

# MANAGING COMPETITION LAW RISK

Tony Baldanza, Partner, Fasken Martineau DuMoulin LLP  
Brent Clooney, General Counsel, Toshiba of Canada Limited  
Leslie Milton, Partner, Fasken Martineau DuMoulin LLP  
Mitchell Wolfe, Senior Vice-President, General Counsel and Secretary, Visa Canada

January 31, 2008





## What We Will Cover

- Nuts and Bolts of Competition Law
- Framework for Managing Risk
- Identifying, Classifying and Appraising Risk
- Attributes of Industry That Heighten Risk
- Changes in Law and Enforcement Policy Heighten Risk
- Activities That Heighten Risk (and Techniques for Managing such Risks)
- Additional Risk Management Techniques
- Internal Obstacles to Managing Risk
- Q&A



# Nuts and Bolts of Competition Law

## Criminal Matters

- “Market Power”
- Conspiracy to prevent or lessen competition unduly (section 45)
- Foreign Directives (section 46)
- Bid-rigging (section 47)
- Price maintenance (section 61)
- Price discrimination and predatory pricing (section 50)



## **Nuts and Bolts of Competition Law Reviewable Matters**

- Abuse of dominance (section 79)
- Exclusive dealing, tied selling, market restriction (section 77)
- Refusal to deal (section 75)



## Framework for Managing Risk

- Identifying, classifying and appraising risk
- Risk management techniques



## Framework for Managing Risk (cont'd)

- Does not mean total avoidance of risk
- Strict compliance in areas involving non-trivial criminal risk
- A more nuanced approach in areas involving exposure to non-criminal risk (reviewable conduct, civil damages)
  - Risk/reward analysis in light of industry characteristics, behavior and other factors and other factors



## Framework for Managing Risk (cont'd)

- Complexity and size of organization and business may mean a larger commitment is required
- One size does not fit all



## Framework for Managing Risk (cont'd)

Consider:

- Attributes of industry which give rise to heightened risk
- Business activities which give rise to heightened risk





# Identifying, Classifying and Appraising Risk

- Distinguish between criminal, reviewable conduct (civil) and civil damages risk
- Assess likelihood and potential consequences of
  - a finding of non-compliance
  - *and* criminal or civil enforcement action being taken



# Identifying, Classifying and Appraising Risk (cont'd)...

## Potential Consequences of Non-Compliance

### - Criminal Matters

- Fines, imprisonment, prohibition orders
- Examples – Bayer (rubber and polyester), Cascades, Domtar and Unisource (carbonless sheet), Mitsubishi, Nippon Carbon and others (graphite electrodes), Ajinomoto and others (nucleotides), Labatt (discount beer), taxi services
- Civil damages from private actions (including class actions)



# Identifying, Classifying and Appraising Risk (cont'd)...

## Likelihood of Enforcement Action in Criminal Matters

- International cartel enforcement has been vigorous and will remain so
- United States and, increasingly, Europe tend to be the originating jurisdictions
- MLATs, Cooperation Agreements and Competition Bureau enforcement policy implicate Canada
- Canadian domestic cartel enforcement a priority
- As a practical matter, in Canada criminal enforcement action confined to naked cartels



## Identifying, Classifying and Appraising Risk (cont'd)...

### Likelihood of Civil Actions

- Civil actions, particularly class actions, a major threat
- Class action 'industry' exists
- civil burden of proof 'plus', applies
- Oftentimes "strategic" in nature



# Identifying, Classifying and Appraising Risk (cont'd)...

## Potential Consequences of Non-Compliance

### - Reviewable Matters

- Orders imposing a supply obligation
- Orders prohibiting or compelling changes to business practice
- Forced divestiture or other restructurings
- Administrative monetary penalties (AMPs)
- Example – Canada Pipe



## Identifying, Classifying and Appraising Risk (cont'd)...

Likelihood of enforcement action in reviewable matters

- less enforcement than for criminal matters
- Lots of private refusal to deal applications; few successes due to requirements for
  - Substantial effect on business of refused party
  - Adverse effect on competition
- Bureau is looking to make law in the abuse of dominance area



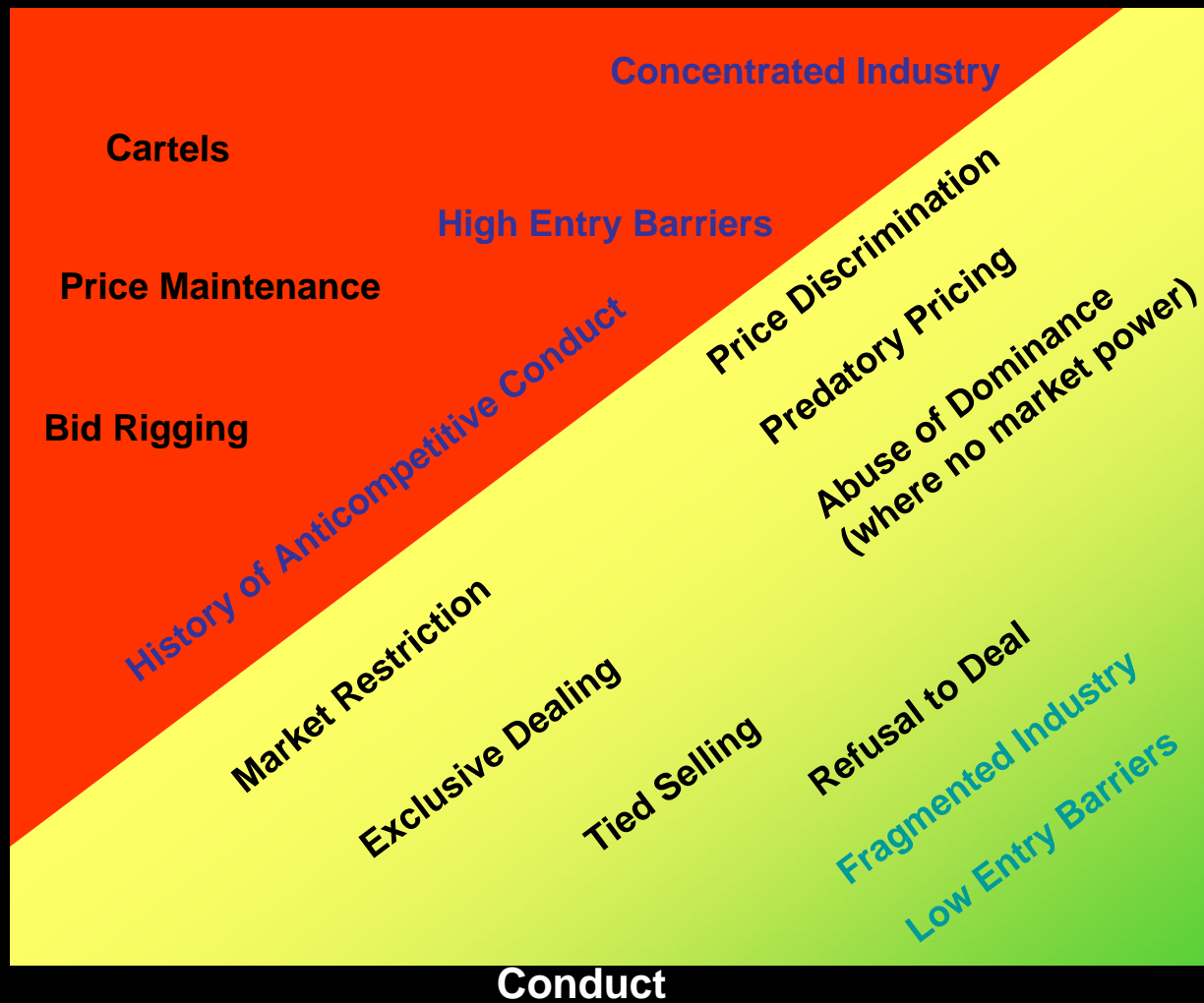
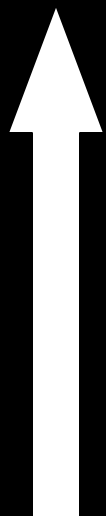
## Identifying, Classifying and Appraising Risk (cont'd)...

### **Other consequences of Non-Compliance**

- Damage to reputation of
  - Corporation
  - Its directors and officers
- Impair careers
- Involve substantial costs, including management time and energy to respond/defend
- Threaten a transaction or business
- May breach competition/antitrust laws of other countries in which the conduct has an effect

# Competition Risk Management Spectrum

Increasing  
Preventative  
Resource  
Allocation &  
Strictness of  
Compliance



Industry  
Structure





## Attributes of Industry that Heighten Risk

Commodity product; concentrated industry;  
high barriers to entry

- This is a classic oligopoly structure where coordination is most readily accomplished
- Most cartel enforcement has applied in these kinds of industry
- Examples – Bayer, Cascades, Mitsubishi, Ajinomoto, Atlantic Sugar



## Attributes of Industry that Heighten Risk (cont'd)...

### History of non-compliance

- Shows that firms have successfully coordinated in the past
- Enhanced scrutiny by Competition Bureau
- Harsher remedies for non-compliance



## Attributes of Industry that Heighten Risk (cont'd)...

### Existence of market power/dominance

- Market power is a prerequisite to the ability to lessen or prevent competition unduly or substantially
- Firms with market power may be subject to an order under the Competition Act for engaging in behavior that a firm without market power can engage in with impunity



## **Attributes of Industry that Heighten Risk (cont'd)...**

Industry that is transitioning to deregulation, partially deregulated or interacts extensively with government:

May create assumption that regulated conduct defence is available even if it is not.

Examples:

- Telecommunications
- Healthcare
- Electricity



## Changes in Law and Enforcement Policy Heighten Risk

- Awareness of developments in competition law and enforcement policy and priorities will assist in properly calibrating risk management efforts
- Examples:
  - *Canada Pipe*
  - Changes in regulated conduct defence (RCD)
  - Initiatives to reform section 45
  - Commissioner's priorities
  - International developments



## **Activities that Heighten Risk (and Techniques for Managing such Risks)**

Significant interaction among competitors

- Can provide a forum for exchanging competitively sensitive information and engaging in improper coordinated conduct
- May support inference of improper conduct
- Contexts include:
  - Trade associations
  - Where competitors are also customers
  - Strategic alliances and other collaborations



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### Trade Associations

- While there are many legitimate functions of trade associations, they also facilitate improper conduct
- Many violations of the conspiracy provisions have involved a trade association to one degree or another



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

Trade Associations (cont'd)

Some areas of special concern are:

- Industry statistics
- Credit committees
- Benchmarking studies
- Standard setting
- Membership restrictions





## Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...

### Trade Associations (cont'd)

- Recent Example – CREA Investigation
- To come – Bureau enforcement guidelines
- Manage risks by:
  - Being well-informed re constraints of competition laws and have written compliance policies
  - Receive and review agendas of meetings prior to attending
  - Person knowledgeable in competition law at all meetings
  - Never discuss competitively sensitive information
  - Receive and review minutes of meetings
  - Carry on only permitted activities
  - Never discuss price; allocation of customers, markets or territories; output



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Where Competitors Are Also Customers**

- Example is a commodity industry where competitors supply each other
  - in cases of supply shortage; or
  - to enjoy transportation savings
- May lead to facilitating practices:
  - Exchange of competitively sensitive information
- May lead to inappropriate agreements respecting “ownership” of markets or territories



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Where Competitors Are Also Customers (cont'd)...**

- **Concerns**
  - interaction may lead to improper agreement or understanding
  - Potential anti-competitive effects of reciprocal supply
- **Manage risk by:**
  - Being careful about the information exchanged
  - Avoiding improper agreements
  - Establishing ethical walls



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Joint Ventures, Strategic Alliances and Other Collaborations with Competitors**

- Ongoing interaction between competitors through the life of the alliance may give rise to behavioral issues under the
  - conspiracy,
  - abuse of dominance,
  - price maintenance
  - and other provisions



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

## **Joint Ventures and Alliances – Identifying and Managing the Risks (cont'd)...**

Assess:

- Effects on incentives
- Rationale for alliance. Legitimate rationales include:
  - achieving scale quickly
  - accelerating projects
  - achieving efficiencies/synergies
  - sharing risks
  - gaining access to new technologies
  - gaining access to financing
  - expanding product offerings
  - gaining access to new markets and customers



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Joint Ventures and Alliances – Identifying and Managing the Risks (cont'd)...**

Distinguishing between legitimate strategic alliances and harmful cartels:

- Integration of business activities, not coordination of conduct
- Purpose is to build competitive advantage, not prevent or lessen competition, raise prices, restrict output or allocate markets or customers
- The parties compete outside the alliance
- Not covert



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Joint Ventures and Alliances – Identifying and Managing the Risks (cont'd)...**

Does the alliance have attributes of a cartel?

- Are the participants large component of the market?
- Will the alliance maintain, create or enhance market power?
- Will the alliance raise prices, prevent entry, or tie up sources of supply?
- Will the alliance deny access to an essential facility?
- Will alliance members compete effectively after implementation of the alliance?



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Joint Ventures and Alliances – Identifying and Managing the Risks (cont'd)...**

#### Precautionary Tools

- Confidentiality Agreement
- Restrict exchanges of information to what is necessary for the alliance
- Avoid exchanging information on current or future pricing, costs, trading terms, or marketing strategies
- Aggregated information is less problematic than disaggregated information
- Historical information is less problematic than current information





## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Joint Ventures and Alliances – Identifying and Managing the Risks (cont'd)...**

#### Precautionary Tools

- Restrict access to information to a “need to know” basis for purposes of achieving the legitimate objectives of the alliance
- Exchange information through an independent third party
- Exercise caution in sharing analyses or conclusions drawn from information exchange
- Keep control over key competitive variables outside alliance (e.g., price, output)
- Do not use alliance as a means of signaling action by members outside the scope of the alliance



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Joint Ventures and Alliances – Identifying and Managing the Risks (cont'd)...**

#### **Additional Techniques for Reducing Risk**

- Favour alliances where no clear market power
- Preserve competition among the participants
- Consider implementing alliance management that is independent of alliance participants



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

### **Joint Ventures and Alliances – Identifying and Managing the Risks (cont'd)...**

#### **Additional Techniques for Reducing Risk**

- Keep the term of the alliance as short as possible
- Use compliance programs and policies
- Keep interaction to the minimum necessary
- Insights from VISA's experience



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

Customer selection/termination--think of:

- Refusal to deal-section 75
- Price maintenance-section 61
- Conspiracy-section 45



## **Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...**

Where US (or other foreign competition/antitrust) policies are automatically extended to Canada

Examples:

- price maintenance
- price discrimination



## Activities that Heighten Risk (and Techniques for Managing such Risks) (cont'd)...

### Activities of foreign affiliates

- Counsel to a subsidiary of a foreign entity must be alert to section 46 of the Competition Act
- Recent example – *Christie's-Sotheby's*



# Additional Risk Management Techniques

## Identify and manage possible complaints

- Competition Act is largely enforced on a complaints basis
- Consider who is likely to complain and why
- Consider whether there are legitimate means of preventing complaints



## **Additional Risk Management Techniques (cont'd)...**

### **Implement a Competition Law Compliance Program**

The essential elements of an effective compliance program are:

- Clear and unequivocal support of senior management
- Documented compliance policies and procedures
- Ongoing training of all officers and employees who are in a position to engage in or be exposed to anti-competitive conduct
- Credible monitoring, auditing and reporting mechanisms
- Consistent disciplinary measures





## **Additional Risk Management Techniques (cont'd)...**

Implement a Competition Law Compliance Program

Benefits of a competition law compliance program  
are:

- Reduced risk of non-compliance
- Due diligence defence
- Alternative case resolution
- Immunity from prosecution
- Mitigating factor in sentencing and remedial orders



## **Additional Risk Management Techniques (cont'd)...**

- Smell test
- Dawn raid protocol
- Call-in number for whistleblower complaints
- Advance consultation with the Competition Bureau
- Contractual indemnification provisions
- Policies for Document
  - Creation
  - Management
  - Retention
- Immunity and leniency program



## **Internal Obstacles to Managing Risk**

- Expense and complexity of training a large and geographically diverse employee base
- Scarce management resources



Q & A