"Criminals" Get A Better Deal – The Statutory Double Standard For Prohibition Orders in Criminal Matters vs. Reviewable Matters under the *Competition Act*

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Introduction

As the popular saying goes, all good things eventually come to an end. For that matter, so do bad ones, unless the bad thing happens to be a prohibition or a remedial order issued by the Competition Tribunal with respect to certain reviewable matters.[1] Much like the famous long-eared protagonist of the Energizer commercials, those can keep on going and going and going.

When the *Competition Act*[2] first came into force in 1986, prohibition orders in both criminal and civil reviewable matters had no statutory time limits. In 1999, however, the Act was amended to limit the duration of prohibition orders issued for violations of the criminal provisions of the Act, as well as the civil deceptive marketing practices provisions, to ten years.[3] Surprisingly, no corresponding amendments were made with respect to prohibitions and remedial orders issued under the reviewable matters provisions. Accordingly, prohibitions and remedial orders in reviewable matters, whether contested or on consent, can and have run for periods longer than the ten-year statutory maximum allowed for prohibition orders in respect of criminal matters.

This paper explores this paradox in Canadian competition law and its legal and practical implications. We believe that the discrepancy in the treatment of criminal and civil orders is unfair, especially in light of the Commissioner's enforcement discretion, as it results in a harsher punishment for those engaged in arguably legitimate business practices than for those engaged in criminal activity. From a policy perspective, it is inconsistent with the purpose of the Act. Practically, remedial orders in the reviewable matters (in particular, those without a defined term) put a significant burden on businesses and have the potential to create a chilling effect on business activity in Canada. There is no principled reason, either at law or on public policy grounds, why

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[1] For the remainder of this paper, when we refer to "reviewable matters", unless stated otherwise, we mean to specifically refer to exclusive dealing, tied selling and market restriction under section 77 of the Act and abuse of dominance under section 79 of the Act.

[2] RSC 1985, c C-34, as amended [*Act*].

[3] Bill C-20, *An Act to Amend the Competition Act and to Make Consequential and Related Amendments to Other Acts*, 1st Sess, 36th Parl, 1999. Part VII.1 of the Act – Deceptive Marketing Practices – was added as part of the same Bill.

the Act should not be amended to provide for at least the same time limit for prohibitions and remedial orders in reviewable matters. In the absence of legislative amendments, at the very least, the Commissioner should come out with a set of clear guidelines setting out her approach to the duration of orders in reviewable matters.

Part I of this paper briefly sets out the statutory framework for prohibition orders in both criminal and civil matters, including the Commissioner's enforcement discretion which, although not likely to be relevant for many civil reviewable matters, may have significant implications for joint abuse cases. This part also discusses the practical realities businesses face when deciding whether to contest the Commissioner's allegations in a reviewable matters proceeding. Part II explores in detail the paradox created by the 1999 amendments, describing why the situation cries out for change and providing some practical suggestions.

Part I – Statutory Framework and Practical Choices

A. Prohibition Orders For Violations of the Criminal Provisions of the Act

Where a person has been convicted of a criminal offence under Part VI the Act, subsection 34(1) permits the court to issue an order prohibiting the offending conduct or any other conduct that may facilitate the continuation or repetition of the offence. Subsection 34(2) also permits the court to issue a prohibition order where it appears that a criminal provision of the Act will be contravened, *i.e.*, without conviction or prosecution. For that reason, prohibition orders are often issued on consent, as they allow parties to address the Commissioner's concerns while avoiding the stigma of criminal proceedings or a guilty plea, as well as potential civil liability.

While section 34 has been part of the Act since it came into force in 1986, it was not until 1999 that the section was amended to limit the maximum duration of a prohibition order to ten years.[4]

B. Prohibitions and Remedial Orders For Breaches of the Reviewable Matters Provisions of the Act

The Competition Tribunal can make orders prohibiting businesses from engaging in the alleged tied selling, exclusive dealing or market restriction (section 77) or the alleged practice of anti-competitive acts (section 79). In addition, section 105 of the Act permits the Commissioner and the parties alleged to have engaged in the prohibited conduct to avoid Tribunal proceedings by entering into a consent agreement with the Commissioner. Once registered with the Tribunal, the consent agreement has the force of a Tribunal order.

Unlike in the criminal context, consent agreements in reviewable matters have no statutory time limit and can (and, as will be discussed later, some do) continue in

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[4] *Ibid*. The amendments, which came into force on March 18, 1999, introduced subsection 34(2.2), which provides for a ten-year limit on prohibition orders.

perpetuity. It is possible to negotiate a termination date with the Commissioner. In fact, all of the recent consent agreements have been time-limited.[5] However, while this seems to indicate a measured approach, the decision to time-limit a consent order remains entirely in the Commissioner's discretion. In the absence of a statutorily prescribed time limit, the only option available to the parties seeking to end the restrictions placed on their business by the order is to have it rescinded or varied under subsection 106(1) of the Act based on the material change in circumstances. Although in theory affected persons can bring rescission/variation proceedings without first consulting with the Commissioner, it is almost always advisable to first seek the Commissioner's consent, a process that involves engaging in protracted negotiations with the Commissioner and her staff to satisfy them that the market conditions have changed such that the order is no longer necessary or appropriate. To successfully do this, a party will almost always have to spend considerable time and resources to gather the economic evidence necessary to satisfy the Commissioner and this requires a significant time commitment from management.

C. Prohibition Orders For Violations of the Deceptive Marketing Practices Provisions of the Act

The March 1999 amendments introduced a new category of civil reviewable matters under Part VII.1 of the Act – "Deceptive Marketing Practices" – that allowed the Commissioner to pursue civil remedies with respect misleading representations and certain other deceptive marketing practices.[6] Section 74.1(1) of the Act empowers a court[7] to issue an order prohibiting the person from engaging in the offending conduct or substantially similar conduct, requiring the person to publish or otherwise disseminate a notice regarding the conduct at issue or requiring the person to pay an administrative monetary penalty. The court may also, as a result of the 2009 amendments to the Act[8], issue a restitution order for false or misleading representations.

Similarly to other civil reviewable matters, parties alleged to have engaged in deceptive marketing practices may avoid court proceedings by entering into a consent

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[5] Since 1999, the terms of consent agreements stemming from alleged violations of the reviewable matters provisions of the Act have been ten years or less.

[6] Prior to 1999, misleading representations and other deceptive marketing practices were dealt with exclusively under the criminal provisions contained in sections 52 (misleading representations), 56 (referral selling), 57 (bait and switch), 58 (sale above advertised price) and 59 (promotional contests) of the Act. These sections were repealed by the 1999 amendments and, with the exception of referral selling, re-enacted as reviewable matters under section 74. The option of criminal prosecution for false or misleading representations remains available under section 52 of the Act, although it is now reserved for particularly egregious cases involving either recklessness or deliberate intent to deceive.

[7] Unlike other reviewable matters, which are adjudicated before the Tribunal, the definition of "court" under section 74 includes the Tribunal, a superior court of a province or the Federal Court.

[8] Bill C-10, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on January 27, 2009 and Related Fiscal Measures*, 2nd Sess, 40th Parl, 2009 (assented to 12 March 2009), SC 2009, c 2.

agreement with the Commissioner, which is then subject to the same court registration process. Additionally, subsection 74.13 provides a consent agreement rescission/variation mechanism similar to the one available in the reviewable matters cases.

One significant difference, however, is that unlike other civil reviewable matters, prohibition orders issued for violations of the civil deceptive marketing practices provisions are subject to the same ten-year statutory time limit available for criminal prohibition orders.

D. The Commissioner's Enforcement Discretion

The Commissioner has considerable discretion, within the confines of satisfying the elements of the relevant provisions of the Act, to categorize conduct as criminal or civil. While this discretion is unlikely to be relevant for many reviewable matters, it can play a significant role in joint abuse cases. A notable example is the ongoing application against the Canadian Real Estate Association ("CREA"), in which the Commissioner has alleged that CREA has engaged in an abuse of dominance.[9] Interestingly enough, slightly over two decades ago (in 1988), CREA and nine member organizations consented to a criminal prohibition order that related at least in part to conduct that is similar to the conduct that is the subject of the current proceeding.[10]

Some parts of the order required certain acts to be done within seven years. However, most of its terms had no stated time limit and appeared to have been intended to have the perpetual effect on the activities of CREA and its member organizations.[11] When subsection 34(2.2) became law on March 18, 1999, CREA brought an application arguing that the prohibition order was more than ten years old and, therefore, expired at that time.[12] The Director[13] argued that, for policy reasons, the amendments did not apply to pre-existing orders. Alternatively, the Director argued that the effect of the amendments was to start the ten-year clock from the date of the amendments.[14] The court, however, rejected both of the Director's arguments and concluded that the CREA order ceased to have effect on March 18, 1999.

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[9] *The Commissioner of Competition v The Canadian Real Estate Association* (2010), CT-2010-002, online: Competition Tribunal http://www.ct-tc.gc.ca.

[10] *Canada (Attorney General) v Chambre d'Immeuble du Saguenay-Lac St. Jean Inc*, [1988] FCJ no 1122 (QL)(TD).

[11] *Canada v Chambre d'immeuble du Saguenay-Lac St. Jean Inc,* [1999] FCJ no 1226 (QL) at para 9 (TD).

[12] *Ibid* at para 11.

[13] The Director of Investigation & Research is the former title of the Commissioner of Competition.

[14] *Supra* note 11 at paras 15 and 34.

As a result of the current proceedings, CREA is exposed to the possibility of a remedial order that could last for a term longer than the ten-year maximum allowable under the criminal provisions. While there is no evidence to suggest that this will be the case, the lack of an explicit statutory limitation leaves this possibility open.

E. The Practical Realities

"Agree, for the law is costly" – this advice remains as true today as it was five centuries ago, when first offered by William Camden.[15] It is almost always the case that businesses will seek to resolve the Commissioner's concerns by way of negotiation as opposed to litigation. The reasons for this may be numerous, including the desire for certainty and managing public perception. By and large, however, the decision to contest the Commissioner's allegations is usually based on weighing the potentially astronomical litigation costs (including the Tribunal and possibly appellate proceedings)[16] against the costs of settling without admitting any wrongdoing. The practical reality is that in all but a handful of cases, the costs of litigating significantly outweigh the benefits of entering into a consent agreement, including in cases where the Commissioner's position is not especially strong. This reality gives the Commissioner significant negotiating leverage and, arguably, allows her to obtain results on consent than she would not have obtained in contested proceedings. This view is supported by the fact that out of the five contested abuse of dominance cases[17], the Tribunal substantially accepted the Commissioner's position as to whether the conduct at issue constituted a practice of anti-competitive acts in only two cases.[18] The Tribunal completely rejected the Commissioner's position with respect to the practice of anti-competitive acts in Canada Pipe[19] and rejected it with respect to certain practices in *TeleDirect* and *NutraSweet*.[20]

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[15] An English antiquarian, historian and officer of arms who wrote the first topographical and historical survey of Great Britain and the first detailed historical account of the reign of Elizabeth I of England.

[16] A company can spend millions of dollars in legal and expert fees litigating a Tribunal case. Opportunity costs and costs resulting from wasted management time can amount to equally large sums.

[17] *Canada (Director of Investigation & Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp Trib) [*NutraSweet*]; *Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp Trib) [*Laidlaw*]; *Canada (Director of Investigation & Research) v D&B Companies of Canada Ltd* (1995), 64 CPR (3d) 216 (Comp Trib) [*Nielsen*]; *Canada (Director of Investigation & Research) v TeleDirect (Publications) Inc* (1997), 73 CPR (3d) 1 (Comp Trib) [*TeleDirect*] and *Canada (Commissioner of Competition) v Canada Pipe Co,* 2005 Comp. Trib. 3 (Comp Trib), rev'd 2006 FCA 233 [*Canada Pipe*].

[18] *Laidlaw* and *Nielsen ibid.*

[19] In the original Tribunal proceeding, the Tribunal rejected the Commissioner's contention that the stocking distributor program ("SDP") at issue constituted a practice of anti-competitive acts. The Federal Court of Appeal, however, reversed the Tribunal's decision and the Supreme Court of Canada denied Canada Pipe's leave application. See *Canada Pipe supra* note 17. On re-determination, the Tribunal decided, based on the new test set out by the Federal Court of Appeal, that the SDP constituted a

Part II – the Paradox

A. "Criminals" Get a Better Deal

(a) The Lack of a Statutory Time Limit is Inconsistent with the Purpose of the Act and Basic Legal Principles

The lack of a statutory time limit on prohibitions and remedial orders versus the ten-year limit on prohibition orders in criminal cases is surprising for many reasons, not the least of which is the significant difference in the type of conduct these respective provisions are designed to address.

The criminal provisions of the Act (as well as section 74) are designed to punish and prevent conduct that is generally viewed as reprehensible and without any redeeming characteristics. The severity of the corresponding penalties reflects this view. Conversely, the conduct at issue in an abuse of dominance or an exclusive dealing case is not inherently illegal. Quite the opposite, the conduct in these cases is presumptively legal (and is also usually widely engaged in by market participants), unless it can be demonstrated that the conduct, when engaged in by a firm or firms with market power (which is itself a point of contention) results in a substantial prevention or lessening of competition in the relevant market. In addition, the conduct at issue often has positive economic effects.

Simply put, depending on the circumstances, the conduct at issue in the reviewable matters cases can be pro-competitive, anti-competitive or neutral – a determination which requires a lengthy and sophisticated economic analysis, as anyone who has ever read an abuse of dominance decision knows. Indeed, as the litigation history of these cases suggests, whether the conduct at issue contravenes the Act is almost always unclear.

It seems inconsistent with the objectives of the Act, sound enforcement policy and basic legal principles to subject conduct that is generally acceptable and permissible and that, in fact, may even be pro-competitive (unless a very specific set of

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practice of anti-competitive acts. See *Canada (Commissioner of Competition) v Canada Pipe Co*, 2007 CarswellNat 3913 (WL CAN) (Comp Trib).

[20] In *TeleDirect*, the Tribunal rejected the Director's allegations that the respondents engaged in anti-competitive acts against publishers and against agents. The Tribunal accepted certain of the Director's allegations that the respondents engaged in anti-competitive acts against advertising consultants. In *NutraSweet*, the Tribunal rejected the Director's allegations that (i) an agreement between NutraSweet and a Japanese supplier that excluded that supplier from Canada as an independent supplier for a certain period of time; and (ii) alleged abuses of governmental reporting requirements constituted a practice of anti-competitive acts. The Tribunal agreed with the Director that NutraSweet's practices of (i) using exclusivity clauses, logo display allowances, cooperative marketing allowances, meet-or-release clauses and most-favoured-nation clauses in its contracts; and (ii) using its U.S. patent to foreclose competition by a system of rebates on exports from the U.S. to induce Canadian importers to have only NutraSweet's products used in products they purchased in Canada constituted anti-competitive acts.

economic conditions exists) to harsher sanctions than the conduct that clearly has no socially-redeeming value. In the words of the Canadian Bar Association:

> "Reviewable matters ought to be subject to lesser consequences than more serious criminal conduct that is unambiguously harmful to competition…"[21]

This sentiment[22] was echoed by the Competition Policy Review Panel, which concluded that:

> "[I]t is clearly inappropriate to have a monetary penalty for a violation of a civil provision that exceeds the maximum fine available for a criminal offence under the key conspiracy provision."[23]

We submit that it is similarly inappropriate for the Act to provide, even by omission, for harsher sanctions in the context of sections 77 and 79 than is the case under the criminal conspiracy provisions. This is especially so given the fact that the majority of remedial orders in civil reviewable matters are entered into on consent. When this happens, there is no finding of the Tribunal that the parties have, in fact, engaged in prohibited conduct. The parties simply decide, mostly for economic and business reasons, not to contest the Commissioner's allegations. This creates a perverse situation where a person convicted in a court of law of a criminal offence may, potentially, be subject to a shorter prohibition order than a person who not only has never been convicted of any offence, but who may simply have engaged in a legitimate business conduct, but, for whatever reasons, decided not to contest the Commissioner's position.

Furthermore, in the case of a contested order, a person alleged to have violated the reviewable provisions of the Act is subject to a lower standard of proof, "the balance of probabilities", as opposed to the "beyond a reasonable doubt" standard for criminal violations. It is inappropriate to have a lower evidentiary standard correspond to a stricter penalty.

(b) The Lack of Time Limit is Unfair

By and large, criminal prohibition orders (or orders issued in respect of the violation of the civil deceptive marketing practices provisions) even the ones with fairly

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[21] The National Competition Law Section, the Canadian Bar Association, "Submission on Bill C-19: *Competition Act* Amendments" (December 2004) at 5, online: http://www.cba.org.

[22] Although the comments of both the Canadian Bar Association and the Competition Policy Review Panel were expressed in a different context, namely, the proposed introduction of the administrative monetary penalties for violations of the abuse of dominance provisions, we believe they are equally applicable in this situation.

[23] Competition Policy Review Panel, *Compete to Win*, Final Report to the Minister of Industry (June 2008) at 59. The Panel's mandate was to examine the laws and policies that underpin Canada's continue economic growth and development.

broad prescriptive terms, do not, *per se*, interfere with the offending parties' actual business operations. Rather, they are aimed at precluding the offending parties from engaging in the harmful conduct or any conduct that would facilitate the commission or continuation of the offence. By contrast, when it comes to reviewable matters, a remedial order interferes directly with the affected company's business practices and hobbles its ability to compete – while everyone else in the market is allowed to engage in the same conduct, the person subject to the order cannot. If an order is allowed to run in perpetuity, it puts the affected company at a significant competitive disadvantage.

An illustrative example of this is the *Laidlaw*/*Waste Management* case[24], where the company (a waste removal firm) was subject to a remedial order of an unspecified duration issued in 1992, which prohibited it from engaging in certain types of contractual practices.[25] At the time the order was finally rescinded[26] – some 14 years after it had been issued – Waste Management's market share in the relevant markets had decreased so dramatically (in large measure because the remaining competitors continued to engage in the very same contractual practices Waste Management was prohibited from engaging in by the 1992 order) that it no longer possessed the requisite degree of market power for the order to remain in place. [27] Significantly, Waste Management had not possessed the requisite degree of market power for a considerable period of time prior to seeking the rescission of the order.

To obtain the Commissioner's consent to have the order rescinded, Waste Management engaged in extensive consultations and negotiations with the Commissioner and her staff, which included preparing written submissions, teleconferences and face-to-face meetings with the Competition Bureau. The process entailed considerable expense, in terms of management time, company resources and legal fees, to rescind an order that, on any reasonable interpretation, ought not to have run for as long as it did in the first place.

This case demonstrates that unlimited remedial orders place affected businesses at a significant competitive disadvantage. First, they preclude them, for periods of time that are much longer than necessary given the market conditions, from engaging into legitimate business practices that other competitors are perfectly at liberty to engage in (as in the Waste Management case, for example). They also preclude them from

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[24] Waste Management of Canada Corporation ("Waste Management") is a successor corporation to Laidlaw Waste Systems Ltd. See *Laidlaw supra* note 17. Waste Management is a client of Cassels Brock.

[25] Among the practices in question were the terms of contracts, evergreen clauses, right of first refusal clauses, termination notice provisions and liquidated damages provisions.

[26] *Waste Management of Canada Corporation (formerly Laidlaw Waste Systems Ltd) v The Commissioner of Competition (formerly the Director of Investigation and Research) (*11 December 2006), CT-2006-009, online: Competition Tribunal http://www.ct-tc.gc.ca.

[27] In some markets, from approximately 90% at the time of the 1992 order to below 30% at the time of the rescission. In all of the relevant markets the company's share decreased to below 45% at the time the order was rescinded.

effectively and efficiently responding to the changes in the competitive landscape. Second, they put an onus on the businesses to prove that the circumstances have changed and that the rescission or variation is necessary. In practical terms, this translates into huge costs (not only financial but opportunity costs, time and other managerial resources) necessary to either obtain the Commissioner's consent or to contest the order. High litigation costs also result in the balance of power weighing in favour of the Commissioner, giving her considerable strategic advantage over private parties.

If the conduct was criminal and subject to a section 34 prohibition order, after ten years (at most) the order would terminate and the onus would revert to the Commissioner to prove that the affected person breached a provision of the Act. However, in civil reviewable matters, the order may never terminate and the onus continues to remain with the affected party. In this respect, under the Act, "criminals" get a better deal, which is also inconsistent with principles of fairness.

(c) The Lack of Time Limit is Unnecessary

Markets are dynamic by nature, partly as a result of technological advances that may quickly and drastically change the corporate landscape, but also (and in large measure) as a result of the previously unseen management mobility. Whereas 20, even ten years ago, it was not that unusual for people to spend many years with the same company, these days one would be hard-pressed to find a company where upper management has been around for ten years. Yet, it is entirely possible for the management to inherit a ten-year old remedial order, long after the market conditions have changed and everyone involved in the original conduct has gone. Given that corporate behaviour, which is largely shaped by the management, can change as quickly as management changes, it seems unnecessary and overly restrictive to have Tribunal orders of lengthy or indefinite duration.

Conclusion

Although at the time of the 1999 amendments to the Act Parliament did not directly address the reasons for adopting the ten-year limitation on criminal prohibition orders,[28] the *Report of the Consultative Panel on Amendments to the Competition Act*,[29] as well as other publications[30] suggest that it was, at least in part, due to

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[28] *See House of Commons Debates*, 36th Parl, 1st Sess, No 074 (16 March 1998) (McClelland); *House of Commons Debates*, 36th Parl, 1st Sess, No 122 (23 September 1998) (McClelland); and *House of Commons Debates*, 36th Parl, 1st Sess, No 124 (30 September 1998) (McClelland). For the most part, the debates focused on proposed amendments targeting misleading advertising and deceptive telemarketing.

[29] See *Report of the Consultative Panel on Amendments to the Competition Act to the Director of Investigation and Research, Competition Act, Mr. George N. Addy*, (March 6, 1996) at 36.

[30] See for example, the paper issued by the Library of Parliament, Parliamentary Research Branch, "Bill C-20: An Act to Amend the *Competition Act* and to Make Consequential and Related Amendments to Other Acts" by David Johansen, Law and Government, No LS-309E (November 27, 1997) revised March 9, 1999 at 8.

concerns that permitting courts to issue unlimited prescriptive orders created broad authority that could lead to onerous terms and result in unfairness. We argue that, for the reasons discussed in this paper, the same considerations apply equally (if not more so) to civil remedial orders. Unlimited prohibitions and remedial orders are inconsistent with the purpose of the Act, overly intrusive, unfair and unnecessary. They put affected businesses at a significant competitive disadvantage and may create a significant chilling effect.

We suggest that the Act should be amended to align the criminal and civil provisions and include a statutory time limit for prohibitions and remedial orders in civil reviewable matters. While the exact time limit is, perhaps, subject for another debate, in any case, in our view it should not be any longer than the ten-year limitation period applicable to criminal prohibition orders. It would also be helpful to add a provision to the Act, akin to subsections 74.1(5) and 78(3.2)[31], setting out the factors to be taken into account in determining the length or a remedial order. In the absence of legislative changes, we suggest that at the very least the Commissioner should issue clear guidelines setting out a reasoned and principled approach to the duration of remedial orders in reviewable matters cases. Absent these changes, "criminals" in Canada will continue to get a better deal.

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[31] Subsections 74.1(5) and 78(3.2) of the Act set out aggravating or mitigating factors the Tribunal will take into account in determining the amount of an administrative monetary penalty.