



Corporate Policies & Procedures

Competition

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Approval Date:	Sep 1, 1994	Approved by:	Charlie Fischer
Last Revised:	Nov 1, 2000		President & Chief Executive Officer

POLICY

It is the policy of the Company to conduct its business in an ethical and honourable manner in compliance with Canadian laws. Every employee whose duties involve (i) contact with competitors, customers, suppliers, acquisitions, or trade associations, or (ii) selling, pricing, pricing policies, terms of sale, bidding, or other marketing responsibilities should be aware of the scope and requirements of Canadian competition law. This Competition Policy is intended to be general in nature and is intended to assist such employees in determining their responsibilities with respect to Canadian competition law.

PROCEDURES

Employee Responsibility

Employees are responsible for complying with this policy and the competition laws of Canada. In addition, employees shall bring to the attention of the contact person any information regarding conduct that is in breach of the competition laws or may be a reviewable practice as referred to below.

Each employee should consult the contact person if there are questions concerning this policy, or about the legal consequence of a proposed act under Canadian competition law. Early consultation is vital in order to avoid unintended problems, and to structure plans to achieve lawful objectives.

Management Responsibility

Management, through the contact person, shall disseminate this policy to all employees, provide twice yearly reminders and provide information seminars and other educational programs periodically to inform employees of the scope and requirements of Canadian competition law, and shall review and update this policy on a periodic basis as may be required.

The contact person is the Senior Vice-President, General Counsel and Secretary.

OVERVIEW OF THE COMPETITION ACT

Competition law in Canada is governed by the Competition Act (Canada) (the "Competition Act"). The Competition Act governs all aspect of competition law in Canada, its stated purpose being to maintain and encourage competition in Canada. Three parts of the Competition Act are of principal significance, namely the provisions regarding regulatory offences, civil claims and reviewable practices. Each will be discussed in turn.

Regulatory Offences

The Competition Act establishes a number of regulatory offences. A breach of these provisions could lead to a criminal prosecution, with fines or imprisonment for those responsible including, the Company and its officers, directors, and employees. The maximum penalty for contravention of the Competition Act is 5 years imprisonment or an unlimited fine (the amount determined by the court), or both.

The following are examples of offences under the Competition Act:

- a. Conspiracy - Agreements and arrangements between individuals or companies that have the effect of lessening competition unduly. Although a potentially broad charge, most often a conspiracy will involve price fixing arrangements between competitors.
- b. Bid-Rigging - Any agreement by non-affiliated entities to coordinate or jointly tender bids, unless the person calling for the bids is aware of the agreement.
- c. Price Discrimination - Unequal treatment by suppliers to competing purchasers who purchase goods of the same quantity and same quality at approximately the same time.

- d. Promotional Allowances - The granting of a rebate or other price promotion of a product to one purchaser that is not offered, on proportionate terms, to competing purchasers.
- e. Predatory Pricing - "Unreasonably low" pricing practices that are intended to drive a competitor out of business or to deter entry of a competitor into the market.
- f. Misleading Advertising - Materially false and misleading misrepresentations about a product to the public.
- g. Price Maintenance - An attempt by a supplier to influence its dealers and distributors to maintain or increase the price at which its products are advertised or sold.
- h. Refusal to Supply - A refusal to supply a product to a customer due to the low pricing policy of that customer.

Unintentional acts of employees may give rise to liability for a breach of competition law under the conspiracy and bid-rigging provisions of the Competition Act. These offences are discussed in greater detail below.

Conspiracy

It is a regulatory offence under the Competition Act to enter into an agreement or arrangement with another person that will unduly prevent or lessen competition. The conspiracy section is most often applied in price-fixing arrangements. However, a violation of this provision can also arise in the case of agreements not to buy from or sell to certain individuals. The agreements do not have to be written or formalized in any way, but the agreements do have to be the result of communications amongst the parties, and not the product of independent business decisions.

As a result of the foregoing, it is the Company's policy to make its business decisions independently without consultation with competitors. This area creates potential problems with competition law, therefore, any discussion or conduct from which any agreement or arrangement might be inferred must be avoided.

Appropriate Business Behaviour

Employees must be sensitive to situations where confidential information could be exchanged or where clandestine deals could be made, or seen to be made. For example:

- a. Trade Associations or Meetings - Be careful when in contact with competitors at trade meetings:
- secure and review agenda and program in advance of meetings;
 - retain copies of minutes and speeches from the meetings;
 - immediately object at a meeting if a prohibited subject arises, and call for the discussion to stop;
 - if the discussion continues, leave the meeting and demand the departure, as well as the reason for the departure, be recorded; and
 - obtain prior authorization from the contact person before providing any data or material at such meetings.
- b. Gathering Market Intelligence - Do not exchange confidential price or product information with a competitor. If a competitor offers you this type of information, do not take it, instead, call the contact person.
- c. Documenting Business Decisions - Where a decision is made on pricing, customer or territorial allocation, bids etc., the business justification for that decision should be recorded before the decision is made. When it is clear that a decision could have some impact on competition in a market, the contact person should be consulted before the decision is implemented.

The Competition Act does allow agreements or arrangements that relate exclusively to:

- the exchange of statistics;
- defining product standards;
- the exchange of credit information;
- definition of industry terminology;
- cooperation in research and development;
- restriction of advertising;
- sizes and shapes of containers; and
- measures to protect the environment.

Although these exceptions exist, it is prudent to consult the contact person even if an agreement seems to fall within these exceptions.

Bid Rigging

Bid-rigging is an agreement or arrangement between one or more persons either not to submit a bid, or to submit a joint bid. This is not permitted by the Competition Act, unless the person requesting the bid is aware of such an agreement, or the parties are affiliates of each other.

Appropriate Business Behaviour

There should be no communication of any kind to a competitor with respect to bids on the part of the Company. Furthermore, even if the company wishing to communicate with you is believed to be an affiliate, prior consultation with the contact person is important.

Civil Claims

The Competition Act allows competitors, customers or suppliers to sue the Company civilly. To be successful in a suit, the plaintiff would have to demonstrate to a judge's satisfaction (i) that the Company had breached one of the regulatory offences, and (ii) that the breach has caused the plaintiff damage. A successful claim could have a serious effect on the Company, and it should be noted that a civil claim can be made even if the Company has not been prosecuted for a breach of a regulatory offence.

Reviewable Practices

The Competition Act establishes a number of "reviewable practices". These are practices that are not illegal or even improper, but which in some cases may be anti-competitive. A company is free to engage in any reviewable practice until it is ordered not to by a court-like tribunal called the Competition Tribunal. Only the Director can bring a matter to the Competition Tribunal, and typically does so only after a long and intensive investigation conducted by commerce officers at the Bureau of Competition Policy.

Dealing with the Director as he conducts an investigation is usually expensive - both in time and in legal fees. Consequently, it is best to avoid having to deal with the Director at all by not engaging in the reviewable practices. However, if there are strong business reasons for engaging in an activity that may constitute a reviewable practice, that activity may be pursued with careful planning and proper legal advice. Any activity that may be reviewable by the Director may only be carried out in consultation with, and direction from the contact person.

The following is a non-exhaustive list of examples of reviewable practices established by the Competition Act:

- a. Refusal to Deal - A refusal to supply product which is in ample supply to a purchaser on usual trade terms. In addition, the purchaser must be substantially affected.
- b. Exclusive Dealing - A requirement or inducement by a major supplier causing a purchaser to deal primarily in products, or a class of products supplied by or designated by the supplier, if the effect of this practice is to substantially lessen or prevent competition in a market.

- c. Tied Selling - A practice by a major supplier to supply a product only if the purchaser agrees to (a) acquire another product of the supplier, or (b) refrain from using or distributing a competitor's product, if the effect of this practice is to substantially lessen or prevent competition in a market.
- d. Market Restriction - A practice by a major supplier to (a) supply a product on condition that it only be sold in a specified area, or (b) penalize a customer in any way for selling a product out of specified area.
- e. Abuse of Dominant Position - This occurs when a dominant player or group in a market engages in anti-competitive substantially lessening or preventing competition in a market.

Seemingly innocent acts may be seen as an abuse of a dominant position within a market. To be classed as dominant, a company must possess market power (defined as having some degree of control over prices in a relevant market). Market power is a product of high market shares (at least 35%, and probably over 50%) in a relevant market (which includes a product and all of its reasonable substitutes in a defined geographic region) combined with barriers to entry into the market (e.g., high sunk entry costs, existing excess capacity, regulatory constraints etc.).

The dominant company must have engaged in a practice of anti-competitive acts. The Competition Act sets out a list of examples of anti-competitive acts, and in the two cases which it has heard thus far, the Competition Tribunal has found a number of other practices which qualify. Some of the practices are widely used in business (e.g., exclusive dealings contracts, most favoured nation clauses, "meet or release" clauses). However, these practices become anti-competitive when they are designed with an anti-competitive purpose or intent, for example, they are designed to impede the ability of the dominant company's competitors to compete in the market.

Finally, the anti-competitive practices must, or be likely to, substantially lessen or prevent competition in the market. According to the Competition Tribunal, this means that the practices have created, preserved or enhanced the dominant company's market power. This would be accomplished primarily through maintaining existing, or raising additional, barriers to entry or through expansion in the market.

Appropriate

Business Behaviour

Wherever possible, document the business rational for a decision. Explain why the decision makes sense for the Company. Explanations that were given at the time that a practice was developed are much more persuasive than explanations created after a practice has been challenged.