

## Competition Bureau Concludes Examination into ICBC Policies

August 15, 2008

### *Background*

Following receipt of a complaint from six residents of Canada, the Competition Bureau (the "Bureau") commenced an inquiry on February 28, 2007, to determine whether certain policies and practices of the Insurance Corporation of British Columbia ("ICBC") constituted reviewable conduct under the *Competition Act* (the "Act"). In particular, the inquiry focused upon whether ICBC's policies constituted a practice of anti-competitive acts that lessened or prevented competition substantially in a relevant market, contrary to the abuse of dominance provision of the Act, section 79.

ICBC is a provincial Crown corporation that provides mandatory basic automobile insurance (primarily minimum third party liability and accident benefits) to all drivers in B.C. and competes with other insurance companies in supplying optional auto insurance products, including excess liability, collision, and comprehensive coverage. It markets its insurance under the name Autoplan and sells it through brokers across British Columbia.

The complaint alleged that ICBC had prevented and lessened competition substantially in the provision of optional auto insurance in B.C. by:

- 1) requiring brokers that sell ICBC insurance and who are affiliated with a competing insurance company, not sell their affiliate's optional auto insurance;
- 2) coercing certain non-affiliated brokers not to sell private optional insurance or to favour ICBC's optional insurance; and
- 3) prohibiting brokers from "screen scraping" customer data from ICBC's online database for use in preparing quotes and processing transactions for optional insurance offered by private insurers.

This Background summarizes the Bureau's main findings in this matter.

Readers should exercise caution in interpreting the Bureau's assessment. Enforcement decisions are made on a case-by-case basis and the conclusions discussed in this backgrounder are specific to the present matter and are not binding on the Commissioner of Competition (the "Commissioner"). The legal requirements of section 29 of the Act and the Bureau's policies and practices regarding the treatment of confidential information limit its ability to disclose certain information obtained during the course of an inquiry.

### *Previous Cases*

The Bureau has dealt with a number of complaints about ICBC.

In July 1995, ICBC gave undertakings to the Bureau to resolve competition concerns arising from an agent remuneration scheme that the Bureau viewed as offering inducements to ICBC's agents to deal exclusively with the Corporation's products. During 1993 and 1994, ICBC paid its agents a sliding scale commission that increased with the proportion of an agent's total business accounted for by Autoplan products. At the beginning of 1995, ICBC adopted a non-exclusionary agent remuneration scheme, and then provided the undertakings to the Bureau in which the Corporation undertook to not discourage its independent agents from representing other insurance companies who sell competing insurance products. Those undertakings were for a period of ten years. Nevertheless, so far as the Bureau is aware, ICBC is not engaging in any conduct that would have breached the undertakings.

In addition, previous examinations have looked at ICBC's affiliated broker policy, but these did not find evidence that the policy, on its own, was likely to substantially lessen competition. The 1995 inquiry, based on information from many market participants and potential entrants, found that the policy did not constitute a serious constraint on the ability of insurers to expand in the market. Potential entrants did not identify the policy as a significant barrier to entry. Given the various alternatives available, in the absence of something out of the ordinary that would arise from the particular combination of the broker offering its affiliate's product, ICBC's policy would have only a slight effect on competition in the market as a whole.<sup>1</sup> Another consideration was whether ICBC maintained the policy to protect itself from the apparent conflict of interest that would arise when a firm derives only commission income from the sale of Autoplan insurance but both commission and premium income from the sale of a competing product. The Bureau concluded that, although the affiliated broker policy may restrain competition in the optional auto insurance market in B.C., at the time it did not provide reasonable grounds for applying for an order under the civil provisions of the Act.

It is worth noting that because recent developments may have lowered some barriers to entry, it may be even less likely that ICBC's affiliated broker policy, on its own, would substantially lessen competition. These developments include: the British Columbia Utilities Commission started approving basic premiums in 2004 to prevent cross-subsidization of optional insurance; regulatory costs incurred by ICBC since 2004; and, most notably, Basic Insurance Information Sharing. The last of these developments could have the greatest impact in the future when it provides the kind of broad based claims data that ICBC's competitors need to profitably price insurance in B.C.

### *Abuse of Dominance*

The Bureau examined the issues relating to ICBC's policies under the abuse of dominance provision of the Act, which addresses conduct by firms holding a dominant position that are likely to have a significant anti-competitive effect. Subsection 79(1) sets out three essential elements all of which must be satisfied before the Competition Tribunal (the "Tribunal") may impose a remedy in respect of an abuse of dominance. The Tribunal must find that:

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<sup>1</sup> As noted below, the current inquiry did not find that this situation had changed.

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
- that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
- the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

Any case brought forward by the Bureau under the abuse of dominance provision must satisfy each of these three elements. In assessing matters under section 79, finding that any one element is not satisfied means that a determination need not be made with respect to the other elements. The Bureau concluded in this case that ICBC's conduct was unlikely to substantially lessen or prevent competition.

### *The Bureau's Investigation*

The Bureau interviewed and obtained information from a number of market participants including ICBC, other insurance companies, brokers, and trade associations.

In light of the available information, the Bureau considers that ICBC has a dominant position in the relevant market, meeting the first element of section 79 of the Act. ICBC enjoys a high market share in the market for optional auto insurance in British Columbia and the market is characterized by high barriers to entry.<sup>2</sup>

In terms of anti-competitive practices, the Bureau found no evidence supporting the allegation that ICBC coerces brokers who are not affiliated with a competing insurance company. On the other hand, the Bureau views ICBC's affiliated broker and screen scraping policies as potentially exclusionary. However, possible legitimate business reasons for these policies could call into question whether ICBC engages in these practices for the purpose of having a predatory, exclusionary or disciplinary negative effect on a competitor or competitors. Such a purpose is necessary for a practice to constitute an anti-competitive act. To reach a conclusion on this point would have required further investigation which the Bureau did not pursue because of the finding on the third element of section 79.

With respect to the third element, the Bureau did not find that ICBC's alleged anti-competitive practices are having a substantial effect on competition. Though the policies place some restrictions on how ICBC's competitors conduct their business, reasonable alternatives are readily available to a large extent.

1. *Affiliated Broker Policy* In terms of the sale of optional insurance, private insurers (i.e., ICBC's competitors and potential competitors) have a large number of unaffiliated brokers through which they may sell their insurance. In fact, the overwhelming majority of brokers in B.C. are not affiliated and thus are free to offer optional insurance from both

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<sup>2</sup> It remains to be seen what impact the recent developments noted previously will have on entry conditions. For now at least, the barriers to entry in this market are still fairly high.

ICBC and any private insurer. Even if a private insurance company was affiliated with a broker and that broker could therefore not sell both its affiliate's product and ICBC insurance, the private insurer could compete in the market by offering its product through one or more of the hundreds of unaffiliated brokers in B.C. The availability of such a large number of alternatives to choose from means that any lessening or prevention of competition that results from ICBC's affiliated broker policy cannot be considered substantial.

2. *Screen-scraping Policy* Based on information obtained from the industry, ICBC's screen-scraping policy represents an inconvenience, but does not have a substantial impact on brokers' ability to sell private insurers' optional insurance. Notwithstanding the foregoing, the Bureau is of the view that allowing brokers to use customer information on ICBC's system on a customer-by-customer basis would be helpful in facilitating competition in the optional automobile insurance market in B.C. and encourages ICBC to examine its policy to this end.

In view of the foregoing, since at least one element of section 79 is not satisfied in this case, grounds do not exist for the making of an order by the Tribunal.

Nevertheless, although the inquiry concluded that ICBC's policies, in and of themselves, do not likely result in a substantial lessening of competition at this time, they are potentially anti-competitive and could assume greater competitive significance in the future and could be subject to further examination as circumstances warrant. For example, the policies may warrant further examination if market conditions change sufficiently for the policies to have a much greater impact on competition or ICBC engages in other conduct that combined with the policies would constitute anti-competitive acts likely to substantially lessen or prevent competition.

#### *More Information*

For more information on the Bureau's role and activities, please visit the Bureau's Web site.