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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Canada --

15 June 2015

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More documents related to this discussion can be found at: http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm

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-- Canada --

Introduction

1. Canada's Competition Bureau (the "**Bureau**") is pleased to provide this submission to the OECD Competition Committee's June 2015 roundtable on "The Relationship between Public and Private Antitrust Enforcement". The Bureau, headed by the Commissioner of Competition (the "**Commissioner**"), is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "**Act**")[1] and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

2. The Act is a federal law governing most business conduct in Canada. Its purpose is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy; expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada; ensure that small and medium-sized enterprises have an equal opportunity to participate in the Canadian economy; and provide consumers with competitive prices and product choices.

3. The Act includes specific provisions dealing with direct private actions, including the right to private recovery of damages resulting from certain violations of the Act and the right of private access to the Competition Tribunal (the "**Tribunal**") under certain civil provisions. Further, the Act contains specific mechanisms that may assist private persons in addressing anti-competitive conduct or obtaining individual remedies via Bureau action. In particular, the Act provides the ability for private persons to apply to the Commissioner for an inquiry into a matter. There are also provisions empowering courts to make restitution orders in favour of private persons and issue interim injunctions to freeze assets for certain conduct under the Act. The Commissioner also has the ability to enter into consensual agreements with parties and to use these agreements to secure restitution for victims of anti-competitive conduct. This submission discusses the framework for private antitrust enforcement in Canada as it relates to conduct covered by the Act. It also provides case examples of instances where private actions have been commenced and restitution has been obtained for victims.

1. Overview of the *Competition Act*

4. The Act contains both civil and criminal provisions aimed at preventing anti-competitive practices in the marketplace. The civil provisions allow orders to be made in respect of refusal to deal, price maintenance, exclusive dealing, tied selling, market restriction, abuse of dominance, delivered pricing, agreements between competitors and mergers (collectively, the "**Reviewable Matters**"), provided that the constituent elements of these provisions are satisfied. The criminal provisions prohibit, among other things, agreements between competitors to fix prices, allocate markets or restrict output, as well as bid-rigging, deceptive telemarketing, double ticketing and pyramid selling (collectively, the "**Criminal Matters**"). In addition, the Act includes provisions relating to deceptive marketing practices, which can be addressed under civil and/or criminal provisions in the Act (the "**Deceptive Marketing Practices Matters**").

5. The Bureau investigates Reviewable Matters, Criminal Matters, and Deceptive Marketing Practices Matters. If a Bureau investigation proceeds to a formal litigation stage, the venue in which the matter is heard will depend on the type of matter in question.

[1] R.S.C. 1985, c. C-34.

1.1 Reviewable Matters

6. The Commissioner can bring applications to adjudicate Reviewable Matters before the Tribunal, a specialized tribunal established in 1986 to deal exclusively with competition law matters.

1.2 Criminal Matters

7. For Criminal Matters, following an investigation, the Commissioner makes recommendations to the Attorney General of Canada through the Public Prosecution Service of Canada (the "**PPSC**"), which conducts federal public prosecutions. If, according to its own policies, the PPSC chooses to bring the case forward, it tries the case before a provincial court of criminal jurisdiction or in the Federal Court of Canada (the "**Federal Court**").

1.3 Deceptive Marketing Practices Matters

8. As noted above, for Deceptive Marketing Practices Matters, the Commissioner may choose to proceed under civil and/or criminal provisions in the Act. If the Commissioner chooses to proceed under the civil provisions, an application is filed in the Federal Court, a provincial superior court or the Tribunal. On the other hand, if the Commissioner chooses to proceed under the criminal provisions, the matter is referred to the PPSC for possible prosecution before a provincial court of criminal jurisdiction or in the Federal Court.

2. Direct Private Actions

2.1 Private Actions for Damages

9. Under section 36 of the Act, private parties can commence legal action in the Federal Court or a provincial court of superior jurisdiction to recover losses or damages incurred as a result of conduct contrary to one of the criminal provisions of the Act or the failure of any person to comply with an order of the Tribunal or a court under the Act. Individuals or organizations may sue and recover any loss or damage proved to have been suffered as a result of the conduct, along with any additional amount the court allows, not exceeding the costs of investigating the misconduct and bringing the proceeding. They may also recover pre-judgment and post-judgment interest at the rates prescribed by relevant legislation. They are, however, unable to obtain punitive damages or injunctive relief. Section 36 is the only provision in the Act that allows a person to sue for damages.

10. Once a person is convicted of a criminal offence under the Act, the record of the criminal proceedings may be used by the plaintiff in the private action to establish *prima facie* proof of the wrongdoing and its effects on the plaintiff. However, an action for damages under section 36 of the Act exists independently of any criminal prosecution that has been or may be brought. In fact, an action can be brought under section 36 of the Act even if a criminal prosecution has not been initiated pursuant to one or more of the provisions of the Act.

11. An action for damages under section 36 must be brought within two years from the later of (a) "a" day on which criminal conduct was engaged in or the order in question was contravened or (b) the day on which any related criminal proceedings were finally disposed of. This language raises some interesting issues. First, because the limitation period runs two years from "a" day on which criminal conduct was engaged in or an order was contravened, a plaintiff could seek to recover damages for continuing conduct that occurred over a number of years, rather than just conduct that occurred during the two-year limitation period. Second, the bringing of criminal proceedings revives an otherwise expired limitation period. This can result in the limitation period differing significantly between cases where there has been a criminal prosecution and those cases where there has not. Third, while the wording of section 36 of the Act suggests

that the "discoverability rule" does not apply, certain courts have suggested otherwise. This rule postpones the beginning of the limitation period until the time when a plaintiff knew or ought to have known of the anti-competitive conduct or the disposition of criminal proceedings.

12. As it is expensive and often difficult for plaintiffs to establish the commission of an offence and damages, particularly in instances where there is not a prior conviction in a criminal proceeding, private actions under section 36 of the Act typically take the form of class proceedings or class actions. Class actions are available by statute in most provinces in Canada, including Ontario, Quebec and British Columbia, as well as in the Federal Court.

13. A private action must satisfy the test for certification before a court will allow it to proceed to trial as a class action. The certification process in a Canadian class proceeding generally includes the following elements:

- the claim must disclose a cause of action;
- there must be an identifiable class of persons;
- the claims must raise common issues; and
- there must be an appropriate representative plaintiff.

14. In recent years, the Bureau has seen an increase in private enforcement by civil litigants through class action proceedings in Canada. For example, according to the National Class Action Database[2] created by the Canadian Bar Association, in 2014, there were 34 class action lawsuits that raised claims relating to or otherwise referenced the Act. This is an increase from 2013, when there were 25 such class action lawsuits.

2.2 Confidentiality of Information in the Bureau's Possession in the Context of Section 36 of the Act

15. Individuals or organizations contemplating actions under section 36 of the Act may believe that the Bureau possesses information, such as information obtained as a result of the use of formal investigative powers, which could be relevant to their claims. However, it is important to note that section 36 does not provide a general right of access to records in the Bureau's possession or control. Rather, the rules that apply to discovery are the rules of the province in which the action was commenced.

16. To preserve the independence necessary to carry out the Bureau's mandate effectively and to protect the integrity of the Bureau's investigative process and the confidentiality of information in its possession, the Bureau will not voluntarily provide information to persons contemplating or initiating a private action under section 36 of the Act. Moreover, the Bureau will oppose subpoenas for production of information if compliance with them would potentially interfere with an ongoing examination or inquiry, or otherwise adversely affect the administration or enforcement of the Act. If the Bureau's opposition is unsuccessful, it will seek protective court orders to maintain the confidentiality of the information in question.

[2] The National Class Action Database is a voluntary initiative and is not a comprehensive listing of all class action lawsuits currently underway in Canada. More information can be found online: http://www.cba.org/classactions/main/gate/index/.

2.3 Case Examples – Private Recovery of Damages

2.3.1 Pro-Sys Consultants Ltd. v. Microsoft Corporation (2013)

17. A class action proceeding was commenced by Pro-Sys Consultation Ltd. ("**Pro-Sys**") on behalf of indirect purchasers of Microsoft Corporation ("**Microsoft**") operating systems and/or application software. The plaintiff alleged that Microsoft had breached two criminal provisions of the Act – sections 45 (conspiracy) and 52 (false or misleading representations) – which resulted in inflated prices. The plaintiff sought, among other things, damages under section 36 of the Act. The class was composed of final consumers of Microsoft products, who had acquired the products from retailers. These final consumers are considered to be indirect purchasers because they did not buy the products directly from Microsoft, but rather from an intermediary, in this case the retailers. The British Columbia Supreme Court initially certified the class in Pro-Sys, but the British Columbia Court of Appeal subsequently overturned that decision. The case was appealed to the Supreme Court of Canada (the "**Supreme Court**"), which held that indirect purchasers have a cause of action for damages.

18. The Supreme Court released two similar decisions in conjunction with the Pro-Sys decision: *Sun-Rype Products Limited v. Archer Daniels Midland Company and Infineon Technologies AG v. Option consommateurs. Each of these cases also dealt with the issues of class certification and indirect purchasers, and like Pro-Sys, the Supreme Court held in both cases that indirect purchasers have a cause of action against manufacturers of products.*

19. In these three cases, the Supreme Court recognized the right of indirect purchasers to assert competition claims. These three decisions set the framework for indirect private actions in Canada. This result is positive for the Bureau, as it views section 36 of the Act as an additional enforcement mechanism serving not only the private recovery interests of plaintiffs, but also the broader public interest of deterrence of anti-competitive conduct. Eliminating such actions for indirect purchasers would have limited the important deterrent effect of section 36 of the Act.[3]

2.3.2 Simon Jacques c. Les Pétroles Therrien Inc. (2008)

20. As part of its active monitoring of retail gas prices and news media, the Bureau became aware of allegations of price-fixing among gas stations in several communities in the province of Quebec. Following an investigation by the Bureau, charges were laid in June 2008, July 2010 and September 2012 against a total of 39 individuals and 15 companies. In the course of its investigation, the Bureau applied for orders authorizing it to intercept the private communications of a number of individuals.

21. As a result of this public investigation, a class action lawsuit was commenced under section 36 of the Act against several gas retailers in the affected markets. The plaintiff in the lawsuit, who represents consumers of gas in the affected markets, sought access to the wiretaps that were in the Bureau and PPSC's possession. In June 2012, the Quebec Superior Court ordered the Bureau and the PPSC to (a) disclose the intercepted communications to the parties to two related class actions that had been filed in Quebec and (b) engage in a filtering process to protect privacy rights. The Quebec Court of Appeal declined to hear the issue in January 2013, following which the class action defendants sought and were granted leave to appeal to the Supreme Court.

[3] More information on these cases can be found on the Supreme Court's website: http://www.scc-csc.gc.ca/home-accueil/index-eng.aspx.

22. The Supreme Court heard the appeal on April 24, 2014. The purpose of the hearing was to clarify the constitutionality of section 402 of the Quebec *Code of Civil Procedure*, which grants discretion to Quebec courts to compel the production of records in the possession of third party. During this hearing, PPSC counsel argued that intercepted communications are disclosable provided that appropriate protections are put in place to protect the privacy rights of third parties. In October 2014, the Supreme Court issued a decision in which the majority held that a party to a civil action can request the disclosure of recordings of private communications intercepted by the state during a criminal investigation. As a result, the wiretaps will be disclosed to the lawyers and experts participating in the civil proceedings, with certain protections in place for third parties.[4]

2.3.3 Chocolate Class Action Lawsuits (2008)

23. In June 2013, the Bureau announced that charges had been laid against three companies and three individuals for fixing the price of chocolate confectionary products in Canada. Hershey Canada Inc. ("**Hershey**") pleaded guilty for its role in the conspiracy and was fined CAD$4 million. Related to this investigation, a number of class action lawsuits were started across Canada against chocolate manufacturers Cadbury Adams Canada Inc. ("**Cadbury**"), Hershey, Nestlé Canada Inc. ("**Nestlé**") and Mars Canada Inc. ("**Mars**"), and distributor ITWAL Limited. The lawsuits were brought on behalf of purchasers of chocolate confectionary products in Canada between February 1, 2001 and December 31, 2008 and alleged that the defendants conspired to fix or maintain prices for such products in Canada, causing chocolate buyers to pay artificially high prices for those products.

24. The class action lawsuits were settled, and the settlements were approved by the courts in the provinces of Ontario, British Columbia and Quebec for all of Canada. Together, the defendants, Cadbury, Hershey, Nestlé, and Mars, **paid CAD$23.2 million** for the benefit of persons who bought their chocolate confectionary products in Canada during the relevant period. The defendants did not admit to any wrong-doing.[5]

25. This case is notable because it illustrates that the relationship between public and private antitrust enforcement may cross jurisdictional borders. In particular, following publicity of the Bureau's chocolate investigation, class actions were commenced in multiple states in the United States of America ("**US**"). In 2008, Canada intervened in the consolidated US class action to protect the integrity of the Canadian investigation. Additional issues subsequently arose in relation to depositions of witnesses in the US class action while they remained subject to criminal investigation in Canada, resulting in litigation in Canadian courts.

2.3.4 DRAM Class Action Lawsuits (2008)

26. In the early 2000s, several jurisdictions began investigating allegations of price-fixing for dynamic random access memory ("**DRAM**") by several companies. DRAM is a form of computer memory that is contained in computers and many other electronic devices. It is the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication, and consumer electronic products.

27. The Bureau was one of the agencies that investigated allegations into price-fixing in the DRAM industry. Following a careful examination of the evidence obtained by the Bureau during the course of this inquiry, the Commissioner concluded that no further inquiry was justified. The Bureau discontinued its investigation in March 2010.

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4 More information on this case can be found on the Supreme Court's website: http://www.scc-csc.gc.ca/home-accueil/index-eng.aspx.

5 More information can be found on the Chocolate Class Action website: http://www.chocolateclassaction.com/.

28. As a result of these public investigations, several groups of consumers initiated class action lawsuits against the DRAM manufacturers in Canada and elsewhere. In Canada, these lawsuits were brought under section 36 of the Act. The Canadian plaintiffs sued some DRAM manufacturers alleging they agreed to fix the price at which they sold DRAM and that, as a result, people who bought DRAM or electronic devices that contain DRAM paid more than they would otherwise have paid.

29. The class action lawsuits in Canada resulted in final settlements totalling over CAD$79 million with eleven groups of defendants. **Everyone who qualifies will receive at least CAD$20, and possibly more depending on the quantity of electronic devices containing DRAM purchased.**[6]

2.4 Private Access to the Competition Tribunal

30. Section 103.1 of the Act permits private parties to apply for leave to make an application to the Tribunal if they are directly and substantially affected by the conduct of another party. Private access to the Tribunal is only available for conduct reviewable under sections 75 (refusal to deal), 76 (price maintenance) and 77 (tied selling, exclusive dealing and market restriction) of the Act, which are all Reviewable Matters. The private access provisions were added to the Act to complement the Bureau's public enforcement and increase the deterrent effect of the Act. Private litigation before the Tribunal may also yield valuable jurisprudence, which could assist the Bureau in its enforcement and application of the Act and could better delineate the bounds of legitimate behaviour for the business community.

31. There are several safeguards in place to control the use of private access to the Tribunal and prevent frivolous or groundless proceedings. For example, a prospective applicant must apply for and obtain leave of the Tribunal in order to bring an application. The application must be accompanied by an affidavit setting out the facts in support of the person's application under that section. In granting leave, the Tribunal must believe that the applicant's business is directly and substantially affected by the relevant anti-competitive practice or conduct. Further, leave will not be granted if the Commissioner has commenced an inquiry into or settled the matter. Finally, the Tribunal has the ability to award costs, which may deter suits by competitors seeking to gain a competitive advantage.

2.5 Intervention by the Commissioner

32. Under section 103.2 of the Act, the Commissioner may intervene in any application made under sections 75, 76 or 77 by a person granted leave under section 103.1. When deciding whether or not to intervene in a matter, the Commissioner will take into consideration a variety of factors. However, the overriding factors are whether there are significant competition issues raised and whether it is in the public interest for the Commissioner to intervene.

33. As a general rule, the Commissioner will only intervene in a private proceeding in exceptional circumstances, such as:

- when the impact on competition has importance beyond the immediate parties and affects a wider geographical area;
- when the issues could have a significant impact on consumers, on the business community or on the Canadian economy; or
- when the case could result in the development of a new economic theory or in valuable jurisprudence.

[6] More information can be found on the DRAM Class Action website: https://www.themoneyismine.ca/.

34. The Commissioner may also decide to intervene in a private proceeding if a consent agreement is reached between the private parties, which the Commissioner believes has or is likely to have anti-competitive effects. The Commissioner may seek to have the Tribunal vary or rescind such a consent agreement.

35. The decision of whether or not to intervene will always be made on a case-by-case basis, and to date, the Commissioner has not intervened in any of the private access cases before the Tribunal. Nevertheless, if and when such interventions are made, the Bureau's policy with respect to the communication of confidential information will be the same as with other applications before the Tribunal or courts.

36. If the Commissioner does not intervene, and if one of the parties involved in an application under section 103.1 requests confidential information or records in the possession of the Bureau, the request will be treated in the same manner as a request made by a party to an action initiated under section 36 of the Act.

2.6 Case Examples – Private Access to the Competition Tribunal

2.6.1 Used Car Dealers Association of Ontario v. Insurance Bureau of Canada (2011)

37. In September 2011, the Tribunal released a decision granting leave to the **Used Car Dealers Association of Ontario** (the "**UCDA**") to bring an application against the **Insurance Bureau of Canada** (the "**IBC**") seeking redress under the refusal to deal provisions in section 75 of the Act. The UCDA claimed that the IBC had stopped supplying the UCDA with information on vehicle accident and claims history, which the IBC compiles from its member insurers. According to the UCDA, it relied on being able to purchase this data to supply vehicle accident history reports to its members. In January 2013, a settlement was reached between the parties and the application by the UCDA was withdrawn on a without-costs basis.[7]

2.6.2 Nadeau Poultry Farm Limited v. Groupe Westco Inc. (2008)

38. In May 2008, the Tribunal released a decision granting leave to Nadeau Poultry Farm Limited ("**Nadeau**"), a chicken processor, to bring an application under section 75 of the Act against three of its chicken suppliers. Nadeau sought an order directing the suppliers to continue to supply the applicant with live chickens on usual trade terms in the volumes previously supplied. The respondents had previously provided advance notice to the applicant in respect of the termination of supply. The applicant contended that the refusal to deal would reduce its supply of live chickens substantially and would significantly affect its business. In June 2009, the Tribunal found that while Nadeau would be substantially affected in its business as a result of the respondents' refusals to deal, Nadeau had failed to satisfy the other requirements of section 75 of the Act.[8] As a result, Nadeau's application for relief was dismissed. [9]

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7 More information can be found on the Competition Tribunal's website: http://www.ct-tc.gc.ca/Home.asp.

8 Section 75 requires that a customer is substantially affected in its business or is precluded from carrying on business because it is unable to obtain adequate supplies of a product anywhere in a market on usual trade terms; this occurs as a result of insufficient competition among suppliers; the customer is willing and able to meet usual trade terms; the product is in ample supply; and the refusal to deal is having or is likely to have an adverse effect on competition in a market.

9 More information can be found on the Competition Tribunal's website: http://www.ct-tc.gc.ca/Home.asp.

2.6.3 B-Filer Inc. v. Bank of Nova Scotia (2005)

39. In November 2005, the Tribunal released a decision granting leave to B-Filer Inc., a company providing an internet payment service, to bring an application under section 75 of the Act against the Bank of Nova Scotia (the "**BNS**") for refusal to deal. The applicant's business involved offering customers the ability to use debit cards to pay participating vendors for the purchase of goods and services over the internet. The applicant used the services of the BNS to process the transactions required to offer that service. The BNS subsequently sent a notice terminating the services, prompting B-Filer to make an application to the Tribunal. The Tribunal subsequently found that the Applicant had failed to meet the constituent elements of section 75 of the Act. As a result, B-Filer's application was dismissed.[10]

3. Additional Mechanisms Available in Favour of Private Persons

3.1 Applications for Inquiry

40. Under section 9 of the Act, any six persons who are residents of Canada and are over the age of 18 may apply to the Commissioner for an inquiry into a matter, often called a six resident application. To make an application, the residents must be of the opinion that an offence under the Act has been or is about to be committed, that a person has contravened an order under the Act or that grounds exist for the making of an order under various sections of the Act. A six resident application must be accompanied by a statement that includes the names and addresses of the applicants, the nature of the alleged contravention or offence, the names of persons they believe to be concerned and a concise statement of the evidence supporting their opinion.

3.2 Case Examples – Applications for Inquiry

3.2.1 Nuclear Energy (2008)

41. In February 2007, the Bureau initiated an inquiry following a six resident application regarding allegedly false or misleading representations relating to the nuclear energy industry. In particular, the complainants alleged that published representations reported that nuclear power is "clean, reliable and affordable", creating a misleading impression of the environmental impacts, economic risks and financial costs associated with nuclear technology. They also alleged that these representations could affect public opinion, which in turn could influence government in the establishment of policies that favour nuclear electricity generation to the disadvantage of non-nuclear energy producers.

42. After examining the information obtained, the Bureau concluded that continuation of the inquiry was not warranted as the representations were not found to be material to consumer purchase decisions and thus did not contravene the Act. Consequently, the inquiry was discontinued in January 2008.[11]

3.2.2 Ashley v. Canada (Commissioner of Competition) (2006)

43. In June 2003, a group of professionals applied to the Commissioner under section 9 of the Act to request an inquiry concerning representations made by several cigarette manufacturers promoting their tobacco items as "light" or "mild". The applicants alleged that these representations were false and misleading, contrary to sections 52 and 74.01 of the Act. In August 2003, the parties were advised by the Bureau that the Commissioner had commenced a formal inquiry in respect of the promotional practices complained of in the section 9 application.

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10 Ibid.

11 See Bureau's News Release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03060.html.

44. Approximately 17 months after the inquiry was commenced, the applicants applied to the Federal Court for an order of *mandamus*, requiring the Commissioner to complete her inquiry and to refer to the matter to the Attorney General of Canada or apply to a court of competent jurisdiction for determination of reviewable conduct. The application was dismissed as the Commissioner had no duty to complete an inquiry that had been commenced upon receipt of an application under section 9 of the Act.[12]

3.2.3 Charette v. Canada (Commissioner of Competition) (2002)

45. Between May 1999 and March 2001, Kirk Charette made several complaints to the Bureau regarding the pricing arrangements and representations of a manufacturer of energy management systems and its authorized distributor. The Bureau investigated all of the complaints and provided Mr. Charette with detailed information as to why it had determined there was no basis to believe that any further inquiry into a violation of the Act was warranted or appropriate.

46. Following receipt of this information, Mr. Charette, along with five other Canadian residents, filed an application under section 9 of the Act requesting that the Commissioner reinvestigate three of his complaints. The applicants subsequently filed an application to the Federal Court for *mandamus* to compel the Commissioner to commence an inquiry The Federal Court found that the Commissioner had already fully performed the legal duty that it owed to the applicant by investigating his complaints, determining that an inquiry was not warranted and advising him of the result. The application was dismissed with costs.[13]

3.3 Restitution Orders and Interim Injunctions to Freeze Assets

47. Under paragraph 74.1(1)*(d)* of the Act, the court and the Tribunal are empowered to make restitution orders against parties who are found to have engaged in reviewable conduct by making materially false or misleading representations to the public under paragraph 74.01(1)*(a)* of the Act. Restitution, along with the other remedies available under section 74.1 of the Act, serves as an additional incentive for companies to comply with the Act. Restitution to victims can also be ordered for certain violations of the Canadian *Criminal Code*, such as fraud.

48. Under section 74.111 of the Act, the court and the Tribunal are also empowered to issue an interim injunction to freeze assets in situations where the Commissioner is pursuing, or intending to pursue, a restitution order. This power can only be exercised when the court or Tribunal finds a strong *prima facie* case that a person is engaging in, or has engaged in, conduct that is reviewable under paragraph 74.01(1)*(a)* of the Act, and the court or Tribunal is satisfied that the person owns, possesses or controls assets, is disposing, or is likely to dispose, of them, and that such disposal will substantially impair the enforceability of a restitution order made under paragraph 74.1(1)*(d)* of the Act. Such injunctions are a critical tool to ensure the preservation of property pending the outcome of a case.

12 More information can be found on the Federal Court's website: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Index.

13 *Ibid.*

3.4 Case Examples – Restitution Orders

3.4.1 Matthew Hovila (2013)

49. In June 2013, Matthew Hovila was convicted by a jury of engaging in criminal conduct under the Act relating to the operation of an online job opportunities scam. Mr. Hovila was found guilty of making materially false or misleading representations on a website promoting job opportunities in the oil and gas industry and of contravening a registered consent agreement under the Act.

50. Mr. Hovila had previously signed a consent agreement with the Commissioner in 2006 regarding the same website and paid a CAD$100,000 administrative monetary penalty ("**AMP**"). At that time, Mr. Hovila admitted he had violated the Act's civil false or misleading representations provision and agreed to cease the conduct and notify the public. In February 2014, Mr. Hovila was sentenced to two-and-a-half years in jail for operating an online job opportunities scam and breaching the consent agreement. Further, in June 2014, Mr. Hovila was ordered to pay over CAD$185,000 in restitution to approximately 1,500 people in more than 60 countries. The restitution was ordered under the *Criminal Code.* Mr. Hovila was also fined an additional CAD$164,000 for his role in the scam.[14]

3.4.2 Yellow Pages Scam (2012)

51. In March 2012, five companies and three individuals were found to have violated the Act for operating a deceptive marketing scheme targeting businesses, individuals and organizations across Canada and internationally. By using symbols that closely resemble the well-known trademark of the Yellow Pages Group, the companies and individuals deceived recipients into believing that they were merely updating contact information for an online business directory listing. In fact, buried in the fine print was a stipulation that, by returning the form, recipients were committing to a new two-year contract for a listing at an annual cost of CAD$1,428 for a listing in a business directory that had no relation to the Yellow Pages Group. In addition to being ordered to pay AMPs totalling CAD$9,035,000 (CAD$8 million by the companies and CAD$1,035,000 by the individuals), the court also ordered the companies and individuals to pay full restitution to the victims of the scam.[15]

3.4.3 Olufemi Olutunde, Emmanuel Ajayi and Duro Akintola (2010-2011)

52. In February 2010 and July 2011, three individuals, Olufemi Olutunde, Emmanuel Ajayi and Duro Akintola, pleaded guilty for their role in an employment opportunity scam involving counterfeit cheques. The scam targeted Canadian residents who believed that they had been hired to act as secret shoppers to assess the customer service of Western Union Financial Services. The victims were provided with cheques, instructed to deposit them, then to withdraw cash and wire it to individuals through the international money transfer service. All cheques were subsequently identified as counterfeit and the victims were left liable for the cash withdrawals. All three accused pleaded guilty to fraud contrary to the *Criminal Code*, with Mr. Ajayi and Mr. Akintola also pleading guilty to making false and misleading representations contrary to section 52 of the Act. Mr. Oluntunde was sentenced to 12 months in jail, while Mr. Ajayi and Mr. Akintola both received conditional discharges with 12 months of probation. Mr. Oluntunde was ordered to pay CAD$23,000 in restitution to 14 victims, Mr. Ajayi was ordered to pay CAD$5,000 in restitution to four victims, and Mr. Akintola was ordered to pay CAD$3,000 in restitution to five victims. In these instances, the restitution was ordered pursuant to section 738 of the *Criminal Code*.[16]

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14 See Bureau's News Release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03761.html.

15 See Bureau's News Release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03439.html.

16 See Bureau's News Release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03397.html.

3.5 Consent Agreements

53. In addition to the provisions contained in the Act related to private actions and restitution, the Commissioner also has the ability to enter into consent agreements with parties whose conduct has raised concerns under the Act. Consent agreements are filed with the Tribunal for immediate registration, and may contain a variety of restrictions on, or undertakings by, the parties to the agreement. In many instances, consent agreements are used, among other things, as a mechanism to secure restitution to victims of anti-competitive conduct.

3.6 Case Examples – Consent Agreements

3.6.1 Rogers (2015)

54. In March of this year, the Bureau announced that it had reached a consent agreement with Rogers under which Rogers has agreed to pay up to an estimated CAD$5.42 million in refunds regarding "premium text messaging" charges on customers' wireless phone bills. This is a record refund for a Bureau enforcement action.

55. The Bureau's agreement with Rogers was the result of an investigation into the marketing practices of Rogers, Bell, Telus and the Canadian Wireless Telecommunications Association (CWTA) concerning "premium text messaging". As a result of the investigation, the Bureau concluded that Rogers made, or permitted to be made, false or misleading representations to customers in advertisements for premium text messages appearing in pop-up ads, apps and social media. The Bureau also determined that wireless customers were charged by third parties on their wireless phone bills for premium text messaging services, such as trivia questions and ringtones that they did not intend to purchase and for which they had not agreed to pay. As part of the settlement, the Bureau will discontinue the legal proceedings against Rogers that were initiated before the Ontario Superior Court in 2012. While the agreement resolved the matter against Rogers, legal proceedings against Bell, Telus and the CWTA remain ongoing.[17]

3.6.2 National Energy Corporation (2014)

56. In November 2014, the Bureau announced that it had determined that sales agents for National Energy Corporation ("**National**") were making false or misleading representations regarding their identity and the purpose of their visits to consumers' homes. During the course of the investigation, the Bureau became aware of thousands of complaints received by other organizations, including the Ontario Ministry of Consumer Services, the Better Business Bureau and the *Office de la protection du consommateur* in Quebec. To address the Commissioner's concerns, National and its parent company, Just Energy Group Inc., signed a consent agreement that required, among other things, CAD$1.5 million in restitution to be paid by National to all current National customers signed up through door-to-door marketing since July 2008 in the form of a direct credit on their water heater rental bills and the implementation of a Corporate Compliance Program.[18]

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17 See Bureau's News Release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03889.html.

18 See Bureau's News Release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03849.html.

3.6.3 Automobile Distributors Hyundai and Kia (2013)

57. In August 2013, the Bureau announced that it had reached consent agreements with Canadian automobile distributors Hyundai Auto Canada Corp. ("**Hyundai**") and Kia Canada Inc. ("**Kia**") that formalized the steps they had taken to respond to inaccurate fuel consumption ratings found in advertisements for a number of their automobiles. The fuel consumption ratings were based on testing conducted at joint testing facilities in Korea. The consent agreements ensured that affected customers received full restitution. In particular, the agreements required that Hyundai and Kia compensate affected customers for the cost associated with the difference between the affected vehicle's advertised and corrected fuel consumption ratings for the entire time the vehicle is or was owned; provide an additional 15% to affected customers' compensation entitlement as an acknowledgement of the inconvenience caused to affected consumers; and issue the compensation in the form of personalized prepaid credit cards that will be issued each time an affected consumer makes a request, for as long as an affected customer owns an affected vehicle.[19]

3.7 Shared Compliance

58. Shared compliance is the recognition that everyone, including the Bureau, the legal community and the business community, has a role to play in ensuring compliance with the Act and other legislation enforced by the Bureau. The Bureau strongly believes in the importance of shared compliance, and feels that private actions are an important aspect of shared compliance. Through shared compliance, immeasurably more can be achieved for the benefit of consumers, business and the economy than if parties act alone. Shared compliance ensures fair play in the marketplace, which levels the playing field and results in increased economic development. By providing private citizens and organizations with mechanisms beyond public enforcement to address conduct that is anti-competitive and harmful, private actors are empowered to obtain redress for conduct that has affected them. These private actions also result in increased awareness and deterrence of anti-competitive activity, which are key aspects of shared compliance.

3.8 Conclusion

59. There are several provisions in the Act that are intended to foster the ability of victims of anti-competitive conduct to obtain redress for the harm they have experienced as a result of anti-competitive conduct, either directly or by means of Bureau action. The direct provisions include a right of private action for damages and private access to the Tribunal. The Bureau views private antitrust actions as an additional but important enforcement mechanism, separate and independent from its investigations, serving not only the consumers' private interests to recover damages, but also the broader public interest of deterrence. Additional mechanisms include applications for an inquiry into a matter, and the ability for courts and the Tribunal to issue restitution orders and interim injunctions to freeze assets. Consent agreements also provide an instrument for the Bureau to secure restitution for private victims of anti-competitive conduct.

[19] See Bureau's News Release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03588.html.