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CANADA - REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

The attached report updates information on the current state of competition policy in Canada. It was edited after the Competition Committee discussion (Item VII) in October 2004, which compared experiences in ten countries. It is circulated FOR INFORMATION.

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UPDATED REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

CANADA

1. This Report examines the current state of competition policy in Canada. It focuses particular attention on developments since the OECD's 2002 "Report on the Role of Competition Policy in Regulatory Reform" ("2002 Report"), prepared as part of a larger OECD study of regulatory reform in Canada.¹ This report follows the same outline as the 2002 Report, dealing with substantive law and application, institutions, enforcement process, coverage, and policy issues. The recommendations of the 2002 Report and subsequent developments related to their implementation are highlighted in boxes.

2. Competition policy in Canada continues to evolve rapidly in favour of a strengthened role for competition law as a replacement for regulation, reflecting a growing appreciation for the benefits of competition policy. Nonetheless, competition policy is currently the subject of a number of sharp controversies and challenges. The Canadian antitrust law was significantly amended by legislation enacted in June 2002. The amendments contained provisions that responded to recommendations in the previous report urging expansion of private rights of action, improvements in the operation of the Competition Tribunal, and a simpler method for resolving cases by consent. Additional significant amendments are currently under consideration. The proposed amendments include elements responding to the previous Report's recommendations on cartel prohibitions and civil remedies against abuse of dominance violations, and other items as well, including provisions designed to expand private rights of action, eliminate maximum limits on monetary penalty assessments, and empower courts to order restitution in certain deceptive marketing cases.

Substantive law and applications

3. Canada's antitrust law, which dates back to the original Combines Act of 1889, has been amended on a regular basis in response to a continuing evolution in attitudes about competition policy. The modern era commenced with the passage of the Competition Act in 1986. The Act's purpose (Sec. 1.1), stated simply as the maintenance and encouragement of competition, is followed by a list of the beneficial results that competition under the Act is expected to produce. In order, these include efficiency, adaptability, expanded opportunities for Canadian firms in world markets (while also "recognizing the role of foreign competition in Canada"), an "equitable opportunity to participate" for small businesses, and competitive prices and product choices for consumers. The Commissioner of Competition, supported by the Competition Bureau, is principally responsible for competition law and policy in Canada. The Competition Tribunal, a body comprised of judicial and lay members, is a special court available as a first-instance decision-maker for civil matters under the Competition Act.

¹ Canada: The Role of Competition Policy in Regulatory Reform (2002), available at www.oecd.org/competition. Also published as *Review of Competition Law and Policy in Canada*, OECD J. Competition Law & Policy, vol 5, no. 1, p. 47 (2003).

4. Under Section 45 of the Competition Act, agreements that prevent, restrain, or injure competition “unduly,” or that “enhance unreasonably” the price of any product or service, are crimes. The statute does not distinguish between horizontal and vertical agreements, but in practice the provision has been applied principally to horizontal price-fixing and market division. Because Section 45 does not create *per se* offences, proof of a violation requires showing something beyond the fact of the agreement. An unreasonable enhancement of price turns on the manner of enhancement rather than the magnitude. Undue injury to competition depends on an analysis of structure and conduct, and requires that the parties exercise enough market power to affect the price level (or at least enough to insulate themselves from market discipline). On the other hand, countervailing benefits or harms other than to competition are irrelevant, and “efficiencies” arising from the agreement are no defence.² Penalties for violating the conspiracy provisions are a fine up to CAD 10 million or imprisonment up to 5 years or both. Additionally, in conjunction with a conviction, the court may enter an order to control future conduct for up to 10 years (Sec. 34(1)).³ The Attorney General also has the option to forego a conviction, with its attendant fines and imprisonment, and seek only a conduct order under the court’s injunction procedures (Sec. 34(2)). Violations of conduct orders are themselves crimes punishable by a fine in the court’s discretion and up to two year’s imprisonment (Sec. 34(6)).

Box 1. Cartel Provisions

2002 Recommendation: Clarify the anti-cartel principle in the substantive law

Status: Proposed statutory amendments are under consideration.

As the 2002 Report noted, the Competition Act’s language barring agreements that prevent or lessen competition “unduly,” or that enhance prices “unreasonably,” raises concerns on two grounds. First, deterrence of anti-competitive conduct is impaired by requiring proof of economic effects to convict the members of a price-fixing cartel. Second, efficient economic activity is suppressed by exposing the members of legitimate joint ventures to criminal prosecution. The Report concluded that the rule against hard-core horizontal cartels should not depend so heavily on close economic analysis of particular markets, and that a less stringent, civil enforcement route should be provided for ambiguous conduct that courts are reluctant to condemn as criminal.

The problems with the cartel provisions have been actively debated for more than a decade, and were addressed in the consultations that led to the 2002 amendments. The consensus view then was that the complexity of the issues warranted further review, and the Bureau thereafter commissioned three independent studies of the matter, published in August 2001. In 2002, the House of Commons Standing Committee on Industry, Science and Technology recommended amending the Act to create a “two-track” approach for agreements between competitors. The criminal conspiracy provisions would be limited to clearly defined egregious behaviour, while potentially benign arrangements among competitors would be reviewed under a civil provision. The Committee also recommended that a voluntary clearance system be created to provide a safe harbour for pro-competitive strategic alliances.

The current proposals to amend the conspiracy provisions of the Act largely follow the Committee’s suggestions. The criminal conspiracy provisions would bar price fixing, market or customer allocation, and output restriction agreements among

² Section 45(3) provides a defence if the agreement relates only to one or more items on a list that includes such activities as defining product standards, cooperation in research and development, and “restriction of advertising or promotion.” The defence is lost if the agreement is found likely to lessen competition unduly in respect of prices, production quantity or quality, markets or customers, or methods of distribution (Sec. 45(4)).

³ The Act establishes a registration system under which “specialization agreements” (wherein the parties agree to discontinue producing an article or service in return for reciprocal agreements from the other parties, and which may involve agreements to purchase products exclusively from participating parties) are protected from attack under section 45 and from the exclusive dealing provisions of section 77. Registration requires a determination by the Tribunal, after an opportunity for the Commissioner to be heard, that the agreement is not coercive and will likely produce efficiency gains offsetting any reduction in competition (Secs. 85 -90).

competitors or potential competitors. A defence would be available where the defendants established, “on a balance of probabilities,” that the conduct under attack was ancillary to, and necessary to effectuate, a principal agreement, unless the court found that the principal agreement itself had an unlawful objective. Finally, to increase deterrence, the current CAD 10 million maximum fine would be replaced with a fine set at the court’s discretion.

The Tribunal’s jurisdiction would be enlarged by a new civil strategic alliances provision targeting all other agreements among competitors that could prevent or substantially lessen competition. In assessing the competitive effects of such agreements, the Tribunal could consider a list of factors similar to those currently considered during a merger review. The Tribunal could issue an order prohibiting the parties to the agreement from entering into or continuing the agreement and could also impose administrative monetary penalties. Further, on application, the Commissioner could review a joint venture arrangement and, where appropriate, issue a binding certificate assuring the parties that no referral would be made to the Justice Department for prosecution and that no order would be sought from the Tribunal under the civil strategic alliances provision.

The amendments proposed for the cartel provisions are hotly disputed on a variety of grounds. Some assert that no real problem exists with respect to prosecution of hard-core behaviour, and that the Bureau has not demonstrated that its enforcement capacity is truly impaired. The Bureau has indeed obtained a series of handsome settlements in international cartel cases. Such settlements do not, however, prove that domestic cartel behaviour is effectively deterred, and deterrence is critically important for the kind of surreptitious conspiracies that section 45 targets. Other concerns are that the proposed language does not cleanly separate hard-core agreements from potentially efficient behaviour, and that the defence for ancillary agreements is unworkable. There are also objections relating to the necessity and utility of the civil strategic alliances provision and the clearance certificate process. There may well be room for refinement of the proposals, and the consultation process in Canada appears well-designed to generate a result that, even if imperfect, improves the even more imperfect status quo. *Per se* treatment for hard-core conduct is a standard feature of antitrust regimes worldwide because the importance of deterring cartels outweighs the (presumably inescapable) risk of suppressing some desirable joint behaviour at the margins of the *per se* zone. Canada’s statute should be amended to permit ready prosecution of “*per se*” criminal offences, and to provide appropriate civil law enforcement for strategic alliances and other agreements among competitors that deserve more refined examination.

5. The Act treats bid rigging as a separately defined, *per se* offence (Sec. 47), although agreements to submit a joint bid are permitted if the parties properly advise the tendering authority. Also, the statute’s (essentially *per se*) price maintenance provision is not limited to resale prices, and thus may be applied to agreements among horizontal competitors to increase prices or prevent their reduction (Sec. 61). Penalties for violating these criminal provisions are the same as for Section 45 except that the fine is in the discretion of the court. Other statutory criminal provisions target specific kinds of horizontal agreements, including the effectuation of international cartel agreements reached outside of Canada that would have violated Section 45 if entered within Canada (Sec. 46, punishable by a discretionary fine but no imprisonment); agreements among federal financial institutions about interest rates, charges, or services (Sec. 49, illegal *per se*, punishable the same as a section 45 offence); and conspiracies to limit unreasonably professional sports players’ opportunities to participate in the sport or negotiate with other teams (Sec. 48, punishable the same as a section 47 offence).

6. Non-price vertical restraints are usually treated as “civil reviewable” matters. Specific provisions govern several common distribution issues, such as refusals to deal (Sec. 75); consignment sales (Sec. 76); exclusive dealing, downstream market restrictions, and tying (Sec. 77); and delivered pricing (Sec. 81). The refusal to deal provision in Section 75 requires that there be an “adverse effect” on competition for a violation to arise.⁴ Similarly, Section 77, dealing with exclusive dealing, market restrictions, and tying, focuses on restraints that are imposed by a major supplier or that are in widespread use, with the result that competition “is likely to be lessened substantially” through impeded entry or otherwise. Consignment sales are barred by Section 76 only when the supplier is employing them to enforce downstream price maintenance or price discrimination. In contrast, the delivered pricing provision in Section 81 demands only that some customer be disadvantaged. The remedy for violations of any of these sections is a conduct

⁴ The 2002 amendments added the “adverse effect” element. Previously, section 75 entailed no competitive effects requirement.

order, subsequent violation of which is a crime subject to a fine in the court's discretion or up to five year's imprisonment, or both (Sec. 66). One of the pending proposals for amending the Competition Act would empower the Tribunal to impose administrative monetary penalties for violating any of these four sections, on the grounds that the current threat of a conduct order alone is insufficient to deter anti-competitive conduct. Vertical restraints may also be addressed through the statute's civil abuse of dominance provisions, described below. In theory, the general criminal conspiracy section (Sec. 45) could likewise be applied to vertical agreements, although this rarely happens. Finally, as noted previously, price maintenance is covered by the criminal provision in Section 61 and is virtually *per se* illegal. It prohibits attempts by suppliers to influence resale prices upward or to refuse to supply or otherwise to discriminate against discounters. Likewise, resellers are prohibited by Section 61 from boycotting suppliers that do business with discounters.

7. Section 79 empowers the Tribunal to remedy abuse of dominance by entering conduct orders and, where necessary, requiring divestiture of assets or shares. To find a violation, the Tribunal must conclude that the respondents (one firm or several) "substantially or completely control" a relevant market and engage in a practice of anti-competitive acts that prevent or lessen competition "substantially" (or that are likely to do so). Section 78 provides a non-exhaustive list of qualifying anti-competitive acts, including vertical squeezing of non-integrated customers' margins, acquisition of a customer's or supplier's potential alternative source or outlet, freight equalisation on a competitor's plant, deployment of "fighting brands," pre-emption of scarce facilities or resources, buying up product to sustain prices, setting incompatible product specifications, inducing a supplier to deal only with certain customers, and predatory sales below acquisition cost.⁵ Notably, the list does not include the simple exercise of market power by charging a high price or by withholding supply from the market. Canadian jurisprudence does not consider such activity to constitute abusive exploitation of market power. Rather, "abuse" is conduct that tends to enhance or entrench market power, or facilitate its exercise, by excluding, disciplining, or effecting predation against competitors...⁶ One pending amendment would add to the list of qualifying anti-competitive acts a clause referring to the sale of products "at a price below avoidable cost." There is also a proposal to delete the market power element from section 79, so that violations would require only a substantial lessening of competition without regard to the perpetrator's degree of market dominance.

Box 2. Abuse of Dominance Provisions

2002 Recommendation: Provide stronger civil sanctions against abuse of dominance

Status: Proposed statutory amendments are under consideration

The 2002 Report urged that, to enhance deterrence, consideration be given to authorizing administrative penalties for abusive practices by dominant firms. The only remedies available now in Tribunal proceedings are orders controlling future behaviour and structural orders such as divestiture.

Proposed amendments would permit the Tribunal to impose administrative monetary penalties ("AMPs") for violating any of the Competition Act's provisions respecting civil reviewable conduct (excepting mergers). Whether to impose an AMP, and its size, would be left to the Tribunal's discretion. The Act presently authorizes AMPs only for misleading representations and deceptive marketing practices barred under the civil provisions in Part VII.1 of the Act (Sec. 74.1) and for abuse of dominance

⁵ The use of intellectual property rights to lessen competition unduly can be subjected to a court order revoking patents and mandating licenses (Sec. 32). This section, which dates originally from the 1930s, has never been used. In its Intellectual Property Enforcement Guidelines, the Bureau observes that such a remedy might be applied in "network industry" situations.

⁶ The Bureau issued abuse of dominance enforcement guidelines in 2001, followed in December 2002 with an interpretation bulletin explaining how the abuse of dominance provisions apply to the Canadian grocery sector.

violations by a domestic airline under Section 79(3.1) of the Act, and penalties imposed under either of those provisions are subject to a maximum limit.

Deterrence of unlawful practices by dominant firms would be enhanced by permitting the Tribunal to impose monetary fines. Although conduct orders have a curative effect, they allow violators to retain the fruits of their unlawful conduct. Divestiture orders are appropriate only for gross abuses of entrenched market power and have never been employed in a Tribunal case. The prime objection to expanding AMPs is that the increased deterrent effect would restrain desirable pro-competitive behaviour as firms adjust their risk calculations in undertaking civil reviewable conduct. Critics note that the civil reviewable provisions of the Act were introduced to deal with commercial conduct that is not inherently anti-competitive and that does not warrant criminal prosecution. Consequently, a specific instance of such conduct becomes unlawful only once the Tribunal determines it be so. The concern about deterrence gains added force if, as presently proposed, the Act's cartel provisions are revised to make strategic alliances civilly reviewable, because such alliances would also be exposed to AMPs.

The problem of over-deterrence is, however, significantly ameliorated in the Canadian enforcement scheme because the "conformity continuum" employed by the Bureau makes it unlikely that a company engaging in debatable conduct would be charged with an AMP before it had an opportunity to modify its behaviour. Bureau enforcement guidelines and Tribunal precedents also provide guidance to firms undertaking potentially anti-competitive conduct and, under section 124.1 of the Act (as amended), a firm may always obtain a binding advisory opinion (albeit at a fee) about the legality of contemplated commercial activity. Finally, at least as to abuse of dominance violations, the examples of "anti-competitive acts" recited in Section 78 of the Act uniformly require that the conduct at issue be undertaken "for the purpose" of impeding or preventing a competitor's entry into, or eliminating a competitor from, a market. This element (which is separate from the additional requirements in Section 79 that the abusive conduct be undertaken by an entity with market power, entail a "practice" of anti-competitive acts, and have or be likely to have the effect of preventing or lessening competition substantially in a market) operates to protect firms from inadvertent exposure to monetary penalties.

The proposal permitting imposition of administrative monetary penalties ("AMPs") for violating any of the Competition Act's provisions respecting civil reviewable conduct (other than mergers) should be adopted. Further, because of the heightened deterrence arising from exposure to AMPs, the affected statutory prohibitions should be tailored as much as possible to address only anti-competitive behaviour. A competitive effects clause should therefore be added to the provisions on delivered pricing in Section 81, which now requires only that an individual commercial customer (rather than market competition itself) be disadvantaged

8. Two sections of the Competition Act protect small businesses in their relationships with large suppliers and customers by outlawing various forms of discrimination. Discrimination between customers respecting price or other terms, for goods of like quality and quantity, is prohibited without the need to show an anti-competitive effect (Sec. 50(1)(a)). There is no cost justification defence, but volume discounts are permitted even if not cost-justified. Granting advertising or marketing allowances on non-proportional terms is prohibited, again without regard to whether there is any anti-competitive effect (Sec. 51). Geographic price discrimination and selling at "unreasonably low" prices are both barred where the effect, tendency, or intent is to substantially lessen competition or eliminate a competitor (Sec. 50(1)(b) and (c)). The statute stipulates that violations of all these provisions are crimes punishable by imprisonment for up to 2 years, but it has no provision for the imposition of fines. The Criminal Code, however, has provisions permitting the assessment of fines in lieu of imprisonment. Through price discrimination and predatory pricing enforcement guidelines, the Bureau has tried to limit the risk that these provisions could be used to prevent competition unnecessarily. Liability depends on a "practice" or a "policy" of discrimination or unreasonably low pricing, which means that businesses may meet a rival's lower price, or reduce prices to win a new account, enter a new market, or participate in a special retail event. The price predation guidelines require both that the perpetrator have sufficient power to affect market prices and recoup lost profits and that the prices charged be at least below average total cost. Allegations of predatory pricing can also be, and have been, addressed under the Act's non-criminal abuse of dominance position provisions. The pending proposed amendments to the Competition Act would remove criminal sanctions from these offences and convert them to civil reviewable matters requiring demonstration of an anti-competitive effect.

9. Mergers are civil reviewable transactions that the Tribunal is empowered to prevent or dissolve (wholly or in part) if the merged entity can prevent or lessen competition substantially or is likely to do so (Sec. 92). The Bureau has issued merger enforcement guidelines that interpret the “substantial lessening of competition” test in terms both of single-firm market power and of co-ordinated action. The Bureau will be concerned if the merged entity could increase price above competitive levels for a sustained period. Generally, a merger will not be challenged if the merged firms’ share will be less than 35%. Where the focus is risk of co-ordinated action, the merger will not be challenged if 4-firm post-merger concentration will be under 65% and the merged firms’ share will be under 10%. Markets are defined by conducting an economic analysis of demand and supply substitution. Other factors are considered in addition to market share, including barriers to entry, the effectiveness of remaining competitors (or the risk of eliminating a particularly effective one), and innovation. A “failing firm” proviso permits an acquisition of an insolvent firm that is in the process of exiting the market, provided that no preferable buyer is available and acquisition would produce a better competitive outcome than restructuring or liquidation. In 2004, the Bureau expects to issue revisions to its 1991 Merger Enforcement Guidelines and also to complete a reassessment of its 1998 Bank Merger Guidelines.

10. The statute establishes an efficiencies defence where the Tribunal finds that an otherwise anti-competitive merger has produced (or is likely to produce) efficiency gains that are greater than, and offset, the effects of diminished competition and are not attainable by means other than the merger (Sec. 96).⁷ The Bureau’s original 1991 merger enforcement guidelines articulated a “total surplus” standard, under which a merger would be permitted if the gain in productive efficiency exceeded the “deadweight loss” associated with the reduction in output that would result from the merged entity’s increased market power. The Bureau, however, broke from the total surplus standard to challenge the 1998 *Superior Propane* transaction. That merger, to near-monopoly, was expected to produce dead-weight loss and other inefficiencies totalling about CAD 6 million, but would also have saved the combined firms about CAD 30 million. Consumer prices in the affected market for bottled propane gas, which is sold mostly to lower-income rural users and small businesses, were projected to increase about CAD 40 million, or nearly 10%. The Tribunal looked only at the dead-weight losses and held that the acquisition should proceed because they were outweighed by the cost savings. The Federal Court of Appeal disagreed, finding that the Tribunal had improperly limited the balancing of effects and efficiencies. Relying on the array of policy objectives stated in Section 1.1 of the Act (including particularly the reference to providing consumers with competitive prices), the court concluded that the total surplus standard was not appropriate and instructed the Tribunal to consider other anti-competitive effects (such as wealth transfers from consumers to producers or impacts on smaller businesses) for comparison to the claimed efficiency benefits.

11. The Tribunal reopened the matter and issued another decision in early 2002, reaching essentially the same conclusion as it had the first time. The Tribunal found that, even under a broader definition of “effects,” the quantified efficiencies would nonetheless exceed and offset the anti-competitive effects. The Tribunal rejected the Commissioner’s argument that the entire amount of the consumer-to-producer wealth transfer should be counted as an anti-competitive “effect.” Such an approach is a feature of the “consumer surplus standard,” which permits an efficiencies defence only if the economic benefit of the efficiencies flows through to consumers in sufficient quantity to prevent any price increase arising from increased post-merger market concentration. The Tribunal held instead that only regressive redistributions of wealth constituted anti-competitive “effects” for the purposes of section 96. The Tribunal’s final conclusion was that the regressive impact of the merger (which it construed as the price increase to poor households that used propane for residential heating) was relatively small compared to the substantial efficiencies that had already been accepted as proven. In January 2003, the Federal Court of Appeal dismissed the Commissioner’s appeal from the Tribunal’s second decision and accepted the Tribunal’s methodology. In March, 2003, the Bureau announced that it would not appeal the Federal Court’s decision. Concurrently, a

⁷ Canada and South Africa are the only two countries with such a statutory efficiency exception.

private member of Parliament initiated Bill C-249, under which (1) efficiency gains would be converted from an affirmative defence to a factor for consideration in assessing mergers, and (2) only gains in efficiency that benefit consumers (for example, in the form of competitive prices and product choice) could be considered in the competition analysis. The House passed a version of the Bill with little debate and it was then referred to the Senate. On May 12, 2004, the Competition Commissioner testified before the Senate Committee on Banking, Trade and Commerce in support of C-249. The bill died, however, upon dissolution of Parliament in May 2004.

12. Pre-merger notification to the Bureau is required if (1) the combined Canadian assets of the merging parties (or their combined sales in, from, or to Canada) exceeds CAD 400 million and (2) the acquired entity has Canadian assets (or sales in or from Canada) exceeding CAD 50 million (increased in April 2003 from CAD 35 million). The Bureau has internal service standards that specify the period within which the Commissioner will decide whether to challenge a merger. For complex cases, the Bureau must persuade the parties to refrain voluntarily from closing, seek interim relief from the Tribunal (Sec. 100(1)), or else rely on post-transaction remedies. Failure to notify when required, or closing a transaction before the deadline, is punishable by a fine of up to CAD 50 000 (Sec. 65(2)). For a fee, parties may obtain some certainty and avoid the notification process by applying to the Commissioner for an Advance Ruling Certificate (Sec. 102). The Bureau has issued a Notification Guide, along with a series of interpretative bulletins, on the application of the Act's notification provisions. A final Interpretative Guideline on the filing exemption for acquisitions in the ordinary course of business was published in December 2002, and, in April 2003, the fee of CAD 25 000 for merger notifications and Advance Ruling Certificate requests was increased to CAD 50 000 to reflect cost escalation subsequent to the fee's original implementation in 1997.

13. The Competition Act includes a variety of criminal and civil provisions prohibiting false or misleading representations and deceptive marketing practices. The Bureau considers enforcement of these provisions to be an integral part of its mission to ensure the proper functioning of competitive markets. Representations are prohibited if they are false or misleading in a material respect; that is, if they could influence a consumer to buy. General impressions, as well as literal meaning, are assessed to determine whether a representation is misleading. Some of the statutory provisions entail criminal penalties (typically, a fine in the court's discretion and up to five years imprisonment, or both) while others are enforced civilly. On the criminal side, the Act targets misleading advertising (Sec. 52), deceptive telemarketing (Sec. 52.1), multiple price tags on retail items (sec. 54), compensation claims for multi-level marketing plans (Sec. 55), and pyramid schemes (Sec. 55.1). A new provision added in 2002 imposes criminal penalties on communications suggesting that the recipient has won a prize, if the recipient is also asked to pay money or incur a cost (Sec. 53). The Bureau issued draft enforcement guidelines for this provision in August 2003. The Commissioner is also responsible for enforcing the Consumer Packaging and Labelling Act, the Textile Labelling Act, and the Precious Metals Marking Act, which require accurate (and in some cases, mandatory) labelling and provide criminal penalties for violations. The civil provisions, added in 1999 as Part VII.1 of the Act, address deceptive advertising claims (Sec. 74.01(1)),⁸ misleading "ordinary selling price" representations (Secs. 74.01(2) and (3))⁹, untrue or unauthorized test

⁸ Prohibitions apply to false or misleading representations (par. 74.01(1)(a)), performance claim representations that are not based on adequate testing (par. 74.01(1)(b), and misleading warranty or guarantee representations (par. 74.01(1)(c)).

⁹ In July 2002, the Bureau commenced its first case under the "ordinary selling price" provision in Section 74.01(3), which prohibits misrepresentations about the price at which products are normally sold. The application alleged that Sears Canada Inc. referred to inflated regular prices when promoting certain tires to consumers at sale prices. In responding to the application, Sears challenged the constitutional validity of Section 74.01(3), asserting that it unjustifiably infringed on the freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. The case is pending.

claims and testimonials (Sec. 74.02), bait and switch selling (Sec. 74.04), sales above advertised prices (Sec. 74.05), and promotional contests that fail to disclose certain required information (Sec. 74.06). Remedies that the Tribunal or civil courts may impose for Part VII.1 violations include cease and desist orders for up to ten years, corrective notices, and administrative monetary penalties (up to CAD 100,000 for a firm and CAD 50,000 for an individual, doubled for recidivists)(Sec. 74.1(1)). Proposed amendments would further enhance the available remedies in civil cases under Part VII.1 by eliminating the maximum limits on administrative penalties, providing restitution in certain cases to victimized consumers (up to the amount that the consumer had paid for the item), and empowering the Tribunal or court to issue *ex parte* asset freeze orders to secure funds for restitution.

Competition Policy Institutions

14. The Commissioner of Competition, supported by the Competition Bureau, is principally responsible for competition law enforcement and policy in Canada. The Bureau conducts investigations and recommends action to the Commissioner. The Commissioner may refer criminal cases to the Attorney General of Canada for prosecution in the criminal courts or such other action (including negotiation of a consent agreement) as the Attorney General deems appropriate. In civil cases, the Commissioner may commence an action in the civil courts or before the Tribunal, and is represented in such proceedings by lawyers from (or retained by) the Department of Justice.

15. The Commissioner, an “independent statutory person,” is appointed by the Governor in Council. As a practical matter, this means appointment by the Prime Minister, based on the recommendation of the Minister of Industry. On administrative matters, the Commissioner reports through the Deputy Minister of Industry Canada. The Competition Bureau itself is part of Industry Canada and subject to the department’s oversight and policies about personnel and budget. With respect to law enforcement, the Minister has the power to instruct the Commissioner to open a formal inquiry or to revisit a decision to discontinue an inquiry, but that power has rarely been used. The Minister has no power to close a case or direct a particular outcome. Relations between the Commissioner and the Minister are formal and infrequent, typically to prepare the Minister to respond in Parliament to questions about Bureau actions, or to consult about legislative amendments. The Bureau initiates policy proposals and legislation specifically addressing competition issues. In general, for this function (and for dealing with other legislation that may affect competition), the Bureau operates within the Department’s legislative review process. Industry Canada is responsible for some 60 other statutes, many of them with direct or indirect effects on competition, such as the laws about bankruptcy and intellectual property. Industry Canada has generally supported policies of developing competition and international competitiveness, but differences in the positions of the Department and the Commissioner can and do sometimes arise.

Box 3. Competition Bureau Independence

2002 Recommendation: Clarify the scope of the Commissioner’s decision-making independence.

Status: Some action undertaken.

The 2002 Report concluded that “[c]larifying the relationship between the Commissioner and Industry Canada is an increasingly important concern, because the appearance that decisions depend on political calculation and direction undermines the Commissioner’s credibility,” adding that “the position of the Bureau within the department fuels media perceptions that political connections affect the disposition of controversial cases.”¹⁰

As this language suggests, the problem of the Commissioner’s independence presents itself in two aspects. First, at the time of the previous Report, the handling of certain merger cases had produced media comment suggesting that the Commissioner had

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been influenced by an interest in maintaining the government's good favour. Second, the structural posture of the Bureau, making it dependent for finances and personnel on a department otherwise responsible for promoting industry rather than policing it, inevitably leads to the misimpression that there are conflicting pressures on a Commissioner's decisions.

Under the Competition Act, the Commissioner is fully empowered to render independent decisions in law enforcement matters. Further, the independence of ultimate decisions is promoted by the requirement that all matters, civil and criminal, be decided by a court or the Tribunal. Since the previous Report was issued, no new cases raising a media outcry about Bureau autonomy have occurred. The Bureau has taken a number of steps to emphasize its independence from the ministry in law enforcement matters, setting up an independent website and creating its own letterhead and e-mail addresses.¹¹ Commissioners, former and current, have since taken positions that differed from the government's on such controversial issues as foreign ownership restrictions.

Lingering misperceptions regarding the independence of the Competition Bureau could be further dispelled by presenting its budget as a separate line item within Industry Canada's estimates, in line with the recently-adopted practice of presenting the Bureau's activity and budget as a separate item within Industry Canada's Reports on Plan and Priorities and Departmental Performance Report. Other options might be making it a stand-alone agency, reporting to Parliament through the Minister of Industry but responsible for its own finances and personnel, or locating it elsewhere within the governmental structure, although this would reduce the Bureau's ability to influence internal policy deliberations within Industry Canada.

16. The Competition Tribunal is the first-instance decision-maker for civil reviewable matters, including mergers and abuse of dominance. There are up to 4 judicial members, who are sitting judges with other judicial duties, and 8 lay members. Members are appointed by the Governor in Council on recommendation of the Minister of Justice for 7 year renewable terms. One of the judicial members is designated as the Chairman by the Governor in Council. The Tribunal sits in panels of from 3 to 5 members, which must include at least one judicial and one lay member. A judicial member chairs each panel, and only a judicial member may resolve questions of law.¹²

Law Enforcement Process

17. The Bureau's approach to law enforcement relies on a variety of compliance activities as well as litigation.¹³ Perhaps reflecting a cultural aversion to confrontation, enforcement policies are motivated by the belief that businesses want to comply with the law, in part to avoid the costs and complications of formal processes. Thus, the Bureau's "conformity continuum" includes education and stresses advice, voluntary compliance, and consent procedures. The Bureau offers, for a fee, written advisory opinions that (due to the 2002 statutory amendments) are binding on the Commissioner for so long as the material facts underlying the opinion remain substantially unchanged (Sec. 124.1). The Bureau also issues non-binding

¹¹ Also, in April 2003, the Justice Department's Competition Law Division, which provides the lawyers who represent the Bureau in court and Tribunal proceedings, became a separate legal division, independent of the departmental unit providing legal services to Industry Canada.

¹² Applications under Part VII.1 of the Act (Deceptive Marketing Practices) may be filed with the Tribunal, the Federal Court, or the superior court of a province. Under section 11(2) of the Competition Tribunal Act, such applications filed with the Tribunal are heard by a judicial member sitting alone.

¹³ The Bureau operates according to five principles of regulatory quality: transparency, fairness, timeliness, predictability, and confidentiality. Transparency informs stakeholders and the public. Fairness implies a general norm of employing the least-intrusive instrument to achieve compliance with the law. Timeliness means completing decisions as soon as possible. Predictability includes publishing background information and guidance to encourage compliance and constrain arbitrary determinations. Confidentiality is protected to the greatest extent possible, to encourage co-operation in investigations and elsewhere.

guidelines about enforcement policies, some tailored for particular industries, which are developed through a process of public consultation on draft proposals.¹⁴

18. Law enforcement investigations may be initiated in three ways, most commonly arising from a Commissioner's finding of "reason to believe" that there are grounds for civil or criminal action. Investigations may also be commenced by direction from the minister or upon the application of six Canadian residents complaining about a violation (Secs. 9, 10). The Commissioner may discontinue an inquiry at any time, but must explain that action to the Minister, and, where applicable, to the 6 residents whose complaint sparked the inquiry. The Minister has the power to instruct the Commissioner to undertake further inquiry (Sec. 22), but not to reach a particular result. To obtain information in support of the Bureau's inquiries, the Commissioner may apply *ex parte* to a court for an order requiring testimony under oath, production of documents, or responses to interrogatories (Sec. 11(1)). The Court may issue the order if it is satisfied, based on the Commissioner's submission, that an investigation is underway and that the target of the order has or is likely to have relevant information.¹⁵ In cartel, deceptive telemarketing, and other criminal cases, the principal investigative tool is the search warrant, typically executed without notice by Bureau officers (sometimes helped by the police). Courts may issue search warrants when there are reasonable grounds to believe that an offence (criminal or civil) has been or is about to be committed, and that there is evidence at the premises to be searched (Sec. 15). The Bureau also may apply to a court *ex parte* for wiretapping authority when investigating price fixing, market sharing, bid-rigging, or deceptive telemarketing, but must then demonstrate that other, less intrusive means have been, or are likely to be, unproductive. The Bureau has, however, no authority to undertake an investigation in the absence of a qualifying law enforcement basis. This means that it cannot conduct an investigation simply to study the state of competition or market practices in a sector of the Canadian economy.¹⁶ Policy discussions and consultations have taken place concerning a proposal that would authorize the Commissioner, with the concurrence of the Minister of Industry, to request that another government agency undertake such sectoral studies.

19. The Bureau has had a formal program since September 2000 for parties interested in obtaining immunity from criminal prosecution for violations of the Competition Act. The Attorney General of Canada receives recommendations from the Bureau on immunity applications, but retains final authority on whether immunity will be granted. The program offers full immunity to a party disclosing its participation in an offence if (1) the Bureau is unaware of an offence, and the party is the first to disclose it, or (2) the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral to the Attorney General. The party must not have been the instigator or the sole Canadian beneficiary of the offence, must cease involvement in the illegal activity, and must provide full and timely co-operation in the ensuing investigation and prosecution of the activity. The program contemplates that where a party coming forward does not qualify for immunity, the Commissioner may

¹⁴ The Bureau deserves praise for its efforts in issuing guidelines that the private sector finds genuinely helpful in understanding current law enforcement policies. Sentiment in the antitrust bar, however, suggests that the Bureau could enhance transparency by explaining more often and more fully its enforcement decisions, including its decisions not to pursue significant mergers and other law enforcement actions.

¹⁵ The Commissioner typically requests and is granted a court order sealing the material submitted in support of a section 11 compulsory process request. In 2001–2002, the Bureau introduced an "internal challenge" function as part of its Section 11 process. The challenge function requires that a senior officer in the Bureau's Compliance and Operations Branch determine that requests for records and information are clear, and that the Bureau is seeking only necessary records and information, before a Section 11 application may be presented in court.

¹⁶ The Bureau is also unable to employ formal investigative powers in conducting *ex-post* reviews of previous law enforcement actions.

recommend that the Attorney General grant another form of leniency. The program's success to date is reflected in the numerous guilty pleas and substantial fines negotiated by the Bureau and the Attorney General in international cartel cases. While the antitrust bar is satisfied with the core immunity program, there are some complaints that insufficient guidance is available about the availability of leniency for parties that do not qualify for full immunity. The Bureau's view is that because leniency, by its nature, entails something less than full immunity, its availability can be assessed only on a case-by-case basis.

20. The Competition Act provides several mechanisms for obtaining interim relief in law enforcement proceedings. A court may enter an injunction pending prosecution either for a violation of the Act's criminal provisions or for a violation of a conduct order previously entered with respect to a civil reviewable matter. Violation of such an injunction is a crime punishable by a fine in the court's discretion or up to two year's imprisonment (Sec. 33). For civil deceptive marketing practices under Part VII.1 of the Act, the Commissioner may request a court to issue a temporary conduct order pending completion of the inquiry and the application proceeding (Sec. 74.11). In a civil reviewable matter, the Tribunal may impose an interim conduct order pending completion of a proceeding filed before the Tribunal (Sec. 104). An amendment in 2002 added new section 103.3, authorizing the Tribunal to issue a conduct order pending completion of an investigation by the Commissioner of any civil reviewable matter other than mergers and specialization agreements. Violation of a court order issued under Section 74.11 or of an interim Tribunal conduct order is a crime punishable by a fine in the discretion of the court or up to five year's imprisonment, or both (Sec. 66).

Box 4. Consent Order Process

2002 Recommendation: Improve the consent order process.

Status: Consent order process substantially modified by recent statutory amendments.

In criminal cases and civil cases before the courts, parties may negotiate settlement agreements with the Attorney General. In civil reviewable matters before the Tribunal, parties may negotiate settlement agreements with the Bureau. Prior to the 2002 amendments, consent settlements in Tribunal cases were required to be submitted to the Tribunal for review and promulgation, and the Tribunal took an active interest in examining and revising the terms of consent orders presented to it. Parties who had entered settlement negotiations in order to truncate proceedings, save costs, and achieve certainty were frustrated by such intervention.

The 2002 Report recommended that the consent process be changed to resolve these concerns. Section 105 of the Competition Act, as amended, now provides that a consent agreement between the Commissioner and a party may be filed with the Tribunal "for immediate registration," provided only that the agreement is based on terms that could be the subject of a Tribunal order against the party. Upon registration, any pending proceedings before the Tribunal are terminated and the agreement acquires the same force and effect as a Tribunal order. In recognition of third party interests, the Act provides that any person directly affected by a consent agreement (other than a party to that agreement) "may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied." The Tribunal is empowered to grant such an application "if it finds that the person has established that the terms could not be the subject of an order of the Tribunal" (Sec. 106(2)). The 2002 amendments also established a similar system for registration in court of consent agreements reached in civil deceptive marketing practice cases under Part VII.1 of the Act (Secs. 74.12, 74.13).

21. Some portions of the Act are enforceable only in the criminal courts, while others are enforceable either in the regular civil courts or before the Competition Tribunal. Still others are enforceable only before the Tribunal. In general, conduct that is pursued criminally may not also be pursued under the Act's civil provisions. Appeals from the Tribunal go to the Federal Court of Appeal, on the same basis as judgements of trial-level federal courts. Appeal is of right for matters of law and "mixed" matters of law and fact. For matters solely of fact, leave to appeal must be requested and obtained. Matters of law are reviewed under a "correctness" standard, while other matters are treated under a less exacting, more deferential "reasonableness" standard.

Box 5. Competition Tribunal's Role

2002 Recommendation: Improve the decision process, by strengthening the Tribunal or by shifting to a “unitary” structure.

Status: Statutory amendments and new procedural rules designed to improve the Tribunal's processes have recently been adopted.

The 2002 Report observed that adjudications of civil reviewable matters before the Tribunal were often costly and drawn-out, and urged reforms to make the Tribunal's processes more efficient. On February 13, 2002, the Tribunal's rules of practice and procedure were modified to create a “disclosure track” process for all non-merger matters. Parties are now required to make early disclosure of the evidence they intend to rely on in a given proceeding and discovery is permitted only where a party establishes that it is “warranted by the circumstances.” The rules also now permit the Commissioner to read directly into the record sworn testimony gathered in the course of the Commissioner's inquiry, rather than calling witnesses to recite that testimony in court. To date, two cases have proceeded on the disclosure track,¹⁷ and the rule changes have led to considerable interlocutory litigation and several appeals.¹⁸

The 2002 legislative amendments provided the Tribunal with authority it did not previously possess to award costs and to resolve applications on a summary basis. Thus, Section 8.1 of the Competition Tribunal Act now gives the Competition Tribunal power to award costs in accordance with the Federal Court Rules. This authority can be employed to deter parties from filing frivolous motions or pursuing other unreasonable delaying tactics. Under Section 9(4) of the Act, as amended, a judicial member of the Tribunal may now resolve an application in a summary manner, dismissing or granting it as the case may be if there is “no genuine basis” for it or the defence offered against it. The Tribunal is thus now able to terminate a proceeding without a full-blown hearing.

The 2002 amendments also established a new procedure permitting reference of specific questions to the Tribunal for resolution. Subsection 124.2(1) of the Competition Act provides that, where the Commissioner and a person who is the subject of an inquiry agree, they may refer any question of law, mixed law and fact, jurisdiction, practice or procedure to the Tribunal for determination. While the question referred must relate to the application or interpretation of Parts VII.1 or VIII of the Competition Act (dealing with civil reviewable matters), it may be submitted whether or not the Commissioner has commenced a formal proceeding before the Tribunal. A companion provision in subsection 124.2(2) provides that the Commissioner may, at any time, independently refer a question of law, jurisdiction, practice or procedure to the Competition Tribunal for determination. Under this provision, the question referred may relate either to the portions of the Competition Act dealing with civil reviewable matters or to the Part IX of the Act dealing with notifiable transactions. These provisions are intended as another means of avoiding protracted Tribunal proceedings, as the threshold determination of a critical legal point may enable the matter to be resolved without further litigation.

In enacting the statutory amendments, Parliament plainly decided to preserve the Tribunal as a significant participant in Canada's competition law enforcement regime and declined to move toward a “unitary” structure. Whether the changes to the Tribunal's rules and the amendments to the Competition Act and the Competition Tribunal Act are sufficient to resolve the problems identified in the 2002 Report remains to be seen.

Other enforcement methods

22. Under the Competition Act and predecessor statutes, private parties have been able since 1976 to sue in court for recovery of damages caused either by conduct violating the Act's criminal provisions or by

¹⁷ *Commissioner of Competition v. Sears Canada Inc.*, 2003 CT- 2002/004 and *Commissioner of Competition v. Canada Pipe Company Ltd.*, CT-2002/006.

¹⁸ For example, in August 2003, the Tribunal rejected a motion asserting that the rule revisions violated the right to a fair hearing guaranteed by paragraph 2(e) of the *Canadian Bill of Rights*. *Commissioner of Competition v. Canada Pipe Company*, 2003 Comp. Trib. 15 (Aug. 8, 2003). On appeal, the Tribunal's decision was upheld by the Federal Court of Appeal (2004 FCA 76).

failure to comply with an order entered under the Act by the Tribunal or another court (Sec. 36(1)). Besides damages, the plaintiff may also recover the costs of investigating and prosecuting the case. In previous years, relatively few private suits were brought under Section 36, although the volume of filings has increased more recently. Such cases have largely (but not exclusively) involved follow-on cases to government criminal cases rather than independent antitrust prosecutions. Some private cases never appear on court dockets because they are settled without litigation. The clause in Section 36 permitting suit for conduct that violates a previous order does not appear to have attracted any activity by plaintiffs. With respect to suits arising from criminal behaviour, the Act does not require that there be a prior criminal conviction. So, for example, a private plaintiff could pursue a case on its own or undertake to follow-on an injunction proceeding brought by the Attorney General of Canada (or the attorney general of a province) under Section 34(2) of the Act where the Attorney General had decided not to pursue criminal penalties. In cases where there is a prior criminal conviction, the record in the prior proceeding may be admitted as *prima facie* evidence of the violation and its effect (Sec. 36(2)). Plaintiffs might also obtain useful information and admissions from the statement of facts that accompanies an injunction entered under Sec. 34(2).

23. Class actions under Section 36 based on antitrust violations are possible under most provincial rules of civil procedure, as well as under recent amendments to the Federal Court rules. At least 15 class actions were filed in three jurisdictions in the wake of the international vitamin cases, and others have followed the guilty pleas in other international cartel cases, including lysine, sorbates, citric acid and polyester staple. In January 2003, the Ontario Court of Appeal refused to certify a class of indirect consumer purchasers in a price-fixing class action against a manufacturer of iron oxide pigments used to make bricks, paving stones, and other building materials.¹⁹ The Court did not, however, rest its holding on a determination that indirect purchasers could never maintain an action for damages in a price-fixing case. Rather, the Court focussed on the question of whether proof of injury (as distinct from quantum of damage) was a common issue for the class of plaintiff homeowners. The plaintiffs had not supported their certification motion with any evidence that price increases had actually been passed through to home purchasers, and had offered no suggestion about how the existence of harm could be proven on a common basis for all members of the class. The Court found that this failing was fatal to defining liability as a common issue, but its opinion leaves room for plaintiffs in other cases to demonstrate how injury could be adjudicated on a common basis.

Box 6. Private Litigation

2002 recommendation: Providing a wider right of private action could use institutions more efficiently.

Status: Private rights of action were expanded by recent statutory amendments and further expansion is included in proposed statutory amendments presently under consideration.

The 2002 Report noted that private complainants who were frustrated by a Bureau refusal to pursue their complaint in a civil reviewable matter had no viable means to obtain relief. This is true even if the Bureau's refusal is based merely on unavailability of resources. Providing private parties with a means of access to the Tribunal would enable them to present their case to the neutral decision-maker and help deflect concerns about the independence of the Commissioner. The Report concluded that "[i]t is unclear whether there is a large unmet demand for this avenue of relief, but no harm would be done by providing for the possibility, subject, of course, to measures to discourage frivolous or strategic litigation. Moreover, such actions would give the now-underemployed Tribunal a larger role in developing policy."²⁰

The 2002 amendments added Section 103.1 to the Competition Act. Under that Section, private actions may now be filed before the Tribunal seeking conduct orders against defendants for violating the Competition Act's civil prohibitions on refusals to

¹⁹ Chada v. Bayer Inc., Docket No. C37224 (Jan. 14, 2003).

²⁰ P. 44.

deal (Sec. 75) and on exclusive dealing, tied selling, and downstream market restrictions (Sec. 77). Plaintiffs may not, however, seek damages or invoke the Competition Act's compulsory process provisions, and must apply to the Tribunal for leave to pursue the case at the outset. These features, in addition to the Tribunal's new authority to award costs and a requirement that any application under Section 103.1 be filed within one year after the practices complained of cease, are designed to minimize the risk of frivolous and groundless claims. The Commissioner may intervene as of right in any proceeding for which the plaintiff has been granted leave by the Tribunal (sec. 103.2). Of the five cases that have been filed since the amendment took effect, the Tribunal denied leave in one case and granted leave in the remaining four.²¹ All four applications that were granted have been appealed to the Federal Court of Appeal and are pending.

The Act provides that an application for leave must be supported by an affidavit setting out the facts supporting the application under Section 75 or 77 (Sec. 103.1(1)). Leave to make an application may be granted if the Tribunal "has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in [either Section 75 or 77] that could be subject to an order under that section" (Sec. 103.1(7)). The Tribunal has concluded that this language does not require it to determine from the applicant's petition and affidavit whether there is sufficient evidence to satisfy each of the elements in a Section 75 or 77 case. Rather, the Tribunal need only be satisfied that it "has reason to believe that: (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section."²² The Tribunal may not consider an application for leave in any case where (a) the Commissioner is conducting an inquiry into the same conduct or has terminated an inquiry by reaching a settlement with the respondent, or (b) the same conduct is the subject of an application already submitted to the Tribunal by the Commissioner (Sec. 103.1(3), (4)).

Three other features of the 2002 statutory amendments affect Section 103.1 private actions before the Tribunal. First, Section 104 of the Competition Act, permitting the Tribunal to impose an interim conduct order pending completion of a Tribunal proceeding, was amended to apply also to section 103.1 actions. Second, the amendments to Section 105 of the Act, permitting registration of consent agreements between the Commissioner and a party in a Tribunal proceeding, were extended also to agreements reached between the private plaintiff and the respondent in a Section 103.1 action (Sec. 106.1). The agreement must be published for thirty days before it takes effect and third parties may intervene during that period to contest it. The Commissioner may petition the Tribunal at any time to have a registered agreement amended or rescinded on the grounds that it has or is likely to have anti-competitive effects. Third, the new procedures permitting reference of specific questions to the Tribunal for resolution were made applicable in private actions. Thus, under subsection 124.2(3), a person granted leave under section 103.1 and the person against whom an order is sought may, by agreement, refer to the Tribunal for determination "any question of law, or mixed law and fact, in relation to the application or interpretation of Part VIII [of the Act], if the Tribunal grants them leave." The parties must provide notice of their application to the Commissioner, who may intervene in the proceeding.

The pending proposals for further amendments to the Competition Act also include a provision relating to private suits. Section 36, the provision now providing that private parties can sue in court to recover damages caused either by conduct violating the Act's criminal provisions or by failure to comply with an order entered under the Act by the Tribunal or another court, would be extended to permit damage suits for certain civil reviewable conduct. Specifically, private parties would be able to sue in court for damages arising from conduct with respect to which the Tribunal or other civil court had entered an order finding a violation under one of the following seven sections of the Competition Act: Section 74.1 (deceptive marketing practices), Section 75 (refusal to deal), Section 76 (consignment selling), Section 77 (tied selling, downstream market restrictions, and exclusive dealing), Section 79 (abuse of dominant position), Section 79.11 (a newly-proposed section dealing with strategic alliances) and Section 81 (delivered pricing). A consent agreement would not, however, give rise to a cause of action under Section 36, and all damage suits for would be filed in (and adjudicated by) civil courts, not the Tribunal.

Authorizing private parties to file their own antitrust complaints can usefully supplement the government's law enforcement activities. Arranging sufficient incentives for private suits without encouraging inappropriate litigation or deterring pro-competitive commercial conduct is, however, a delicate undertaking. Antitrust litigation is expensive, and although the proposal provides that a successful plaintiff may obtain an award to cover the costs of investigation and litigation, an unsuccessful plaintiff may be required to pay the respondent's costs. In Canada, the expense and risk associated with litigation appear to dissuade all but the wealthiest or most resolutely determined firms from pursuing an antitrust complaint in court, even where damages and costs may be awarded. The very small number of applications filed with the Tribunal under Section 103.1, and the relatively small number of cases filed by individual plaintiffs (as opposed to class action plaintiffs) under Section 36, substantiate this view.

²¹ National Capital News Canada v. Miliken, 2002 Comp. Trib. 41, Barcode Systems Inc. v. Symbol Technologies Canada ULC, [2004] C.C.T.D. No. 1, Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd., [2004] C.C.T.D. No. 4.

²² National Capital News Canada v. Miliken, 2002 Comp. Trib. 41, paragraph 8.

The pending proposal represents an incremental expansion of private litigation rights, reflecting Canadian concerns that private litigation can easily become overbearing. The proposal is problematic, however, for two reasons. First, with respect to providing appropriate opportunities to plaintiffs, a complainant who can prove anti-competitive conduct by a respondent should be able to pursue a damage claim even if the respondent has not been subjected to a court or Tribunal order finding a violation. Second, the proposal provides that a private suit cannot be pursued if the preceding case that provides the predicate for the claim was settled by consent. This feature eliminates the possibility that private enforcement could discipline unduly generous consent settlements. It also vests enormous negotiating leverage in the hands of the government that could be employed to coerce settlements from respondents. A more moderate approach would be to provide that the record in the government case would be prima facie proof of a Competition Act violation in any follow-on section 36 private case, except cases where a consent agreement was registered before any testimony was taken. This would still provide the government with significant leverage, but would not bar a private plaintiff from filing suit and proving a claim simply because the preceding government case had been resolved by consent. Finally, the proposal would require private damage suits to be brought in the regular civil courts. The 2002 OECD Report, in contrast, contemplated that such suits would be brought before the Tribunal. Such an approach would, as the previous report observed, have the advantage of vesting the Tribunal with a larger role in developing antitrust policy.

Permitting private parties to obtain conduct orders and damages for violations of the Act's civil provisions (other than those relating to mergers) would be the most effective means of supplementing governmental enforcement and deterring anti-competitive conduct. Absent that, some form of the pending proposal, permitting private suits in the wake of a violation found by the Tribunal or other civil court, would be a partial advance in the right direction. Enabling private parties to seek conduct orders from the Tribunal for violations of all the Act's civil provisions (other than mergers) would be another desirable incremental expansion.

24. Another available means of competition law enforcement is through the provincial attorneys general. These officials have authority to enforce the Competition Act's criminal provisions, and provincial attorneys general have actively prosecuted criminal deceptive telemarketing cases, some of which have arisen from joint investigations by municipal police and the Competition Bureau. Provincial governments have a major role in consumer protection generally, with responsibility for unfair business practices and contract terms, warranties, conditions of sale, guarantees, and business licensing. The provinces have not, however, undertaken criminal antitrust prosecutions.²³

International matters

25. Canada asserts extraterritorial jurisdiction over conduct outside Canada, in particular anti-competitive agreements and coercion to boycott, if that conduct has a real and substantial connection to competition in Canada. Canada reserves the right to refuse the assertion of extraterritorial jurisdiction by other countries where it conflicts with Canadian law or policy, and the Tribunal may forbid compliance with a foreign order, decree, or judgement if compliance would affect Canadian competition, efficiency, or foreign trade (Secs. 82, 83). General federal legislation, the Foreign Extraterritorial Measures Act, empowers the Attorney General to issue blocking orders where a foreign tribunal is seeking to exercise jurisdiction or power in a way that is likely to affect adversely significant Canadian interests in international trade or commerce, or that is likely to infringe Canadian sovereignty. These orders can block compliance with discovery demands in foreign proceedings. In addition, the law provides for complete "clawback" of any damage award entered elsewhere against a Canadian defendant. Most of these defensive measures appear to have been intended to shield Canadian firms from US treble damage litigation, and they have not been invoked since the uranium cartel cases in the 1970s. In February 2004, following consultations with the Competition Bureau, the Government of Canada filed an amicus curiae brief with the United States Supreme Court in the Empagran case (F. Hoffman-La Roche Ltd., et al. v Empagran S.A., et al.). Empagran involved a treble damage action filed in the United States by a foreign claimant seeking relief for damages suffered in a foreign country. The defendants were participants in an

²³ Another procedure in Canada for criminal prosecution, albeit rarely used, is the private criminal complaint. There has been at least one privately-prosecuted criminal competition matter.

international vitamin price-fixing conspiracy that injured both American and foreign purchasers. Canada argued that awarding treble damages under U.S. antitrust law to foreign claimants would unjustifiably impinge upon Canada's sovereign right to control domestic antitrust policy, including the establishment of appropriate remedies in conspiracy cases. Ultimately, the Supreme Court concluded that an antitrust damage suit cannot be pursued where the plaintiff's claim rests solely on foreign harm independent of the domestic effect in the United States.

26. Recognizing the increasingly cross-border nature of anticompetitive conduct, the Bureau has in recent years frequently leveraged its resources by offering and obtaining assistance from foreign law enforcement agencies, in the US and the EU especially. Co-operation has been frequent in competition enforcement and even more extensive in prosecuting deceptive marketing practices. Canada has entered a variety of co-operation agreements and arrangements. A formal state-to-state agreement reached with the US in 1995 covers both competition and deceptive marketing. A similar agreement dealing with competition matters was concluded with the EC in 1999. In 2001, the Bureau entered a trilateral agency-to-agency agreement with the competition agencies in Australia and New Zealand. The Bureau also has cooperation arrangements with the Chilean Competition Authority (2001), the Mexican Competition Commission (2002), and the UK authorities (DTI/OFT) (2003), and is currently negotiating an agreement with Japan. Pursuant to the cooperation agreements or arrangements entered into with the United States, Australia, and the United Kingdom, the Bureau has signed information sharing protocols with the US Federal Trade Commission, the UK Office of Fair Trading, and the Australian Competition and Consumer Commission. Over the years, Canada also has entered into numerous treaties under the authority of the Mutual Legal Assistance in Criminal Matters Act. Since April 1, 2001, Canada has implemented new assistance treaties for handling criminal matters with seven countries, covering Argentina, Belgium, Hong Kong, Sweden, Trinidad, Tobago, and Uruguay. New MLATs have also been signed with Germany, Brazil, and Jamaica, but are not yet in force. The 2002 amendments to the Competition Act included a new Part III, ("Mutual Legal Assistance"), which permits similar treaties to be entered for mutual legal assistance in civil matters.

27. The Bureau's program for dealing with telemarketing fraud has been a major enforcement priority and an occasion for frequent cross-border co-ordination and co-operation. Canada has experienced a proliferation in deceptive telemarketing schemes, especially those targeting victims in other countries. This development, estimated to cause injury in the billions of dollars annually to domestic and foreign consumers, has led to the characterization of Canada as a haven for telemarketing crime. The Bureau has responded in a variety of ways, including the establishment of a Joint Canada-US Working Group on Deceptive Marketing Practices, pursuant to an agreement between the national governments. The Bureau is also a member of 5 regional partnerships, designed to combat deceptive marketing practices, that involve other Canadian and US law enforcement agencies including the US FTC and Postal Inspection Service, various municipal and provincial Canadian police services, the Royal Canadian Mounted Police and several provincial consumer protection ministries. The Fraud Prevention Forum, which is chaired by the Bureau, launched a wide ranging public awareness campaign in March, 2004 to warn consumers against deceptive telemarketing, lottery scams, identity theft and other forms of fraudulent conduct. Internationally, the campaign messages developed by Canada have been adapted and distributed throughout the United States by the US FTC and will be adapted in Britain by the Office of Fair Trading. The Bureau has also commissioned a report to evaluate the effectiveness of the 1999 amendments to the Competition Act that made deceptive telemarketing a criminal offence. The project is expected to result in further recommendations for dealing with this problem, including the establishment of renewed partnerships with other enforcement agencies in Canada, increased cooperation with the Bureau's international counterparts, and enhanced prevention and awareness initiatives.

28. The Canadian Commissioner of Competition and the Bureau played a prominent role in the creation of the International Competition Network ("ICN") in 2001 and have continued a major

commitment to the ICN's subsequent work. The ICN provides antitrust agencies with a forum for addressing practical antitrust enforcement and policy issues of common concern, and promotes procedural and substantive convergence worldwide. The Competition Bureau is carrying out on an interim basis the ICN Secretariat functions and is involved in annual ICN conference planning. For consumer protection issues, Canada was one of the founding members of the International Consumer Protection and Enforcement Network ("ICPEN"), a group of governmental organizations created in 1992 to facilitate the prevention and prosecution of deceptive marketing practices with an international component. The Bureau is also involved in the work of the OECD's Competition Committee and, in partnership with the Office of Consumer Affairs of Industry Canada, participates in the OECD's Committee on Consumer Policy.

Agency Resources

29. Staff and budget levels, shown in Table 1, are determined by Industry Canada. The federal government instituted user-fees in 1997, and since then the Bureau has generated some additional income through fees assessed for merger notifications, advance ruling certificates, advisory opinions, and document copies. Fees collected in the last three fiscal years (2001-02 through 2003-04) were CAD 7.6 million, CAD 6.3 million, and CAD 8.9 million respectively, of which the Bureau retained for its own use 100 per cent in the first two years and 72 per cent (CAD 6.4 million) in the most recent year.²⁴ For 2004-05, the Bureau has been allocated an operating budget of CAD 39.2 million, of which CAD 10.5 million is anticipated fee revenue. The Bureau is negotiating to obtain supplementary funding of CAD 8 million to meet its current operational requirements.

Table 1. Trends in Competition Bureau Resources

	Authorized Personnel (FTE)	Appropriations (CAD million) ¹	Expenditures (CAD million)
2003-04 ²	440	45.0	40.8
2002-03	383	43.3	43.2
2001-02	383	45.4	45.4
2000-01	383	37.3	36.9
1999-2000	382	35.3	36.1
1998-99	382	35.6	36.2
1997-98 ³	353	30.5	30.5
1996-97 ³	353	30.3	30.3

1. Includes base budget and revenues allocated at the beginning of the fiscal year, plus temporary budget adjustments.

2. Of the 57 FTE increase from 2002-03, ten are attributable to an administrative transfer of positions from industry Canada to the Competition Bureau. The other 47 FTE were funded by the CAD 8 million supplementary allocation that the Bureau received in 2003-04.

3. Figures include resources allocated to the former Consumer Products Directorate, an Industry Canada unit that was formally consolidated with the Bureau in 1998.

Source: Competition Bureau, 2004

²⁴

Most fee revenue arises from the merger notification system and such funds must be expended on Bureau activities related to merger examination. The relative decline in merger transactions and merger investigations during 2003-04 resulted in a surplus of merger fee revenue at the end of the fiscal year. The Bureau may carry forward unexpended funds to the next fiscal year, provided that the carry-forward does not exceed five per cent of its operating budget for the year ended.

30. The Competition Law Division (CLD), a legal services unit in the Department of Justice with 21 attorneys, provides services exclusively to the Competition Bureau and is the Department's centre of competition law expertise. The Division represents the Bureau in all civil and criminal court and Tribunal proceedings, and also provides the Bureau with legal advisory and legal policy consultations. Salaries of Department of Justice lawyers are funded in part by Justice and in part by the Competition Bureau. (In 2003-04, CAD 850 000 was contributed by Justice and CAD 1.6 million by the Bureau). The Bureau also funded CAD 653 000 in CLD support salaries and non-salary expenditures. Additionally, outside lawyers, who are appointed by the Department of Justice as Crown agents, are paid directly by the Competition Bureau. Such Crown agent costs were CAD 229 000 in 2003-2004, but ranged as high as CAD 1.7 million in previous years.

Box 7. Competition Bureau Resources

2002 Recommendation: Improve the Bureau's resources.

Status: Modest increases provided in recent fiscal years, but no substantial, permanent increase in Bureau's base budget.

The 2002 Report concluded that the Bureau needed more resources, citing a Bureau study that identified needs amounting to a 40% budget increase.

For 2003-04, the bureau's base budget (the operating budget less expected fee revenue) was increased CAD 3 million above the 2002-03 base of CAD 27.6 million and was accompanied by a supplementary allocation of CAD 8 million. The Bureau's view is that the supplementary funding, while critically important, does not constitute a permanent solution to the Bureau's chronic shortfall in resources. The Bureau notes that its responsibilities and needs have continued to increase since the previous Report. Changes affecting the Bureau's mandate include amendments to the legislative framework, the demand for increased international cooperation in antitrust enforcement and pressure for harmonization of antitrust laws, the growth of deceptive telemarketing as a major field of criminal activity; increased cartel case work as a result of the Bureau's immunity program, and increased intervention and enforcement activity in deregulated sectors such as telecommunications and energy. A larger proportion of law enforcement investigations also involve cross-border activities, making detection and prosecution more difficult and costly.²⁵

The Bureau's responsibilities and needs have indeed continued to increase since the previous Report noted the need for additional funds. More resources will also be required if the Bureau is given authority to conduct market competition studies. A permanent increase would put the Bureau in a position to complete law enforcement investigations with greater dispatch and fulfil its mandate more effectively.

31. The Bureau, with an authorized staff of 440 for 2003-04, is organised by function. The offices that enforce the competition law include the Mergers Branch, the Civil Matters Branch (which also handles interventions before regulatory agencies), the Fair Business Practices Branch, and the Criminal Matters Branch. The Criminal Matters Branch, responsible for cartel, price maintenance, and bid rigging cases, has an authorized staff of 48. The Fair Business Practices Branch, with an authorized staff of 153 and a national network of offices, is responsible for cases of deception and misrepresentation, both civil and criminal, and for several product labelling statutes. The Mergers Branch has an authorized staff of 49 and the Civil Matters Branch has 36. Other branches, with a total authorized staff of 159, provide administrative, legal, economic, policy, and communications support. The Bureau's law enforcement activities are shown in Table 2.

²⁵

The Bureau adds that an increase would also bring its resource level into closer alignment with similar agencies around the world. An informal analysis of year 2000 budget data for five competition agencies showed that Canada ranked fourth in terms of budget expenditures per capita. Canada ranked behind competition agencies in the United States, Australia, and the United Kingdom, and ahead only of Germany.

Table 2. Trends in Competition Bureau Actions

	Criminal Branch	Civil Branch	Mergers Branch	Fair Practices Branch
2003-04: matters opened ¹	33	36	202	494
Possible violations found ²	10	0	1	30
relief imposed ³	6	1	8	86
total sanctions imposed CAD MM	5.3			2.0
2002-03: matters opened ¹	61	34	279	807
Possible violations found ²	4	1	1	187
relief imposed ³	8	3	7	255
total sanctions imposed CAD MM	4.9			0.9
2001-02: matters opened ¹	32	46	328	783
possible violations found ²	5	1	0	278
relief imposed ³	3	3	7	277
total sanctions imposed CAD MM	2.9			0.1
2000-01: matters opened ¹	60	46	373	1324
possible violations found ²	6	1	0	130
relief imposed ³	13	4	3	129
total sanctions imposed CAD MM	17.6			1.0
1999-2000: matters opened ¹	41	48	361	2670
possible violations found ²	9	0	0	590
relief imposed ³	21	5	10	601
total sanctions imposed CAD MM	102.8			1.2
1998-99: matters opened ¹	56	33	309	2334
possible violations found ²	7	0	2	642
relief imposed ³	16	3	8	652
total sanctions imposed CAD MM	40.6			1.4
1997-98: matters opened ¹	43	44	320	2800
possible violations found ²	3	4	0	724
relief imposed ³	48	8	6	726
total sanctions imposed CAD MM	2.7			0.6
1996-97: matters opened ¹	54	33	262	3256
possible violations found ²	0	0	0	723
relief imposed ³	22	4	3	732
total sanctions imposed CAD MM	9.9			0.2

1. Includes examinations involving 2 or more days of review and applications for inquiry under Sec. 9; for Criminal and Civil Branch, does not include advisory opinions; for the Fair Practices Branch, includes matters opened under the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act, and the Precious Metals Marking Act, but does not include written opinions.

2. For criminal matters, includes referrals to the Attorney General (for the years covered by the Table, the Attorney General declined to proceed or withdrew the charges in 2 matters: 1 in 1997-98 and 1 in 1999-2000); for civil matters, includes disposition of inquiries through application to Tribunal; for mergers, includes examinations concluded through contested proceedings; for Fair Business Practices Branch (FBPB), includes applications filed with the Competition Tribunal for matters handled under the Competition Act, referrals to the Attorney General for matters handled under the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act, and the Precious Metals Marking Act, and visits during which potential violations to any of the three labelling statutes were identified by the Bureau. (FBPB data has not previously been reported by this method of aggregation.)

3. For criminal matters, includes all dispositions, including acquittals as well as convictions and guilty pleas; several dispositions may be possible, for different defendants, in the same matter. For civil matters, includes alternative case resolution and consent order restructuring, and for mergers, also includes transactions abandoned after the Commissioner's objection. For Fair Business Practices Branch, includes convictions, guilty pleas, court orders, consent orders, and other forms of alternative case resolution.

Source: Competition Bureau, 2004

Coverage of competition law

32. Canada's long list of special regimes and exemptions reflects a history of concern for fostering national-scale firms, preserving Canadian culture from homogenization by the United States, and a constitutional structure that vests substantial market regulation authority with the provinces. However, since 1986, the Competition Act has been fully applicable to corporations operated by the national or provincial governments to the extent they are engaged in commercial operations actually or potentially competitive with private sector firms (Sec. 2.1).

33. The "regulated conduct defence" was developed by courts to shield conduct required by a national or provincial regulatory program from antitrust consequences. Common examples of protected programs include those administered by provincial marketing boards and price-setting commissions. The defence applies, and the Competition Act is displaced, only where there is clear operational conflict between the regulatory regime and the Act, such that obedience to the regime means contravention of the Act. In determining applicability of the defence, agencies charged with implementing a regulatory regime have generally been shown considerable deference by the courts, because such agencies are deemed to be acting in the public interest. With respect to the persons subject to a regulatory regime, the Bureau considers it important to evaluate whether their conduct is voluntary. The defence applies only to situations where conduct that is contrary to the Act is mandated or required by the regulator.

34. The regulated conduct defence has been applied in civil cases, although it was originally conceived as a defence in criminal cases. The Bureau's position is that the defence applies to criminal matters and also applies both to the regulators and the regulated parties in civil matters, including mergers. The Bureau also takes the position that an economic regulator's decision to forbear from regulation unconditionally or conditionally because a market has become competitive, necessarily makes the regulated conduct defence unavailable. In most cases, both the Act and the statutory regulatory regime will be able to co-exist and will simply complement one another. The defence has been invoked in about 5 cases in the last 20 years, most of them involving lawyers or other services. Although the number of decisions invoking the defence is small, some complaints have not been pursued at all because the applicable regulations clearly protected the anti-competitive conduct.

35. The constitutional division of powers between federal and provincial institutions in Canada effectively authorises provinces to adopt laws that impair competition in local markets and that inhibit inter-provincial trade and competition. While the Constitution bars the provinces from imposing tariffs on products imported from other provinces (Constitution Act, 1867, Sec. 121), there are abundant opportunities for establishing non-tariff barriers. The federal Parliament is exclusively empowered to legislate concerning "the regulation of trade and commerce" (Constitution Act, 1867, Sec. 91(2)), but each provincial legislature is also exclusively empowered to legislate concerning business licensing and "property and civil rights" within its own jurisdiction (Constitution Act, 1867, Secs. 92(9), 92(13)). Provincial governments also have exclusive legislative authority concerning non-renewable resources, forestry, and electric power generation (subject to a requirement, enforceable by national legislation, of non-discrimination in trade with other provinces) (Constitution Act, 1867, Sec. 92A). The federal Parliament and provincial legislatures have concurrent powers over agriculture and immigration (Constitution Act, 1867, Sec. 95).

36. Recognition that the elaborate system of inter-provincial trade-barriers was harmful to national welfare came to the fore beginning in the mid-1980s, due to a confluence of several elements. Most prominently, signature of the 1989 Canada-US Free Trade Agreement and the 1994 North American Free Trade Agreement, as well as Canada's participation in GATT and the WTO, meant that Canadian firms could trade more easily in foreign markets. Canadian businesses discovered that regulatory inhibitions affecting international business transactions were less burdensome than those affecting inter-provincial

markets at home. Further, some provincial regulations were attacked outright by foreign trading partners. A celebrated GATT case in 1988 found Canadian provincial beer and wine regulations to be in violation of international trading rules. These factors and others, coupled with pressure from the business community, led to the initiation in 1985 of an effort by the national and provincial governments to reduce domestic trade barriers. The ultimate outcome was the signature in July 1994 of the Agreement on Internal Trade (“AIT”), which took effect on July 1, 1995.

37. The stated objective of the AIT is to promote an open, efficient, and stable domestic market and to reduce and eliminate, to the extent possible, barriers to trade and investment within Canada (Art. 100). The principles articulated in the Agreement for general application oblige the parties to (1) treat products and services from other parties no less favourably than each party’s own, (2) permit unfettered movement of goods, services, persons, and investments across borders, (3) assure that regulatory measures have a legitimate purpose and restrict internal trade no more than necessary, (4) reconcile differing standards among parties, and (5) maintain regulatory transparency and notify other parties of proposed actions that could materially affect operation of the Agreement (Ch. 4). The agreement contains provisions dealing with government procurement and bidding, investment, labour mobility, consumer measures and standards, agriculture and food products, alcoholic beverages, natural resources, communications, transportation, and environmental protection. A promised section on energy remains to be adopted. Certain activities or subjects are exempt from AIT coverage, most notably financial services, but also including regional development programs, aboriginal peoples, cultural matters, national security, and taxation. Further, the AIT focuses on inter-provincial trade regulations, and does not directly address intra-provincial restrictions, such as price or supply control systems.

38. Besides the fact that some important trade restrictions are not covered by the AIT, there are two critical problems that impair its efficacy as a vehicle for reducing provincial trade barriers. First, the obligations it establishes cannot, as a practical matter, be effectively enforced. The dispute-resolution process available for dealing with allegedly illegitimate trade restrictions depends heavily on negotiation, and proceeds through a series of lengthy stages from consultation through consideration by a high-level committee of government representatives to the appointment of a panel. It contemplates that disputes will generally be resolved between governments. Private persons have some rights to complain, but can pursue a matter directly only if the person’s home province declines to do so and if an independent screener concludes that the claim is reasonably meritorious. The only sanction against a province that fails to comply with a determination in a case brought by a private party is adverse publicity. Where the respondent province does not comply with a determination in a case brought by a government entity, the Agreement permits a complaining province to “suspend benefits of equivalent effect or, where this is impracticable, impose retaliatory measures of equivalent effect against the Party complained against until such time as a mutually satisfactory resolution of the dispute is achieved” (Art. 1710). Such sanctions have never been imposed under the AIT. In any event, the schedule and deadlines established in the Agreement mean that the time from complaint to action could be 2 years or more, and the result is the imposition of a new restriction, not the elimination of the offending constraint. The elaborate consultation procedures do not apply to procurement and bid protests, for which a more efficient and streamlined process is provided. Perhaps unsurprisingly, most formal complaints have involved procurement matters.

39. The second problem is that, subsequent to the AIT’s inauguration in 1995, provincial commitment to its implementation (and to its underlying objectives) waned seriously. The provinces conceded as much. In December 2003, Canada’s thirteen Provincial Premiers formed a “Council of the Federation” for the general purposes of enhancing inter-provincial collaboration improving relations with the federal government, and with the more specific purpose (among others) of “strengthening the economic union, including enhancing internal trade, improving labour mobility, and harmonizing and streamlining regulation.” In February 2004, the Council released a work plan intended to demonstrate the provinces’ “collective commitment to resolve long standing challenges related to domestic trade barriers by

reconfirming their commitment to internal trade and honouring all obligations under the current Agreement.” The work plan sets target dates for finishing a series of tasks contemplated by the AIT that remain incomplete. These include adoption of an Energy chapter (originally scheduled for completion by July 1995), application of the AIT’s provisions to procurement actions by now-excluded Crown corporations (originally scheduled for June 1996); a review of the scope and coverage of the Agriculture chapter (originally scheduled for September 1997), and implementation by all parties of the agreement for eliminating residency-based policies affecting occupational mobility (originally scheduled for July 2001). Other elements of the Plan include a review of the AIT’s dispute resolution mechanisms; an assessment of areas exempt from or otherwise outside the AIT’s scope; an examination of business subsidies; action to assure consistent treatment and mutual recognition of foreign-trained professionals working in Canada; acceleration of efforts to harmonize regulations, standards, and associated processes; and a re-assessment of the Procurement Chapter with a view to reducing the contract size thresholds for application of the AIT and expanding the chapter to cover professional services. In an August 2004 progress report, the Council announced that it had achieved application of the AIT to procurement actions by provincial and territorial Crown corporations, had improved the AIT dispute settlement process, and was making headway on issues relating to agriculture, energy, and labour mobility.

Box 8. Provincial Restraints

2002 Recommendation: Review the scope of provincial-government restraints on competitive markets.

Status: No review undertaken.

The 2002 Report identified anti-competitive provincial legislation as a matter of concern and recommended that a comprehensive study be undertaken to assess the competitive effects of provincial laws and regulations and to identify sectors where reform is most needed. Prime targets for action would be provincial laws and decisions that constrain trade among the provinces, permit business and professional associations to restrict price and other forms of competition among their members, and protect providers and dealers against new competition or prohibit aggressive pricing and other marketing methods. The Report noted that the outcome of such a study would be material for advocacy rather than for law enforcement action, since the regulatory authority of provincial governments is embedded in Canada’s constitutional framework.

The Bureau responded that it had consulted with Industry Canada’s Internal Trade and Outreach Directorate, which had recommended focusing attention on specific areas where prospects for beneficial change were most promising. The Directorate suggested that likely targets for study were how professional associations restrict competition among members and the desirability of authorizing provinces to transmit locally-generated electricity to consumers in a distant province through the territory of a third province ("wheeling"). The Bureau concurred with the Directorate’s observation that addressing particular issues in specific areas or sectors may prove more likely to produce concrete results to make markets more efficient than a comprehensive study of the competitive effects of provincial laws and regulations.²⁶

The Bureau should be a prime proponent of AIT implementation. The Council of the Federation’s project to revitalise the AIT and reduce provincial regulations that restrain competition should be vigorously pursued, and the Competition Bureau should take an active competition advocacy role in that effort. A critical part of the Federation’s project should be a study to identify and assess all forms of anti-competitive provincial regulation, whether or not they fall within the present ambit of the AIT.

²⁶

A study answering at least in part to the recommendation in the 2002 Report was published in 2003. See Beaulieu, E., J. Gaisford and J. Higginson, *Interprovincial Trade Barriers in Canada*, The Van Horne Institute, AGMV Marquis: Calgary. The study assesses factors affecting inter-provincial commerce and includes insights from interviews conducted in 2000 and 2001 with businesses affected by the AIT, but does not contain a comprehensive survey of inter-provincial trade barriers.

Sector specific provisions*Financial services*

40. Several major market sectors are subject to regulatory oversight or special statutory provisions that affect or forestall application of the Competition Act to sector activities. In financial services, legislation passed in June 2001 substantially changed the system of bank merger regulation. Reviewing a merger involving large banks (over CAD 5 billion) now involves 5 parties – the Bureau, the banking regulator, two committees of Parliament, and the Minister of Finance – and entails 3 steps – a competition analysis, a prudential review, and a public interest evaluation. Ultimate decisional authority is retained by the Minister. Once the Minister decides the public interest balance, the bank regulators and the Minister develop a set of remedies to resolve any identified issues. Remedies in bank merger cases are constrained by a statutory 20% cap on the share of a bank’s equity that can be held by a single shareholder, a provision that discourages foreign banks from investing in Canadian banks. In June 2003, the government asked the Bureau to review the Bank Merger Enforcement Guidelines that the Bureau had published in 1998. That review is pending. Agreements or arrangements among securities dealers and issuers that are reasonably related to underwriting a security are protected by Section 5(1) of the Competition Act from the Section 45 prohibitions on restrictive agreements and the Section 61 prohibitions on actions to influence prices upward.

Airlines

41. Airline services were largely deregulated under the 1987 National Transportation Act, which relaxed entry controls, ended licence restrictions on flight frequency and aircraft type, and permitted discounting. In 1999, with Canadian Airlines (one of the country’s two major scheduled airlines) in financial distress, the government decided to permit the other carrier, Air Canada, to acquire it. The merger was eventually approved with the Bureau’s concurrence, subject to conditions, because the Bureau found that Canadian Airlines was failing. Statutory restrictions on foreign ownership severely limited the otherwise available remedies. The result was a near-monopoly, as the Air Canada-Canadian Airlines combination that emerged carried more than 80% of domestic passengers and earned nearly 90% of domestic passenger revenues.²⁷

42. To deal with the resulting market concentration, legislation enacted in 2000 added sector-specific rules to the Competition Act. Clauses were added to the abuse of dominance provision in Section 78 of the Competition Act authorising the Governor in Council to establish airline-specific conduct regulations (Sec. 78(1)(j)), and specifying one particular “anti-competitive” act explicitly: denial, by a domestic airline, of access on reasonable commercial terms to essential facilities or services, or refusal to supply them (Sec. 78(1)(k)). Those “essential” facilities or services, described further in regulations, include operating slots, interline arrangements, airport gates and related facilities, maintenance services, and baggage handling. The regulations also describe conduct that would be considered predatory or exclusionary, and provide that it will be considered anti-competitive for a dominant airline to operate or expand capacity on a route at fares that do not cover the “avoidable cost” of the service (or to use an affiliated carrier to accomplish the same result). Other kinds of anti-competitive conduct described in the regulations are pre-empting slots or facilities to withhold them from the market, and using commissions, incentives, loyalty programs, or

²⁷

More recently, low-cost carriers such as WestJet, CanJet, and Jetsgo have aggressively expanded their market presence. Between January 2000 and May 2004, Air Canada’s share of domestic seat capacity fell from 87% to approximately 51%, reflecting a parallel increase in the combined market shares of low-cost carriers. Despite this new entry, Air Canada has not faced effective competition on a national basis, especially for the important business segment of the market where flight frequency and network connections are critical.

scheduling or infrastructure changes to discipline or eliminate a competitor or to prevent entry. The amendments make the Commissioner, not the Minister of Transport, responsible for enforcing these sectoral rules. Moreover, they give the Commissioner the extraordinary unilateral power to enjoin on a temporary basis anti-competitive conduct while an investigation is pending and before the matter is brought to the Tribunal (Sec. 104.1). The 2002 amendments permit the Commissioner to apply to the Tribunal to extend the order beyond a maximum 80 day period, for such additional time as the Tribunal determines is necessary (Sec. 104.1(5.1 to 5.5)).²⁸ The 2002 amendments also permit the Tribunal to assess an administrative monetary penalty of up to CAD 15 million against a domestic airline ultimately found to have abused a dominant position (Sec. 79(3.1)).

43. In July 2003, the Tribunal issued its first decision construing the “avoidable cost” test for predatory conduct set out in the regulations and enforcement guidelines dealing with dominant airlines. The decision arose from an application, filed by the Commissioner in March 2001, charging that Air Canada had responded to the entry of two low-price airlines (WestJet and CanJet) by operating or adding capacity at fares that did not cover the avoidable cost of providing service on seven routes. At the request of the parties, the Tribunal divided the proceeding into two phases. The first would involve Tribunal consideration of specific questions related to the application of the avoidable cost test. The second would address the larger issue of whether Air Canada had violated the abuse of dominance provision of the Competition Act. In its Phase I decision, the Tribunal defined avoidable costs as all costs that can be avoided by not producing the good or service in question (in general, the variable costs and the product-specific fixed costs that are not sunk). The Tribunal identified three ways in which the costs of providing a service can be avoided: (a) outright cost avoidance (the cost is not incurred if the service is not provided); (b) redeployment (the cost is still incurred, but resources are shifted to another productive use); and (c) disposal (capital costs are avoided through sale of an asset, cancellation of a lease, sublease, etc.). In applying the test, the appropriate unit of capacity to examine is the scheduled flight (a numbered departure scheduled at approximately the same time of day on some regular periodic basis). For the purpose of determining whether an airline’s fares cover the avoidable cost of providing the service, the relevant measure is the revenue drawn from all fares actually charged, rather than the individual fares announced by the airline. There is no minimum time period prescribed by the Airline Regulations, nor is there a “grace period” (for low season or otherwise), during which an airline may operate below avoidable costs. However, the Tribunal suggested that it would be appropriate for the Commissioner to assess the length of time during which costs were below revenues in exercising his discretion to commence an action. Revenue expected to be realized from passengers continuing their journey on subsequent “legs” beyond the flight at issue (referred to as “beyond contribution”) is irrelevant for the purpose of applying the avoidable cost test. However, expected profit from such continuing journeys could be considered a legitimate business reason for operating a scheduled flight below avoidable cost, and thus become relevant in determining whether a “practice” of anti-competitive acts has occurred.

44. Having elaborated the avoidable cost test, the Tribunal examined two sample routes that the parties had submitted for review as part of Phase I. The Tribunal concluded that Air Canada had engaged in anti-competitive acts by operating or increasing capacity on those routes at fares that did not cover the avoidable cost of providing the service. The Tribunal emphasised that its finding did not mean that Air Canada had engaged in an abuse of dominant position within the meaning of the Competition Act. Such a determination must await the outcome of the second phase of the hearing, which would examine whether Air Canada was dominant on the routes in question, whether its below cost operations constituted a “practice of anti-competitive acts,” and whether the result was a substantial prevention or lessening of competition. Because Air Canada is engaged in re-structuring under the Companies’ Creditor’s Arrangement Act (“CCAA”), the Tribunal stayed its Phase I decision and the appeal period associated with

²⁸ As discussed further below, however, the Commissioner’s authority under Section 104.1 was subsequently declared unconstitutional on due process grounds, and is now inoperative.

it until Air Canada emerges from CCAA protection. Phase II is likewise being held in abeyance. The Tribunal's explication of "avoidable cost" in the Air Canada decision is relevant not only to abuse of dominance cases under the special provisions affecting dominant airlines, but also for application of the Bureau's general abuse of dominance guidelines and for enforcement of the "unreasonably low" pricing provision in Section 50(1)(c) of the Competition Act.

45. One additional feature of the Air Canada litigation that deserves mention arises from the fact that the Commissioner exercised his authority under Section 104.1 of the Competition Act to issue a temporary order against Air Canada during the course of a Bureau investigation. Air Canada appealed unsuccessfully to the Tribunal, asserting that the statutory requisites for such an order had not been established. Further appeals from the Tribunal's decision to the Federal Court of Appeals and the Supreme Court were likewise denied. Simultaneously, however, Air Canada petitioned for relief in the Quebec Superior Court on the grounds that Section 104.1, by vesting the Commissioner with unilateral power to issue an order, violated due process of law under the *Canadian Bill of Rights*. In January 2003, the Quebec Court of Appeal declared Section 104.1 to be inoperative on due process grounds. The government appealed this decision to the Supreme Court. However, in the spring of 2004, the government withdrew its appeal, and accordingly Section 104.1 is now inoperative. The Commissioner nevertheless still retains authority under Section 103.3 to seek an interim order from the Tribunal, on an *ex parte* basis if necessary.

46. A special merger review regime was adopted after the Air Canada-Canadian Airlines combination and applied retroactively to make the terms of that deal legally enforceable. A dual track now applies to notifiable transactions involving airlines. Where an airline merger requires pre-notification under the Competition Act, the parties are required also to notify the Minister of Transport and the Canadian Transportation Agency. If the Minister deems that the proposed transaction raises public interest concerns on national transportation policy grounds, authority to accept or reject the merger rests with the Governor in Council on the recommendation of the Minister. In formulating his recommendation, the Minister is required to seek the advice of the Commissioner of Competition and provide the parties with an opportunity to address any competition concerns identified by the Commissioner. Mergers for which the Minister has not identified public interest concerns, or that are too small to require pre-notification, are within the Commissioner's exclusive jurisdiction. To challenge such a merger, the Commissioner must make application to the Competition Tribunal as in other merger cases.

Other transport sectors

47. The Canada Transportation Agency (CTA) once had responsibility, concurrent with the Bureau's Competition Act review, to determine if mergers in transport sectors were in the public interest. That authority was eliminated in 1996, and the Bureau thereafter had exclusive authority under the Competition Act for all transport sector mergers until the special airlines merger regime was established in 2000. Under proposed amendments to the Canada Transportation Act introduced in 2003, the special regime now applicable to airline mergers would be replaced by a similar system applicable to any transportation sector merger that is notifiable under the Competition Act. The proposed legislation died due to a change in government in July 2004, but is likely to be re-introduced. Liner conference agreements in ocean shipping are exempted from the Competition Act by the Shipping Conferences Exemption Act. Amendments were made to the Exemption Act in 1979, 1987 and 2001 to enhance competition, reduce the scope of the exemption, and increase efficiency. Regulation of surface transport modes, particularly inter-provincial trucking, has been liberalised. The Motor Vehicle Transport Act 1987 ended rate controls and made entry easier by setting a uniform national standard, administered by provinces under delegated authority. Constraints may remain at the intra-provincial level, although all provinces undertook at least some deregulation—except for Alberta, which did not need to do so because it had never imposed economic regulation on trucking. A 1999 proposal to de-regulate inter-city buses was not implemented, but referred instead to a Parliamentary Committee, which submitted a report in December 2002 recommending partial

de-regulation. The Transport Ministry has not yet taken any action on that recommendation. In rail service, the National Transportation Act 1987 moved toward liberalisation and increased competition. It permitted confidential contracts with shippers, abolished collective rate making, provided for competitive access, streamlined the process for abandoning rail lines, and provided for dispute resolution.

Agricultural products

48. The Farm Products Marketing Agencies Act provides that the Competition Act does not apply to a contract or arrangement among parties who are subject to the authority of any regulatory agency. Provincial legislation authorises collective price setting or supply regulation for a wide variety of agricultural producers, covering such products as eggs, milk, pork, beef, chicken, turkey, and various grains, including wheat and barley. The Marketing Agencies Act also establishes a quota system controlling inter-provincial imports of agricultural products. The Agreement on Internal Trade presently covers only “technical” (e.g., sanitary) regulations on inter-provincial trade in agricultural products, and thus excludes commodity supply regulation. Transportation of grain grown in western Canada has long been a subject of regulation. Amendments adopted in July 2000 to the controlling provisions in the Canada Transportation Act, among other changes, replaced the existing railway rate cap on regulated grain movements with a revenue cap. A general review of the Transportation Act, released to the public in July 2001, urged that Canada’s transportation system be operated on a more commercial basis, an approach that could lead to repeal of the revenue cap on grain rates. Some of the review’s specific recommendations for making rail transportation a more competitive market were included in the Transportation Act amendments proposed in 2003. As noted previously, the amendments to the Transportation Act proposed in 2003 died due to a change in government in July 2004, but are likely to be re-introduced.

Fisheries

49. Contracts or arrangements among fishermen and buyers or processors about prices or terms are exempted from the Competition Act (Sec. 4(1)(b)).

Professional services

50. Licensing of, and hence controlling entry into, professional and other services, is a provincial responsibility. Licensing requirements and related restrictions effectively make it difficult for professionals to practice across several jurisdictions. Under the Agreement on Internal Trade, mutual recognition agreements or similar protocols were to be negotiated to permit greater mobility between provinces, thus encouraging competition in local markets. The target date for completion was July 1, 2001. As of that deadline, 42 of the 51 regulated professions on a national level had reached agreements designed to facilitate mobility. Agreements for another seven professions were completed in subsequent years. Not all provinces, however, have signed all of the agreements reached, and this project is therefore still not complete. It is one of the items on the agenda for the newly-formed Council of the Federation in its efforts to revitalize the AIT. Provinces also impose a variety of other anti-competitive regulations, often through professional associations acting as provincially authorized regulatory bodies. Mandatory association membership, minimum fee schedules, restrictions on advertising, and limits on permissible business structures (to prevent multi-disciplinary practices in the legal and accounting professions) continue to exist in many provinces. Due to the applicability of the regulated conduct defence, attempts to address the anticompetitive effects of such regulations have focussed on advocacy rather than on enforcement of the Competition Act.

Natural gas

51. Wholesale natural gas prices were deregulated in 1985 and virtually all natural gas transmission pipelines, both inter-provincial and intra-provincial, are owned and operated by private-sector companies.²⁹ Development of the transmission network is left to the market, although inter-provincial transportation rates, conditions of access and terms of service are regulated by the National Energy Board. Local distribution companies, with two exceptions, are privately owned,³⁰ and are regulated at the provincial level by public utility commissions. Third-party access is allowed to the distribution grids, and large industrial customers and power generators can buy gas directly from producers. Many smaller customers in the residential and commercial sectors can also buy gas directly from producers through aggregators, brokers and other middlemen. The regulated rates for distribution service are for the most part based on cost of service. More recently, however, the mode of regulation has begun to shift from cost-based to performance-based ratemaking.

Electric power

52. Under the Constitution Act, 1867, electric power generation is a provincial responsibility. The federal government, through the National Energy Board (NEB), exercises jurisdiction over the construction and operation of international electricity transmission lines. Tariffs in most provinces are regulated on a cost-of-service (or cost-plus), historical-cost basis, but both industry structure and policies vary considerably across provinces. Only two provincial governments – Alberta and Ontario – have established markets characterised by wholesale and retail unbundling. In both, an independent system operator (ISO) sets and administers policies for grid interconnection, transmission planning, and spot market operation. In the remaining provinces, vertically integrated utilities offer bundled services at regulated rates to consumers.³¹

Telecommunications

53. An independent regulator, the Canadian Radio-Television and Telecommunications Commission (CRTC), is responsible for the regulation of the telecommunications and broadcasting sectors. Telecommunications regulation is exclusively under federal jurisdiction, and, as a consequence, reform has proceeded smoothly in this sector. The regulatory regime is characterised by structural measures aimed at improving competitive conditions, and features equal access requirements, the use of incremental costs and price caps for determining regulated charges, carrier pre-selection, number portability, local loop unbundling, and open access for DSL. Canada has had open market entry in all telecommunications services since the end of 1998. A license is required for wireless operators and international service providers, while others need only register. The Bureau and the CRTC entered an “Interface Agreement” in 1999 specifying those areas where one body or the other has jurisdiction and those where jurisdiction is shared. The Telecommunications Act provides for forbearance from regulation (thus permitting full

²⁹ The one exception is the natural gas transmission system in Saskatchewan, TransGas Limited, which is a provincial Crown corporation.

³⁰ SaskEnergy is a Crown corporation in Saskatchewan, and in 1999 Manitoba Hydro (a Crown corporation) bought the private gas distribution company, Centra Gas Manitoba.

³¹ The history of deregulatory programs in Ontario and Alberta with respect to the electricity sector is described in the Canada EDRC report (forthcoming). Draft legislation proposed by the Ontario government in June 2004 would terminate Ontario’s previous plan to divest most of the province’s power generation assets to private control. The legislation would also delete “promotion of competition” as a stated goal in Ontario’s electricity legislation, create a new entity called the Ontario Power Authority (OPA) responsible for developing an integrated power system plan, implement regulated pricing for designated generation facilities, and establish a new annual regulated rate for certain customer classes.

application of the competition law) wherever the regulator finds that competition is strong enough to obviate the need for special controls over a formerly dominant firm. The CRTC has determined to forbear from regulation in several markets, including long distance, mobile, internet, international, and inter-exchange private lines. Increased cooperation between the CRTC and the Competition Bureau (such as by allowing the two agencies to share confidential information) would promote more effective forbearance decisions. The CRTC retains responsibility for technical issues relating to interconnection and network access, and for social policy goals such as affordability. Both agencies deal with mergers. The Bureau applies the Competition Act, while the CRTC applies a Canadian-control mandate under which foreign ownership cannot exceed 20 per cent of a Canadian operating company and one-third of a Canadian holding company.

Broadcasting

54. The CRTC also regulates broadcasting. Its responsibilities include licensing radio and television programming and broadcast distribution. Broadcast program distribution was opened to competition in 1997, so cable firms now face competition from direct-broadcast satellites and multi-point, multi-distribution systems. The CRTC's primary goals are promoting Canadian content and culture and programming diversity. All kinds of broadcasting – television, cable, satellite direct broadcast, and wireless cable – are subject to Canadian-content requirements, principally to maintain a national identity and cultural sovereignty. The CRTC has decided, however, not to attempt regulation of the Internet.

55. There is no general provision under the Broadcasting Act permitting forbearance based on the state of competition, and application of the Competition Act thus depends on the particular activity at issue. Mergers in broadcasting are subject to special concentration and ownership rules, which CRTC applies, as well as to the merger provisions of the Competition Act. In radio, a single owner can have up to 4 commercial stations (2 AM, 2 FM) in any market that has 8 or more commercial radio stations, and up to 3 stations (with a maximum of two in either bandwidth) in smaller markets. In TV, owning more than one conventional, over-the-air station is permitted in a few specified markets, such as Vancouver-Victoria. As of June 2001, cable TV firms may own an unlimited number of analogue cable program sources, but limits remain on owning digital cable specialty channels. In November 2003, the CRTC issued the framework for regulating the distribution of digital television signals. Regulatory obligations and authority to distribute digital signals will match those currently applicable to distribution of the analogue versions of these signals. Foreign ownership in broadcast distribution cannot exceed 20% of a Canadian operating company or one-third of a Canadian holding company.

Publishing

56. As in broadcasting, concerns about preserving Canadian cultural sources also constrain competition in print media. In addition to paying subsidies to Canadian publishers, the government limits the extent of foreign ownership of booksellers and newspapers. Foreign ownership of a bookstore requires the approval of Heritage Canada, and foreign ownership of newspapers is limited to non-controlling shares. Regulations under the Copyright Act prevent booksellers from ordering a book except from its authorised distributor in Canada, a regulation that has the perverse effect of encouraging consumers to make purchases via the internet.

Sports

57. Agreements among teams, clubs, and leagues in amateur sports are exempted from the Competition Act (Sec. 6(1)). It is not clear whether the exemption applies only to agreements about the terms of competition within or between leagues, or whether it could also extend to agreements with commercial implications, such as agreements that affect the value of broadcast rights. Presumably other

parties to such agreements (for example, promoters or media firms) would not enjoy any exemption if there were an anti-competitive impact, even if the teams, clubs, and leagues themselves could not be found liable.

Performing arts

58. The general exemption for collective bargaining agreements in Section 4(1) of the Competition Act is reinforced by another explicit antitrust exemption in the Status of the Artist Act covering certain associations of performers.

Export trade

59. Agreements about export trade are exempt from the conspiracy prohibition of the Competition Act (Sec. 45(5)). The effect of such an agreement on competition outside Canada is not relevant to the exemption, but protection is lost if the agreement affects competition in Canada by reducing the real value of exports, restricting entry into the exporting business, or impairing competition in services that facilitate exports (Sec. 45(6)).

Foreign ownership restrictions

60. Canadian sensitivity to issues associated with foreign investment is reflected in a number of legal provisions that impact competition law. For example, Investment Canada is responsible both for promoting foreign investment in Canada and for screening foreign acquisitions to determine whether they are of “net benefit” to Canada. The thresholds and standards employed in that screening process are not the same as those applied to mergers generally under the Competition Act. In fact, however, Investment Canada has not rejected an investment since it was created in the 1980s. Instead, it has tried to negotiate commitments from the parties. Another ministry, Canadian Heritage, also has a role in reviewing investments and mergers in industries that are deemed cultural. It also tries to negotiate undertakings from the parties in cases where it has a concern.

61. Foreign investment is expressly limited or controlled in several fields, notably airlines, telecoms and the media. The 25 per cent ceiling on foreign ownership interests in airlines serving domestic routes (as well as the prohibition on cabotage – service between Canadian points by a foreign carrier) prevented adoption of the best remedy for the 1999 merger of Canadian Airlines and Air Canada. In the communications sector, the objectives are to promote Canadian content and culture and to achieve other policy goals such as universal telephone service. In both telecommunications and broadcasting, foreign ownership cannot exceed 20% of a Canadian operating company and one-third of a Canadian holding company. Moreover, television, cable, satellite direct broadcast, and wireless cable are all subject to Canadian-content requirements. In publishing, foreign ownership of newspapers is limited to non-controlling shares, and approval of Canadian Heritage is required for foreign ownership of retail book outlets.³² The latter restrictions prevented the best remedy to a 2001 merger that combined the only two national book-selling chains in Canada. The acquired firm, which was in financial trouble, was the object of a hostile takeover offer by the other major chain, and the ban on foreign ownership of bookstores prevented a deal with a US or European acquisition partner.

³² This restriction has been applied to prevent foreign ownership of drug stores that sold magazines.

Box 9. Foreign Ownership Restrictions

2002 Recommendation: Use direct measures, rather than controls on competitive entry, to protect distinctive interests.

Status: While the Bureau has advocated removal of foreign ownership prohibitions, the government has not terminated any of the existing restrictions.

The Bureau provided the following statement in response to the recommendation in the 2002 Report respecting foreign ownership regulations:

The Competition Bureau (Bureau) has consistently advocated more effective, direct means to achieve social and other policy objectives than by restricting foreign ownership. These include targeted regulatory changes and other relevant measures. The Bureau has argued that foreign ownership restrictions are often an inefficient way to achieve these policy objectives. Access to capital is essential for a dynamic and efficient industry, and squeezing out foreign capital is not consistent with an effective capital market. For optimal functioning of a market there is a need for a diversity of options and sources of capital, including diverse sources, diverse risk acceptance, and diverse terms and conditions. Foreign capital is not just about bringing cash to a country, but involves bringing outside financial ideas, financial influence, sources of technology and managerial efficiency. It may also provide another means of allowing an existing market participant to continue operating as opposed to merging with another domestic competitor. This would result in more competition and greater choice for consumers.

With the emergence of a more global marketplace characterized by the integration of capital, technology and information across national borders, there is a cost of preventing foreign ownership. Indeed, the economic cost of foreign ownership restrictions tends to be more severe in small economies such as Canada and sectors protected by trade barriers or other types of natural barriers from foreign competition. In such cases, a policy that excludes foreign-owned competitors may itself further reduce competition and even result in a monopoly.

The Bureau has taken the view that opening our domestic market to more foreign investment will create more favourable conditions for new players to enter the market. This will in return contribute to the creation of more competitive structures within which firms will be able to face the organizational changes involved in implementing global strategies.

In a few industries, the Government has nonetheless determined that it is appropriate to restrict foreign ownership in order to achieve social and economic policy objectives such as affordable universal services, promoting Canadian content and culture, economic development, macro-economic objectives, fiduciary duties, and safety. Such industries include airlines, banking, telecommunications and broadcasting.

The Bureau has taken the position that the goals that the Government seeks to achieve in these industries can usually be achieved at lower cost to the economy through the use of policies that are less restrictive of competition. For example, in airlines, current policy limits foreign ownership of Canadian air carriers to 25 percent of voting shares. The Government's policies on foreign ownership and prohibition on cabotage - that is, allowing foreign airlines to fly domestic routes, are the largest regulatory barriers to entry into the airline industry. In 1999, in response to concerns that a dominant carrier would emerge from industry restructuring, the Bureau recommended that the Government negotiate unrestricted cabotage rights with our trading partners on a reciprocal basis. The Bureau recommended an immediate increase in the foreign ownership limit from 25 percent to 49 percent of voting shares.

In banking, the Bureau's submission to the Task Force on the Future of the Canadian Financial Services Sector (November 1997) recommends the removal of the restrictions on the ability of foreign banks to establish branches in Canada. While the removal of the subsidiary requirement would require new regulations to ensure the prudential operation of foreign banks in Canada, this may be a means to encourage further entry into the domestic marketplace.

In telecommunications foreign ownership cannot exceed 20% of a Canadian operating company and one-third of a Canadian holding company. The Bureau stated before the House of Commons Industry Committee on February 24, 2003, that these foreign ownership restrictions should be removed. The Bureau has stressed before the House of Commons Heritage Committee (May 7, 2002 and December 12, 2002) and the Industry Committee (February 24, 2003) that, in terms of carriage, there is no distinction between the carriage of telephone signals and the carriage of broadcasting signals. Consequently, the carriers of either signal, be they telephone companies or Broadcast Distribution Undertakings, should enjoy the same access to capital and be bound by the same ownership rules. Anything less would give one sector an unfair

advantage over the other and distort economic decision making.

Responses by the Government to these interventions have been limited to date. With respect to telecommunications and broadcasting the Government had requested that the House of Commons Standing Committee on Industry Science and Technology examine the issue of the continued need for the foreign investment restrictions for telecommunications carriers. The Committee subsequently came to the same conclusion as the Bureau - that these restrictions be removed for both telecommunications carriers as well as for 'broadcasting distribution undertakings', essentially the cable television industry. However, the House of Commons Heritage Committee, looking into the broader question of broadcasting policy, subsequently recommended that these restrictions remain in place for both the telecommunications and cable industries. The Government has undertaken to review the basis of these conflicting recommendations.

Foreign ownership restrictions are an inefficient method of accomplishing policy objectives. Instead, direct and transparent measures that are already in place should be used to achieve cultural and other policy objectives, while allowing the maximum number of potential entrants.

Conclusions and recommendations

62. The 2002 amendments made important improvements in three areas that generated recommendations in the previous Report: expansion of private rights of action, improvements in the operation of the Competition Tribunal, and a simpler method for resolving cases by consent. The amendments package also made beneficial changes relating to mutual legal assistance in civil competition matters, regulation of dominant airlines, binding written opinions by the Commissioner, issuance of interim Tribunal orders during the pendency of a Bureau investigation, and deceptive prize notices. More remains to be done, however, with respect to the recommendations in the previous Report that have not yet been effectively addressed, including recommendations relating to Bureau independence and resources, foreign ownership restrictions, and anti-competitive provincial government regulations. The proposed amendments to the Competition Act should be adopted in a form that will effectively expand private rights of action, clarify the statutory provisions against cartels, provide stronger civil sanctions against abuse of dominance violations, make the Competition Act's antitrust pricing provisions civil rather than criminal violations, authorize studies of competition in market sectors, and provide for asset freeze orders and restitution in deceptive advertising cases. Finally, the efficiencies defence in merger litigation should be clarified in the wake of the *Propane* case.

Policy options for consideration

- ***Use direct measures, rather than controls on foreign ownership, to protect cultural or other policy interests.***

63. Canadian laws that control or limit foreign ownership interests in banking, airlines, telecommunications, and media should be eliminated. Such constraints have resulted in anti-competitive acquisitions of failing firms because interested foreign investors were not eligible purchasers. Rules should target achieving the identified policy goal, and do so by transparent means such as service standards or subsidies that do not encourage or protect domestic monopolies.

- ***Focus more attention on reducing provincial government regulations that restrain competitive markets.***

64. The Council of the Federation's project to revitalise the AIT and reduce provincial regulations that restrain competition should be vigorously pursued, and the Competition Bureau should take an active competition advocacy role in that effort. A critical part of the Federation's project should be a study to identify and assess all forms of anti-competitive provincial regulation, whether or not they fall within the present ambit of the AIT. Provincially-authorized regulations (established by professional

associations or otherwise) that restrict competition, either within a province or across provinces, should be eased, and the Competition Bureau should increase its advocacy and enforcement efforts to eliminate such unwarranted anti-competitive regulations and practices.

- ***Enhance the Commissioner's decision-making independence.***

65. Lingering misperceptions that Bureau actions may be sensitive to ministry preferences could be further dispelled by presenting its budget as a separate line item within Industry Canada's Main Estimates, in line with the recently-adopted practice of presenting the Bureau's activity and budget as a separate item within Industry Canada's Reports on Plan and Priorities and Departmental Performance Report. Other options to enhance its perceived independence might be making it a stand-alone agency, reporting to Parliament through the Minister of Industry but responsible for its own finances and personnel, or locating it elsewhere within the governmental structure, although this would reduce the Bureau's ability to influence internal policy deliberations within Industry Canada. The pros and cons of such a proposal would have to be considered carefully.

- ***Improve the Bureau's resources.***

66. The Bureau should be allocated a permanent budget increase, enabling it to complete law enforcement investigations with greater dispatch and fulfil its mandate more effectively.

- ***Provide a wider right of private action to enforce the Competition Act.***

67. The pending proposals for further amendments to the Competition Act would extend Section 36 so that private parties could sue in court for damages arising from conduct with respect to which the Tribunal or another civil court had found a violation under certain provisions of the Act: Section 74.1 (deceptive marketing practices), Section 75 (refusal to deal), Section 76 (consignment selling), Section 77 (tied selling, downstream market restrictions, and exclusive dealing), Section 79 (abuse of dominant position), Section 79.11 (a newly-proposed section dealing with strategic alliances) and Section 81 (delivered pricing). Ideally, private complainants should be able to pursue anti-competitive conduct regardless of whether a court or Tribunal has entered an order against the respondent finding a violation. Permitting private parties to obtain conduct orders and damages for violations of the Act's civil provisions (other than those relating to mergers) would be the most effective means of supplementing governmental enforcement and deterring anti-competitive conduct. Absent that, some form of the pending proposal, permitting private suits in the wake of a violation found by the Tribunal or other civil court, would be a partial advance in the right direction. Enabling private parties to seek conduct orders from the Tribunal for violations of the Act's civil provisions (other than mergers) would be another desirable incremental expansion.

- ***Clarify the anti-cartel provisions in the substantive law.***

68. The provisions in Canada's statute dealing with horizontal agreements should be amended to permit ready prosecution of "per se" criminal offences, and to provide appropriate civil law enforcement for strategic alliances and other agreements among competitors that deserve a more refined examination.

- ***Provide stronger civil sanctions against abuse of dominance and other civil reviewable conduct.***

69. To increase deterrence of unlawful practices, proposed amendments permitting the Tribunal to impose administrative monetary penalties ("AMPs") for violating any of the Competition Act's provisions respecting civil reviewable conduct (excepting mergers), and to determine the maximum amount of such penalties, should be adopted. Further, because of the heightened deterrence arising from exposure to AMPs, the affected statutory prohibitions should be tailored as much as possible to address only anti-competitive behaviour. A competitive effects clause should therefore be added to the provisions on

delivered pricing in Section 81, which now requires only that an individual commercial customer (rather than market competition itself) be disadvantaged.

- ***Clarify the efficiencies defence in merger cases.***

70. The Competition Act establishes an efficiencies defence for otherwise anti-competitive mergers. An appellate court recently held, partly in accord with the Bureau's contentions, that the defence required neither that total economic surplus increase nor that consumer surplus increase. Rather, the court concluded that the Competition Tribunal should evaluate the relative significance of the merger's impact on various economic groups of consumers. It is undesirable for merger enforcement determinations to depend on wholly subjective evaluations by members of a judicial tribunal. Effective competition policy demands that the application of enforcement criteria be reasonably predictable and consistent with the goal of competition policy to benefit consumers, and the treatment of efficiencies should be re-formulated to meet that standard.

- ***Make the statute's pricing provisions civil rather than criminal violations.***

71. The pricing conduct addressed in Sections 50 and 51 of the Act is not appropriately treated as criminal behaviour subject to imprisonment. Low "predatory" pricing, price discrimination, and discriminatory promotional allowances can be pro-competitive, and such practices are better handled as civil reviewable matters. The proposed amendments would delete sections 50 and 51 outright and apply the abuse of dominance provisions in Sections 78 and 79 to such pricing activity, thus subjecting violations to a "substantially lessened competition" test (which is not applicable to price and allowances discrimination under present law). Violators would also be exposed to AMPs if the proposal for extending monetary fines to all of the Act's civil provisions is adopted.

72. These proposals should be adopted and should be expanded to include price maintenance presently treated as a criminal offence under section 61 of the Act. Price maintenance, like the conduct covered by Sections 50 and 51, can be pro-competitive and is best treated as a civil reviewable matter. Consideration should also be given to moving certain other sections of the Competition Act within the ambit of sections 78 and 79. Abuse of dominance violations under section 79 require that the perpetrator "substantially or completely control ... a class or species of business." The Bureau's abuse of dominance enforcement guidelines state that "control" for this purpose is deemed to be "synonymous with market power," basing this interpretation on pertinent Tribunal decisions.³³ Market power, in turn, is defined as the ability to profitably maintain prices above competitive levels (or restrict non-price dimensions of competition) for a significant period of time, normally taken to be 1 year.³⁴ While no precise market share test is prescribed, the Bureau's guidelines specify that a firm with a market share below 35% (or a group with a collective market share below 60%) is unlikely to possess sufficient market power to warrant investigation.³⁵ Thus, both the Tribunal and the Bureau appear to regard sections 78 and 79 as applicable to single firms that do not have what is ordinarily considered to be "monopoly" power, as opposed to lesser market power that is still sufficient to produce an anti-competitive effect.³⁶

³³ Enforcement Guidelines on the Abuse of Dominance Provisions (July 2001) 13 & n. 20.

³⁴ *Id.*, pp. 13-14.

³⁵ *Id.*, p. 15.

³⁶ For example, courts virtually never find monopoly power under section 2 of the US Sherman Act when market share is less than about 50%; see American Bar Association (2002), *Antitrust Law Developments (Fifth)*, pp. 234-37.

73. In fact, the 2002 Report notes that findings of dominance by the Tribunal in contested cases under section 79 have all involved monopoly-level shares, the lowest being 87%.³⁷ It is therefore unsurprising that, during the consultation process for the proposed amendments, small firms reacted to the proposed inclusion of price discrimination under sections 78 and 79 by urging the removal of the “market control” requisite from the elements of the offence. Abuse of dominance violations would then hinge solely on a showing of substantially lessened competition, and the test for unlawful abuse of dominance conduct would become essentially identical to that for the ordinary non-price vertical practices (exclusive dealing, downstream market restrictions, and tying) now covered by section 77.³⁸ The modification sought by small firms is, of course, unnecessary if sections 78 and 79 are already applicable to firms that, even though not monopolists, possess sufficient market power to reduce competition substantially. Moreover, given the apparent applicability of sections 77 and 78 to such firms, there seems to be no reason why section 77 (and, for that matter, section 75 dealing with refusals to deal) could not also be merged into the abuse of dominance provisions.

74. One further feature of the proposed amendments is the addition to the list of qualifying anti-competitive acts in Section 78 of a clause referring to the sale of products “at a price below avoidable cost.” This language would be added as a new subsection 78(1) (i.1), leaving intact the existing provision in subsection 78(1) (i) referring to the sale of products at a price “lower than the acquisition cost.” The apparent effect would be that sales meeting either criterion would qualify as unlawful predatory pricing if the other requisites of a section 79 were met. The Bureau’s enforcement guidelines state that “avoidable cost” is the exclusive test for predatory conduct under section 78.³⁹ The potentially conflicting reference to acquisition cost should therefore be eliminated by deleting subsection 78(1)(i).

- ***Authorize studies of competition in market sectors.***

75. Discussions and consultations have considered a proposal that would authorize the Commissioner to request that another agency conduct market sector studies. Under the draft, the Canadian International Trade Tribunal (“CITT”) would “inquire, in accordance with terms of reference approved by the Minister of Industry, into the state of competition and the functioning of markets in any sector or subsector of the Canadian economy.” No agency in Canada presently has express authority to study an industry simply for purpose of illuminating its competitive dynamics. This is a tool that should be available to advance the objectives of competition policy. Market studies can reveal previously unsuspected forms of private conduct or government regulation that impair competition. And study results can play an important role in promoting public understanding of how competition works and what benefits it produces.

76. It might be more appropriate to vest market competition study authority in the Competition Bureau or an independent third party. The Bureau is a candidate because it is the agency responsible for, and most knowledgeable about, maintaining competitive markets. The CITT, which is responsible for the application of Canada’s anti-dumping and trade subsidy laws, conducts studies to assess the market impact of unlawful import trade practices. These studies are not the same as the market competition studies contemplated in the statutory proposal, and the CITT is not well suited for the broader examinations. The proposal to have the CITT conduct studies reflects, in part, a concern in Canada that a competition law enforcement agency like the Competition Bureau will not be perceived as an impartial collector of facts but as an investigator searching for violations of the law. Such concerns about the impartiality of Competition Bureau investigators could be addressed by imposing confidentiality restrictions on the Bureau’s study

³⁷ P. 8

³⁸ One difference might be that section 79(1) (b) expressly establishes as an element of the offense that the defendant be engaged “in a practice of anti-competitive acts.” Section 77 does not have precisely this language, although section 77(1) defines the various offenses by employing the words “any practice.”

³⁹ Enforcement Guidelines on the Abuse of Dominance Provisions (July 2001) 23.

staff with respect to firm-specific information, and prohibiting study staff members for some period of years from involvement in law enforcement proceedings related to the industry examined. In any event, it must be recognized that market studies can impose significant resource costs both on the agency conducting the study and the firms under focus. They can also generate expectations that law enforcement or other governmental intervention in the market will be forthcoming. Studies should therefore be conducted only where the need is well justified, and any public announcement should emphasize that the government is not conducting an investigation based on suspicion of unlawful behaviour.

- ***Authorize asset freeze orders and restitution in deceptive advertising cases.***

77. Providing restitution to victims of deceptive marketing schemes is a desirable goal. Where the Bureau has undertaken a successful prosecution, appending a restitution action is more efficient (and likely to be fairer) than having the victims proceed by individual suits or class actions. Agencies in other countries that possess restitution authority have put it to good use for the benefit of consumers. Such agencies in have also found that authority to obtain asset freeze orders is an important adjunct to restitution proceedings. The proposed amendments providing for asset freeze orders and restitution should be adopted.