

Appendix B

Exerts of Business Review Letter from the Canadian Bureau of Competition.

Dear Mr. Vishny:

Thank you for your letter dated May 4, 1999 with attachments, requesting an advisory opinion on the application of the Competition Act (the Act) to the proposed establishment of joint selling groups, by the Canadian division of the Association of Independent Corrugated Converters (AICC). The Program of Advisory Opinions seeks to facilitate compliance with the Act by indicating whether a particular practice would provide the Commissioner of Competition with sufficient grounds to commence an inquiry on his own initiative pursuant to paragraph 10(1)(b) of the Act. The Commissioner, under certain circumstances, is obliged to commence an inquiry under paragraphs 10(1)(a) and (c) of the Act. You should understand that the Commissioner has no authority to decide the law.

In the course of discussions with the Competition Bureau, you have confirmed that the proposed transaction raises to your knowledge no issues that are being considered by any other law enforcement agency in Canada or abroad.

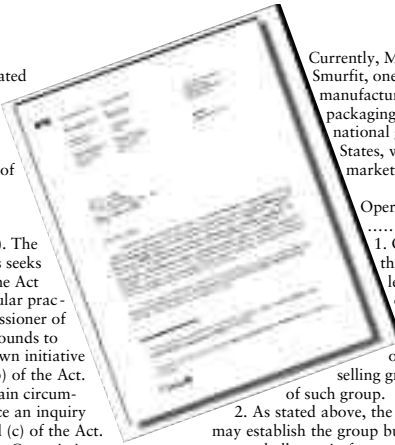
Our understanding of the proposal is as follows:

Purpose of the Strategic Alliance

According to your submission, the cost of transporting corrugated paper packaging materials more than 400 kilometers, significantly increases its price to customers. As a consequence, there are a number of national/regional customers in both Canada and the United States, who will only purchase from corrugated suppliers who have a sufficient number of plants to efficiently supply their national or regional needs. The AICC believes that its member, as a result of their small size and limited number of plants, have lost a significant amount of national and regional account business to larger multiplant manufacturers. In particular, smaller manufacturers with only one or two production facilities, are unable to bid on business for these national/regional accounts.

The proposal would allow the Canadian members of the AICC to form joint selling groups which could supply national/regional accounts and compete with large integrated competitors, who have multi-plant production capacity.

In addition, the strategic alliance will allow members of the AICC, in Canada and the United States, to form joint selling groups to bid on contracts for either Canadian or US multinational firms who require product in various locations within both countries. This will effectively allow Canadian AICC members to participate in bids to supply product to multinational purchasers who operate in both markets.



Currently, Macmillan Bathurst/Stone Smurfit, one of the largest Canadian manufacturers of corrugated paper packaging materials, is part of a multinational group located in the United States, which has a large share of that market.

Operation of the Strategic Alliance

1. One general member or a third party would constitute the lead member of a group of companies who will jointly sell to one or more national accounts. The lead member of each group within a joint selling group will select the members of such group.
2. As stated above, the lead member of each group may establish the group but: (a) each member of the group shall remain free at all times to compete with the group for the business of any national or regional account (proposed customer) except as respects a specific bid or order for which the member participates in the group; (b) the proposed customer will be advised of each group member and the customer shall have the right to decline to deal with any member of the group; (c) only the lead member will negotiate pricing with the proposed customer.
3. The lead member may (i) negotiate a contract with the proposed customer and subcontract out portions of the work to the members of the group or (ii) invite bids from proposed members of the group, which the lead member proposes or agrees to sell products to the proposed customer.
4. No member of the group will be advised of the prices quoted by any other member of the group nor of the price at which the lead member proposes or agrees to sell products to the proposed customer.
5. Participation in the program or in any group will be voluntarily and can be terminated at anytime by any member, subject to the rights and obligations of parties to a contractual obligation.
6. No member of the group may be a company that has the capacity to meet the national (or regional, as the case may be) requirements of the proposed customer in a satisfactory manner.
7. The lead member will not submit a bid or seek a quote from any member of the group for delivery to any proposed customer location where the lead member is capable of meeting the requirements of the customer in a satisfactory manner.
8. The various joint selling groups will be free to compete with each other.
9. Each joint selling group will be independent of every other joint selling group. The makeup of joint selling groups will not be identified to the AICC nor will any one joint selling group identify its existence or its membership to any other joint selling group.

Application of the Competition Act

As a strategic alliance, your proposal has been considered under the conspiracy provisions of the Act. It is the Competition Bureau's intention to encourage those strategic alliances which increase companies' competitiveness provided they do not infringe the Act.

Section 45 has two material elements-(1) agreement, and (2) an undue lessening of competition -continues- ExertsofBusinessReviewLetterfromtheCanadian BureauofCompetition - continued -

flowing from that agreement. With respect to the agreement element, the intent of the parties in entering into the JSG is to satisfy demand from those customers who only want to purchase from national or regional suppliers. We also believe that on an objective basis, a reasonable business person would not draw the inference that the likely effect of the proposal would be to unduly lessen competition.

The appropriate legal framework for the assessment of the undue standard is articulated by the unanimous decision of the Supreme Court of Canada in R. v. Pharmaceutical Association of Nova Scotia et al., [1992] 2 S.C.R. 606. In that case the Supreme Court held that the inquiry into whether an agreement has prevented or lessened competition unduly involves three steps:

1. Defining the relevant market;
2. Analyzing the structure of the market to determine if there is market power; and
3. Analyzing the behaviour of the parties to the agreement.

It is the combination of market power and some behaviour likely to injure competition that makes a lessening of competition undue and thus unlawful

Relevant Market and Structure

The relevant market is Canada and is expanding to points in the United States. Canadian members of the AICC have approximately 17% of the total Canadian market, and about 22% of the Ontario market. The percentages for other parts of Canada are significantly lower.

The top five integrated firms in Canada account for between 78% and 83% of total Canadian supply of corrugated paper packaging materials. It is estimated that the two largest Canadian firms, Norampac and Macmillan Bathurst/Stone Smurfit, supply over 55% of the entire Canadian market. Crown, in British Columbia, has over 50% of that regional market. No members of the AICC are included in the top five ranking of corrugated suppliers in Canada. Given the relatively low market shares that AICC members will have as a group either regionally or nationally, it does not appear that any joint selling group would have market power. If at a later date the market shares change significantly, the Commissioner may be required to review the matter again.

The object of the agreement is to allow small manufacturers of corrugated paper packaging materials to compete with large multi-plant manufacturers. This would appear to increase competition for the larger manufacturers who are supplying the national and regional accounts.

Assessment

Overall, I am of the opinion that the proposed establishment of joint selling groups by AICC, is not likely to lessen competition unduly in any market in Canada. I would like to stress however, that this analysis is based upon the current market share information. In addition, it is important that the lead members of the JSG adhere to the principle of price confidentiality expressed in the submission to the US DOJ which you have indicated makes up the submission to the Bureau.

Conclusion

In our opinion, based on the information which you have provided as set out above, the Commissioner does not have grounds for causing an inquiry to be made pursuant to paragraph 10(1)(b) of the Competition Act. This opinion is predicted on the assumption that no material facts have been omitted or misrepresented in your submission. It is also based on the interpretation of the existing jurisprudence. Finally, this opinion will continue to be valid unless there is an amendment of the provision of legislation upon which it was based. Should you be uncertain as to the impact of any amendment on the opinion you have received, you should seek legal advice or re-contact the Competition Bureau.

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Yours sincerely,

Jim Walker
Assistant Deputy Commissioner (Criminal Matters)