to determine their net overall competitive effect.[45] As a consequence, some businesses in the Canadian oil and gas sector, particularly those that are associated with operations in the U.S., or whose businesses might affect commerce in the U.S., should instruct their employees to avoid discussions or agreements with competitors that would offend the rules in either country.

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42 *Supra* note 1, s. 45(3).
43 *Ibid.*, s. 45(4).
44 15 U.S.C. (1890) [*Sherman Act*].
45 Facey & Assaf, *supra* note 36 at 179-86.

2. BID-RIGGING

The *Act* also prohibits bid-rigging, which involves:

> (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or
>
> (b) the submission, in response to a call or request for bids or tenders, of bids and tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
>
> where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.[46]

Bid-rigging is a *per se* offence; that is, the prosecution does not need to prove an anti-competitive purpose or effect to secure a conviction. Examples of bid-rigging are agreements to rotate bids or to not bid in one market in exchange for another party not bidding in another market, where such agreements are not made known to the person calling for the bids. This concept could apply to tenders for petroleum and natural gas rights. Oil and gas companies are often the recipient of bids and can benefit from the prohibition against bid-rigging. Their procurement groups should be instructed to contact counsel in the event that they suspect bid-rigging by suppliers.

As with the conspiracy provisions, bid-rigging is not an offence if the participants are all affiliates.[47]

3. PRICE MAINTENANCE

Price maintenance occurs when a party attempts to control the sale price of a product sold by another party through prohibited means. It is a *per se* criminal offence under the *Act* that arises when a person, "directly or indirectly, by agreement, threat, promise or any like means, attempts to influence upward, or to discourage the reduction of, the price at which any other person supplies or offers to supply or advertises a product."[48]

Price maintenance is one of the most common and easily prosecuted offences under the *Act*. The attempt need not be successful, and the prosecution does not have to prove any anti-competitive effect or that the person charged with price maintenance has any market power to support a conviction. This provision is particularly onerous on the supplier, as the supplier (as opposed to the other contracting party) is the party guilty of an offence under the *Act*.

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46 *Supra* note 1, s. 47.
47 *Ibid.*, s. 47(3).
48 *Ibid.*, s. 61(1)(a).

A necessary element of the offence is the use of the prohibited means set out in the section, that is, an "agreement, threat, promise or any like means." As a result, attempts to maintain or increase prices which merely involve good faith discussions, advice, or suggestions may not offend the *Act*. Notwithstanding the foregoing, whether conduct is more properly characterized as a "request" as opposed to a "threat" or a "promise" may be difficult to assess. Generally speaking, parties should recognize that courts may interpret these words broadly and should not engage in such conduct without prior consultation with counsel.

To the extent that a supplier qualifies as an "agent" or "affiliate" of the other person, any arrangement between such persons would not raise issues under the price maintenance provisions.[49]

While price maintenance cases typically deal with vertical arrangements, for example, where a supplier attempts to set a minimum price at which its distributor sells the supplier's products, price maintenance also applies to horizontal arrangements where a party attempts to improperly influence a competitor's prices using prohibited means. For example, this could arise in the context of the oil and gas industry where processing facilities are owned jointly by more than one party and operated on the basis that each owner will have a designated share of capacity that they are at liberty to use for their own production or to make available to third parties. In such circumstances, where the joint owners are competing to market their excess capacity, attempts by one owner to influence the price charged by the other owner upwards could constitute price maintenance if the methods used involved prohibited means.

An advantage to challenging such conduct under the price maintenance provisions, as opposed to the conspiracy provisions, is that price maintenance is a *per se* offence and therefore would be easier to prove. The price maintenance provisions merely require the prosecutor or plaintiff to establish an attempt to influence prices improperly by prohibited means, as opposed to the additional requirement under the conspiracy provisions to establish an agreement that would lead to a likely undue prevention or lessening of competition, or unreasonable enhancement of prices.

4. ABUSE OF DOMINANCE

Abuse of dominant position occurs when a firm (or firms), which substantially or completely controls a business in an area of Canada, is engaged in a practice of anti-competitive acts that has had, is having, or is likely to have, the effect of preventing or lessening competition substantially.[50] Joint dominance may arise in a market where no one competitor is clearly dominant, but which is relatively highly concentrated.[51]

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49 *Ibid.*, s. 61(2).

50 *Ibid.*, s. 79(1). See also Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (July 2001), online: Competition Bureau <http://strategis.ic.gc.ca/pics/ct/aod.pdf>.

51 For a discussion of joint dominance, see John D. Bodrug, "Joint Dominance" (2003) 21 Can. Comp. Rec. 104.

The abuse of dominance provision is not designed to establish equality among competitors or penalize efficient firms for engaging in legitimate, aggressive competitive behaviour. Instead the purpose is to limit the ability of a dominant firm (or group of firms) from engaging in conduct that is intended to eliminate or discipline a competitor, or to deter future entry by new competitors with the result that competition is prevented or lessened substantially.[52]

While the *Act* does not define the phrase "anti-competitive act," the *Act* contains a non-exclusive list of anti-competitive acts; ss.78(1)(e), (f), (h), and (i) specifically include:

> (e) pre-emption of scarce facilities or resources required by a competitor;
>
> (f) buying up products to prevent the erosion of existing price levels;
>
> …
>
> (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing entry into or expansion in a market [by a competitor];
>
> (i) selling articles at a price lower than acquisition cost for the purpose of disciplining a competitor.[53]

The phrase "anti-competitive acts" has been interpreted to apply to acts where "the requisite purpose is an *intended predatory, exclusionary or disciplinary negative effect on a competitor*," where the purpose or overall character of the act can be determined by considering such factors as "the reasonably foreseeable or expected objective effects of the act (from which intention may be deemed …), any business justification, and any evidence of subjective intent, if available."[54]

Where the Tribunal determines that a firm (or firms) has engaged in abuse of dominant position, it may make an order prohibiting the firm(s) from engaging in the anti-competitive acts and, if necessary, requiring the firm to take steps to restore competition in the market.[55]

Whether or not a firm(s) controls a market depends upon whether the firm possesses market power.[56] Given the nature of the oil and gas industry, it is often assumed that oil and gas industry participants cannot be characterized as possessing market power in any market.

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52 For a discussion of abuse of dominance provisions and enforcement activities, see Denis Gascon, "Abuse of Dominance in Canada" (Paper presented to the Insight Conference, Toronto, 26-27 May 2004); Facey & Assaf, *supra* note 36 at 235-66.

53 *Supra* note 1, ss. 78(1)(e)-(f), (h)-(i).

54 *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] F.C. 3 at paras. 64, 67, adopting the Tribunal's definition of "anti-competitive act" put forth in *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 [emphasis in original].

55 *Competition Act*, *supra* note 1, s. 79(2).

56 For a brief discussion of market power, refer to Parts IV.A.5 and IV.B.8 of this article, below. In addition, the Tribunal has recently considered market power in *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2005 Comp. Trib. 3 at para. 138. While this decision was reversed in 2006 FCA 236, [2007] F.C. 57, the Tribunal's findings with respect to market power were affirmed.

This assumption is based on the number of participants in the Canadian oil and gas industry and because oil and gas are internationally traded commodities. However, this assumption fails to recognize the regional nature of some aspects of the oil and gas industry, and the degree of integration of many participants. To the extent, for example, that a firm (or group of firms) controls all or most of the transportation of an energy product between two regions, the processing of an energy product within a particular region, or the downstream distribution or retail facilities in a region, such firms may control a market and be characterized as dominant under the *Act* and, accordingly, should take care to avoid acts that may be characterized as anti-competitive.

In order to avoid any allegation of abuse of dominant position, it is recommended that any firm possessing a degree of market power avoid engaging in acts which may be characterized as anti-competitive without first assessing with counsel the likely impact on competition. These acts include engaging in: (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market; (b) pre-emption of scarce facilities (for example, acquiring a pipeline or facility in order to deny access by third parties) or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market; or (c) any other type of conduct designed to impede or prevent a competitor's entry into or expansion in a market.

5. MERGERS AND ACQUISITIONS

Every party to a proposed transaction involving operating businesses (including amalgamations, combinations and acquisitions of assets, shares (above certain levels), or interests in a combination) above a certain financial threshold is required to file a pre-merger notification with the Bureau.[57] Generally pre-merger notification of a transaction involving the acquisition of shares or assets is required where:

(1) the parties to the transaction, together with their affiliates, have assets in Canada that exceed CDN$400 million in aggregate value, or had gross revenues from sales in, from or into Canada that exceed $400 million determined during the last audited fiscal year; and

(2) (a) in the case of an acquisition of assets, the aggregate book value of the assets in Canada to be acquired would exceed CDN$50 million or the gross revenues from sales in or from Canada generated from such assets would exceed $50 million in the last audited year; or

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[57] For a discussion of merger review under the *Act*, see Facey & Assaf, *supra* note 36 at 195, n. 1; John D. Bodrug, Mark Katz & Lori Cornwall, "Key Aspects of the Canadian Merger Review Process in the Context of International Mergers" (Paper presented to the Insight Conference, 22 March 2002); James Musgrove & Janine MacNeil, "Substantive Issues in Canadian Merger Control: A Practical Guide" (Paper presented to the Ontario Bar Association Business Law Section Essentials of Competition Law, Toronto, 13 May 2002).

(b) in the case of an acquisition of shares,

(i) the aggregate book value of the assets in Canada that are owned by the target corporation and corporations controlled by the target corporation would exceed CDN$50 million, or the gross revenues from sales in or from Canada generated from these assets would exceed $50 million in the last audited fiscal year; and

(ii) as a result of the transaction, the acquiree would own 20 percent or increase its ownership to 50 percent of the outstanding voting shares of a public corporation, or would own 35 percent or increase its ownership to 50 percent of the outstanding voting shares of a private corporation.[58]

The notification requirements apply to all such transactions independent of whether any substantive competition issues may arise in connection with the transaction.[59] In the event the financial thresholds are triggered, each of the parties to the proposed transaction must file a pre-merger notification prior to completion of the transaction. Once filed, the *Act* provides that the parties may not close the proposed transaction until 14 days after a short-form notification has been filed, or 42 days after a long-form notification has been filed. Pre-merger notification is not required if the Commissioner has granted an advance ruling certificate (ARC) indicating that she is satisfied that she would not have sufficient grounds to apply to the Tribunal to review the proposed transaction under s. 92 of the *Act*.[60] An ARC is commonly sought in most upstream oil and gas acquisition transactions.

Independent of whether or not the parties are required to file a pre-merger notification, the Commissioner maintains the ability to examine any "merger"[61] between two parties. Where on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market, the Tribunal may make certain remedial orders, including ordering the parties not to proceed with the transaction or a part thereof or requiring the parties to dissolve the merger or dispose of assets or shares.[62]

A precondition to the Tribunal making any such order is a finding that the merger or proposed transaction prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market. The *Act* does not define substantial lessening or prevention of competition. However, in September 2004, the Commissioner released the updated

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58 *Competition Act*, *supra* note 1, ss. 109-10.

59 Note that s. 112 of the *Act* sets out a specific exemption from the pre-notification requirements for combinations that are joint ventures. For more information, refer to Part IV.B.3, below which discusses joint ventures.

60 *Supra* note 1, s. 102.

61 "Merger" is very broadly defined in s. 91 of the *Act* as "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."

62 *Ibid.*, s. 92.

Merger Enforcement Guidelines,[63] which, although not legally binding, provide insight into the Commissioner's approach to assessing the likely impact on competition resulting from a merger. In the *Guidelines*, the Commissioner states that "[a] substantial prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power."[64] Market power generally refers to the ability to profitably maintain prices (or other dimensions of competition, such as quality, product choice, and service innovation) above the competitive level for a significant period of time. The *Guidelines* indicate that the Commissioner will generally not challenge a merger: (1) on the basis of independent exercise of market power where the post-merger combined market share of the parties would be below 35 percent, and (2) on the basis of coordinated exercise of market power (for example, collusion and potentially also "conscious parallelism")[65] when the post-merger combined market share of the four largest competitors would be less than 65 percent or the combined share of the parties would be less than 10 percent.[66]

Unlike the conspiracy provisions, efficiencies can be a defence where the efficiency gains brought about by the merger are greater than and offset the effects of "any prevention or lessening of competition resulting from the merger."[67]

Given the nature of the Canadian upstream oil and gas industry, specifically the significant number of competitors in the exploration, development, and production of oil and gas in Canada and the fact that oil and gas and related products are commodities sold throughout North America, if not globally, mergers in the Canadian upstream oil and gas industry do not generally raise significant issues under the *Act* in respect of the transaction overall. However, notwithstanding the competitive nature of the upstream oil and gas industry, as part of its assessment of whether a transaction will likely lessen or prevent competition, the Bureau will assess in particular whether there is any increase in ownership in any facility or pipeline or whether the transaction involves the acquisition of a facility or pipeline that competes with any facility or pipeline already owned or controlled by the purchaser, which consolidation may involve the increase of market power under the *Act* in a particular segment of the market.

B. GUIDELINES WHEN DEALING WITH COMPETITORS

As dealings between competitors are a regular occurrence in the oil and gas industry, it is useful to provide employees with some guidelines to prevent potential concerns under the *Competition Act* from arising, while at the same time ensuring that legitimate business discussions are not discouraged.[68]

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63 Competition Bureau, *Merger Enforcement Guidelines* (September 2004), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01245e.html> [*Guidelines*].

64 *Ibid.* at 2.1.

65 For a discussion of "conscious parallelism," see Facey & Assaf, *supra* note 36 at 136-37, 148-53.

66 *Guidelines*, *supra* note 63 at 4.12.

67 *Competition Act*, *supra* note 1, s. 96.

68 For a discussion of provisions of the *Act* governing agreements among competitors, see Susan M. Hutton & Michael Mahoney, "This is the Law" (Paper presented to the Insight Conference, Toronto, 26-27 May 2004); Tim Kennish & Thomas W. Ross, "Toward a New Canadian Approach to Agreements Between Competitors; Re-Evaluating the Law on Horizontal Agreement" (Paper presented to the Insight

1. PROHIBITED TOPICS WITH COMPETITORS

Employees should be instructed that certain topics, such as prices; costs; items of sale; business plans; the allocation of suppliers, customers, or markets; boycotts; or any other competitively sensitive information, should not be discussed with competitors. Legal advice should be obtained before any of these topics are discussed with competitors in any circumstances. If approached by a representative of a competitor in respect of such topics, employees should refuse to engage in the discussion and immediately report it to internal or external counsel or another designated individual within the organization. This will allow the "approach" and the refusal to engage in improper discussions to be appropriately documented.

2. DISCUSSIONS WITH CUSTOMERS OR SUPPLIERS WHO ARE ALSO COMPETITORS

Where customers or suppliers are also competitors, care needs to be taken to ensure that the relationship is not used to facilitate the inappropriate communication of competitively sensitive information. As regular contact can increase both the likelihood and/or the perception that this is occurring, both the amount of contact and the information communicated should be limited to that necessary to complete the business transaction.

3. JOINT VENTURES

The term "joint venture" or "joint adventure," as it was originally called, is a familiar term within the oil and gas industry and one encounters it on a frequent basis as the traditional vehicle for resource-related activity involving high stakes.

The *Manual of Oil and Gas Terms* by Howard R. Williams *et al.*, refers to a joint venture as "an association of persons for the prosecution of a single venture" and having the following usual elements: "(i) a community of interest in the object of the undertaking; (ii) an equal right to direct and govern the conduct of each other with respect thereto; (iii) share in the losses if any; and (iv) a close and even fiduciary relationship between the parties."[69]

In *Williston on Contracts*, a joint venture is described as "a special combination of two or more persons, whether corporate, individual or otherwise, formed for some specific venture in which a profit is jointly sought without the parties designating themselves as an actual partnership or corporation."[70]

Although it is a common term in the oil patch, when one refers to the *Competiton Act*, it is surprising to discover that the term "joint venture," while admittedly not a legal term of art, is only referenced twice, and in each case in the context of exemptions to the merger

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Conference, 25 May 2000); Neil Campbell, "The Application of the Merger and Abuse of Dominance Provisions to Competitor Agreements" (Paper prepared for The Institute for Professional Development, 17 November 2003).

69 Howard R. Williams *et al.*, *Manual of Oil and Gas Terms: Annotated Manual of Legal, Engineering and Tax Words and Phrases*, 13th ed. (Newark, N.J.: Matthew Bender, 2006) at 524.

70 Richard A. Lord, ed., *Williston on Contracts*, 4th ed. (Rochester, N.Y.: Lawyers Cooperative, 1999) vol. 12 at § 36:9.

review process. Beyond the *Act*, there are a number of references to joint ventures and their consideration as one form of a strategic alliance as found in the Bureau's *Strategic Alliances Bulletin*.[71]

The *Bulletin* provides guidance and clarifies the Bureau's approach to the review of strategic alliances under the *Act*. It points out that joint ventures often lead to efficiency gains without accompanying negative effects on competition but "seek[s] to apply the *Act* to the few alliances which potentially lead to anticompetitive effects."[72] Indeed the stated purpose of the *Bulletin* is to ensure that strategic alliances, including joint ventures, which are beneficial for the economy, continue to be pursued and not be affected by the lack of understanding as to the Bureau's enforcement approach to strategic alliances under the *Act*.

In the fall of 2002, the Bureau invited comments on its *Bulletin* after receiving suggestions that the provisions in the *Act* "continue to discourage strategic alliances and have a chilling effect on agreements that are either harmless or beneficial."[73] In response, the Bureau received a number of submissions, but to date has not made any changes to the original *Bulletin*. This is likely due in part to the fact that none of the written submissions received by the Bureau suggested that the *Bulletin* required substantive revision, and most comments were of a minor updating and clarification nature. In addition, the Bureau has been considering proposals to amend s. 45 of the *Act* in an effort to distinguish between hard core cartels and other potentially anti-competitive forms of agreements, but this has proven more complex than initially anticipated.

One can suggest that joint ventures in the oil and gas sector, besides being low on the radar screen of the Bureau as representing a recognizable threat to competition in the marketplace, may be sheltered behind the regulated conduct defence, discussed in Part VI, below, where the activities in question are subject to direct provincial regulatory authority.

As stated by William R. Prueter, the

> exploration for and development of natural resources in Canada in general, and of oil and gas in particular, is one of the most highly regulated forms of business activity in Canada. Moreover, recent ventures into the Beaufort Sea, into secondary and tertiary recovery methods, and into tar sands and similar projects, are subject to the closest forms of provincial regulatory scrutiny.[74]

Prueter goes on to identify the use of "joint ventures" as the traditional approach taken to tackle high cost and high risk activities. He states:

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71 Industry Canada, Director of Investigation and Research, Interpretation Bulletin, *Strategic Alliances Under the Competition Act* (November 2005), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01671e.html> [*Strategic Alliances Bulletin* or *Bulletin*].

72 *Ibid.* at iv.

73 Competition Bureau, Information Notice, "Competition Bureau Invites Comments on its Strategic Alliances Bulletin" (4 September 2002), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00413e.html>.

74 William R. Prueter, "Resource Sector Perspectives on Canadian Competition Policy" (1979) 17 Alta. L. Rev. 26 at 37-38.

> The physical and financial resources of industry are not unlimited. Through the co-operative sharing of cost and risk to acquire and operate lands, drill wells, develop and jointly operate oil and gas plants, transport oil and gas, and more recently develop the tar sands, substantial advances have been made on a larger scale than might otherwise be possible.[75]

The Mackenzie Gas Project and the many new and proposed oil sands projects suggest that Prueter's remarks apply equally today.

This background discussion may suggest that joint ventures in the oil and gas sector are immune from scrutiny under the *Act*. However, such a conclusion would be wrong. As addressed by Elliott, Katz, and Margison,[76] there are three main substantive provisions of the *Act* that need to be considered when assessing joint ventures in Canada. They are (i) the civil merger provisions, (ii) the criminal conspiracy provisions, and (iii) the civil abuse of dominant position. However, Elliott, Katz, and Margison go on to say:

> [I]t is worth noting that the merger, conspiracy and abuse of dominance provisions all share the threshold prerequisite that a joint venture may only be condemned if it is likely to prevent or lessen competition substantially or unduly. Therefore, under any of these provisions, a joint venture should be permitted unless it can be shown that, among other things, in the absence of the venture, the joint venture parents would likely have competed with respect to matters within the scope of the venture and that they possess market power. Further, since the focus of the Bureau's competition concerns under the Act has been foremost on pricing and output effects, joint ventures that involve cooperation at the early stages of bringing a product to market, such as cooperative research or production, are less likely to attract scrutiny than ventures involving joint distribution or marketing.[77]

Turning to the *Act*'s merger provisions, one can rely on s. 112 of the *Act* to avoid the pre-merger notification requirements. Section 112 sets out a specific exception for those "combinations that are joint ventures."

Section 112 provides that a proposed joint venture or combination is exempt from pre-notification if:

> (a) all the persons who propose to form the combination are parties to an agreement in writing or intended to be put in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;
>
> (b) no change in control over any party to the combination would result from the combination; and
>
> (c) the agreement referred to in paragraph (a) restricts the range of activities that may be carried on pursuant to the combination, and contains provisions that would allow for its orderly termination.[78]

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75 *Ibid.* at 38.

76 Richard Elliott, Mark Katz & Christopher Margison, "Joint ventures in Canada" in *Global Competition Review: The Antitrust Review of the Americas 2007* (London: Law Business Research Limited, 2006) 99.

77 *Ibid.* at 99.

78 *Competition Act*, *supra* note 1, s. 112.

A substantive review could still arise from an application by the Commissioner for an order under s. 92 of the *Act*. The corresponding exemption for joint ventures is found under s. 95, but here the language, while similar to that in s. 112, has certain requirements not found in s. 112, namely that the joint venture would not otherwise have taken place and that the impact on competition is only what would be considered reasonable as arising from the joint venture. Consequently, with these differences between ss. 95 and 112, certain joint ventures may still be subject to substantive review even if exempt from pre-notification.

Next, one must keep in mind that notwithstanding the applicability of any exemptions under ss. 95 or 112 of the *Act*, the proposed joint venture must still avoid issues under certain other provisions of the *Act*, in particular the conspiracy and abuse of dominance provisions.[79] Adherence to the following key guidelines should assist in avoiding scrutiny under such provisions:

(1) Ensure that the communications among the joint venture participants are reflective of the pro-competitive purpose of the joint venture, namely the pooling of complementary resources, sharing of risk, and achieving economies of scale;

(2) Avoid any actions that could be construed as an attempt to influence a joint venture participant's actions outside the joint venture, such as the marketing and distribution of the petroleum products from an oil and gas joint venture and the prices for such products;

(3) Do not discourage the other joint venture participants from pursuing business opportunities outside the joint venture;

(4) Avoid any basis for allegations to be made that an artificial limit has been set for a joint venture capacity in order to limit output and raise prices;

(5) Be careful when soliciting information about a joint venture participant's involvement in other joint ventures. Understanding "lessons learned" or "best practices" is appropriate, but avoid communications that could be construed as seeking to impede other joint ventures;

(6) Do not divulge your company's proprietary forward-looking financial data to assist in evaluating the project economics for the joint venture. Instead, utilize a consultant or public information to develop any required economic models for the joint venture;

(7) Do not share information beyond what is legitimate for the operation of the joint venture;

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[79] For guidance regarding drafting joint venture arrangements, see Richard E. Clark, "Negotiating and Drafting Joint Venture Agreements" (Paper presented to the Insight Conference, Major Business Agreements, 7 November 1995).

(8) Do not allow the audit rights under a Joint Operating Agreement to be misused to get competitively sensitive information for use outside the joint venture. An example might be gathering information about an operator's procurement contracts and disclosing same to the buying group within one's own company;

(9) Recognize that the "affiliate" exemption under the *Act* only applies to arrangements amongst affiliates. That is, it is not available if the joint venture is a stand-alone business organization with its own mind and management and the interest of your company in the joint venture is less than a majority voting ownership. In addition, this "affiliate" exemption does not apply between the minority and majority co-venturers or between co-venturers who are equal participants in the joint venture; and

(10) Ensure your joint venture business people have a contact lawyer — either in-house or outside counsel — if there is any question or uncertainty as to the formation or activities of a joint venture.

Below are some further suggestions to follow if involved in joint venture negotiations with a competitor:

(1) Stagger information exchanges in line with the progressions of discussions, but only to the extent necessary to permit an informed negotiation;

(2) Restrict the information flow to those negotiators who clearly need to know;

(3) Any information exchanges that involve competitively sensitive matters such as production plans or prices should be limited to historic data;

(4) The parties should enter into a confidentiality agreement prohibiting misuse or unauthorized disclosure of proprietary information. A "joint defence agreement" may also be used to enable outside counsel to assess competitively sensitive information that would not be exchanged between the parties;

(5) Counsel should be involved on a regular basis in respect of the formation of a joint venture;

(6) Avoid code names for a joint venture that overstate the competitive effects of the joint venture (for example, "Powerplay"); and

(7) Keep in mind that depending on the scrutiny that the joint venture may draw from the Bureau, the documents leading to the joint venture may have to be provided. Write accurately and carefully.

In conclusion, joint ventures, if properly structured and managed, are unlikely to be an issue from a competition law perspective. However, any form of collaborative commercial dealings with a competitor can be a potential problem if the parties fail to adhere to the suggested protocols, and if they allow their collaboration to drift to commercially sensitive

areas outside the joint venture or engage in anti-competitive acts within the confines of the joint venture.

4. INFORMATION EXCHANGES AND BENCHMARKING

The exchange of commercial information with competitors should only take place after consideration of possible issues under the *Act*.[80] Indeed, any discussions or exchanges of information that involve prices, costs, terms of sale, business plans, suppliers, customers, territories, capacity, production, or any other subject that would be considered commercially important are problematic in the context of competition law compliance.

Exchanges of information among competitors are safest when there is a legitimate business purpose and the likelihood of any negative effect on competition is remote. Examples of such exchanges would include best practices in the areas of safety or security and measures to protect the environment.

When considering sensitive confidential information, any exchange should be managed through an independent outside party that gathers the information on a confidential basis, aggregates it, and disseminates it on an anonymous basis. Also, historical information is less susceptible to raising concerns. In fact, the U.S. Department of Justice considers data at least 90 days old as historic.[81] There is no such guideline in Canada and therefore one has to carefully consider the circumstances in each case.

Benchmarking is simply a more focused form of information exchange or comparison, with the number of companies involved usually being limited to those that are best in class in a particular field or area. It is not unusual for major companies to have a list of "comparator companies" that they regularly use to benchmark for best practices in selected key processes, products, and services. Benchmarking can be an internal exercise within a large corporation and its affiliates or an external exercise with third parties and it is in the latter context one would assess competition law compliance. The essence of benchmarking is a knowledgeable understanding of one's own practices and those of other companies with a view to implementing the best of both and achieving total quality. Some examples of benchmarking studies would include billing processes; cost reduction strategies; facilities management; inventory management; procurement; supplier management; management of safety, health, and environment; and outsourcing.

A few guidelines to ensure that external benchmarking with competitors has legitimate business purposes and are structured to avoid anti-competitive results are as follows:

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[80] For a discussion of the implications of information exchanges under the *Act*, see John J. Rook, "Information Exchanges Among Competitors in Canada: Does it Matter" (Paper presented to the Insight Conference, Toronto, 26-27 May 2004); John D. Bodrug & Simon Lockie, "Information Exchanges Among Competitors" (Papers presented to the Insight Conference, Toronto, 26-27 May 2004).

[81] U.S., Department of Justice & Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (August 1996), online: U.S Department of Justice <http://www.usdoj.gov/atr/public/guidelines/0000.pdf>.

(1) Clearly set out the business purpose and procedure for the exchange clearly set out in writing and ensure it has been reviewed by legal counsel;

(2) Be wary of any exchange of competitively sensitive information without putting in place the safeguards previously mentioned;

(3) Recognize that information collected regarding processes and practices is normally less competitively sensitive than the collection of results and data. An example of the former would be environmental compliance procedures;

(4) Avoid the exchange of analysis or recommendations;

(5) Do not overuse information exchanges;

(6) Ensure all participants in the information exchange are on the same page as to the purposes and the process to be followed;

(7) Build legal review into any planned information exchange; and

(8) Ensure assessments of benchmarking studies and all business decisions made as a result thereof are made independently.

A review of the *Strategic Alliances Bulletin* and in particular, Appendix 1: Illustrative Scenarios, provides an example of benchmarking in the context of warehousing and distribution techniques with a non-competitor in one case, and a competitor in another.[82] The guidance offered where a competitor is involved is rather limited with the *Bulletin* suggesting a potential risk of exposure under the conspiracy provisions of the *Act*. The *Bulletin* goes on to identify that the level of risk is tied to the market power held by the participants, the kind of information shared, who shares it, and the processes followed to collect and disseminate it.

5. SUPPLY ARRANGEMENTS BETWEEN REFINERS

Outside the scope of traditional joint ventures in the Canadian petroleum industry, the inter-refining supply agreements represent another area where arrangements between competitors are encountered. These arrangements are described in detail in the *Restrictive Trade Practices Commission Report*.[83]

What we have because of the high costs associated with refinery investment is "an ongoing but changing need for refiners to have a variety of supply arrangements with other refiners in order to reduce the overall cost of product supply within their own system."[84]

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82 *Strategic Alliances Bulletin*, *supra* note 71 at 23.
83 *Supra* note 16 at 224-26.
84 *Ibid.* at 222.

Supply arrangements that are entered into by refiners with each other usually fall into one of four categories, namely agreements encompassing the exchange, purchase, processing, or terminalling of petroleum products.[85]

Looking at each of these arrangements, exchange agreements entail the supply of product to one party at a specified location or locations in return for a corresponding receipt of product from such party at another specified location or locations.

Exchange agreements usually have elements of reciprocity arising from their interdependence and typically involve substantially similar products and volumes.[86] Purchase arrangements may also be entered into from time to time by refiners to address imbalances in their individual supply situations.[87] Processing arrangements entail the refining or processing of another party's crude oil or other feedstock for a negotiated fee and the delivery of the refined products to such party.[88] Terminalling agreements involve bulk storage for and re-delivery of petroleum products to another party in return for what is commonly called a "throughput" fee. What is in essence a warehousing service, terminalling does not involve a change in title of the product of the other party.[89]

The use of inter-refiner supply arrangements can thus be viewed as a means to minimize the cost of product or service supply and to maximize capacity utilization of one's facilities.

The *Restrictive Trade Practices Commission Report* issued in 1986 drew a number of conclusions with respect to inter-refiner supply arrangements, and extracts from such conclusions are as follows:

1. The detailed evidence on particular inter-refiner supply arrangements clearly indicates that typically each refiner enters into such arrangements solely with a view to preserving and improving its own individual competitive position as against the rest of the industry even though this also presumably involves an improvement of the competitive position of the other party to the agreement.

2. The nature and extent of inter-refiner supply agreements, including the extensive degree of reciprocity and the long-term nature of some of the agreements, do not give rise to competition problems that require general prohibitions or advance approvals such as were recommended by the Director. It is not a characteristic or effect of such agreements to stabilize market shares or to deprive un-integrated marketers of supply. Should any specific agreement, whether involving refiners or anyone else, restrict in any way the distribution of the product being supplied, or amount to market sharing, or limit in any way the supply or involve any other type of exclusionary commitment, then the rules and procedures under the Combines Investigation Act that apply equally to all industries should provide sufficient remedy.[90]

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85 *Ibid.* at 224-26.
86 *Ibid.*
87 *Ibid.*
88 *Ibid.*
89 *Ibid.*
90 *Supra* note 16 at 251.

With this background, the following guidelines should assist in ensuring that inter-refiner supply arrangements are not characterized as collusive or exclusionary arrangements under the *Act*:

(1) A supply arrangement with a competitor should not involve the prices or pricing policies of either party, except as specifically and necessarily related to the particular product or service in question. Avoiding the fact or appearance of otherwise communicating with competitors about price information is critical to being able to rebuff allegations of anti-competitive behaviour;

(2) The parties should continue to do their own billing and maintain their customer contacts notwithstanding that one party is providing product or services to the other;

(3) Agreement provisions that have exclusionary effects should be carefully considered in light of the business purposes for the transaction and generally avoided. These could include: exclusive dealing provisions or preferential rights, options with respect to the capacity or output of the other party, restrictive covenants requiring the closing or mothballing of facilities, or the reduction or maximum limits for output;

(4) A legitimate business purpose and sufficient economic rationale should be demonstrated. In this context, it is generally acceptable to permit a competitor to participate in markets where it does not own the necessary facilities to provide products and services to its customers; and

(5) The language used in capturing the inter-refiner supply arrangements should not:

   (a) imply that the parties intend to affect competitive factors in the market place such as price, output, supply, or customers;

   (b) speculate on potential effects of the transaction in the marketplace;

   (c) tie the arrangement to the closure or disposition of a competitor's facilities; or

   (d) suggest a merger is being formed through the casual use of words such as alliance, partnership, or joint venture.

6. GATHERING COMPETITIVE PRICE INFORMATION

Collecting market information regarding prices that are being charged by competitors can be important to the ability of a business to compete effectively in the market. However, any direct communications or agreements among competitors regarding prices or the sharing of pricing information are potentially problematic and should be avoided. Information regarding competitors' prices may be obtained from public sources, government agencies, or customers of the competitor, or from a survey conducted by a third-party marketing survey company. In such circumstances, it would be advisable to ensure in advance that the marketing survey company is not simultaneously acting for competitors, that it will not disclose who it is acting

for when making inquiries, and that the price information collected is not disclosed to any third parties.

Information that is collected should not relate to future pricing. It is also prudent to ensure that the source of any pricing information that is collected is recorded. For example, if a competitor's price list is obtained from a customer, the name of the customer and date that the list was provided should be recorded on the list.

7. PARTICIPATION IN TRADE ASSOCIATIONS

Trade association meetings are sensitive due to the opportunity they provide for collusive conduct among actual and potential competitors, or the appearance of such conduct. While membership in trade associations or attending meetings where competitors are present do not automatically raise issues under the *Act*, care must be taken to ensure that no anti-competitive activities are agreed upon or condoned.

While trade associations often engage in pro-competitive or neutral conduct, certain activities may raise, or appear to raise, issues under the *Act*. As trade associations are generally comprised of many competitors and potential competitors, and also sometimes suppliers and/or customers, activities of trade associations may be subject to close scrutiny by the Bureau to ensure compliance with the *Act*.

The following guidelines relate to activities typically engaged in by trade associations and their members:

(1) Meeting

(a) Written agendas should be prepared for each trade association (or sub-committee) meeting, where issues may arise under the *Act*. Prior to distribution, the president or chair of the trade association should review the agenda so as to ensure that possible anti-competitive topics are excluded from the meeting agenda. Similarly, minutes of each meeting should be prepared, and reviewed prior to finalization, in order to document that discussions at the meeting complied with the provisions of the *Act.*

(2) Independent Business Decisions

(a) All business decisions that may have an impact on competition (such as those relating to prices, terms or conditions of sale, service, production, capacity, distribution, territories, customers, and business plans) should be determined independently by each trade association member.

(3) Lobbying Activities

(a) Trade associations and their members should only engage in lobbying activities associated with legitimate regulatory purposes that would not result in a likely

undue lessening of competition in a market. Lobbying activities should not be a sham designed to achieve an anti-competitive purpose.

(b) In connection with lobbying activities, trade associations and their members should not make any direct, indirect, or implicit statements (or at least be very cautious when making such statements) about the consequences of a particular government proposal on business decisions of trade association members that may have an impact on competition (such as those relating to prices, terms or conditions of sale, service, production, capacity, distribution, territories, customers, and business plans), as such statements may be perceived as evidence of a conspiracy among the trade association members to take common action in response to a government proposal. For example, it is not advisable to state that prices will increase in response to a government proposal that would increase the costs of trade association members. While such a consequence is possible, and perhaps even likely, competition between participants may produce unanticipated results.

(c) By reducing the appearance of coordinated conduct (insofar as such conduct relates to competitive factors), there is a reduced risk of complaints to, and investigations by, the Bureau into conduct engaged in by the trade association and its members.

(4) Benchmarking, Information Gathering, and Exchanging Information

(a) The guidelines provided in Parts IV.B.4 and 5, above, regarding Information Exchanges and Benchmarking, and Gathering Competitive Price Information are also applicable to activities involving trade associations.

(5) Agreements and Discussions

(a) Discussions, agreements, or documentation should not involve a recommended course of conduct to be followed by individual trade association members (as opposed to the trade association as an entity) insofar as such recommendations relate to business decisions that may have an impact on competition (such as those relating to prices, terms or conditions of sale, service, production, capacity, distribution, territories, customers, and business plans). Such business decisions should be considered and made by each trade association member on an independent basis without direction from the trade association or their members.

(b) Do not enter into any understanding, agreement, plan, or scheme, express or implied, formal or informal, with any trade association or member regarding business decisions that may have an impact on competition (such as those relating to prices, terms or conditions of sale, service, production, capacity, distribution, territories, customers, and business plans). In particular, do not:

(i) agree to set prices or coordinate price movements;

(ii) attempt to influence the prices or terms of sale of products of any other persons, including any trade association member;

(iii) take part in a boycott (a refusal to sell to particular customers or to buy from particular suppliers); or

(iv) engage in bid-rigging.

(c) Ensure that legitimate joint activities do not extend into other activities and limit joint activities to those activities strictly necessary to achieve the legitimate business goal.

8. SUBMISSION OF BIDS

Companies in the oil and gas sector are frequently involved in submitting bids to acquire various types of oil and gas interests such as permits, leases, or licenses, or to supply particular products or services. Potential problems in respect of the bid-rigging provisions of the *Act*, discussed in Part IV.A.2, above, can be avoided by ensuring that:

(1) a company's decision with regards to how, when, whether, and what to bid is made independently;

(2) there are no discussions between or amongst potential bidders regarding the intent to bid or not bid for a contract or the terms and conditions of any bids; and

(3) whenever a bid is submitted on behalf of more than one entity, such as the participants in a joint venture, the identity of all participants is disclosed at the time that the bid is submitted.

9. MERGERS AND ACQUISITIONS

When considering whether to enter into an acquisition or merger transaction with a third party, the parties should consider the following factors, each of which may affect the structure of the transaction or the timing of the closing of the transaction:

(1) whether the transaction will trigger the pre-merger notification requirements, in which case, closing of the transaction may not be completed unless an advance ruling certificate is obtained or until a notification is filed by each of the parties to the transaction and the associated statutory waiting period has expired;

(2) whether the transaction will raise any substantive issues under the merger provisions of the *Act* if the parties are competitors in respect of any product (for example, whether the transaction involves competing facilities or pipelines);

(3) whether the transaction involves the acquisition of control of a business operating in Canada (which includes oil and gas assets, generally) by a party that is ultimately controlled by a non-Canadian, in which case the transaction will be subject to the *Investment Canada Act*[91] and, if certain thresholds are satisfied (which thresholds are lower if the transaction involves a transportation service, which includes pipeline assets), may be subject to review prior to completion of the transaction, which review period is generally approximately 45 to 75 days and often involves legal undertakings regarding business plans of the purchaser in respect of the acquired party; and

(4) whether the parties to the transaction have assets in or sales into other jurisdictions which may trigger pre-merger notifications and waiting periods in other jurisdictions pursuant to their antitrust legislation, which may be significantly different from the requirements in Canada.[92]

V. DEALING WITH CUSTOMERS

The provisions of the *Competition Act* that apply to dealings between customers and suppliers generally relate to pricing practices or restrictions sought to be imposed by a supplier on its customer's ability to make independent decisions about the manner in which the customer conducts its business activities.[93]

A. PRICING PRACTICES

The *Act* prohibits price discrimination and predatory pricing, which are both criminal offences.[94] Price discrimination is the practice of granting price concessions or providing other advantages to one purchaser that are not available to competing purchasers in respect of a sale of articles of like quality and quantity.[95] The prohibition applies to articles only, not services. It requires a "practice" so that isolated acts to meet competition will not constitute an offence. The Bureau's approach to price discrimination provisions of the *Act* is described in its *Price Discrimination Enforcement Guidelines*.[96]

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91 R.S.C. 1985 (1st Supp.), c. 28.

92 See Tim Kennish & Michelle Lally, "Competition, Foreign Investment and Other Regulatory Considerations for Mergers And Acquisitions" (Paper presented to the Insight Conference, 10-11 May 1999); John F. Clifford & Omar K. Wakil, "Competition Law Merger Notification Issues in International Transactions" (Paper presented to the American Bar Association's Business Law Section Spring Meeting, 2 April 2005, and the Canadian Corporate Counsel Association 2005 National Spring Conference, 19 April 2005).

93 For a review of pricing and distribution practices (both in Canada and the U.S.), see Paul Collins & Michael Mahoney, "Cross-Border Compliance" (Paper presented to the Insight Conference, Toronto, 26-27 May 2004); Glenn F. Leslie, "Restriction of Competition on Distribution" (Paper presented to the Insight Conference, 2-3 December 1999); Facey & Assaf, *supra* note 36 at 267, n. 1.

94 For an additional discussion of the criminal pricing provisions of the *Act*, see Omar K. Wakil & Casey W. Halladay, "The Criminal Pricing Provisions of the *Competition Act*" (Paper presented to the Essentials of Competition Law Conference of the Ontario Bar Association, May 2002).

95 *Competition Act*, *supra* note 1, s. 50(1)(a).

96 Competition Bureau, Director of Investigation and Research, *Price Discrimination Enforcement Guidelines* (17 August 1993), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01810e.html>.

Predatory pricing is a policy of selling products at prices that are unreasonably low, which policy is designed to or has "the effect of substantially lessening competition or eliminating a competitor."[97] An example of predatory pricing is when a company provides a service or sells equipment below cost to drive a competitor out of a market. The Commissioner has also published her *Predatory Pricing Enforcement Guidelines*[98] to provide guidance to business, recognizing that a misapprehension of this provision could have a chilling effect on legitimate price competition.

B. PRICE MAINTENANCE

As discussed earlier in the article, price maintenance occurs when a party attempts to control the sale price of a product sold by another party through prohibited means. While it can arise in horizontal dealings between competitors, it is most common in vertical arrangements involving a supplier and its dealer or distributor. The *Act* deems that a suggested retail price provided by a supplier to a dealer constitutes an attempt to influence prices upward, unless it is made clear to the dealer that he is not obliged to, and will not be penalized if he fails to, accept the suggestion.[99] The same presumption applies to a suggested retail price contained in an advertisement unless it makes it clear that the product may be sold for less.[100]

It is also an offence to "refuse to supply a product or otherwise discriminate against" someone because of that party's low pricing policy[101] or by "threat, promise or any like means, [to] attempt to influence a supplier … as a condition of his doing business with the supplier, to refuse to supply a product"[102] to someone because of their low pricing policy.

Firms in the retail gasoline business have been convicted of price maintenance on a number of occasions.[103]

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97 *Competition Act*, *supra* note 1, s. 50(1)(c).

98 Competition Bureau, Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (31 March 1992), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01746e.html>.

99 *Competition Act*, *supra* note 1, s. 61(3).

100 *Ibid.*, s. 61(4).

101 *Ibid.*, s. 61(1)(b).

102 *Ibid.*, s. 61(6).

103 See e.g. *R. v. Arrow Petroleums Ltd.* (1972), 8 C.P.R. (2d) 95 (Ont. Prov. Ct. (Crim. Div.)); *R. v. Petrofina Canada Ltd.* (1974), 20 C.P.R. (2d) 83 (Ont. Dist. Ct.); *R. v. Arrow Petroleums Ltd.* (1980) [unreported]; *R. v. Imperial Oil Ltd.* (4 April 1984) [unreported] (Ont. Co. Ct.); *R. v. Sunoco Inc.* (1986), 11 C.P.R. (3d) 557 (Ont. Dist. Ct.), aff'd (1988) 28 C.P.R. (3d) 287 (Ont. C.A.), sentenced (1986), 12 C.P.R. (3d) 79 (Ont. Dist. Ct.), var'd (1988), 28 C.P.R. (3d) 287 (Ont. C.A.); *R. v. Shell Canada Products Ltd.* (1989), 24 C.P.R. (3d) 501 (Man. Q.B.), leave to appeal to Man. C.A. refused, (1990), 29 C.P.R. (3d) 32 (Man. C.A.); *R. v. Shell Canada Products Ltd.* (1989), 25 C.P.R. (3d) 101 (Man. Q.B.), var'd (1990), 29 C.P.R. (3d) 32 (Man. C.A.); *R. v. Perry Fuels Inc.* (May 1991) Oshawa (Ont. Court) [unreported]; *R. v. Ultramar Canada* (30 May 1991), 91-7282, 91-7283 (Ont. Ct. (Gen. Div.)) [unreported].

C. NON-PRICE VERTICAL RESTRAINTS

Non-price vertical restraints are terms, conditions, restrictions, or other requirements that are imposed by an upstream supplier upon a downstream distributor. Certain of these restraints constitute reviewable practices under the *Act*. They include the following practices:

(1) Tied selling — A supplier requires or induces customers to either require a second product from the supplier or refrain from using, supplying, or distributing another product that is not of a brand manufactured or designated by the supplier;

(2) Exclusive Dealing — A supplier requires or induces its customers to either deal only or primarily in products supplied by the supplier, or to refrain from dealing in specific products; and

(3) Market Restriction — A supplier requires its customer to supply any product only in a defined market, or exacts a penalty if the customer supplies any product outside that market (for example, exclusive dealer territories).[104]

The *Act* recognizes that these practices are generally pro-competitive and permissible, however, under certain market conditions they can have a negative impact on competition. In such circumstances, the Commissioner, or a private party who is directly and substantially affected who has obtained leave from the Tribunal, can obtain a remedial order from the Tribunal prohibiting the supplier from engaging in the practice, where they can establish that the practice is:

(a) engaged in by a major supplier or is widespread in the market;

(b) likely to have an exclusionary effect in the market (for example, impede entry or expansion) in the case of tied selling or exclusive dealing; and

(c) likely to substantially prevent or lessen competition.[105]

There is generally no obligation on a business to supply a product to a particular customer. However, in certain limited circumstances, the Commissioner, or a private party with leave of the Tribunal, can obtain an order from the Tribunal requiring one or more suppliers of a product to accept a person as a customer on usual trade terms.[106] To grant such an order, the Tribunal must be satisfied that:

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

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104 *Supra* note 1, s. 77.
105 *Ibid.*
106 *Ibid.*, s. 75.

(b) a person is unable to do so because of insufficient competition among suppliers of the product in the market;

(c) the person is willing and able to meet the usual trade terms;

(d) the product is in ample supply; and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market.[107]

VI. IMPACT OF REGULATION

Regulated activities may be subject to the regulated conduct doctrine (RCD) under Canadian competition law.[108] The RCD is not an express statutory exception to the provisions of the *Competiton Act*, but rather a defence that has evolved at common law. Generally, the RCD provides that business activities that would otherwise contravene the *Act* may be permitted if such activities are conducted pursuant to a constitutionally valid regulatory scheme. The rationale supporting the RCD is that the conduct in question is addressed by another statutory or regulatory scheme informed by public interest objectives. The doctrine is not absolute and the particular circumstances must always be examined to determine whether, and if so to what extent, it may be available.

The RCD was considered by the Supreme Court of Canada in 2004, in *Garland v. Consumers' Gas Co.*[109] Consumers' Gas was a regulated utility in Ontario, whose rates were set by the Ontario Energy Board (OEB). The rates approved by the OEB included a late payment penalty of 5 percent if the monthly bills were not paid by the due date. The late payment penalty was challenged on the basis that it contravened the prohibition set out in s. 347 of the *Criminal Code*[110] of charging interest at a criminal rate that exceeded 60 percent per annum. This would result if the bill was paid shortly after the due date. A class action for restitution was brought on behalf of Consumers' Gas customers. Among other defences, Consumers' Gas argued that the RCD barred recovery. The Supreme Court disagreed. The Court confirmed that where a federal statute can be properly interpreted so as not to interfere with the provincial statute, that interpretation is appropriate. However, the Court distinguished the circumstances from other cases in which the defence was found to apply where the federal statute used the phrase "in the public interest" or the word "unduly," as in the case of the *Competition Act*.[111] Unlike those statutes, the *Criminal Code* provisions provided no flexibility. The absence of such language in the *Criminal Code* therefore precluded application of the RCD.

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107 *Ibid.*, s. 77.

108 The RCD is also referred to as the "regulated industries defence."

109 2004 SCC 25, [2004] 1 S.C.R. 629 [*Garland*].

110 R.S.C. 1985, c. C-46, s. 347.

111 *Supra* note 109 at para. 75.

In June 2006, the Commissioner released the *Technical Bulletin on "Regulated" Conduct*,[112] which sets forth the Bureau's approach to enforcement of the *Act* in respect of conduct that may also be regulated by another federal, provincial, or municipal legislative regime. In the *Technical Bulletin*, the Commissioner adopts a relatively restrictive interpretation of the application of RCD on the basis that "a cautious application of the RCD is warranted" and that "the Bureau … should refrain from immunizing conduct from the Act absent confidence that Parliament intended such immunity,"[113] especially in light of extremely limited case law.

The *Technical Bulletin* sets forth different standards of application of the RCD insofar as the impugned conduct is authorized by provincial or federal law. With regard to provincial law, the Bureau will consider the RCD, but will not necessarily refrain from pursuing regulated conduct simply because provincial law authorized the conduct or is more specific than the *Act*. This approach is on the basis that the Bureau views its mandate to enforce the law as directed by Parliament, not a provincial legislature.

With regard to federal law, the Commissioner will not pursue a matter under the *Act* if it determines that Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime that provides a regulator with the authority to take action inconsistent with the *Act* and where the regulator has done so where the regulation has failed to do so, the Bureau will apply the *Act*.

As a result, notwithstanding that business activities may be subject to some form of legislation, most conduct is not likely to be protected by the RCD. When assessing whether the RCD may apply, the following three factors should be considered prior to engaging in conduct that may offend the provisions of the *Act*, but for the application of the RCD:

(1) Is the conduct subject to regulation pursuant to validly enacted federal or provincial legislation?

(2) Is the conduct specifically compelled or authorized by validly enacted legislation or the regulations thereunder, or by the direction of a regulatory agency acting within the scope of its jurisdiction?

(3) Is the regulatory body with the authority to control the conduct in question in fact exercising such authority?

The exploration, development, and production of oil and gas in Canada are subject to significant regulation. However, to the extent such regulations do not actively apply to

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112 Competition Bureau, Information Bulletin, *Technical Bulletin on "Regulated" Conduct* (29 June 2006), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02141e.html> [*Technical Bulletin*]. For a discussion of the *Technical Bulletin*, see Janet Bolton & Lorne Salzman, "The Regulated Conduct Doctrine and the Competition Bureau's 2006 Technical Bulletin: Retrospective and Prospective" (Paper presented at the Canadian Bar Association Annual Fall Conference on Competition Law, Gatineau, 28 September 2006); Huy A. Do & Aaron Stefan, "Regulated Conduct Defence Post-*Garland v. Consumers' Gas Co.*" (2004) 22 Can. Comp. Rec. 1.

113 *Technical Bulletin*, *ibid.* at 2, n. 4, citing *Garland*, *supra* note 109.

conduct that may be subject to review under the *Act*, this regulatory regime will not preclude the review of conduct by the Commissioner under the *Act*. For example, the Energy Resources Conservation Board (ERCB)[114] has the authority under the *Oil and Gas Conservation Act* and regulations to grant common processor orders where necessary to mitigate discriminatory practices or circumstances that may prevent producers from producing their resources, leaving those resources subject to drainage by adjacent producers.[115] As a remedy, producers are entitled to apply to the ERCB for an order declaring an owner or operator to be a common processor for the purpose of processing all natural gas produced from a specified location. To obtain a declaratory order, the producer must demonstrate: (a) that producible gas reserves exist and gas processing facilities are needed; (b) reasonable arrangements for the use of processing capacity in an existing processing plant could not be agreed upon by the parties; and (c) the proposed common processor operation is either the only economically feasible way, or is clearly the most practical way to process the gas in question or is superior environmentally.[116] While the ERCB is guided by the purposes of the legislation and its own policies, including the avoidance of unnecessary duplication of facilities and the promotion of the efficient development of oil and gas resources in Alberta, it has the authority to review processing fees to ensure they are fair and equitable to all parties.

To the extent that the ERCB has not declared an owner or operator to be a common processor, the conduct of such owner or operator could be reviewed by the Commissioner under the provisions of the *Act*, notwithstanding that the owner or operator's conduct may in fact be disciplined by the existence of the possibility of a declaration. In the event that the ERCB granted an order that was viewed by the Bureau as authorizing conduct that was contrary to the *Act*, the scope of the RCD could arise and be tested.

VII. DEALING WITH THE COMPETITION BUREAU

The Commissioner may become aware of possible anti-competitive conduct and commence an investigation into such conduct by virtue of complaints from competitors, suppliers, customers and other industry participants, newspaper articles, investigations in

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114 The AEUB is the successor to the Public Utilities Board. Please note that as of 1 January 2008, the ERCB and the Alberta Utilities Commission (AUC) have replaced the AEUB. For more information, see online: AEUB <http:// www.eub.ca/eub/index.html>.

115 *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, s. 55 states that:

> (1) If the Board has declared the proprietor of a pipeline to be a common carrier and agreement cannot be reached between the proprietor and a person desiring to have the person's oil or synthetic crude oil carried in the pipeline as to the tariff to be charged for the carriage, either party may, pursuant to the *Public Utilities Board Act*, apply to the Public Utilities Board.
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> (2) If the Board has declared a purchaser or processor of gas to be a common purchaser or a common processor and agreement cannot be reached between the common purchaser and a person desiring to sell the person's gas or have it processed, as the case may be, as to the price to be paid for the gas or the costs, charges or deductions for the processing of the gas, either party may, pursuant to the *Gas Utilities Act*, apply to the Public Utilities Board.
>
> (3) If the Board has declared the proprietor of a pipeline to be a common carrier and agreement cannot be reached between the proprietor and a person desiring to have the person's gas carried in the pipeline as to the tariff to be charged for the carriage, either party may apply to the Public Utilities Board to fix the tariff.

116 AEUB, Decision 2005-027: *Celtic Exploration Ltd. Application for Common Carrier and Common Processor Orders, Other Field* (26 April 2005) at 2.

other countries, or further to a notification under the merger provisions of the *Competition Act*.

As part of an investigation the Commissioner may use either informal or formal investigative tools to gather information on a compulsory or voluntary basis from the parties subject to the investigation or knowledgeable industry participants. It should be noted that the Commissioner is increasingly relying on the use of her formal powers, especially with respect to criminal offences under the *Act*.

A. INFORMAL INVESTIGATIVE TOOLS

Informal investigative tools used by the Commissioner to gather information consist of telephone calls, written requests for information, and interviews with industry participants. Persons are not legally required to co-operate with the Commissioner's requests for information. Upon receipt of, and prior to voluntarily responding to, any request for information or discussing any matter with the Commissioner or a Bureau official, an organization should first assess whether it wishes to assist the Commissioner's information-gathering process, and if it wishes to participate, the persons who will be involved and information to be disclosed. Employees should be instructed that if they are contacted by a representative of the Bureau, they should first seek advice from internal or external legal counsel so that an appropriate determination can be made before any information is provided.

Generally, it is recommended that organizations co-operate with informal requests from the Bureau so as to potentially avoid any compulsory, formal investigative process. All information provided to the Bureau is "on the record," even information provided voluntarily and informally, and the organization should take this into consideration before any information is provided.

B. FORMAL INVESTIGATIVE TOOLS

The Commissioner has the option of relying on two formal investigative tools once she has commenced an inquiry into potential anti-competitive conduct under s. 11 of the *Act*: orders and search warrants.[117] These court orders are typically granted to the Commissioner without the knowledge of the person required to comply with the order. Accordingly, a person or company will not likely receive notice of investigations by the Commissioner unless and until it is served with an order.

Section 11 orders are court orders requiring a person to: (a) appear before the Commissioner to be examined under oath; (b) provide records specified in the order; and/or (c) provide a written response under oath containing information required by the order. It is important to note that a person who receives a s. 11 order may not be excused from complying with the order on the grounds that his testimony, records, or written responses may tend to incriminate him. However, the information provided will not be used in charges

[117] *Competition Act*, *supra* note 1, s. 11.

against the individual personally, other than a prosecution for perjury or for providing contradictory evidence under ss. 132 or 136 of the *Criminal Code*.[118]

A s. 11 search warrant authorizes Bureau officials to enter and search specified premises and seize specified records and items, including computer records identified in the search warrant. Unlike a s. 11 order where a person is requested to provide records, a s. 11 search warrant involves an unannounced attendance at the company's or individual's premises by Bureau officials seeking specified records and other items (such as a "dawn raid"). As service of the search warrant is likely the first notice that a company will have that it is being investigated under the *Act*, it is imperative that companies establish procedures to deal with a possible search by the Bureau.

In many cases, the Commissioner will initially rely on a search warrant to search a person's premises and records. Once the Commissioner has reviewed the seized records, the Commissioner may subsequently seek additional information under a s. 11 order to compel a person to be examined under oath, produce specific records, and/or provide a written response.

Solicitor-client privileged records should not be disclosed or provided to the Bureau, regardless of whether such records fall within the scope of an order. This means that requests for advice from, and advice given by, lawyers are properly withheld from the Commissioner. All records and electronic files must be checked for solicitor-client privilege and removed before giving access to the officials. Such review should be conducted with the assistance of a lawyer. If you believe certain documents are or may be subject to solicitor-client privilege, contact the appropriate person in your organization immediately. Failure to assert privilege at the time of the search could result in the privilege being lost.

Computer searches (searches of any data contained in or available to the computer system) are authorized under the *Act*. The Commissioner has taken the position that all information "contained in or available to" a computer system in Canada can be seized, even if the information is stored outside Canada, for example by an affiliate of the organization, and theoretically, beyond the jurisdiction of a Canadian order.

C. PRACTICAL GUIDELINES WHEN RESPONDING TO AN ORDER

Upon receipt of an s. 11 order:

(1) Consult immediately with counsel. It may be appropriate for legal counsel to challenge the order or attempt to narrow its scope. Challenges may be made if misleading, incomplete, or inaccurate facts were used to support the grant of the order, if documents requested in the order are irrelevant to the Commissioner's inquiry, or if the tests for granting a order have not been satisfied;[119]

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118 *Supra* note 110, ss. 132, 136.

119 For a discussion regarding challenges to the Commissioner's formal investigative tools under the *Act*, see Melanie L. Aitken & Randal T. Hughes, "Price-Fixing Conspiracies" (Paper presented to the Insight Conference, Toronto, 26-27 May 2004); Glenn A. Hainey & Keith Geurts, "Counsel's Response to Section 11 Orders and Search Warrants under the *Competition Act*" (Paper presented to the Insight

(2) Ensure that employees do not destroy documents or erase computer records, such as e-mail notes;

(3) Identify and claim solicitor-client privilege over all protected records. The *Act* provides for a particular process to be followed where it is alleged that a record is subject to solicitor-client privilege;[120]

(4) Maintain complete copies of all documents provided to the Commissioner in response to the order;

(5) Co-operate with the requirements set forth in the order. It is a criminal offence to refuse to comply with an order.[121] Even if a person intends to challenge the order in whole or in part, and/or to seek to stay the order or more time to comply, the person must, pending directions from the courts, comply with the order;

(6) Request that the Bureau officials refrain from proceeding with the search until a legal advisor has arrived. However, if a lawyer does not arrive within a reasonable time, the officials will likely start the investigation;

(7) Ensure that a lawyer, either internal or outside counsel, is present at all times during the search and reviews all responses to be provided to the Bureau;

(8) Object to unreasonable requests, but comply if the request is not withdrawn. Make a note of your objection and the Bureau officer's response to enable your counsel to challenge the reasonableness of the request in later court proceedings. However, do not obstruct the investigation as this can be a separate criminal offence;[122] and

(9) Do not, as a general rule, make any statements, oral or written, or respond to questions of the Bureau officials, as such comments may be introduced as evidence.[123]

Conference, Toronto, 30-31 May 2005).

120 *Supra* note 1, s. 19. If the Bureau official wishes to review, seize, or copy a record notwithstanding a claim by the person that the record is subject to solicitor-client privilege, the record must be placed in a sealed and identified package and placed in the custody of either: (i) the court that granted the search warrant; (ii) the sheriff of the district or county in which the search warrant was issued or where the record is located; or (iii) with a person agreed on by the Commissioner and the person claiming privilege. A judge will then decide the question of solicitor-client privilege.

121 *Criminal Code*, *supra* note 110, s. 127.

122 *Ibid.*, s. 139.

123 For a further discussion regarding how to respond to investigations by the Commissioner, see Mark W. Nelson *et al.*, "Swimming In A Sea Of Production" (Paper presented at the Canadian Bar Association Annual Fall Conference on Competition Law, 28 September 2006); James Musgrove, David M.W. Young & Dan Edmondstone, "The Competition Cops are at the Door: How to Best React When The Worst Happens" (Paper presented to the Insight Conference, 19-20 February 2001); John F. Clifford & Jeffrey P. Roode, "Practical Issues in Responding To Bureau Investigations And Ensuring Competition Law Compliance" (Paper presented to the Insight Conference, 2 December 1999).

VIII. COMPETITION LAW COMPLIANCE PROGRAMS

An effective competition law compliance program is an essential component of a company's arsenal to safeguard against anti-competitive behaviour and to ensure its ability to comply with current competition law requirements.[124]

While establishing a compliance program is not mandatory, it is strongly recommended both to assist in the avoidance, detection, and remediation of conduct that may offend the *Competition Act* and to be available to be taken into account by the Bureau in the event a company has engaged in conduct contrary to the *Act*.

For the Bureau to consider the compliance program in its assessment of whether to recommend the granting of immunity[125] or a lenient sentence, or to engage in alternate dispute resolution, or other favourable treatment, it must be able to answer affirmatively the question: "Is this program effective and appropriate for this particular business?"[126]

A well-developed and implemented compliance program will promote a pro-competitive understanding and educate employees, who can reduce activities that give rise to potential criminal and civil liability, fines, administrative monetary penalties (in matters involving civil deceptive marketing), and damages, which are most often a result of ignorance of the law. Moreover, where there is uncertainty as to the nature of business activity (whether it would be pro-competitive or anti-competitive in the circumstances), business representatives will be alert to potential issues and can discuss concerns with legal counsel in advance or modify the business activity as appropriate.

A. ELEMENTS OF AN EFFECTIVE CORPORATE COMPLIANCE PROGRAM

The Commissioner sets out in the *Corporate Compliance Program Bulletin* five essential elements of an effective program: (1) clear and genuine support of senior management; (2) the development of relevant policies and procedures; (3) ongoing training of all necessary employees; (4) provision for monitoring, auditing, and internal reporting; and (5) appropriate disciplinary procedures.[127]

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124 For further discussions regarding designing and implementing *Competition Act* compliance programs, see John F. Clifford & Alan J. Weinschel, "Managing Competition Law Compliance: Workshop: How To Design And Implement An International Competition Law Compliance Program" (Paper presented to the Insight Conference, 11 June 1998); Calvin S. Goldman & Mark Katz, "The Five 'W's' (And One 'H') Of Competition Compliance Programs" (Paper presented to the Insight Conference, 3 May 1999); Eric T. Young, "The Role of Compliance in Risk Management: How Compliance Can Help Manage Corporate Governance, Operational Risk and Internal Controls" (Paper presented to the Insight Conference, 23 September 2002).

125 See Brian A. Facey & Yana Ermak, "Immunity Under the *Competition Act*: When to Hold'em and When to Fold'em" (Paper presented to the Canadian Institute's Competition Law Compliance Conference, Toronto, 30-31 May 2005); Paul Crampton "Canada's New Competition Law Immunity Policy-Warts and All" (Address to the American Bar Association Section of International Law and Practice, New York, Spring 2001).

126 Competition Bureau, Director of Investigation and Research, Information Bulletin, *Corporate Compliance Programs* (June 1997), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01638e.html> at 7 [*Compliance Bulletin*].

127 *Ibid.* at 3.

The *Compliance Bulletin* and numerous articles, including those cited in this article, provide excellent guidance in developing a competition law compliance program that is designed to meet the needs of a particular business. In addition, companies should consider whether to incorporate additional safeguards into their programs to address current trends. Following are some important considerations to be taken into account that are not always considered when developing and implementing a competition law compliance program. These include policies regarding: (1) the management of corporate records, (2) the seeking of opinions, and (3) the management of customer or competitor complaints.

B. MANAGEMENT OF CORPORATE RECORDS

Counsel tend to think in terms of a records retention policy. A "record" is broadly defined in the *Act* to include

> any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy or portion thereof.[128]

Companies should ensure they have a program not only for records retention, but also for appropriate record creation, dissemination, retention, and destruction.

1. RECORD CREATION

Business representatives need to think about the wording they use in documents, particularly e-mail communications. This is particularly important in light of the fact that the Bureau places significant reliance on records created in contemplation of and concurrent with certain conduct, as opposed to records created in response to an inquiry initiated by the Commissioner, many of which are reviewed and modified by either internal or external counsel prior to provision to the Commissioner. Advice as to how to take appropriate cautionary measures and avoid inadvertently creating records that may create the appearance of wrongdoing is discussed in this article at Part IX, below, in Compliance Protocols and Avoiding the Appearance of Wrongdoing.

2. RECORD DISSEMINATION

Documents should only be sent to those with a need to know and where the documents fall within the scope of their business activities.

3. RECORD RETENTION

Good documents can help defend against an allegation of conduct that offends the *Act*; however, bad documents can complicate a defence or result in the loss of an action. Consideration should be given to what needs to be retained and for how long, with the advice of counsel.

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[128] *Supra* note 1, s. 2(1).

4. RECORD DESTRUCTION

Most corporate programs commence with civil limitation periods and provide for destruction after the relevant limitation period has expired. However, programs should also consider criminal investigations and prosecutions under the *Act*, which, if involving an indictable offence, will not have any limitation period. The retention of relevant documents may well form the basis of an organization's ability to provide answers to questions of the Bureau at the investigation stage of a proceeding and give the organization an opportunity to avoid a charge or the commencement of proceedings before the Tribunal. Retaining relevant documents may also form the basis of a charge being laid, a successful conviction or proceedings being commenced before the Tribunal, or an order being made by the Tribunal. In any case, the time for destruction should be contained in a well-thought out program and not left to individual discretion.

Ultimately, records should reflect accurately the manner in which business operations are conducted.

C. SEEKING OPINIONS

1. OBTAINING LEGAL ADVICE

Most importantly, as part of a company's competition law compliance program, in industries or businesses with high competition law risk, there should be ongoing access to counsel with competition law knowledge. Business representatives should be able to, and should be encouraged to, pick up the phone at any time and obtain legal counsel on the day-to-day application of the *Act*. Business representatives today are well advised to seek the advice of legal counsel at the strategic planning stage where competition law implications are related to proposed business activities. In addition, as a normal course, business representatives should request that legal counsel either draft agreements (or portions thereof) or review them and provide comments prior to execution.

2. OBTAINING WRITTEN ADVISORY OPINIONS FROM THE BUREAU

The Bureau has historically encouraged businesses to come forward, either formally or informally, to discuss concerns with the application of the *Act* to their operations. One component of the formal advice offered has been the issuance of advisory opinions, which are binding on the Commissioner and which provide the Commissioner's guidance on whether there are sufficient grounds to commence an inquiry under s. 124.1 of the *Act*.[129]

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[129] *Ibid.*, s. 124.1 provides:

> (1) Any person may apply to the Commissioner, with supporting information, for an opinion on the applicability of any provision of this Act or the regulations to conduct or a practice that the applicant proposes to engage in, and the Commissioner may provide a written opinion for the applicant's guidance.
>
> (2) If all the material facts have been submitted by or on behalf of an applicant for an opinion and they are accurate, a written opinion provided under this section is binding on the Commissioner. It remains binding for so long as the material facts on which the opinion was based remain substantially unchanged and the conduct or practice is carried out substantially as proposed.

The Bureau's *Fee and Service Standards Handbook*[130] discusses the applicable fees and processes.

It is important that the advisory opinion be sought prior to commencing the business activity in order to avoid engaging in anti-competitive conduct before the opinion is rendered.

D. CAREFUL MANAGEMENT OF CUSTOMER/COMPETITOR COMPLAINTS

Business representatives should be encouraged to handle all customer or competitor complaints, whether verbal or written, in a serious manner and in a manner consistent with the provisions of the *Act*. The advice of legal counsel should be sought. A meaningful review should be conducted to determine the basis and validity of any complaint, and an appropriate response should be prepared and delivered. In addition, if a complaint is of a significant nature, a formal internal investigation (in the Bureau's terminology, an "event-triggered audit") may be required, either by the business personnel, or through counsel to preserve solicitor-client privilege. The careful management of any such complaint provides an opportunity for any valid aspect of the complaint to be addressed, including discontinuing or changing the manner in which the business activity is being conducted.

IX. COMPLIANCE PROTOCOLS AND AVOIDING THE APPEARANCE OF WRONGDOING

As competition law cases are often based on circumstantial evidence, it is important not only to comply with the *Competition Act*, but also to avoid the appearance of improper behaviour. Organizations and individuals may be accused of offending the *Act* where no offence has been committed, but where actions or words have created an appearance of anti-competitive conduct. Defending allegations of anti-competitive conduct can be costly, time consuming, disruptive to an organization's business operations, and damaging to its reputation.

Liability often depends upon the interpretation of business records, including letters, memoranda, notes, reports, expense accounts, daytimers, telephone records, and e-mails. Documents containing careless or inappropriate language can make conduct which is lawful appear to be suspicious or collusive.

E-mails are often the most dangerous documents as there is a tendency for people to be informal and attempt to be amusing. The ease of distributing e-mails can result in circulation well beyond their intended audience. A tongue-in-cheek comment or an overstatement to make a point can be viewed differently several years after the fact when examined out of context by a prosecutor or by opposing counsel in a civil lawsuit who is seeking to establish anti-competitive intent.

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[130] Competition Bureau, *Fee and Service Standards Handout* (4 December 2003), online: Competition Bureau <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/ct02530e_a.pdf/$FILE/ct02530e_a.pdf>.

While improperly worded documents can create problems, it is also important to ensure that employees are not under the mistaken impression that written communications are discouraged. Contemporaneous records prepared in the ordinary course of business that are thoughtfully worded and explain price changes, policy changes, legitimate competitor contacts, or strategic decisions are much more credible than after-the-fact oral explanations.

The following guidelines for employees may be helpful:

(1) Assume that whatever you write may be disclosed in a competition law investigation or civil lawsuit. Nothing is considered "confidential" or "personal" if it is otherwise relevant, even if contained in a "personal file," with the exception of documents protected by solicitor-client privilege;

(2) Avoid humour, emotion, or sarcasm in written communications, particularly in e-mails, all of which can be difficult to explain out of context and after the fact to someone who is looking for anti-competitive intent;

(3) Be precise and factual in your written communications and avoid speculation and exaggeration;

(4) Be mindful of the language used to avoid creating the wrong impression and do not:

   (a) use words that suggest the existence or use of market power, such as "dominant," "dominate," "market leader," "control," "eliminating," "excluding," "disciplining," or "beating" the competition or a particular competitor;

   (b) mischaracterize competition as unexpected or unethical, or use words that falsely suggest the desire to enter into or the existence of an arrangement with competitors, for example, "they're not playing ball," "industry policy," "industry agreement," "signal," "co-operate," or "our fair share";

   (c) refer to lowering prices below costs or to "really high" earnings or "above normal" profits;

   (d) use language that suggests there is something to hide, such as, "destroy after reading" or "for your eyes only";

(5) Do not circulate material to other persons that are marked "privileged and confidential," or which are from internal or external legal counsel, without the approval of counsel, to avoid potentially waiving any privilege that might exist;

(6) Do not speculate about the company's legal position without prior consultation with legal counsel;

(7) Consult with internal or external legal counsel if you have questions about the subject matter or wording of a document;

(8) Use care in making handwritten notes or comments in memoranda written by others; and

(9) Take particular care when characterizing business objectives and strategies in all documents prepared for senior management or the board of directors. For example, it can be difficult to convince the Bureau that a merger is not likely to substantially reduce competition when the financial justification proposed to the board included anticipated price increases that could be achieved if the transaction proceeded.

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