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Competition Law in the Time of Coronavirus

The rapid spread of the novel Coronavirus (COVID-19) is causing significant dislocation to every aspect of our daily lives. For businesses, COVID-19, and the public health responses being taken to try to limit its spread, will have a significant financial impact. Social distancing and self-isolation will result in fewer customers visiting brick-and-mortar retailers, and uncertain economic times will result in an overall drop in consumer demand. Each of these will cause pain for businesses.

In these circumstances, many businesses will feel the impulse to take unprecedented steps to stay afloat. While it's natural to want to take new and creative steps to preserve one's business, it's important that Canadian businesses remain vigilant to ensure that their conduct remains onside Canada's *Competition Act.* While anti-competitive conduct might seem to provide a short-term fix to a negative business climate, the longer-term consequences of anti-competitive conduct will outweigh any short-term gains.

To that end, this blog post provides a reminder of some of the key Canadian competition law principles that continue to apply during the COVID-19 pandemic. These principles are specific to Canada, and Canadian business operating in the United States should be aware that American antitrust laws differ in a number of ways from Canadian competition law.

Agreements as to Price or Supply of Product: Don't Do Them

Some of the most serious breaches of the *Competition Act* are horizontal agreements between competitors to fix prices, allocate sales or customers, or control or limit the production or supply of a product. Such conduct is prohibited under s 45 of the *Competition Act*. Conduct subject to this prohibition would include competitors agreeing to set minimum prices for a product, to not market or supply to one another's customers, or to limit production of products in order to support prices.

All of this conduct can be the subject of criminal prosecution. On conviction, companies can face fines up to $25 million, and individuals involved in such conspiracies can face up to 14 years in jail. Companies that engage in such conduct often also

face class actions from consumers, which can ultimately cost millions of dollars or more in damages and legal fees.

An agreement to fix prices, markets, or supply doesn't need to be in writing in order to be illegal. Indeed, there doesn't need to even be direct evidence of an agreement: the *Competition Act* makes clear that in a prosecution for horizontal conspiracies, the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the parties. For that reason, in addition to avoiding entering into express agreements with their competitors as to prices, markets, or supply, businesses should be very careful not to share confidential business information, such as pricing details, sales information, or other confidential financial data, with their competitors. The exchange of confidential business information that would not typically be shared between competitors may give rise to an inference that there is an anti-competitive agreement between the parties.

Other Agreements with Competitors: Proceed with Caution

Other forms of horizontal arrangements between competitors are also subject to the *Competition Act*. However, arrangements that are not subject to section 45 of the Act will only be reviewed civilly, and they will only be the subject of an order under s 90.1 of the *Competition Act* by the Competition Tribunal where such arrangement will, or is likely to, prevent or lessen competition substantially in a market. The Competition Bureau's *Competitor Collaboration Guidelines* provide a number of examples of the types of arrangements between competitors that could be subject of an order.

Among the types of agreements that the Commissioner of Competition may act to address are information sharing agreements. Indeed, as set out in the *Competitor Collaboration Guidelines*, even where information sharing agreements do not give rise to a hard-core conspiracy under s 45 of the *Competition Act*, such information sharing agreements may be reviewable under s 90.1 of the *Act*.

In the present context, an agreement by two or more competitors to share information of best practices for responding to the Coronavirus outbreak is theoretically subject to review under the *Competition Act*. However, in circumstances where parties are genuinely trying to exchange information to minimize the spread of the Coronavirus and not for an improper or anticompetitive purpose, such information sharing is unlikely to give rise to *Competition Act* concerns. Even where they do agree to share information relating to Coronavirus, businesses should remain vigilant to not share more information than

reasonably necessary to address legitimate concerns.

Marketing Claims: Don't Stretch the Truth

New challenges often create demand for new products, or increased demand for new uses of certain existing products. For example, there have already been reported shortages of a number of products that may be effective in helping to prevent the spread of the Coronavirus. Businesses may be tempted to stretch the truth of their products in order to capitalize on newfound demand. However, businesses need to also remain vigilant to ensure that their marketing and advertising practices remain onside the deceptive marketing provisions of the *Competition Act*.

The making of a false or misleading representation remains serious conduct under the *Competition Act*. Such conduct can be prosecuted criminally, or the Commissioner can bring civil proceedings to address such conduct. Follow-on class actions are also commonplace where a business is investigated or prosecuted for false or misleading representations.

In addition, it's important for businesses to keep in mind the requirement under s 74.01(1)(b) of the *Competition Act* that any performance or efficacy claims for their products must be substantiated by an adequate and proper test. In a nutshell, this means that businesses have to not only know that performance or efficacy claims for their products are true. Rather, they also have to have appropriate testing to be able to back up such claims before making them.

In the present circumstances, the claims that will be most carefully scrutinized will be ones that are intended to combat the novel Coronavirus, both products that are claimed to sanitize and disinfect as well as health products that are claimed to cure or alleviate the symptoms of novel Coronavirus. In the United States, the Federal Trade Commission has already signalled that it will take action against companies that make unsupported claims about products that can treat or prevent Coronavirus.

But other types of claims may face scrutiny by the Bureau. For example, where a business makes a representation that it is able to provide a service in a way that minimizes the risk of transmission of novel Coronavirus, businesses will have to make sure such representations are true and adequately substantiated.

Be Careful Before Advertising Sales

Falling consumer demand may also lead retailers to try to advertise sales to try to attract and retain customers. Advertising deep discounts can be an effective means for many businesses

of drawing customers' attention.

However, retailers making any type of savings claims must ensure that they comply with the ordinary selling price provisions of the *Competition Act*. The basic rule is that a savings claim—such as "50% off" or "Regular price $499. Now $299!"—can only be made if the express or implied ordinary price (the one the sale price is being compared to) really is an ordinary price for that product. How this basic rule is operationalized is complex: the Competition Bureau's Enforcement Guidelines on Ordinary Price Claims set out basic information about how those rules apply, but business may want to get legal advice before running any new promotions.

Price Gouging

The mere fact of increasing prices in response to increased demand for a product is not itself unlawful under the *Competition Act*. However, there are a number of related legal consequences to be aware of if a business is planning to raise prices. First, where a business has advertised a particular price, it is reviewable conduct under s 74.05 to sell a product above that advertised price. Second, if a business is dominant in its market and is able to charge a higher price through anti-competitive tactics, those anti-competitive tactics may be subject to the restrictive trade practices provisions of the *Competition Act*. Finally, if businesses are only able to charge those elevated prices because of agreements with their competitors, they will likely fall offside s 45 of the *Act*, described above.

Responding to Potential Competition Act Issues

In larger businesses, it is sometimes the case that salespeople or middle management will authorize or engage in breaches of the *Competition Act* without the knowledge of senior management or legal. If a business does discover that its employees have been engaging in potential breaches of the *Competition Act*, it is important to seek legal advice immediately so that appropriate steps can be taken to minimize that business's exposure. Problems that are manageable can often become much worse without prompt action.