COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: May 6, 2025
CT- 2024-010

Sarah Sharp-Smith for / pour
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OTTAWA, ONT. | # 59

PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more Orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

-and-

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

MOTION RECORD
VOLUME 15 OF 29

May 6, 2025

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This is Exhibit “26” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

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COMPETITION POLICY IN CANADA:
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Cette publication est également disponible en français

CCAC No. 189 10262 E 89-10

FOREWORD

The development of competition legislation in Canada is a fascinating story. The cornerstone of the law was set in place one hundred years ago in 1889 - one year before the enactment of the Sherman Act in the United States. Over the years, the legislation has undergone a number of important changes, reflecting differing views on both economic priorities and practical approaches to administering a framework law on competition. Today's policy, embodied in the Competition Act, has retained the flavour of its historical origins while also representing a modern approach to competition policy, law and economics.

A fuller appreciation of the form and substance of the Competition Act comes with an understanding of its origins and what comprises competition law in Canada today. This paper sets out to describe in a brief, non-technical manner both of these aspects. The paper was prepared under the direction of the Executive Committee of the Bureau of Competition Policy by Margaret F. Sanderson of the Economics and International Affairs Branch and Professor William T. Stanbury, UPS Foundation Professor, Regulation and Competition Policy of the Faculty of Commerce and Business Administration, University of British Columbia. It is being released in conjunction with the National Conference on the Centenary of Competition Policy in Canada.

It is hoped this paper will provide a basic understanding of the nature and role competition policy has taken within the Canadian environment, thereby encouraging additional interest in the field.

Calvin S. Goldman, Q.C.
Director of Investigation
and Research

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1.0 INTRODUCTION

In May of 1889, An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade was enacted by the House of Commons, establishing the core of Canadian competition law.[1] Legislation governing competition within Canada has evolved significantly since that time.[2] Numerous amendments have been implemented in reaction to the changing political and economic environment. Notwithstanding these developments, the chief objectives of Canadian competition policy have remained remarkably consistent, being aimed at the removal of unreasonable or undue restraints on competition in the interests of protecting consumers and those businesses who wish to be free to act competitively.

1.1 NATURE OF COMPETITION

Competition is maintained in Canada not solely for its own sake, but to act as the prime stimulus to achievement of a number of objectives associated with enhancing the welfare of society. Competition is a process of allocating scarce resources. More strongly put, freely competitive forces are widely believed to result in the best allocation of society's economic resources, the lowest costs and prices, the highest quality, and the greatest incentives for product innovation and development while simultaneously preserving the democratic nature of Canada's political and social institutions.

In the first combines case to reach the Supreme Court of Canada in 1912, Mr. Justice Idington emphasized: "Destroy competition and you remove the force by which humanity has reached so far".[3] Twenty years later, another Canadian judge made much the same point when he said:

> "The incentive to struggle ... is one of the conditions of advance, not only in the realm of nature, but in the realm of industry. Without that incentive, as the naturalists point out, men would sink into indolence and the more gifted would not be more in the battle of life than the less gifted. It follows that there should be open competition for all men and that the most able should not be prevented from succeeding best."[4]

As a decentralized and efficient "discovery procedure", or information system, competitive markets overcome one of the most fundamental and difficult problems in any society, namely the coordination of economic activity in a world of imperfect knowledge and costly information. Individuals and firms discover mutually profitable opportunities for exchange through a decentralized system of information gathering, processing and decision making. In equilibrium, the market as a social process ceases, as there is no further opportunity for mutually beneficial exchange. Note that real markets never reach such an equilibrium state because they are constantly jolted off course by a variety of forces. The virtue of competitive markets lies in the process of moving towards long run equilibrium even if the end state is never reached. The gains are in the journey itself, not in arriving at the destination.

1.2 The Public Interest in Competition Policy

To the extent that competition policy protects the forces of competition, it results in the movement of prices to levels which more accurately reflect demand and cost conditions, facilitating the flow of resources toward their most productive use. By promoting the efficient use of resources, competition policy lessens the need for alternative, more interventionist, forms of control such as regulation and public ownership. No regulator, no matter how sophisticated, is able to "outperform" effective competition as a means of allocating scarce resources in what can be a structurally competitive market.

In principle, it should only be necessary to ensure that market structure and conduct are such as to provide an acceptable degree of competition. The attainment of efficient industry performance can then be left to market forces without the need for detailed intervention by government. To this end, Canadian competition legislation seeks to prohibit certain practices in restraint of trade which serve to prevent the nation's scarce resources from being most effectively utilized. Parliament's intention throughout the past century has been to create an atmosphere

in which those who are willing to compete for economic gain on a fair and equitable basis are free to do so.

1.3 Nature of the Canadian Economy

The nature of the Canadian economy has necessitated such an approach. In many cases Canadian markets are small relative to the efficient scale of production and distribution. This imposes cost disadvantages on Canadian firms competing in international markets. This, in combination with the geographic dispersion of domestic markets, has resulted in oligopolistic industry structures and consequently high levels of market concentration. In such an environment, competition cannot be pursued solely as an end in itself, but rather as the vehicle to increase economic welfare.

Perhaps because they have recognized these facts, Canadians have generally not been inherently distrustful of large-scale enterprise, or even of the combination of otherwise independent firms. Certainly, the framers and supporters of the first competition legislation took this view, believing that Canada had much to gain from "large aggregations of capital". The original legislation, and its successors are not regarded as "anti-combination" but rather as "anti-combine" where the word "combine" has been defined as a combination that operates to the detriment of the public (see Canada, 1888; Bliss, 1973).

Thus, Canadian competition legislation has never regarded large firm size as adverse to competition.[5] Rather, by focusing on prevention of abuse of market power, Canadian competition legislation has ensured that firms achieve desired efficiencies and compete with one another on a fair basis, while also providing customers with product and quality choices at the lowest prices possible.

2.0 Objectives of Canadian Competition Policy

Historically, three major objectives of Canadian competition policy have been identified by the Courts,

Ministers of the Crown, interested officials and academic analysts. These include maintaining free competition; preventing abuses of market power (including the protection of consumers); and achieving economic efficiency. In addition, a number of supplementary objectives for Canadian competition policy have been identified. These include codifying the common law doctrine of restraint of trade; fighting inflation; protecting small business; preserving the free enterprise system; and ensuring fairness and honesty in the marketplace (see Gorecki and Stanbury, 1984).

Throughout the 1970s there was vigorous debate over the primacy of these objectives in government, business and academic circles.[6] A consensus emerged that the fundamental goal of fostering economic efficiency should take precedence over the various supplementary goals. By working towards achievement of economic efficiency the legislation would seek to achieve the optimal use of socio-economic resources to meet society's wants and needs, the production of goods and services at the lowest possible costs consistent with desired quality standards and the optimal rate of investment in technological innovation.

The emphasis on economic efficiency as the primary objective of competition policy in Canada further evolved to emphasize concerns about international competitiveness. Increased efficiency is widely acknowledged as the key to improved Canadian participation and performance in world markets. The role of imports in limiting the potential for abuse of domestic market power in certain sectors has also been recognized.

The objectives of today's competition policy, as embodied in the purpose clause of the Competition Act, reflect this diversity of concerns:

> "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an

equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."[7]

3.0 EVOLUTION OF CANADIAN COMPETITION POLICY, 1889-1986

3.01 ORIGINS OF THE FIRST LEGISLATION

Public pressure to enact competition legislation arose towards the end of the 19th century when both Canada and the United States witnessed a rise in concentrated business interests.[8] Sir John A. MacDonald's National Policy of tariff protection for domestic manufacturing aggravated existing tendencies toward higher prices by severely restricting foreign competition. Tariff protection encouraged the growth of domestic firms and the creation of branch plants of foreign enterprises. Some producers sought relief from the resulting competitive pressures in consolidations. Fears were raised that increased concentration would result in greater opportunities for explicit or tacit collusion and hence higher prices. Consumers demanded greater protection than the existing common law appeared to offer.

Thus, in 1888 a House of Commons Select Committee was established to examine the nature, extent and effect of business combinations in Canada. The Committee, after three months' deliberation, reported price-fixing combinations in a wide variety of industries (Canada, 1888). Immediately after filing the Committee's report, its chairman, Mr. N. Clarke Wallace, introduced a strongly worded private member's bill "for the prevention and suppression of combinations formed in restraint of trade". The difficulty Mr. Wallace had in passing this bill provides an early illustration of the obstacles which Canadian competition legislation would encounter during the subsequent reform process.

Mr. Wallace's bill was given only mild support in the House of Commons.[9] Extensive business opposition resulted in the measure being referred back to committee, this time to the Committee on Banking and Commerce. Amendments were made by both the House and Senate resulting in a greatly

weakened version of the original bill. Eventually, An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade was passed in 1889, making it a misdemeanor to unlawfully conspire, combine, agree or arrange to prevent or lessen competition unduly or to unreasonably enhance prices. The Act was incorporated in the first Criminal Code in the general codification of the criminal law in 1892 at which time the offence became an indictable one.

With the insertion of "unlawfully" and the additional qualifiers "unduly" and "unreasonably" the Act of 1889 was regarded as little more than declaratory of existing common law. Yet, by the end of the 19th century, British common law was extremely lenient in the area of restraint on trade. As long as restrictions were reasonable from the view of the participating parties they were held to be legal. Participation in a conspiracy to fix price or allocate markets was not in and of itself unlawful. It became an offence only by having an unlawful objective or by employing unlawful means. Furthermore, contracts declared void owing to restraint of trade were not necessarily criminal (see Dunlop et al., 1987; Gosse, 1962).

Mr. Wallace introduced bills to delete the words "unduly" and "unreasonably" from the Act in 1890 and 1891, both of which failed to pass the House and Senate. Senator Read made a similar attempt in 1894, but failed to go beyond First Reading in the House of Commons. The next year, the Liberal Member of Parliament, Mr. T. Sproule, tried again and failed to get the Commons to delete "unduly". He also failed in similar attempts in 1896 and 1898. Finally in 1899, Mr. Sproule was successful. His private member's bill to delete "unduly" and "unreasonably" was passed by both the House and the Senate as the Criminal Code Amendments Act, 1899. Nevertheless, a year later both "unduly" and "unreasonably" were restored to the Criminal Code sections in the Criminal Code Amendment Act, 1900. The Senate did, however, delete the word "unlawfully".

Despite this change, enforcement remained difficult due to cumbersome administrative procedures. The Act relied on individuals registering complaints with the relevant

provincial Attorney-General who was then expected to undertake a prosecution under the federal law. While granting private citizen access to the legislation is laudable, consumers rarely possessed the time, finances and influence required to file a forceful complaint. Yet a total of nine combines prosecutions were conducted between 1900 and 1910. Seven convictions were obtained.

The first successful prosecution was obtained in the case of R. v. Elliot in April 1903. The case involved the Ontario Coal Dealers' Association, an organization designed to maintain retail prices and to prevent direct sales to consumers by producers through establishment of a virtual monopoly of coal distribution throughout Ontario. The conviction was upheld on appeal.[10] In delivering the findings of the Ontario Court of Appeal Osler, J.A. stated:

> "The right of competition is the right of everyone, and Parliament has now shown that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right; that whatever may hitherto have been its full extent, it is no longer to be exercised by some to the injury of others."[11]

3.02 Combines Investigation Act, 1910

At the peak of another merger boom, the Combines Investigation Act of 1910 was introduced by the then Minister of Labour, William Lyon MacKenzie King. As the name of the legislation indicates, the Act provided a means to undertake investigations of alleged combines in restraint of trade and hence was intended to facilitate administration of the earlier Act. Any six British citizens could apply to a provincial superior court judge who could order an investigation if they felt sufficient evidence existed. Investigations were carried out by a board of three commissioners, appointed by the Minister of Labour, with wide powers of report. Reports were transmitted to the Minister at the conclusion of an inquiry, to be later published in the Canada Gazette. In the event of a Board finding of a combine, the accused had to cease and desist within 10 days of publication of the finding in the Canada Gazette (Gorecki and Stanbury, 1989).

A combine was defined very broadly in the Act of 1910 to mean:

> "any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of restricting competition in or of controlling the production, manufacture, transportation, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce ... and also includes what is known as a trust, monopoly or merger."

Thus, the legislation was not aimed at combination as such but at what King labelled the "possible inimical effects of combination". Because the 1910 Act was criminal law, only those restraints on competition whose harmful effects could be proven beyond a reasonable doubt were made illegal. Indeed, today the basic conspiracy provisions (although amended several times) remain as criminal law.

Mr. King's comments at the time demonstrate his view that the Act of 1910 was primarily a vehicle of investigation and publicity. In this regard, the legislation was modelled after King's Industrial Disputes Investigation Act of 1907. Mr. King "recognized that there are certain evils in the prevention and removal of which publicity is more effective than penalty" (King, 1912, p. 154). Once the public is fully apprised of the nature and extent of the crime it was expected to devise some means of protecting itself against continued injustice and wrong. According to King, "where public confidence and approval is an essential to business success, the fear of exposure is the real deterrent of wrong" (King, 1912, p. 154).

Mr. King's expectation that investigations followed by a public report would greatly deter parties from engaging in anticompetitive activities -- without the need for criminal prosecution -- was not fulfilled, however. Applicants for an investigation were reluctant to incur the considerable expense and publicity of initiating investigations. In addition, because the board was formed on an ad hoc basis,

there existed no body to provide continuity in the administration of the Act, or to ensure that the reports' recommendations were being fulfilled.

Only one investigation was undertaken under the 1910 Act and although a combine was found, no prosecution was attempted. In November of 1910, an application for a Board of Investigation was made in the matter of the leasing system of the United Shoe Machinery Company. The complaint filed by the manufacturers of boots and shoes was much the same as earlier litigation on the matter in 1905 which was finally decided in favour of the Company by the Privy Council in 1909. The Company fought the application for an investigation unsuccessfully at trial and upon appeal, but did succeed in greatly delaying proceedings (see Ball, 1934). The Board did not begin its investigation until November of 1911, submitting their final report to the Minister a year later. The majority of the three-man Board found a combine, ordering the Company to alter its leasing arrangements within six months. The Board was disbanded upon release of its report.

3.03 New Legislation, 1919

A period of unprecedented inflation during World War I prompted the appointment of a House of Commons Committee to inquire into the reasons for the high cost of living (Canada, 1915). Allegations of widespread profiteering and unreasonable profit margins focused part of the Committee's attention to an examination of combines legislation. However, the Committee found no evidence of unreasonable profit margins nor of profiteering, finding the rise in prices was due primarily to excess demand and to an increase in the supply of money, notably currency. Regardless, the Committee recommended the creation of:

> "a tribunal with power to investigate mergers, trusts, monopolies ... also with regulative power in connection with discriminations in price between purchasers of commodities, exclusive purchase and sale arrangements, inter-corporate shareholding and interlocking directorates, and unfair methods in Commerce."

Consequently, the Board of Commerce Act and the Combines and Fair Prices Act were passed in July 1919. The functions of the Board of Commerce were extensive. Investigation and restraint of combinations, monopolies, trusts and mergers constituting a combine was turned over to their jurisdiction. In addition, the Board had power to control the withholding of commodities and/or the enhancement of prices.[12] The Board of Commerce was to be a permanent administration and enforcement body, having the power to issue civil cease and desist orders for violations of the Combines and Fair Prices Act. It could on its own initiative start an investigation under the Combines and Fair Prices Act. Appeal to the courts from the Board's decisions could be made only on matters of law (see Ball, 1934).

The new legislation was to be short-lived, however, as the Board's powers were called into question on a constitutional reference to the courts in 1920. In 1921, the Judicial Committee of the Privy Council declared parts of both the Board of Commerce Act and the Combines and Fair Prices Act ultra vires the Parliament of Canada.[13] Part of the Court's decision held that the criminalization of the "hoarding of undue profits" was clearly a matter of "property and civil rights" and hence within the provincial sphere of power set out in section 92 of the British North America Act.

3.04 Combines Investigation Act, 1923

The second Combines Investigation Act, which came into effect in June 1923, replaced both the Board of Commerce Act and the Combines and Fair Prices Act. When introducing this legislation into the House of Commons, Mr. King, now Prime Minister, reiterated that like the Act of 1910 this legislation was designed to detect and publicize undesirable combinations in restraint of trade (see Skeoch, 1966a).

To facilitate this process, the lodging of a complaint was made easier and cheaper. A permanent Registrar was established to administer the Act under the Minister of

Labour. The first Registrar appointed was Mr. Harry Hereford, Industrial Engineer of the Department of Labour. Mr. Hereford held the office until September 1925, at which time Mr. F.A. McGregor began his long-standing career in the position.[14]

Under the 1923 Act, the application for initiation of a combines inquiry could be made to the Registrar by six citizens, by the Minister, or be initiated by the Registrar himself. The results of the Registrar's inquiry were reported to the Minister who, in turn, decided whether a further, more formal investigation was needed. Formal investigations were conducted by the Registrar or by a Commissioner appointed by the Minister on an ad hoc basis. Formal reports were transmitted to the Minister and, in the case of a Commissioner's report, published within fifteen days of the Minister's receipt of the report (see Gorecki and Stanbury, 1989).

The separation of investigatory and judicial powers was what differentiated this Act from the earlier Combines and Fair Prices Act. Investigations were carried out by the Registrar while adjudication rested with the courts. Like the 1910 Act, prosecutions under the 1923 Act were to be undertaken by a provincial Attorney-General to whom the report of the Registrar or Special Commissioner had been referred by the federal government. The federal government would proceed with prosecution only if the province did not and an individual laid an information to this effect which was approved for prosecution by Cabinet.[15]

In addition, the central offence of conspiracy was altered. Under the 1910 Act, the crime had consisted of the continuation of a combine judged to be a violation of the law, but with the Act of 1923 the offence lay in agreeing or assisting in the formation of a combine. Hence, a prosecution could be conducted even if the combine had ceased its unlawful activities in light of the investigation. The number of prosecutions increased as a result (see Table 4 and Gorecki and Stanbury, 1989).

3.05 New Legislation in the Depression, 1935-1937

In reaction to the widespread economic distress caused by the Great Depression, the Conservative government of Mr. R.B. Bennett appointed the Royal Commission on Price Spreads and Mass Buying to review combines legislation as part of a larger inquiry into price spreads and trade practices. The Minister of Trade and Commerce, Mr. H.H. Stevens, was made chairman. Mr. Stevens dominated the Committee's hearings, denouncing unfair trade practices and what he felt were flagrant abuses of economic power by department stores, meat packers and other mass buyers. Stevens' exuberant attack on big business considerably strained Conservative party unity at the time, ending with Stevens' resignation from Cabinet but continued membership on the Royal Commission (Forster, 1962).

An important part of Bennett's "New Deal" proposals was action to implement the recommendations of the Price Spreads Commission which were delivered to Parliament in 1935 (Canada, 1935). Among their recommendations was the creation of a federal Trade and Industry Commission to undertake the administration of the Combines Investigation Act. The Commission was to have full power to receive complaints, initiate and conduct investigations, and to make recommendations concerning prosecutions to the Attorney General of Canada. It was also proposed that the Commission be empowered to prohibit unfair trade practices such as discriminatory discounts, rebates and allowances for goods of like quality and quantity, territorial price discrimination, and predatory price cutting.

It should be noted that the Royal Commission's emphasis was on pricing practices rather than on monopolies and combines. Indeed, one provision of the proposed legislation was designed to prevent the ruin of competitors by providing for approval of certain price and production agreements among horizontal competitors where the Commission believed that "wasteful or demoralizing" competition existed in an industry, and that agreements among industry participants would not unduly restrain trade or operate against the public interest.

As a result of the Commission's report, the Dominion Trade and Industry Commission Act was passed by Parliament effective July 5, 1935. It established the Dominion Trade and Industry Commission to administer the Combines Investigation Act, and to authorize combines prosecutions under the Criminal Code. Members of the existing Tariff Board formed the Commission which, administratively, came under the Department of Trade and Industry. Additional legislation was added to the Criminal Code at this time, prohibiting discriminatory discounts, rebates and allowances, regional price discrimination and predatory price cutting (see Figure 1). These provisions (as amended) now constitute section 50 of the Competition Act.[16] In addition, the Combines Investigation Act was amended to provide an operational definition of monopoly (Stanbury, 1978a).

Bennett's government was subsequently defeated in the 1936 election. Immediately upon taking office MacKenzie King referred the Dominion Trade and Industry Commission Act to the Supreme Court for an opinion regarding its constitutional validity. The Supreme Court declared the Dominion Trade and Industry Commission Act provision allowing for price and production agreements to be ultra vires the federal government's power.[17] Consequently, the sections dealing with approval of price and production agreements were repealed by the Combines Investigation Amendment Act of 1937. The 1937 Act also replaced the Registrar with the Commissioner giving the Commissioner shared jurisdiction over combines with the Board of Commerce. In point of fact, however, the Board did not exercise any functions in respect of the Combines Investigation Act. The Commissioner's ability to initiate investigations on his own accord was deleted. The Act was also changed to permit the Attorney-General of Canada to bring cases on his own accord under the Act or the Criminal Code (see Gorecki and Stanbury, 1989).

3.06 World War II and its Aftermath

Throughout most of the Second World War, resource allocation, production and prices were all subject to direct

government control. Commissioner F.A. McGregor (former private secretary to MacKenzie King, Registrar between 1925 and 1935 and Commissioner since 1937), was appointed as an Enforcement Administrator of the Wartime Prices and Trade Board (McGregor, 1945). The enforcement of the combines legislation was effectively suspended, but not with Parliament's consent. Price ceilings on a wide range of commodities were not suspended until January 1947 (Magwood, 1981; Stanbury, 1981a).

Several administrative amendments were made to the Act during this time. In 1945 the Minister of Justice was made responsible for the Combines Branch rather than the Minister of Labour who had held the responsibility since 1910. The amendments also provided for the appointment of up to three Deputy-Commissioners. By regulation, the Commissioner was authorized to make studies of cartels or other monopolistic conditions and report to the Minister of Justice. The Commissioner was also permitted, on his own, to initiate preliminary inquiries, a power which had been in the 1923 Act, but was deleted in the 1937 amendments (see Gorecki and Stanbury, 1989).

According to the Minister of Justice at the time, Mr. L.B. St. Laurent, the principal substantive change resulting from the 1946 amendments was a section which authorized the Exchequer Court (now the Federal Court) to issue an order revising or cancelling a patent licence or pooling agreement or trade mark agreement where such agreements had been used to the detriment of the public. The Act was also amended in 1949 to permit the Attorney-General of Canada to prosecute <u>without</u> waiting three months after a provincial Attorney-General had received a report of the Commissioner recommending prosecution..

3.07 MacQuarrie Committee: Major Amendments in 1951 and 1952

In December 1948, Commissioner McGregor submitted the results of his inquiry into the flour milling industry to the Minister of Justice. In his report, Mr. McGregor

concluded that price-fixing agreements amongst the leading flour milling companies had been in force since 1936, having been maintained throughout the period when the millers' production and prices were subject to federal government scrutiny through the Wartime Prices and Trade Board. Release of the report was subsequently delayed until November 1949 despite the Act's provision that the Minister must publish all Commissioners' reports within fifteen days of receipt. Mr. McGregor resigned in protest on October 29, calling for a firmer commitment by the government to stronger enforcement of the Act.

As a consequence of the resulting widespread public criticism of the government's handling of the flour milling report, the MacQuarrie Committee was appointed in June 1950 to study the purposes and methods of the Combines Investigation Act and related competition statutes as well as those of other countries (Rosenbluth and Thorburn, 1963; Skeoch, 1966b).

The Committee's Interim Report on Resale Price Maintenance was released in October 1951. The Committee concluded that, on the whole, resale price maintenance was not justified, having taken into account both freedom of contract and the objective of economic efficiency (Canada, 1952). Parliament subsequently made the practices of fixing minimum resale prices and refusal to deal illegal per se, effective December 29, 1951. Hence, Canada was made the first country to ban such behaviour outright. This legislation (as amended) is now section 61 of the Competition Act.[18]

The final report of the MacQuarrie Committee was tabled in the House in March 1952 (Canada, 1952). The legislative changes resulting from the MacQuarrie Report were introduced to the House shortly thereafter by the Minister of Justice, Mr. Garson. The legislative amendments announced, while not materially changing existing provisions regarding combines and restraints of trade, did result in fundamental reform in procedural and administrative matters (see Rosenbluth and Thorburn, 1963). At the time Mr. Garson emphasized the innovative and efficiency-enhancing pressures competition exerts on business (Gorecki and Stanbury, 1984).

On an administrative level, the functions of the Commissioner were divided between two new entities: the Director of Investigation and Research (DIR) and the Restrictive Trade Practices Commission (RTPC). Administration and enforcement functions of the former Commissioner were incorporated into the office of the DIR. Mr. T.D. McDonald was appointed Director of Investigation and Research at that time. The DIR was granted numerous investigatory powers including search, affidavits, testimony under oath and sworn returns of information. Note, however, that the Director could only exercise these powers after authorization by a member of the RTPC. Functions of appraisal and public report were given to the RTPC. All prosecutions, upon the recommendation of the DIR, were henceforth to be conducted by the Department of Justice (see Rosenbluth and Thorburn, 1963).

Provision was made for Orders of Prohibition and other remedies as a sole remedy to offences or to be used in conjunction with fines. An additional amendment permitted dissolution of a merger, trust or monopoly. Thus, the legislation was allowing for structural remedies for the first time. The Act was also amended to provide for general inquiries into monopolistic situations or restraints of trade.[19] The number of prosecutions subsequently rose (see Table 4).

3.08 Amendments throughout the 1960's: Consolidating Competition Legislation

On May 6, 1960, the Conservative government of Mr. John Diefenbaker introduced a set of amendments to the Combines Investigation Act which became effective August 10. Mr. Davie Fulton, the Minister of Justice, argued that the amendments were intended to consolidate and clarify the legislation (see Rosenbluth and Thorburn, 1963).

Undoubtedly one of the more significant changes at this time was the incorporation of a provision prohibiting the misrepresentation of the ordinary selling price. This change resulted not from consumers' concern but rather pressure from business. Business was concerned that

misleading regular price comparisons were making genuine sale advertising less credible to consumers, and that these misrepresentations were giving an unfair advantage to those businesses misguiding the public.

The general prohibitions relating to false and misleading statement of fact were moved from the Criminal Code to the Combines Investigation Act in 1969. Remarking on the provisions at the time, the Director of Investigation and Research Mr. D.H.W. Henry, claimed:

> "It is a measure of the importance that Parliament and government have attached to the consequences of misleading advertising that these ... provisions have been inserted in the Combines Investigation Act ... These provisions relate to the consumer ... not only by protecting the consumer against fraud and deception but as well by improving the quality of information which is available to him in making his purchases."
>
> (Henry, 1969, p. 7)

These provisions are now found primarily in paragraphs (a) and (b) of section 52(1) of the Competition Act.

Provisions to deal with misleading or deceptive statements of fact had been in the Criminal Code in one form or another as far back as 1917 where they were originally directed against fraudulent land sales during the early real estate boom in Western Canada (see Cohen, 1971). Provincial authorities had made no use of the Criminal Code provision, however. The result of placing these new provisions in the federal legislation was a virtual explosion of prosecutions, from two in 1969/70 to 68 in 1974/75 to 125 in 1987/88 (see Table 3).

3.09 Need for Fundamental Reform

Despite these changes the government grew increasingly interested in reforming competition law. No doubt part of this interest may be explained by the increasing difficulties the government was facing in prosecuting cases. While recognizing the legislative purpose of the

policy on combines to be the protection of the public interest, the courts continually battled with the problem of deciding at what point horizontal agreements limited competition "unduly". In one of the early explicit judicial statements concerning the meaning of "undue" lessening, Cartwright J. in the case of Howard Smith Paper Mills Ltd. et al. v. R. stated:

> "... an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest."[20] (emphasis added)

In monopoly and merger cases, difficulties arose over the meaning of the criterion "to the detriment or against the interest of the public". Successful prosecution of a monopoly depended on a combination of great market control and public detriment. Gaining or holding a monopoly was not presumed to be against the public interest. Rather, a firm needed to be engaging in particularly restrictive behaviour designed to virtually eliminate all competitors before public detriment was deemed to occur (Stanbury, 1978a).

The difficulty found in interpreting public detriment was compounded in the case of mergers by the criminal nature of the legislation. In 1960, for example, the government lost two important merger cases: R. v. Canadian Breweries and R. v. British Columbia Sugar Refining Company and B.C. Sugar Refining Limited.[21] Neither was appealed. These cases aptly demonstrated the unsuitability of criminal law to merger review. The rules of evidence, burden of proof and implication of wrongdoing found in criminal provisions are inappropriate to evaluation of a merger's future impact on the competitive environment. This situation was further exacerbated by the requirement that not only must competition be lessened substantially but also that specific evidence of public detriment directly attributable to the merger be found (MacCrimmon and Stanbury, 1978).

To deal with these matters, among others, the newly-formed Economic Council of Canada was asked in 1966 to undertake a study of the Canadian marketplace and to make any relevant recommendations in respect of competition policy. In July of 1969 the Economic Council released its Interim Report on Competition Policy. Among the Council's recommendations was the adoption of a revised approach to competition policy, based on a mixture of criminal and civil law employing the single, clear objective of furthering the interest of Canadian consumers through an efficiently functioning economy. By focusing on the sole objective of improved economic efficiency, the Council believed competition legislation would be applied with greater consistency and effectiveness.[22]

Practices regarded by the Council as "rarely if ever productive of any substantial public benefit" were to be vigorously and publicly enforced within the sphere of criminal law. Thus, it was recommended that misleading advertising, resale price maintenance, and agreements between competitors to fix prices, allocate markets or prevent entry be illegal per se. It was further recommended that the existing criminal offences relating to monopoly and merger be replaced by civil law provisions to be adjudicated by an independent group of economic, legal and business experts to be known as the Competitive Practices Tribunal. Through the use of economic analysis, the Tribunal would determine whether mergers or other business practices operated in the public interest in the sense that they promoted economic efficiency, higher real incomes and consumer welfare.

Many of the Economic Council's proposals of 1969 were incorporated into Bill C-256 introduced to the House in June 1971.[23] While the Bill was aimed at achieving a number of objectives, efficiency enhancement was given priority. This was made clear not only by the preamble introducing the legislation but also through a series of speeches delivered by the Minister of Consumer and Corporate Affairs,[24] Mr. Ron Basford, shortly after introduction of the Bill (Gorecki and Stanbury, 1984). In a speech to the Canadian Chamber of Commerce, Mr. Basford stated:

> "The cornerstone of our policy, as the preamble clearly sets out, is that competition is the best means of attaining efficiency in the Canadian economy. It is our conviction - and this is carried through every part of the Act - that through the free interplay of market forces, our manpower, capital and natural resources will be directed into the most productive channels; that effective competition in our markets will provide a spur to greater productivity among Canadian industry; that the need to keep ahead of the competition will lead to progressive technological change and innovation; that Canadian industry will be in a better position to ensure and increase its ability to compete with foreign concerns in both domestic and international markets."
> (Basford, 1971, p. 5).

Business reaction to Bill C-256 was overwhelmingly adverse despite the government's efforts at consultation (see Stanbury, 1977a). The civil review procedures featured in the bill, particularly those pertaining to merger activity, were regarded as an excessive governmental interference in the workings of the marketplace. Canadian businessmen were of the long-standing view that optimal firm size in Canada needed to be so large relative to the small, domestic market that it necessitated very highly concentrated industries. In their view, restricting merger activity in the manner thought to be proposed by Bill C-256 would serve to only hinder the efficient operation of the economy.

3.10 Stage I Amendments

Given the intensity of business opposition, the government decided to proceed with competition policy reforms on an incremental basis. Thus, the Stage I Amendments, dealing with the least contentious proposed revisions to the Combines Investigation Act, were introduced in November 1973. Mr. Robert Bertrand was appointed Director of Investigation and Research in 1974 having the responsibility of getting the Stage I Amendments through the various Parliamentary Committees. The Stage I Amendments were enacted in 1975 after incorporating numerous House and Senate Committee revisions (see Stanbury, 1977a). The amendments came into effect in January 1976.[25]

The Stage I Amendments extended application of the Combines Investigation Act to services. New criminal offences of bid-rigging, the implementation of foreign directives giving effect to agreements contrary to the Act, double ticketing, pyramid and referral selling, bait and switch selling, and selling at higher than advertised prices were also enacted. Other criminal prohibitions against misleading advertising and price maintenance were strengthened. The meaning of the word "unduly" in the context of combines cases was clarified by eliminating any perceived necessity of proving that the combine's effect would be to virtually eliminate competition.

In addition, the amendments created a number of reviewable practices: refusal to deal; consignment selling; exclusive dealing; tied selling; and market restriction. The Restrictive Trade Practices Commission became the adjudicatory authority able to make remedial orders in reviewable practices cases it deemed appropriate. Private civil suits for recovery of single damages were also instituted. Finally, the Director was granted standing to make representations and to call evidence concerning the maintenance of competition before any federal regulatory board.

3.11 Stage II Amendments

Launching of the Stage II Amendments began with the appointment of an Advisory Committee. Lawrence A. Skeoch and Bruce C. McDonald headed the Committee. Their report, Dynamic Change and Accountability in a Canadian Market Economy, was released in May of 1976. The Skeoch-McDonald proposals called for competition policy legislation:

> "that will most effectively facilitate long run dynamic change within the Canadian economy, that will encourage the adoption of real-cost economies, and that will discourage restraints which result from mere market power rather than from superior economic performance."
> (Skeoch with McDonald, 1976, p. 202).

The report rejected extensive government intervention as a means of attaining these goals.[26]

The Skeoch-McDonald report did, however, affirm the need for an expert membership for the proposed National Markets Board which was to administer the civil law provisions relating to mergers and other fields requiring careful analysis of actual and potential economic effects. Nevertheless, Cabinet was to be empowered to set aside or change any order made by the National Markets Board. Important guidelines for identifying "dominant" firms and prohibiting their misuse of monopoly power were also outlined in the report. All structural tests, such as market share of firms, were to be abandoned save for the conditions of entry.

In March of 1977, Bill C-42, representing the first attempt to enact the Stage II Amendments to the Combines Investigation Act, was introduced in the House of Commons.[27] The Bill's preamble contained much of the language of the Skeoch-McDonald report, stressing that the objectives of Canadian competition policy should be the facilitation of the process of dynamic economic change.

Specific provisions of Bill C-42 recognized the need for civil law standards for reviewing mergers. An efficiency exception for mergers that would otherwise lessen competition substantially was also included. Differentiating this provision from previous draft provisions was the lack of a need to demonstrate efficiency gains would be passed down to consumers. The test of consumer benefit was also abandoned in the case of export and specialization agreements. In addition, export agreements would not be considered unlawful if their adverse effects on competition were "unintended" or "ancillary" to their primary objectives.

The capacity of the Director of Investigation and Research, to be renamed the Competition Policy Advocate, to intervene in regulatory hearings was broadened by the proposed Bill. Bill C-42 also required regulatory agencies to exercise their powers in a manner least restrictive of competition. Strict conditions for exemption of regulated conduct from competition legislation were spelled out.

Expanded access to private enforcement of competition legislation was also provided by Bill C-42. Class actions were to be made available to those whose individual damages were so small as to preclude individual redress through the courts. Substitute actions were also called for by the Bill.[28] Under particular safeguards the Competition Policy Advocate could initiate court proceedings on behalf of a claimant group deemed too small to warrant the cost of administering the relief sought in a class action.

Bill C-42 was referred to the House of Commons Standing Committee on Finance, Trade and Economic Affairs chaired by Mr. Norman Cafik. Following the Cafik Committee's recommendations, the government announced that the Bill would be appropriately revised and resubmitted to Parliament. Business opposition to the proposals was strongly felt at the Committee level. In their final report the Cafik Committee stated that while they favoured "a good healthy competition policy", they proposed that "adequate safeguards must be built into the system to ensure that it does not get out of control due to well-intentioned but excessively enthusiastic enforcement". Unfortunately, the proposed safeguards would have seriously restricted the effectiveness of the new legislation (MacCrimmon and Stanbury, 1977).

Bill C-42 did not, however, move beyond Second Reading. Rather, it was replaced by Bill C-13 which was given First Reading in November 1977. Bill C-13 eliminated many of the features business had found objectionable.[29] Nevertheless, it died on the Order Paper in 1978, partly due to business opposition (Stanbury, 1988).

A further attempt at instituting the Stage II Amendments was made in May 1981 when the Minister of Consumer and Corporate Affairs, Mr. André Ouellet, released a discussion paper in the form of a set of proposals to amend the Combines Investigation Act. New civil provisions relating to mergers, monopolization, abuse of intellectual property, import and export restrictions were proposed. Adjudication of these provisions was to remain with the courts. Amendments to the conspiracy section would create certain per se criminal offences and establish a structural

(market share) standard for other types of agreements in restraint of trade. Other criminal offences proposed included the prohibition of Canadian firms exceeding a domestic market share threshold from participating in international cartels and a prohibition of refusal to supply by reason of a delivered pricing scheme. Specialization agreements, once approved by the RTPC, were to be exempt from the conspiracy provisions. It was also proposed that responsibility for competition policy in banking be transferred to the Combines Investigation Act (Canada, 1981).

The proposals did not result in a new bill, in part because of the government's concern about a hostile reaction from the business community at a time when it had other major economic policies to deal with.[30] Mr. Lawson A.W. Hunter replaced Mr. Bertrand as Director of Investigation and Research shortly thereafter.

3.12 Bill C-91, 1985: Success At Last

Recognizing the indisputable role business interests had played in developing competition legislation within Canada, the government increased consultation with business groups following the demise of the Minister's 1981 proposals. These discussions culminated in the introduction of Bill C-29 in the House in 1984.[31] As proposed in previous Bills, Bill C-29 would have reassigned many matters from the realm of criminal law to that of non-criminal or civil law. Reviewable matters would, however, be adjudicated by the courts rather than a special tribunal. The Bill was not enacted before the general election of 1984.

The Progressive Conservative government elected in September 1984 continued the consultative process with business, expressing its commitment to competition legislation reform with the introduction of Bill C-91 in 1985.[32] While very similar to Bill C-29, the new bill restored the proposal for a special tribunal to deal with non-criminal competition policy matters. In June 1986, Bill C-91 was passed into law, creating the Competition

Tribunal and amending the Combines Investigation Act which was renamed the Competition Act. Mr. Calvin S. Goldman was made Director of Investigation and Research shortly thereafter.

4.0 COMPETITION POLICY IN CANADA TODAY

Competition policy in Canada today encompasses four functions: (i) the administration and enforcement of the criminal and non-criminal provisions of the Competition Act; (ii) the conduct of interventions before federal and provincial regulatory bodies in respect of competition; (iii) the provision of input to the design and implementation of government policies that affect the competitive market system; and (iv) representation of Canada's interests in international antitrust forums.

The Competition Act represents the principal piece of framework legislation which seeks to maintain and strengthen the role of competitive market forces in Canada, thereby encouraging maximum efficiency in the use of Canada's economic resources.[33] Note that by focusing on achievement of economic efficiency, the Act continues the legislative tradition of not viewing large firm size as necessarily adverse to competition. Increases in size may be needed to effectively meet domestic and/or foreign competition. Like its predecessors, the primary concern of the Act is the potential abuse of a firm's market position. To this end, the legislation seeks to establish clear and equitable standards -- which are also effective and enforceable -- by which Canadian businesses are to conduct their activities.

The provisions for interventions by the Director of Investigation and Research before regulatory boards provide an excellent example of the Act's general applicability. While criminal jurisprudence has indicated that business activities which are effectively regulated pursuant to federal or provincial legislation may be provided with a "regulated conduct defence", there remain opportunities for adopting competition principles in the design and implementation of various regulations.

The Director was first granted right of intervention before federal regulatory bodies in 1976 as part of the Stage I Amendments to the Combines Investigation Act. Since that time the Director has appeared before numerous federal and provincial boards in an effort to advance competition as an alternative policy to regulation (see Table 2). Some of the boards and tribunals before which the Director has advanced competitive strategies include the Canadian Transport Commission (now the National Transportation Agency), the Canadian Radio-Television and Telecommunications Commission, the National Energy Board, the Canadian Import Tribunal (now the Canadian International Trade Tribunal), the Newfoundland and Labrador Board of Commissioners of Public Utilities, the Ontario Energy Board, the Saskatchewan Public Utilities Review Commission, and various federal and provincial agencies concerned with the marketing of agricultural products.

The provision of advice to senior levels of government and participation with various federal and provincial departments and agencies in the design of government policies affecting the competitive market system is another important aspect of the Bureau of Competition Policy's work. Some of the areas in which the Bureau has played a role in policy formulation include: (i) input to the bilateral free trade negotiating team regarding contingency trade remedies and aspects of intellectual property rights; (ii) regulatory reform of federal and provincial legislation governing financial markets; (iii) development of the National Transportation Act, Shipping Conference Exemption Act and Motor Vehicle Transport Act, which have substantially deregulated the transportation sector; (iv) development of recent legislative initiatives respecting patents and copyrights; (v) deregulation of natural gas and other energy markets; and (vi) active participation in telecommunications reform.

Finally, the administration of competition policy involves the representation of Canada's interests in international antitrust fora. In this function, the Director is involved in the work of the OECD Committee on Competition Law and Policy and the UNCTAD Intergovernmental

Group of Experts on Restrictive Business Practices as well as the various working parties of these organizations.

In particular, Canada has had long-standing contact with the United States in respect of competition policy. Formal contact regarding notification and consultative procedures is presently governed by the 1984 Canada/U.S. Memorandum of Understanding on Antitrust Matters. This arrangement dates back to the 1959 Bilateral Understanding announced by Canadian Minister of Justice Fulton and U.S. Attorney General Rogers. The agreement was subsequently renewed and expanded in 1969 and 1977. Through this agreement, Canada and the United States have effectively reduced the scope and intensity of potential conflicts arising from the independent application of their respective antitrust laws. Informal contact between the two countries has furthered the good working relationship the Bureau shares with both the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.

4.1 Competition Act of 1986: An Overview

The primary focus of competition policy in Canada does, however, remain in the administration and enforcement of the Competition Act. The Competition Act and the Competition Tribunal Act came into force on June 19, 1986 resulting in a marked change from the previous legislation. Responding to the Economic Council's recommendations of two decades previous, the Act combines criminal and non-criminal law provisions. (Recall that the first non-criminal law provisions were enacted in 1976 - see Figure 1.)

Criminal offences under the Act include conspiracy, discriminatory and predatory pricing, misleading or deceptive marketing practices and price maintenance. These are, of course, matters resolved in criminal courts of competent jurisdiction. Strict rules of evidence apply and cases must be proven beyond a reasonable doubt. Reviewable matters include abuse of dominant position, mergers, and the practices of refusal to deal, consignment selling, market restriction, exclusive dealing, tied selling and the application of foreign laws and judgments to Canadian

companies (see Figure 2). These matters are adjudicated by the Competition Tribunal under administrative law standards.

4.2 Investigation: The Role of the Director

The Director of Investigation and Research remains the official responsible for ensuring that the Act is enforced in a fair, effective and timely manner.[34] In this respect, enforcement of the Act can take the form of investigation of violations of the Act with a view to prosecution and imposition of criminal penalties. In other instances the goals of maintaining and encouraging competition may be pursued with greater effectiveness and certainty, and with less time and expense, through an approach which stresses the promotion of continuing voluntary compliance with the Act and relies on a broad range of responses to non-compliant behaviour. It is noteworthy that such an approach was originally advocated, albeit in a somewhat different form, as early as 1910 when MacKenzie King introduced the first Combines Investigation Act to the House of Commons (see King, 1911, 1912).

Today's compliance-oriented approach is characterized by four principal components: a program of communication and education; facilitating compliance through advisory opinions, information contacts and advance ruling certificates; monitoring compliance with the Act; and responding to possible violations of the Act and reviewable matters through a variety of instruments (Canada, 1989).

Company officials, lawyers and others are invited to request an advisory opinion on whether the implementation of a proposed business plan or practice would give the Director grounds to initiate an inquiry under the Act. Those who seek an advisory opinion are not bound by the advice provided and similarly, the Director is not bound by the opinion given. Advisory opinions are given in relation to a specific set of facts. Should the details of the proposed plan differ when implemented from the plan presented to the Director, or should conditions change in a way that would alter the impact of the proposed plan on the market, the matter could be subject to further examination.

Information contacts may be initiated when the Director is of the opinion that a person may be unaware of a particular provision of the Competition Act or of its application. Persons contacted are under no obligation to justify their conduct or to discuss the matter with the Director. Following an information contact the Director may decide to continue the examination, monitor the conduct in question over a reasonable period of time or close the file.

In the case of mergers, parties to a proposed transaction may wish to seek some assurance from the Director that the proposed merger will not raise competition concerns. Under section 102 of the Act, the Director may issue an Advance Ruling Certificate when satisfied by the parties to a proposed transaction that sufficient grounds on which to apply to the Competition Tribunal for a remedial order do not exist. Issuance of an Advance Ruling Certificate precludes the Director from challenging the merger if it is substantially completed within one year of issuance of the certificate and if there is no substantial change in the information on which the certificate is issued (see Table 5).

Despite efforts to increase compliance with the Act on a voluntary basis, instances of non-compliance do arise. For this reason, Bureau staff monitor conduct in the marketplace in an effort to keep the Director informed of possible violations of the Act. The principal information sources relied upon for monitoring purposes include: complaints received from business persons, consumers, government departments and others; material submitted pursuant to undertakings or to orders of the Competition Tribunal or the courts; material submitted pursuant to the notifiable transactions provisions of the Act; and general industry contacts, news reports and trade journals.

Matters which the Director pursues normally begin with a preliminary examination to determine whether a question under any of the provisions of the Act is raised. If the Director believes, on reasonable grounds, that an offence under Part VI or VII of the Act has been or is about to be committed, or that grounds exist for the Tribunal to make an order relating to a reviewable matter under Part VIII of the

Act, or that a person has contravened or failed to comply with an order made under the Act, the Director is obliged to commence an inquiry into all such matters considered necessary to determine the facts. The Director is also obliged to commence an inquiry at the direction of the Minister of Consumer and Corporate Affairs or when six Canadian residents make an application in accordance with section 9 of the Act.

Once an inquiry has commenced, the Director can apply for authorization from a court to search for and seize records, to conduct oral examinations and to exercise the other investigative powers provided by the Act. Note that the Competition Act substantially revised the investigatory powers available to the Director as a result of the 1984 decision of the Supreme Court of Canada in the Southam case.[35] In that decision the Supreme Court declared the former search powers to be unconstitutional under the Charter of Rights and Freedoms. The new search powers incorporate the standards set out by the Supreme Court in the Southam case, being designed to ensure a high degree of neutrality and impartiality in the adjudication of the merits of an application.

Search warrants may be obtained for both criminal and non-criminal matters and may be executed anywhere in Canada, but only after authorization by a judge of a superior or county court or of the Federal Court of Canada. Likewise, authorization for oral examinations and productions of documents must be obtained from a judge of a superior or county court or of the Federal Court of Canada.

The Competition Act also sets out new provisions dealing with the search of computer systems. The Director's representative is permitted by the Act to use any computer system on the premises described in the warrant to gain access to data stored at a location on or off the search premises, such as a service bureau or the head office of a corporation. The person who is in control of the premises has a duty, upon presentation of the warrant, to permit the search officer to use the computer system during execution of the warrant.

The Director may discontinue an inquiry at any stage if further investigation is not thought to be justified. In such an event, the Director is required to submit a written report to the Minister. If the inquiry was commenced as a result of a six-resident application, the Director must inform the applicants of the decision and the grounds for the discontinuance. The Director may be instructed to make further inquiry at the direction of the Minister.

As cited earlier, a number of instruments to resolve cases are available to the Director, including investigative visits, undertakings, orders on consent and contested proceedings. Investigative visits refer to contact the Director or an appointed designate may make with a party alleged to be involved in anticompetitive conduct in order to obtain further information. If the information obtained persuades the Director that further investigation is not justified, the inquiry will be discontinued. Alternatively, the Director may decide that further inquiry is not warranted after an investigative visit because of voluntary corrective action taken by the party.

In other circumstances, the Director may accept written undertakings which eliminate the need to make an application to the Competition Tribunal or refer a matter to the Attorney-General. Undertakings are not new. They have been accepted by Directors since the 1960s, being encompassed in the framework of the enforcement discretion given to the Director by various statutory provisions. Undertakings are designed to remedy or overcome the effects of an anticompetitive course of action. For example, a company might undertake to refrain from certain behaviour or to engage in certain activities which resolve the Director's concerns under the Act. In the case of a merger, the parties under inquiry might undertake to restructure the merger by disposing of certain assets or shares within a certain period of time (see Table 5).

4.3 Adjudication: The Courts and the Competition Tribunal

At any stage of an inquiry relating to the criminal law provisions of the Act, the Director may refer a matter to

the Attorney-General of Canada for consideration as to whether an offence has been or is about to be committed and for such action as the Attorney-General may wish to take. The Director will normally include a recommendation regarding the action the Attorney-General should take when a matter is referred. In this respect the Director may recommend proceeding under subsection 34(2) in pursuit of a prohibition order on consent. When the Court issues an order under this provision, the parties need not plead guilty nor do they stand convicted. No fine or other sentence is imposed. In circumstances where the Director believes it is appropriate to seek a conviction and fine, in addition to a prohibition order, the Director may recommend proceeding under subsection 34(1) of the Act. Orders of the court under these two subsections may be issued with or without the consent of the parties. Whatever recommendation the Director makes, the Attorney-General retains complete discretion as to the action taken. Ultimately, it is for the court to decide whether a proposed order should be imposed in the circumstances of a particular case.

In the case of reviewable matters, the Director may apply to the Competition Tribunal for resolution either on a consent or contested basis. Under section 105 of the Act, the Tribunal may make an order, without hearing the evidence usual in a contested application, in any matter where the Director and the respondents have reached agreement. The issuance of a consent order is ultimately at the discretion of the Competition Tribunal. Applications by the Director in contested proceedings for the Tribunal's issuance of an order are generally pursued in those cases where alternative case resolution instruments do not provide an appropriate remedy to the Director's competition concerns.

In establishing the Competition Tribunal, Parliament sought to combine the important element of judicial process with expertise in the fields of business and economics. To this end, the Tribunal consists of up to four judges of the Federal Court of Canada - Trial Division, and up to eight lay specialists. Appointments are for terms of up to seven years, and both judicial and lay members are eligible for re-appointment for further terms.

Applications to the Competition Tribunal are heard by panels of three to five members, with at least one judicial member and one lay member per panel. The presiding member on any panel is always a judicial member. Some functions have been assigned exclusively to the judicial members of the Tribunal. For instance, questions of law are to be determined by judicial members only. It is within the Tribunal's discretion to grant standing to third parties who may wish to participate in any proceeding before the Tribunal if those parties can demonstrate that they are affected by the matter which is before the Tribunal. Provincial Attorneys-General may intervene as a right in certain proceedings.

The Tribunal is a court of record and possesses the same powers as are vested in superior courts with respect to procedure and the enforcement of its orders. Decisions or orders of the Tribunal, whether final, interlocutory or interim in nature, can be appealed to the Federal Court of Appeal as if they were judgments of the Trial Division of the Federal Court. However, an appeal on a question of fact lies only with leave of the Federal Court of Appeal. There is no appeal to or override given to Cabinet.

4.4 Reviewable Matters

(1) Mergers

The new reviewable provisions relating to mergers represent one of the most important changes enacted in 1986.[36] As discussed earlier, previous merger provisions were under criminal law. Criminal law does not, however, readily facilitate the use of economic analysis, a failing recognized in the case of merger review by the Economic Council in 1969. In addition, criminal law procedural requirements and the strict burden of proof made the previous legislation difficult to enforce.

The Competition Act applies to all mergers in Canada, no matter what their size or the nationality of the acquirer.[37] In the case of asset acquisitions, parties to a proposed merger are obliged to comply with the mandatory

pre-notification requirements when they exceed two thresholds (see Wetston, 1989). First, the parties, together with their affiliates, must have total assets, or total annual revenues from sales in, from, or into Canada, of over $400 million. The second threshold relates to the size of the proposed transaction itself; $35 million in sales or assets. In the case of a corporate amalgamation, notification is required where the value of the assets in Canada or the annual gross revenue from sales in or from Canada of the continuing corporation exceeds $70 million.

For share acquisitions notification is required for a proposed acquisition of "voting shares" of a corporation, where the corporation has assets in Canada, or gross annual revenues from sales in or from Canada, that exceed $35 million and where, as a result of the acquisition, the acquirer will have a greater than twenty percent voting interest in a public company or a greater than thirty-five percent voting interest in a private company.

Upon notification, parties complete either a short or a long information filing. The parties are then required to wait either seven or twenty-one days, depending on the information filing made, before completing the transaction. If the acquisition is to be carried out through the facilities of a Canadian stock exchange, the waiting period is ten trading days. During this time the Director conducts an examination of the competitive implications of the transaction. By providing a period of time to carry out a meaningful preliminary examination of large transactions the notification provisions help avoid the problems associated with the ex poste restoration of firms and competition to their premerger state. Should the parties attempt to proceed with closing a transaction the Director believes is likely to be anticompetitive, the Director may initiate proceedings to ask the Tribunal to enjoin the proposed merger.

In the case of foreign acquisitions, Investment Canada continues to review direct and indirect acquisitions by non-Canadians to ensure that they are likely to be of net benefit to Canada. The assessment of the competition factor, which is only one of a number of factors examined by

Investment Canada, is done by the Bureau. However, Investment Canada is not bound to accept or to reject a proposed acquisition because of the Director's view. Similarly, the Director is not bound by an Investment Canada decision. The Competition Act applies even if a foreign acquisition of a Canadian business has been approved by Investment Canada.

Under the Canada-U.S. Free Trade Agreement, the direct acquisition threshold for Investment Canada review of American acquisitions will be raised and the indirect acquisition threshold gradually phased out. Note, however, that the Free Trade Agreement does not alter in any way the applicability of the merger provisions to acquisitions involving domestic or foreign firms. Business firms will continue to face the Competition Act tests that currently apply in Canada.

The amended Act also gives the Director, rather than the Inspector General of Banks, responsibility for investigating bank mergers. Nevertheless, the Minister of Finance may exempt a bank merger from the Competition Act on the basis of financial policy considerations.

Under the Competition Act mergers are assessed to determine whether they will likely prevent or lessen competition substantially. In making this assessment, the legislation expressly denies a finding of substantial lessening or prevention of competition solely on the basis of evidence of market share or concentration. This provision highlights the fact that merger review is more than a mechanistic process. Both qualitative and quantitative aspects of competition will be taken into account in order to avoid an overly structuralist approach to the law. Competition is a dynamic process, and merely adding up market share in some circumstances may tell little about the effect of a merger on competition.

In addressing whether a merger prevents or lessens competition substantially, or is likely to do so, the Bureau may evaluate any factor relevant to competition in a market. Seven factors are expressly referred to in the statute: the extent of effective foreign competition;

whether a party to the merger is likely to fail; the extent to which acceptable substitutes are available; the presence of any barriers to entry; the extent to which effective competition remains; whether the merger results in the removal of a vigorous and effective competitor; and the nature and extent of change and innovation in the relevant market. This is a non-exhaustive list, and not all factors need necessarily be considered in all cases.

The new merger law also provides for an efficiency exception. Under this provision the Tribunal shall not prohibit a merger which lessens or prevents competition substantially if it finds that the merger has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition resulting from the merger, and that such efficiency gains would not likely be attained if an order were made. Additional consideration will be given to those gains in efficiency which give rise to a greater real value of exports or increased import substitution.

(2) Abuse of Dominant Position

While large firm size is not in and of itself cause for concern under the Competition Act, the Act does provide for remedies when dominant firms engage in anticompetitive conduct. Several elements must be proven in such cases.[38] First, "one or more persons" must substantially or completely control a class or species of business in Canada or any area thereof. Second, the dominant firm must engage in a practice of anticompetitive acts. A non-exhaustive list of acts is provided in the legislation to illustrate the type of conduct which may be considered by the Tribunal to be anticompetitive. These include activity such as the squeezing of profit margins by vertically integrated customers, and the pre-emption of scarce facilities or resources required by a competitor for the operation of a business. Note that such activity must have an anticompetitive object or purpose. Finally, the practice of anticompetitive acts must have or be likely to have the effect of preventing or lessening competition substantially in a market.

In determining whether the practice of anticompetitive acts lessens competition substantially, the Tribunal is directed to consider whether the practice is a result of superior competitive performance. This provision recognizes that consumers benefit when product innovation or improved distribution systems result in a firm out-distancing of its rivals in the marketplace. If competitors fall from the market because a dominant competitor is more efficient than its rivals or more effective in meeting consumer needs, the lessening of competition does not result from an abuse of market power, but rather it is a natural consequence of the competitive process. Inclusion of this provision then ensures that efficiency and innovation are among the factors considered by the Tribunal in its assessment of the trade practices of the dominant firm or firms.

The discretion available to the Tribunal in respect of abuse of dominance is restricted to remedies sufficient to overcome the effects of the anticompetitive practices and restore competition in the marketplace, thereby ensuring minimal interference in the marketplace. In many cases, the Tribunal may choose simply to prohibit continuation of the practices in respect of which the Director has brought an action. However, if this is considered to be insufficient, an alternative provision empowers the Tribunal to make an order requiring partial divestiture or any other remedial measure necessary to restore competition in the market.

On June 1, 1989 the Director filed the first application to the Tribunal under the abuse of dominance provisions. The application filed seeks an order in relation to acts of the NutraSweet Company that the Director alleges are having the effect of lessening competition substantially in the Canadian aspartame market. The application is on the public record before the Competition Tribunal.

(3) Specialization Agreements

The specialization agreement provisions of the Competition Act allow firms to reorganize production in order to achieve efficiency gains made possible from longer production runs. Specialization agreements are defined by

the Act as arrangements where each party agrees to discontinue producing an article or service on the condition that the other party agrees to discontinue producing an article or service. Parties may apply, on notice to the Director, to the Tribunal for an order to register the agreement. Registration provides an exemption from the conspiracy and exclusive dealing sections of the Act.

The Tribunal will register a specialization agreement only if the parties have demonstrated that the agreement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition. Like the efficiency exception in the merger law, it must also be shown that the gains in efficiency would not likely be achieved by other means, such as the unilateral specialization of product lines by the firms.

Where the Tribunal is satisfied that the agreement will produce efficiency gains that offset the lessening of competition but that there will be no substantial competition remaining in the market if the agreement is registered, orders of the Tribunal may be made conditional upon achievement of other matters such as a wider licensing of patents, a reduction in tariffs, a removal of import quotas or a partial divestiture of assets. The Tribunal can set out in its order the period of time that the order of registration will be in force. The Director may make an application to the Tribunal to remove the registration if the conditions underlying registration change.

(4) Refusal to Supply

Refusal to supply cases require the Director to establish the following four criteria before the Competition Tribunal when applying for remedial orders:

(i) a person is substantially affected in his/her business or is precluded from carrying on business due to his/her inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

(ii) the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;

(iii) the person is willing and able to meet the usual trade terms; and

(iv) the product is in ample supply.

Where these criteria are met, the Tribunal may order the respondent supplier(s) to accept the party as a customer on the usual trade terms within a specified period of time. A statutory exception arises where, in the case of an article, customs duties are removed, reduced or remitted within a specified period, having the effect of placing the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada. In the latter circumstances, the basis of the complaint is considered to have been removed.

An important distinction arises in the case of franchise systems. In these cases an article is not considered as a separate product solely on the basis that it is differentiated from other articles in its class by a trade mark, proprietary name or the like. In order to be treated as a separate product, an article differentiated in this way must occupy such a dominant position in the market as to substantially affect the ability of a person to carry on business in that class of articles unless he/she has access to the article so differentiated.

The first application to the Competition Tribunal specifically under provisions of the Competition Act dealing with refusal to supply was brought against Chrysler Canada Ltd. on December 15, 1988. The application filed asks the Tribunal to order Chrysler Canada to supply Chrysler automotive parts for export purposes to a dealer in Montreal.

(5) Consignment Selling

The Competition Act provides that the Tribunal may make an order respecting the practice of consignment selling where it finds that the practice has been introduced for the

purpose of controlling the price at which a dealer supplies the product, or discriminates between consignees and other dealers. The key issue under this provision is whether a person has an anticompetitive purpose or sound business reason for engaging in consignment selling.

(6) Exclusive Dealing, Tied Selling and Market Restriction

The Competition Act also covers the practices of exclusive dealing, tied selling and market restriction. The Act defines exclusive dealing in two ways. In the first case, a supplier requires a buyer to primarily purchase from that supplier or their nominee(s). In the second case, a supplier induces a buyer to deal only in their, or their nominees' products by offering to supply the products to buyers on more favourable terms or conditions (see Takach, 1983).

The practice of tied selling may also take several forms.[39] First, it may involve a requirement by a supplier that the buyer acquire a second product from a supplier or their nominee, as a condition of being granted supply of a first and usually highly desirable product. A second form of tied selling involves the requirement that a customer refrain from using or distributing, in conjunction with the tying product, another product not manufactured by or designated by the supplier or their nominee. The final form of tied selling is to offer the tying product on more favourable terms or conditions if the buyer agrees to either of the first two forms of tied selling.

In order to be the subject of a remedial order by the Competition Tribunal, the practices of exclusive dealing and tied selling must be shown to be engaged in by a major supplier or to be widespread in a market. In addition, the practice must be shown to be likely to impede entry or expansion of a firm or a product into the market, or have any other exclusionary effect in the market with the result that competition is or is likely to be lessened substantially.

Market restriction is defined by the legislation as any practice whereby a supplier of a product, as a condition of

supplying a customer, requires the customer to sell or supply the product only in a defined geographic market, or exacts a penalty of any kind if the customer breaches such a condition. As in the case of exclusive dealing and tied selling, market restriction must be shown to meet specific statutory criteria before it will be the subject of an order by the Tribunal. In particular, the Director must establish that, because the practice is engaged in by a major supplier of a product or is widespread in a market, the market restriction is likely to substantially lessen competition in relation to the product.

Orders issued by the Tribunal in exclusive dealing, tied selling and market restriction cases will normally require the cessation of the practice by all suppliers against whom they are directed. In the case of exclusive dealing and tied selling, the Tribunal may include in such orders any other requirement that, in its opinion, is necessary to overcome the effects of the practice or to restore or stimulate competition in the market. In regard to market restriction, the Tribunal may include any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

In considering the scope and application of the above provisions, it is important to note the several exceptions outlined by the Act. The Tribunal shall not make an order where it believes exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier or a new product into a market. Tied selling that is attributable to a technological relationship between or among products is also allowable. Finally, tied selling that is engaged in by a person in the business of lending money and is reasonably necessary for the purpose of better securing loans made by lenders will not be challenged.

(7) Delivered Pricing

The Competition Tribunal may prohibit a supplier from refusing to permit a customer or potential customer to buy and take delivery of an article at any locality at which the supplier makes a practice of making delivery to any other of

their customers on the same trade terms that would be available to the denied customer if their place of business were in that locality. In general, the provision is directed at a supplier's practice of dividing the market into geographic zones and selling their goods on a delivered price basis.

Several conditions must be met before the Tribunal may make an order prohibiting suppliers from engaging in delivered pricing. First, the respondent must be a "major supplier" in a market, or delivered pricing must be "widespread" in the market, and the customer in question must be denied an advantage that would otherwise be available to him/her in the market. Second, the prohibition applies only to articles, not to services. Third, the supplier must make a "practice" of refusing to deviate from their delivered pricing policy and must also make a practice of offering delivery at the place the customer or would-be customer seeks to take delivery. Fourth, the customer or potential customer must be prepared to take delivery on the same trade terms as others.

Two exceptions or defences are provided by the Act. First, the Tribunal shall not make an order where it finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality. Second, no order is to be made in respect to refusing delivery of an article that the customer sells in association with a trade mark that the supplier owns where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

4.5 Criminal Offences

The criminal offences found in Part VI of the Competition Act include conspiracy, bid-rigging, agreements among banks, price maintenance, price discrimination, predatory pricing, misleading advertising and deceptive marketing practices. For the most part, these provisions are relatively unchanged from those that existed under the Combines Investigation Act.

(1) Conspiracy

The prohibition of horizontal agreements to fix prices, allocate markets and restrict the entry of competitors has been the core of Canadian competition policy since 1889.[40] Cartel-like agreements unilaterally redistribute income from buyers to sellers and hence they contradict the basic tenets of the market system. Such agreements also relax the pressure for firms to be efficient, further raising prices by allowing firms to operate without minimizing their costs.

The basic conspiracy provision functioned with reasonable effectiveness until the mid-1970s, at which time the Supreme Court of Canada judgments in the Aetna Insurance and Atlantic Sugar cases gave rise to considerable uncertainty over the meaning of "unduly" preventing or lessening competition, and hence resulted in reduced effectiveness.[41] To deal with the problems associated with these cases, among other matters, the conspiracy section was amended in 1986. A subsection was inserted providing that the court may infer the existence of a conspiracy "from all the surrounding circumstances, with or without evidence of communication between or among the alleged parties...". In addition, the Act was amended to make it clear that the Crown need only prove the accused intended to and did enter into a conspiracy, but not that the parties intended that the conspiracy have the effect of lessening competition unduly. The exception to the export agreement defence was also altered to provide that where such agreements result in a reduction or limitation in the real value of exports, rather than volume, they are not exempt from the conspiracy provisions. Finally, the 1986 amendments raised the maximum fine and imprisonment relating to conspiracy convictions to $10 million and 5 years respectively.

In a recent conspiracy case under the Competition Act, the Federal Court of Canada issued an Order of Prohibition on December 20, 1988, thereby ending a number of conspiracy and price-fixing inquiries into the Canadian real estate industry. The Director's investigation began in 1986 after receiving complaints from customers and industry members alleging impediments to competition existed with respect to commissions, services or practices of nine real estate

boards in five provinces. During the course of the Director's inquiries, the Canadian Real Estate Association voluntarily approached the Director seeking to resolve the matter without going through the lengthy and costly process of contested prosecutions. Following extensive discussions, all parties agreed to the prohibition order resolution, which in turn was transmitted by the Director to the Attorney-General who, after reviewing it, decided to make the application to the Federal Court.

(2) Bid-rigging

The criminal offence of bid-rigging first came into effect in 1976. It is presently governed by section 47 of the Competition Act. Bid-rigging is defined as an agreement or arrangement between parties to either refrain from submitting a bid in response to a call for tenders or to submit a bid which has been arranged between the parties before the time of bid submission, and where the agreement is unknown to the party requesting tenders. Unlike the general conspiracy provisions, bid-rigging is a per se offence. There is no need to show that the restraint on competition is likely to be undue. Furthermore, the degree of market control exercised by the participants to the bid-rigging agreement is irrelevant.[42]

Record fines were recently imposed by the Saskatchewan Court of Queen's Bench and the Supreme Court of Nova Scotia against several business forms companies for bid-rigging on provincial government tenders.[43] Comprehensive orders of prohibition were also imposed. The seriousness with which the courts regard the anticompetitive impact of bid-rigging is reflected in the large fines.

(3) Agreements Among Banks

Agreements among banks have been brought under the scrutiny of the Director of Investigation and Research by the Competition Act. Six types of agreements among banks are made illegal per se: agreements concerning interest rates on deposits or loans, service charges, the amount or kinds of loans, and the kinds of services to be provided to a customer. Several exceptions are also specified, and

include agreements concerning deposits or loans payable outside Canada, underwriting agreements, and those approved by the Minister of Finance "for the purposes of financial policy". Given the small size of the Inspector General's staff and the Inspector's focus on other regulatory responsibilities, this change should strengthen the application of competition policy to banks.

(4) Price Maintenance

The Competition Act provides that no person who is engaged in the business of making or selling a product shall, directly or indirectly:

> "by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in a business in Canada supplies or offers to supply or advertises a product within Canada."

In order to establish an offence under this provision, the Crown does not need to prove that a supplier actually succeeded in influencing upward or discouraging the reduction of another party's prices. A mere attempt to influence prices in this way has been established as a per se offence.[44] The jurisprudence confirms that acquiescence by the person whom the accused has attempted to influence is not necessary to support a conviction.

Producers or suppliers who make suggestions regarding the resale prices of their products must, in order to avoid liability under the price maintenance provisions, also make clear to the party to whom the suggestion is offered that they are under no obligation to accept the suggested price. In the absence of proof to this effect, the making of suggestions respecting resale prices is deemed to be proof of an attempt to influence the person in accordance with the suggestion offered. Advertisements published by a supplier of a product, other than a retailer, that mention a resale price for the product, must make clear that the product may be sold at a lower price. Unless this is done, the publication of such an advertisement is deemed to constitute an attempt to influence upward the selling price of any person into whose hands the product comes for resale.

Regarding the issue of mens rea, it has been held in several cases that it is not necessary for the Crown to prove that an accused person intended their actions to have the effect of maintaining higher-than-competitive price levels. Rather, it is sufficient to support a conviction if the Crown shows that the accused knowingly carried out the acts which constituted the offence.

Several exceptions to the price maintenance provisions are provided in the case of product distribution systems. The Act does not apply to situations solely involving affiliated companies or directors, agents, officers or employees of the same company, partnership or sole proprietorship; or companies, partnerships or sole proprietorships that are affiliated. In addition, the Act does not apply in situations where the person attempting to influence the conduct of another person and that other person are principal and agent.

The Act makes it a separate offence to refuse to supply on the basis of price discounting. Like the price maintenance provisions, the refusal to supply offence is also directed at controlling possible attempts by dealers to initiate refusals by their suppliers to supply to competing, lower priced distributors. Several defences are provided to a person charged with refusal to supply where the defendant believes that the party that has been refused supply has made a practice of: (i) using the supplied product as a loss-leader; (ii) using the product for the purpose of attracting customers to their store rather than selling for profit; (iii) engaging in misleading advertising in respect of such products; or (iv) failing to provide the level of service that might reasonably be expected by purchasers of the product. It should be noted, however, that these exceptions do not apply to the basic offence of price maintenance, nor do they apply to the offence of inducement to engage in refusal to supply.

(5) Price Discrimination

The extent to which a supplier may discriminate among purchasers of a product on the basis of price is also covered by the Competition Act (see Nozick, 1976). Price

discrimination focuses on the relationship between the price charged to the customer and the prices available to competitors of the customer. The injury to be prevented is injury to these competitors rather than to the general process of competition. Hence, the Act proscribes situations where suppliers charge different prices to competitors who purchase like volumes.

The Restrictive Trade Practices Commission defined competing purchasers as sellers "seeking to serve the same customers." Firms may compete although they are located at different points in the distribution process if they sell to the same customers. Thus a supplier to a wholesaler and a retailer will not be permitted to grant the wholesaler a discount if the wholesaler and retailer serve the same customers. Geographical location of the purchasers is also relevant. Purchasers are competitors when the area they serve overlaps. Proximity is not necessary. Note, however, that the Act requires that the supplier know that purchasers are competitors. The legislation also requires that there be a "practice" of price discrimination. "Practice" implies more than one instance, or even two or three instances, of price discrimination.

The only price differentials then permitted between competitive purchasers are differentials based on volume discounts. Thus, year end discounts are permitted provided that the supplier grants the same discounts to all who purchased the same amount in the same period. Discounts may not be based on performance such as an increase in purchases over the previous year's purchases. Although the Act does not explicitly require suppliers to make volume discounts known to all purchasers, the Director advises businesses that it would be good practice to inform all customers of the discounts which are available.

(6) Predatory Pricing

Two types of predatory pricing are defined within the Competition Act. The first may be described as "geographic predatory pricing" (see Kaiser and Nielson-Jones, 1986). Sellers are prohibited from engaging in a policy of selling products or services in one region in Canada at a price

lower than in another region with the intent or effect of lessening competition substantially or of eliminating a competitor.[45] While this provision asks whether customers are paying the same price in different regions, it is directed at preventing anticompetitive effects to rivals of the seller.

The second type of predatory pricing offence is committed when a business engages in a policy of selling products at "unreasonably low" prices having the effect or intended effect of substantially lessening competition. In assessing the reasonableness of a price, the Courts have instructed consideration of all direct production costs as well as any potential future savings or benefits. Sellers' beliefs over reasonableness of price are not regarded as relevant. Finally, predatory pricing becomes an offence only when the supplier engages in a "policy" of such pricing behaviour.

(7) Misleading Advertising and Deceptive Marketing Practices

Within the overall framework of competition policy, the marketing practices provisions play a key role in ensuring that the market mechanism operates effectively and that consumers are protected from deceptive practices.[46] Along with the obvious need to protect consumers from direct exploitation by semi-fraudulent types of representations, misrepresentations may also cause injury to honest competitors by distorting the functioning of the market. As noted earlier, the impetus toward effective misleading advertising laws in 1960 was due to pressure from business, not consumers. With the passage of broader provisions at later dates the consumer protection aspect of the legislation was clearly recognized. Since their introduction in the 1960s the provisions relating to misleading advertising have been vigorously enforced by the Bureau, absorbing a considerable portion of the Bureau's resources.[47]

Section 52(1)(a) of the Competition Act generally prohibits representations conveyed "by any means whatever"

which are false or misleading in a material respect. In particular, section 52(1) prohibits unsubstantiated claims, misleading warranties and guarantees, and misleading price representation. Untrue and misleading tests and testimonials are prohibited under section 53. A statutory defence to charges laid under sections 52 and 53 of the Act is provided when the defendant establishes that he/she committed an honest error, exercised due diligence and reasonable precautions, and took prompt corrective action upon discovery of the error.

The Competition Act also prohibits "bait and switch selling", defined as situations where a person advertises the product at a bargain price and at the same time does not supply the product in reasonable quantities. Reasonable quantities will depend on the nature of the market in which the party carries on business, the nature and size of the business carried on by the advertiser, and the nature of the advertisement. If an advertiser clearly indicates the number or approximate number of items for sale, an offence will not have been committed. Furthermore, a person will not be deemed to have committed an offence where it can be established that he/she took reasonable steps to obtain a reasonable quantity of the advertised product but was unable to do so due to unanticipated events beyond their control; or that he/she had reasonable quantities but demand surpassed their reasonable expectations; or that he/she offered "rain checks" and fulfilled that undertaking.

Under the Act, the person conducting a promotional contest must ensure that there is no undue delay in distributing prizes and that selection is made by random choice or by skill in any area to which prizes have been allocated. There are also requirements for disclosure of the number and approximate value of prizes and of any fact within the advertiser's knowledge that would materially affect the chances of winning. It should be noted, however, that this section does not refer to advertisements or representations. It does not require that all such information must be disclosed in each and every advertisement. It is only necessary to ensure that at some time before purchase or before entering the contest, the

consumer is made aware in an adequate and fair manner of all these relevant facts.

Other misleading advertising and deceptive marketing practices provisions relate to double ticketing and sales above advertised price. Pyramid and referral selling schemes are also violations under the Act, except where licensed or otherwise permitted by a province. Again, there are exclusions and limitations applicable to these provisions, as well as various defences.

5.0 CONCLUSION

As indicated by its extensive history, Canadian competition policy has come a long way from its rather modest beginnings a century ago. Over time the legislation has expanded with development of the Canadian economy. Yet, at its core, it continues to aim at removing unreasonable or undue restraints on competition in the belief that free and open competition will protect the interests of consumers and business alike and ensure that resources are allocated efficiently. Although the recent reform process has been a long and arduous one, the result is undoubtedly a more effective statute. With the Competition Act of 1986 in place, Canadians are better able to pursue future efficiencies while still protecting the competitive state and health of the domestic economy.

FIGURE 1

ORIGINS OF THE SUBSTANTIVE PROVISIONS IN CANADIAN COMPETITION LEGISLATION

(A) Criminal Offences

. Conspiracy (horizontal combinations)[1]	1889
. Agreements among banks[2]	1986
. Bid-rigging	1976
. Mergers (horizontal or vertical)[3]	1910-1986
. Monopoly (and monopolization)[3,4]	1935-1986
. Predatory pricing	1935
. Price discrimination	1935
. Resale price maintenance and refusal to supply	1951
. Discriminatory advertising or promotion allowances	1960
. Misleading price advertising[5]	1960
. Misleading advertising re: deceptive or misleading statements of fact or of guarantees/warrantees	1969
. Misleading tests or testimonials	1976
. Marketing practices	1976
. Refusals to supply	
. Pyramid selling	
. Referral selling	
. "Bait and switch" selling	
. Multiple ticketing	
. Disclosure in promotional contests	
. Sales above advertised prices	

Notes

1. The original conspiracy section had no force until "unlawfully" was removed in 1900. Conspiracies relating to professional sports and foreign directives to Canadian firms to enter a conspiracy were made illegal in 1976.

2. Transferred from s. 309 of the Bank Act.

3. With the Competition Act of 1986 these offences were replaced by non-criminal reviewable merger and abuse of dominant position provisions.

4. While the word monopoly was in the definition of a combine in the Combines Investigation Acts of 1910 and 1923, it was not defined until 1935 (see Stanbury, 1978a).

5. There were forerunners of this provision in the Criminal Code.

1976 = January 1, 1976
1986 = June 19, 1986

FIGURE 1 cont'd

(B) Reviewable Matters

. Refusal to supply (domestic supplier)	1976
. Refusal to supply (foreign supplier)	1976
. Consignment selling	1976
. Exclusive dealing	1976
. Tied sales	1976
. Geographic market restrictions	1976
. Foreign judgments	1976
. Foreign laws and directives	1976
. Abuse of dominant position (replaced monopoly)	1986
. Delivered pricing	1986
. Specialization agreements	1986
. Mergers (replaced criminal law provisions)	1986

Notes

1976 = January 1, 1976
1986 = June 19, 1986

FIGURE 2

STRUCTURE OF THE SUBSTANTIVE PROVISIONS OF THE COMPETITION ACT, 1986*

I. CRIMINAL OFFENCES

(1) Distribution Offences

(a) Price discrimination, s. 50(1)(a)
(b) Discriminatory advertising or promotion allowances, s. 51
(c) Predatory pricing, s. 50(1)(b),(c)
(d) Price maintenance, s. 61(1)(a)
(e) Refusal to supply, s. 61(1)(b)
(f) Pyramid selling, s. 55
(g) Referral selling, s. 56

(2) Misleading Sales Promotion Offences

(a) False or misleading representation in a material respect, s. 52(1)(a)
(b) Representation not based on a proper test, s. 52(1)(b)
(c) Misleading warrantees or guarantees, s. 52(1)(c)
(d) Misleading price advertising, s. 52(1)(d)
(e) Misleading tests or testimonials, s. 53
(f) Bait and switch advertising, s. 57(2)
(g) Sale above advertised price, s. 58
(h) Promotional contest requirements, s. 59
(i) Multiple ticketing, s. 54

(3) Agreements to Restrict Competition

(a) Conspiracies to fix prices, limit output, fix the price of inputs, etc. that lessen competition unduly, s. 45(1)
(b) Foreign directives to Canadian firms to enter into a conspiracy to lessen competition, s. 46
(c) Bid-rigging, s. 47
(d) Conspiracies relating to professional sport, s. 48
(e) Agreements or arrangements among banks, s. 49

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* See Competition Act, R.S.C. 1985, c. C-34, as amended R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 189; R.S.C. 1985, c. 19 (2nd Supp.); R.S.C. 1985, c. 34 (3rd Supp.), s. 8; S.C. 1988, c. 2, s. 16; S.C. 1988, c. 15, s. 16.

FIGURE 2 cont'd

II. CIVIL PROCEEDINGS

(1) Reviewable Matters

(a) Refusal to supply (domestic supplier), s. 75
(b) Refusal to supply (foreign supplier), s. 84
(c) Consignment selling, s. 76
(d) Exclusive dealing, s. 77(1) and (2)
(e) Geographic market restrictions, s. 77(1) and (3)
(f) Tied selling, s. 77(1) and (2)
(g) Foreign judgments, s. 82
(h) Foreign laws or directives, s. 83
(i) Abuse of dominant position, s. 78-79
(j) Delivered pricing, s. 80-81
(k) Specialization agreements, s. 85-90
(l) Mergers, s. 91-103 (Pre-merger notification requirements are in s. 108-123)

(2) Regulatory Intervention

The Director under s. 125 may make representations and call evidence before federal regulatory tribunals "in respect of competition" and the factors that the tribunal is entitled to take into consideration in making its decisions. Under s. 126 the Director, at the request of any provincial board, commission or other tribunal, or on his/her own initiative with the consent of the board, may make representations and call evidence as in s. 125.

(3) Private Damage Actions

Private parties under s. 36 may bring suit for damages as a result of (i) conduct that is contrary to the criminal provisions of the Act, or (ii) the failure of a person to comply with an order of the Competition Tribunal (i.e., dealing with a civil reviewable matter) or a court under the Act.

FIGURE 3

KEY PARTICIPANTS AND THEIR ROLES IN CANADIAN COMPETITION POLICY, 1986*

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o **DIRECTOR OF INVESTIGATION AND RESEARCH**

- Responsible for administration and enforcement of the Competition Act
- Has a number of formal investigatory powers:
  - testimony under oath (s. 11)
  - required production of records (s. 11)
  - written returns of information under oath (s. 11)
  - search and seizure of records (s. 15)
  - required production of computer records (s. 16)
- Conducts inquiries in response to
  - a six-citizen application; or
  - his/her own "reason to believe" an offence has been committed or he/she has grounds for an order in respect to a reviewable matter; or
  - the direction of the Minister of Consumer and Corporate Affairs.
- Required to inform those subject to an inquiry of the progress of the inquiry if requested in writing.
- Prepares a statement of evidence for submission to the Attorney-General of Canada in criminal cases (s. 23). Note that the decision to prosecute is the Attorney General's.
- Discontinues any inquiry where he/she is of the opinion that the matter "does not justify further inquiry" (s. 22); must indicate to the Minister in writing the reason for discontinuance. The Minister may instruct the Director to make further inquiry.
- In cases dealing with reviewable matters, the Director (or his/her appointed counsel) may bring an application for an order directly to the Competition Tribunal.
- May appear before federal and provincial regulatory tribunals to make representations and call evidence in respect to competition.
- Prepares an annual report that is submitted to the Minister and is later tabled in Parliament.

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* See Competition Act, R.S.C. 1985, c. C-34, as amended R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 189; R.S.C. 1985, c. 19 (2nd Supp.); R.S.C. 1985, c. 34 (3rd Supp.), s. 8; S.C. 1988, c. 2, s. 16; S.C. 1988, c. 15, s. 16.

FIGURE 3 cont'd

- **COMPETITION TRIBUNAL***
  - Responsible for the adjudication of all reviewable matters (s. 8).
  - Composed of both Federal Court judges and lay persons, and is chaired by a Federal Court judge
  - (s. 3-4).Works in panels of three to five members including at least one judicial and one lay member. The panels must be chaired by a judicial member (s. 10).
  - Court of record, but proceedings are to be as informal and expeditious as the circumstances and considerations of fairness permit (s. 9).
  - Questions of law are decided by judicial members only; questions of fact or mixed fact and law are decided by all members (s. 12).
  - Appeal lies to the Federal Court of Appeal; appeal on a question of fact may be made only with leave of the Federal Court of Appeal (s. 13).
- **ATTORNEY GENERAL**
  - Makes the decision whether to prosecute criminal cases referred to him/her by the Director of Investigation and Research (s. 23).
  - Makes the decision on appeals in criminal cases.
  - Appoints counsel in criminal cases and when requested to do so by the Director in non-criminal cases.
  - May appoint counsel to assist the Director in conducting an inquiry (s. 21).
- **COURTS**
  - Adjudicate all criminal cases brought by the Attorney General and supported by the statement of evidence prepared by the Director.
  - Decide on the Director's applications requesting an order requiring testimony of witnesses under oath before a presiding officer, production of records, written returns under oath, search of premises, or production of a computer record (s. 11, 16).
  - Decide on appeals in criminal cases.

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* See Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), as amended S.C. 1988, c. 2, s. 17.

FIGURE 3 cont'd

- **MINISTER OF CONSUMER AND CORPORATE AFFAIRS**
  - May require the Director of Investigation and Research to conduct an inquiry (s. 10).
  - Receive the written report of the Director discontinuing an inquiry; may require the Director to make a further inquiry.
  - Must table the Director's annual report in Parliament within 15 days of receipt (s. 127).
- **GOVERNOR IN COUNCIL**
  - May make regulations regulating the practice and procedure in respect of applications, proceedings and orders under s. 11 to 19 (s. 24).
  - May make such regulations, not inconsistent with the Act, as are necessary for carrying out the Act and its efficient administration (s. 128).
- **ATTORNEY GENERAL OF A PROVINCE**
  - May intervene in merger cases, and in applications for a specialization agreement (s. 88, 101).
- **CITIZENS**
  - May make informal complaints to the Director regarding matters under the Act (most of the Director's inquiries begin with a complaint letter).
  - May make a formal six-citizen application for an inquiry that requires the Director to begin an inquiry (s. 9).
  - With the leave of the Tribunal, any person may make representations in any proceeding before the Tribunal in respect of any matter that affects them.

TABLE 1

RESOURCES AND EXPENDITURES OF THE OFFICE OF THE DIRECTOR OF INVESTIGATION AND RESEARCH

Period, fiscal year ending March 31	Average Yearly Staff	Average Yearly Expenditures ($'000)
1926-1930	n.a.	54
1931-1935	n.a.	43
1936-1940	8	30
1941-1945	8	39
1946-1950	23	115
1951-1955	37	270
1956-1960	45	372
1961-1965	55	491
1966-1970	82	1,030
1971-1975	156	2,758
1976-1980	202	6,448*
1981-1985	245	11,259
1986-1988	256	15,284

* Data unavailable for 1977-78

n.a. = data not available.

Sources: Annual Reports of the Department of Consumer and Corporate Affairs, Annual Reports of the Director of Investigation and Research and data provided by the Bureau of Competition Policy. See also Ball (1934) and Rosenbluth and Thorburn (1963) for annual data from 1923 to 1960.

TABLE 2

SELECTED ACTIVITIES OF THE BUREAU OF COMPETITION POLICY
(EXCLUDING MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES PROVISIONS)

	Number of files opened[1]	Applications for inquiries under section 7	Inquiries in progress at end of year	Matters referred to the Attorney General of Canada	Matters referred where the Attorney General decides no further action warranted	Prosecutions or other proceedings commenced	Applications to the Competition Tribunal[2]	Interventions before regulatory bodies
1965-66	117	2	47	2	0	3	—	—
1966-67	117	0	54	2	0	7	—	—
1967-68	97	0	59	2	0	5	—	—
1968-69	107	1	57	4	0	3	—	—
1969-70	141	1	76	12	0	7	—	—
1970-71	255	2	83	9	0	8	—	—
1971-72	271	5	86	16	1	6	—	—
1972-73	188	2	76	9	5	14	—	—
1973-74	165	6	77	14	7	8	—	—
1974-75	84	5	81	11	2	7	—	—
1975-76	158	4	71	18	2	12	—	—
1976-77	143	7	73	26	4	16	20	4
1977-78	173	5	76	23	6	24	1	5
1978-79	205	7	73	14	6	11	1	2
1979-80	262	7	78	24	3	21	2	4
1980-81	238	8	69	21	5	6	0	4
1981-82	199	9	69	33	6	24	0	15
1982-83	218	8	71	24	5	21	1	11
1983-84	223	2	58	20	6	16	0	23
1984-85	269	2	54	27	4	17	0	23
1985-86	237	8	58	21	11	19	1	22
1986-87	237	13	78	9	4	14	1	18
1987-88	328	9	84	15	3	9	2	16

Notes: 1. Beginning in 1974-75 substantive complaints only, later changing in 1982-83 to those files which required two or more days of review.
2. Prior to 1986-87 this figure indicates applications to the Restrictive Trade Practices Commission.

Sources: Annual Reports of the Director of Investigation and Research, Combines Investigation Act, and data provided by the Bureau of Competition Policy.

TABLE 3

OPERATIONS UNDER THE MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES PROVISIONS

	Number of files opened	Applications for inquiries under section 7	Number of complete examinations	Matters referred to the Attorney General of Canada	Matters referred where the Attorney General decides no further action warranted	Proceedings commenced during year	Completed cases: convictions
1968-69	33	n.a.	n.a.	n.a.	n.a.	15	13
1969-70	412	n.a.	n.a.	n.a.	n.a.	29	27
1970-71	2,520	n.a.	n.a.	n.a.	n.a.	56	43
1971-72	2,872	1	753	105	12	88	61
1972-73	3,470	9	649	84	5	82	68
1973-74	4,387	8	911	123	10	83	70
1974-75	5,068	12	1,047	126	12	107	87
1975-76	6,203	1	1,373	120	12	88	72
1976-77	7,850	4	1,895	117	14	120	87
1977-78	8,078	3	2,113	141	n.a.	119	89
1978-79	8,091	0	2,135	174	11	147	119
1979-80	9,431	0	2,234	129	12	132	100
1980-81	8,373	0	2,147	167	2	134	103
1981-82	8,557	0	2,319	142	13	122	95
1982-83	9,875	1	2,336	199	6	169	121
1983-84	10,091	0	2,068	181	13	163	138
1984-85	9,816	1	2,145	136	10	148	137
1985-86	9,809	0	2,151	175	19	158	109
1986-87	11,514	0	2,188	151	10	149	111
1987-88	12,374	1	2,187	113	0	125	84

n.a. = data not available

Sources: Annual Reports of Director of Investigation and Research, Combines Investigation Act, various years; Proposals for a New Competition Policy for Canada, First Stage (Ottawa: Information Canada, 1973), pp. IC-34C; and data provided by the Bureau of Competition Policy.

TABLE 4

COMBINES CASES AND ACTIVITIES, 1889/90 TO 1988/89

Period, fiscal year ending March 31	Combines Prosecutions[1] Total	Con-spiracy[2]	Merger and/or Monopoly	RPM and Ref. to Sell	Other	Reports or Cases Sent to Attorney General but not Prosecuted	Discontinued Inquiries	Files Opened in Response to Complaints
1890-1910	10	10	0	—	0	n.a.	n.a.	n.a.
1911-1923	1	1	0	—	0	n.a.	n.a.	n.a.
1924-1940	13	10	1	—	2	17	n.a.	538
1941-1946	3	3	0	—	0	0	n.a.	66
1947-1955	9	6	1	2	0	9	25[3]	794[4]
1956-1960	18	13	2	1	2	6	30	456
1961-1965	19	8	0	10	1	10	77	816
1966-1970	25	16	1	7	1	5	82	579
1971-1975	45	18	4	15	8	19	95	963
1976-1980	72	19	2	47	4	19	74	941[5]
1981-1985	82	18	0	58	6	26	96	1,147
1986-1989	62	21	2[6]	38	3	19	71	1,152

n.a. = data not available

Notes:

1. Excludes all misleading advertising and deceptive practices cases and 3 patent cases started in 1945/46, 1967/68 and 1969/70. The first dealt with optical goods, the last two, Union Carbide's plastic extrusion and printing patents.

2. Dated by month in which the case was completed.

3. 1951-1955 only.

4. 1950/51 - 1954/55 only (542).

5. 1957-1982 figures cover "substantive complaints only, due to change in procedure in Records Office." This changes to files which required two or more days of review beginning in 1982-83.

6. See also Table 5 for merger statistics under the Competition Act.

Sources: Gorecki and Stanbury (1979a) and Annual Reports of the Director of Investigation and Research.

TABLE 5

MERGER STATISTICS

	1986-1987*	1987-1988	1988-1989
Examinations Ongoing at Beginning of Period:	-	14	25
EXAMINATIONS COMMENCED: (during period)	40	146	191
Commenced examination as result of prenotification:	0	65	92
COMPLETIONS:	26	133	182
Advisory Opinions:	8	21	20
With undertakings and monitoring:	0	3	4
- no undertakings:	5	7	10
With undertakings - no monitoring	0	1	0
No issue:	3	10	6
Advance Ruling Certificates:	3	26	59
With undertakings and monitoring:	1	0	0
With monitoring - no undertakings:	0	0	0
No issue:	2	26	59
Other Closed/Concl. Matters:	14	86	103
Concluded as posing no issue under the act:	12	84	101
Abandoned following BCP involvement:	2	2	2
APPLICATIONS TO TRIBUNAL:			
Filed or Notice filed:	1	2	2
Orders granted:	0	0	0
Orders refused:	1	0	0
Ongoing proceedings:	0	2	2
Transaction abandoned: (following application to Tribunal)	1	0	0
Tribunal matters concluded or withdrawn:	1	0	2
EXAMINATIONS ONGOING AT END OF PERIOD: (excludes matters currently before Tribunal)	14	25	34

* June 1, 1986 to March 31, 1987.

NOTES

1. Generally, see Ball (1934); Baggaley (1982); Bliss (1973), (1974); Canada (1888); Cohen (1938); Gorecki and Stanbury (1984), (1989), Gosse (1962); Magwood (1981); Reynolds (1946); Smandych (1983); Stanbury (1981a).

2. See Figure 1 for an overview of the origins of the substantive provisions in Canadian competition legislation.

3. Weidman v. Shragge (1912) 46 S.C.R. 1 at p. 28.

4. R. v. Alexander (1932) 57 C.C.C. 346 at pp. 360-361.

5. See the views of W.L. MacKenzie King as quoted in Skeoch (1966a) and King (1911), (1912).

6. See Brecher (1982); Canada (1978); Economic Council (1969); Rowley and Stanbury (1978); Skeoch (1972), (1979); Skeoch with McDonald (1976); Stanbury (1977a).

7. See Competition Act, R.S.C. 1985, c. C-34, as amended R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 189; R.S.C. 1985, c. 19 (2nd Supp.); R.S.C. 1985, c. 34 (3rd Supp.), s. 8; S.C. 1988, c. 2, s. 16; S.C. 1988, c. 15, s. 16.

8. Generally, see Baggaley (1982); Bliss (1973); Canada (1888); King (1911), (1912); Weldon (1966).

9. Generally, see Baggaley (1982); Bliss (1973); Gorecki and Stanbury (1984), (1989); Gosse (1962); Smandych (1983).

10. R. v. Elliot (1905), 9 O.L.R. 648.

11. R. v. Elliot (1905), 9 O.L.R. 648 at p. 661-2.

12. See Traves (1974a), (1974b).

13. Reference re Board of Commerce Act, 1919 and Combines and Fair Prices Act, 1919, [1922] 1 A.C. 191.

14. See Table 1 for estimates of the resources available to the position.

15. See Ball (1934); Gorecki and Stanbury (1989); Stanbury (1981a).

16. Generally, see Anderson and Khosla (1985b); Dunlop et al. (1987); Hayden (1983); Kaiser (1982); Moore (1970); Nozick (1976).

17. Reference re Dominion Trade and Industry Commission Act, [1936] 3 D.L.R. 607.

18. Generally, see Anderson and Khosla (1985c); Dunlop et al. (1987); Kaiser (1982); Skeoch (1966b).

19. The administration and enforcement of the Combines Investigation Act between 1952 and 1960 is described and analyzed in Rosenbluth and Thorburn (1963).

20. See Howard Smith Paper Mills, Ltd. et al. v. R., [1957] 8 D.L.R. (2d) 449 at 473.

21. See R. v. Canadian Breweries, [1960] O.R. 601 and R. v. British Columbia Sugar Refining Company and B.C. Sugar Refining Limited (1960) 32 W.W.R. 557.

22. See Economic Council (1969); McDonald (1970).

23. See Canada (1971); Skeoch (1972); Stanbury (1977a).

24. The Office of the Director of Investigation and Research was moved to the newly formed Department of Consumer and Corporate Affairs in 1967.

25. Generally, see Canada (1973), (1976); Grange (1975); Kaiser (1979); McQueen (1976).

26. Generally, see Skeoch (1979); Stanbury (1977b).

27. Generally, see Canada (1977a), (1977b), (1977c); MacCrimmon and Stanbury (1977); Prichard (1979); Rochwerg (1977); Skeoch (1979); Stanbury (1977a), (1979), (1988); Stegemann (1977).

28. See Prichard (1979); Reid (1978); Whybrow (1976); Williams (1976).

29. Generally, see the papers in Rowley and Stanbury (1978); Stanbury (1978a), (1979).

30. See Block (1981); Lecraw (1981); Skeoch (1982); Stanbury (1988); Stanbury and Reschenthaler (1981). See also BCNI (1981) and Stanbury (1981b).

31. See Canada (1984a), (1984b); Stanbury (1984a), (1984b), (1984c), (1985).

32. Generally, see Canada (1985a), (1985b), (1985c); Maule and Ross (1988); Stanbury (1986), (1988).

33. See Figure 2 for an outline of the Act's substantive provisions.

34. See Figure 3 for an overview of the key participants and their roles in Canadian competition policy. See also Table 1 for an historical overview of the resources available to the Office of the Director of Investigation and Research in administering competition legislation in Canada.

35. See Goldman (1984); Kaiser and Nielsen-Jones (1986); Thomson (1985).

36. Generally, see Canada (1988a), (1988b); Crampton (1989); Goldman (1988c), (1989b); Wetston (1988).

37. See Table 5 for a summary of the Bureau's merger review activity.

38. Generally, see Anderson and Khosla (1987); McDonald (1987).

39. See Anderson and Khosla (1985a).

40. See Table 4 for a summary of the conspiracy case activity conducted over the last hundred years. See also Stanbury (1989) for a review of the cases in the period 1965/66 to 1987/88.

41. Generally, see Cairns (1981b); Green (1981); McFetridge and Wong (1981), (1982); Reschenthaler and Stanbury (1981a), (1981b); Webber (1982).

42. See Kaiser and Nielsen-Jones (1986).

43. On June 8, 1988 Moore Corporation Limited of Toronto and R.L. Crain Inc. of Ottawa were each fined $200,000 after pleading guilty to bid-rigging on tenders submitted to the Nova Scotia Government Purchasing Agency between December 21, 1979 and December 31, 1982. The following day, R.L. Crain Inc., Moore Corporation Limited and Southam Printing Limited of Toronto were each fined $400,000 after pleading guilty to bid-rigging on tenders for business forms submitted to Saskatchewan Government Insurance and the Saskatchewan Government Purchasing Agency during the years 1980 and 1981. Lawson Business Forms (Manitoba) Ltd. of Winnipeg was fined $360,000 after pleading guilty to the same offence.

44. See Anderson and Khosla (1985c).

45. Generally, see Anderson and Khosla (1985b); Dunlop et al. (1987); Hayden (1983); Kaiser (1982).

46. Generally, see Canada (1983); Cohen (1971); Esbin (1981); Orr (1975); Quinlan (1972); Thompson (1977). See also the Bureau of Competition Policy's quarterly Misleading Advertising Bulletin.

47. See Table 3 for a summary of the Bureau's activity in this area.

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This is Exhibit “27” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

91-3E

MERGERS AND ABUSE OF DOMINANT POSITION: LEGAL ASPECTS

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Revised 10 September 1998

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MERGERS AND ABUSE OF DOMINANT POSITION: LEGAL ASPECTS*

ISSUE DEFINITION

The passage of the *Competition Act* and the *Competition Tribunal Act* in 1986 was heralded as the beginning of a new era in Canadian competition policy. For nearly two decades, various governments had unsuccessfully attempted to resuscitate the ineffective merger and monopoly provisions of the *Combines Investigation Act* (CIA). Central to the reform process were issues such as how to deal with abuse of market power and with mergers that might increase the possibility of abuse, who should adjudicate upon these questions, and whether mergers and monopolies should be civil rather than criminal matters. A difficult yet essential task was distinguishing between behaviour that is anti-competitive and exclusionary and that which is the result of superior competitive performance and efficiency.

This paper will review the various proposals to reform the merger and monopoly provisions of the *Combines Investigation Act* and examine the operation of the 1986 *Competition Act* amendments in these areas.

BACKGROUND AND ANALYSIS

A. The *Combines Investigation Act*

Competition legislation has existed in Canada since 1889. The terms "merger and "monopoly" were first incorporated into the *Combines Investigation Act* in 1910, while the concept of combines (mergers and monopolies) that are likely to operate to the detriment of or against the interest of the public was introduced in 1919. These terms, however, which also appeared in the *Combines Investigation Act* of 1923, remained undefined until 1935, when amendments to the CIA introduced a common definition for both. Finally, in 1960 the definition of merger was made distinct from the definition of monopoly, with the concept of "detriment to the public" incorporated into both.

Under the CIA a merger was said to have occurred where a person or company acquired control over or an interest in another company; a monopoly was said to operate when one or more persons or companies had at least substantial control of some area of the market. Not all mergers or monopolies were proscribed, only those mergers which lessened or were likely to lessen competition to the detriment of the

public and those monopolies which operated or were likely to operate to the detriment of the public.

Being a party to an illegal merger or monopoly was a criminal offence. Accordingly, the court had to be satisfied "beyond a reasonable doubt" of the existence of all the constituent elements of the offence. With respect to mergers, the prosecution had to prove beyond a reasonable doubt that the merger did or was likely to lessen competition to the detriment of the public. For a monopoly to exist, it was necessary to prove that the monopoly operated or was likely to operate to the detriment of the public.

The CIA was an ineffective tool for dealing with the economic consequences of mergers and the exercise of monopoly power. There had never been a conviction in a contested merger case. The need to prove that competition had been lessened substantially and to adduce specific evidence of public detriment attributable to the merger were overwhelming obstacles. The record of convictions for monopolistic behaviour was almost as bad. To obtain a conviction for monopolistic activity it was necessary to prove both market control and detriment to the public. Merely acquiring or maintaining a monopoly was not considered to be detrimental to the public; the monopolist had to be engaging in behaviour designed to eliminate all competitors.

B. Proposals for Reform

The process of reforming the merger and monopoly provisions of the *Combines Investigation Act* began in 1966, when the government of the day requested that the Economic Council of Canada prepare a report on competition policy in Canada. The Council's report, published in 1969, proposed far-reaching reforms that would have made mergers and the exercise of monopoly power subject to civil rather than criminal law. A specialized tribunal would have adjudicated these matters.

In 1971, the Minister of Consumer and Corporate Affairs introduced Bill C-256 in the House of Commons. The bill would have required all mergers involving foreign purchasers and all those affecting gross assets or gross revenue exceeding $5 million to be registered with the Competitive Practices Tribunal proposed in the bill. Where a merger had resulted, or was likely to result in significantly less competition than would have otherwise existed, it could have been prohibited, dissolved or altered by the Tribunal. A merger could not have been dissolved or prohibited if the parties could not carry on business independently or where the merger would have likely produced a "significant improvement in efficiency" with a substantial part of the resulting benefits passed on to the public, within a reasonable time, as lower prices or better products. The bill contained a number of criteria that the Tribunal would have had to use in determining whether the merger test had been met and whether efficiencies had resulted from the merger.

The business community strongly disapproved of Bill C-256. As a result, the government proposed that the existing legislation be amended in two stages. The first stage, introduced in 1973, made the *Combines Investigation Act* applicable to services, introduced a number of civil

reviewable matters and altered provisions dealing with misleading advertising, resale price maintenance and conspiracy. These amendments became effective on 1 January 1976.

With the failure of Bill C-256, further studies on competition policy were undertaken at the behest of the government. Of particular importance was the 1976 study, *Dynamic Change and Accountability in a Canadian Market Economy*, which recommended that a specialized tribunal evaluate mergers and monopolies. The report proposed a four-stage analysis of mergers which would examine their primary and secondary consequences.

The Dynamic Change report also looked at the question of monopoly power, noting that this can be exercised by large or small firms depending upon their market circumstances. The report's preferred approach was to define "dominant firms" and to examine how dominance was maintained or extended. The report favoured a functional rather than a statistical market-share definition of dominance. A dominant firm was one that could determine its rate of profits undeterred by competitors.

In March 1977 another bill proposing changes to the *Combines Investigation Act* (Bill C-42) was tabled in the House of Commons. The bill would have established a Competition Board to adjudicate upon questions relating to mergers and monopolies. A merger would have been impugned where it "lessens or is likely to lessen, substantially, actual or potential competition" (section 31.71(2)). Where relevant, the following fourteen factors were to be considered by the Board in a merger examination:

> (a) the availability of acceptable substitutes for products supplied by the merging parties;
>
> (b) the amount of effective competition from imports;
>
> (c) the trend in concentration among producers, suppliers and purchasers;
>
> (d) the size differentials between the parties to the merger and the remaining competitors;
>
> (e) barriers to entry into the market and the impact of the merger on those barriers;
>
> (f) past growth by way of merger by any of the parties;
>
> (g) any past anti-competitive conduct by any of the parties;
>
> (h) the likelihood that the merger would remove a vigorous competitor from the market;
>
> (i) evidence of intent to reduce competition or to control the market;

(j) the likelihood that the merger would result in foreclosure of sources of supply or channels of distribution;

(k) any likelihood, where a party to the merger is or would be entering a new market by means of the merger, that, without the merger, that person would have entered the market in a less restrictive manner;

(l) change and innovation in the market;

(m) the likelihood that the merger would stimulate competition; and

(n) the likelihood that one of the parties to the merger was about to fail.

A merger, however, would not have been struck down where there was a "high probability" that it would have resulted in "substantial gains in efficiency, by way of savings of resources for the Canadian economy that are not reasonably attainable by means other than the merger" (section 31.71(5)).

Bill C-42 also sought to restrict certain monopolistic behaviour. Activities such as restricting market entry, foreclosing a competitor's sources of supply or sales outlets, predatory pricing, coercing a competitor into avoiding or limiting competitive behaviour and disciplining a competitor would have been prohibited where the person engaging in the activity was seeking to create, extend or entrench monopoly power (section 31.72(2)). Monopolistic behaviour that resulted from superior efficiency or superior economic performance would not have been impugned.

Bill C-42 was soundly condemned by the business and academic communities and by the committees of the House of Commons and the Senate charged with studying it. The government withdrew the bill and introduced another (Bill C-13) in its place in November 1977.

Bill C-13 contained the same merger test as Bill C-42 and the same 14 factors to be considered by the Competition Board in determining whether the test had been met. One new general provision would have allowed the Board to consider any other factor relevant to competition (section 31.71(4)). The efficiency defence was altered to provide that a merger would not be attacked if it produced a "clear" probability of substantial gains in efficiency that would save resources for the Canadian economy (section 31.71(5)).

The monopoly provisions of Bill C-13 were similar to those of Bill C-42. Bill C-13 referred to the concept of monopolization, which was defined as a situation where a firm or group of affiliated firms "have sought or are seeking substantial control" of a class or species of business or to entrench such control or to extend monopoly power into another market (section 31.72(1)). The bill listed a number of reviewable monopolistic actions and provided a defence based on superior efficiency or superior economic performance.

Bill C-13 was also widely criticized. The complaints, in so far as mergers and monopolies were concerned, focused on the complexity of the provisions that determined which mergers and monopolies would be illegal, the uncertainty likely to result from these provisions, the use of an administrative agency rather than the courts as the first level of enforcement, the extensive powers granted to the agency and the limited rights of appeal to the courts. Bill C-13 died on the Order Paper with the calling of the 1979 federal election.

In an effort to canvass the opinion of those concerned with competition legislation, the Minister of Consumer and Corporate Affairs published and circulated a Discussion Paper entitled *Proposals for amending the Combines Investigation Act: A Framework for Discussion* in 1981. Extensive consultation with the business, legal and academic communities took place. New legislation, however, did not appear until April 1984, when Bill C-29 was introduced in the House of Commons.

As with other proposals to reform Canadian competition laws, Bill C-29 would have made mergers and monopolies civil rather than criminal matters. But the courts, not a quasi-judicial agency, would have had jurisdiction to adjudicate. The merger threshold would have been altered to read "prevents or lessens or is likely to prevent or lessen competition significantly" (section 31.72). Thus, the idea of preventing competition was included and the word "significantly" replaced the word "substantially."

In determining whether the merger test had been met, Bill C-29 set out twelve factors to be considered by the court. The efficiency defence was altered to refer to "gains in efficiency that will result in a substantial real net saving of resources" that could not have come about in the absence of the merger (section 31.73).

The monopoly provisions of Bill C-29 were substantially different from those found in previous bills. The term "monopoly was replaced by the term "abuse of dominant position." The following three elements would have had to be present before abusive behaviour could be curtailed: (a) a person would have had substantially or completely to control a class or species of business in Canada or in any area thereof; (b) the person would have to have been engaging in a practice of anti-competitive acts; and (c) the practice would have to have had the effect or have been likely to have the effect of lessening competition substantially in a market (section 31.41). Included in the bill was a non-exhaustive list of eight anti-competitive acts. Anti-competitive behaviour would not have been impugned if it was result of superior economic efficiency. Bill C-29 died on the Order Paper with the calling of the 1984 election.

In March 1985, the Minister of Consumer and Corporate Affairs issued yet another consultation paper on reforming competition policy. In the merger area, the paper noted that the three major issues for consideration were: the choice of adjudicator; the lessening of competition test; the efficiency defence; and the status of joint ventures. With regard to monopolies, the issues to be addressed were whether legislation should contain a list of anti-competitive practices, the structure of the efficiency defence and the extent to which the dominance provision should apply to more than one firm. After

extensive consultation, the government introduced Bill C-91 in the House of Commons in December 1985. The bill, which was composed of the *Competition Tribunal Act* and amendments to the *Combines Investigation Act* (to be called the *Competition Act*), became law in June 1986.

C. *Competition Tribunal Act, Competition Act*

Under the *Competition Act*, mergers and abuse of dominant position (monopoly) are civil rather than criminal matters. The applicable standard of proof is the "balance of probabilities" rather than "beyond a reasonable doubt."

Adjudication under the *Combines Investigation Act* was divided between the criminal courts and the Restrictive Trade Practices Commission (RTPC). The *Competition Tribunal Act* provides for the creation of a Competition Tribunal composed of judges of the Federal Court Trial Division and non-judicial members. The RTPC was abolished. The Tribunal has jurisdiction to hear and determine cases respecting mergers and abuse of dominant position, among others. It is an adjudicative body only and does not carry out other functions that were previously performed by the RTPC, such as conducting general inquiries and authorizing the use of formal investigatory powers by the Director of Investigation and Research (the "Director").

Applications to the Tribunal are heard by a panel of not fewer than three but not more than five members. The panel, which must include at least one judicial member and one lay member, is presided over by a judge. Questions of law are determined by the judicial members of the Tribunal while both judicial and non-judicial members decide questions of fact or of mixed law and fact. Decisions of the Tribunal can be appealed to the Federal Court of Appeal.

The enactment of the *Competition Tribunal Act* settled the debate over the forum for adjudicating certain competition matters. One reform proposal had advocated reliance on the courts (Bill C-29) while others had proposed a specialized tribunal (Bills C-256, C-42 and C-13). In establishing a quasi-judicial tribunal, the Act acknowledges that the input of lay persons who are familiar with economic and business issues is essential to the decision-making process.

1. Mergers

The *Competition Act* defines a merger as the acquisition or establishment of control over or significant interest in the whole or part of the business of a competitor, supplier, customer or other person (section 91). Any merger or proposed merger that prevents or lessens, or is likely to prevent or lessen, competition substantially is reviewable by the Tribunal (section 92(1)). The focus of the Act is thus on the effect of the merger.

In determining whether competition would be lessened substantially, the Competition Tribunal can consider a number of specified factors such as: the extent of foreign competition in the market affected by the merger; whether any of the parties is about to fail; the availability of

substitute products, barriers to entry into the market, including tariff and non-tariff barriers to international trade, interprovincial trade barriers and regulatory control over entry; the extent to which effective competition would remain in the market affected by the merger; the likelihood that the merger would remove a vigorous and effective competitor, the extent of innovation in the market; and, a "catchall," other factors relevant to competition.

Although the factors set out in the Act closely resemble those found in previous competition bills, two factors -- any history of anti-competitive behaviour and evidence of intent to prevent or lessen competition or to control a market -- were noticeably absent. Arguably, these factors could be considered under the "other factors" category referred to above.

The Act gives the Tribunal the authority to dissolve a completed merger or to block a proposed merger. Other action can be taken with the consent of the Director and the parties involved.

The Tribunal cannot make a finding that a merger is likely to prevent or lessen competition substantially solely on the basis of evidence of concentration or market share (section 92(2)). The Act also contains a defence for situations where the merger produces gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that would result from the merger (section 96).

The merger provisions apply to joint ventures, subject to an exemption for research and development projects.

The Act requires the parties to certain proposed mergers to give prior notice of the transaction to the Director where such parties and their affiliates have assets in Canada or gross revenues from sales from or into Canada that exceed $400 million and where the business being acquired has assets or gross revenues exceeding $35 million. Certain transactions, such as the acquisition of assets or shares resulting from foreclosure, gift or testamentary disposition and transactions between affiliates are exempt from the pre-notification requirements. Mergers subject to pre-notification cannot be completed until the expiration of certain time periods (7 days or 21 days depending upon the extent of the information provided).

2. Abuse of Dominant Position

The *Competition Act* repeals the monopoly provision of the CIA and replaces it with a civil provision, abuse of dominant position. Abuse of dominant position arises when the following three elements are present: (a) one or more persons substantially or completely control a class or species of business in Canada or any area of the country; (b) such person or persons are engaged in a practice of anti-competitive acts; and (c) the effect of the practice is to lessen competition substantially in a market (section 79).

The Act contains a non-exhaustive list of acts considered to be anti-competitive, including: a vertically integrated supplier squeezing the profit margins of an unintegrated customer-competitor so as to prevent

the latter from entering into or expanding in a market; acquisition of a supplier by a customer, or vice versa, to impede or prevent a competitor from entering the market or to eliminate the competitor from the market; freight equalization for the purpose of impeding or preventing entry into or eliminating a competitor from a market; temporary use of fighting brands to discipline or eliminate a competitor; buying up products to prevent erosion of existing price levels; adoption of incompatible product specifications in order to prevent a person from entering into, or to eliminate that person from, a market; pre-emption of scarce facilities; requiring or inducing a supplier to sell only or primarily to certain customers or to refrain from selling to a competitor; and, selling below cost to discipline or eliminate a competitor (section 78).

In determining whether competition has been lessened substantially, the Tribunal must consider whether the impugned practice is the result of superior competitive performance. A determination that such is the case, while not an absolute defence to abuse of dominant position, would probably weigh heavily against a finding that competition has been lessened substantially.

When making an order in respect of abuse of dominant position, the Competition Tribunal is limited to remedies sufficient to overcome the effects of anti-competitive practices and restore competition to the market. Among the types of orders that the Tribunal can issue are orders prohibiting those concerned from engaging in anti-competitive acts and/or directing that any party involved take whatever action is necessary, including the divestiture of assets or shares, to overcome the effect of such acts.

The provision for abuse of dominant position focuses on the actual effects of anti-competitive practices. Dual proceedings under the abuse of dominance provision and the conspiracy or merger provisions of the Act are prohibited.

D. Merger Enforcement Guidelines

With the passage of the *Competition Act*, the Director adopted a compliance-oriented approach to administering the Act. In relation to mergers, this "fix-it-first" method involves restructuring transactions either before or after closing or calling for undertakings by the parties to take certain steps to rectify competition concerns by a specified date. This system of negotiated settlements was a concern to a number of competition law observers and practitioners. A prominent criticism is that the lack of opportunity for the Tribunal to interpret the merger provisions leads to uncertainty on the part of the Bureau of Competition Policy and the business community about what the law requires.

For this and other reasons, in April 1991, the Director issued Merger Enforcement Guidelines (the "Guidelines") for the purpose of setting out the Bureau of Competition Policy's approach to assessing mergers. Among other things, the Guidelines deal with the definition of merger, articulate a view of the statutory test of preventing or lessening competition substantially and outline the framework for defining the relevant market in a merger case.

Under section 91 of the *Competition Act*, a merger is defined as the acquisition of control over or a significant interest in the whole or part of the business of a competitor, supplier, customer or other person. In relation to this definition, the Guidelines provide that the establishment of a significant interest in a business occurs when a person or persons have the ability to materially influence the economic behaviour of that business. Ownership of less than 10% of the voting shares of a business would not be considered a significant interest.

Section 92(1) of the Act sets out the merger test of preventing or lessening competition substantially. According to the Guidelines, a merger will generally be considered likely to prevent or lessen competition when, as a result of the merger, the parties would have the capacity to exercise a materially greater degree of market power (the ability to influence prices upwardly) in a substantial part of the market for two years or more. In defining the relevant market, the Bureau will look at the smallest group of products and the smallest geographic area in relation to which sellers could impose and maintain a 5% price increase over one year.

For the most part, a merger will not be challenged in relation to concerns about the unilateral exercise of market power where the merged business holds less than a 35% market share or, in relation to concerns arising from the interdependent exercise of market power, where the market share of the four largest firms after the merger is less than 65%, or where the merged business's market share is less than 10%.

Generally, the Director will conclude that a merger is not likely to prevent or lessen competition substantially where sufficient competition can be established to ensure that a material price increase would not likely be sustainable in a substantial part of the relevant market for more than two years. In a failing firm situation, a merger is not likely to be challenged if there are no less anti-competitive alternatives available. Finally, where effective competition continues, a merger is not likely to be questioned.

E. Bank Merger Enforcement Guidelines

In November 1997, the Competition Bureau launched a consultation process on how best to apply the Merger Enforcement Guidelines to Schedule I banks. What emerged from that process was the Bureau's Bank Merger Enforcement Guidelines (the "Bank MEGs"). Released in July 1998, the Bank MEGs set out the analytical framework to be used by the Competition Bureau when assessing the competitive effects of a merger of two or more Schedule I banks.

The Bank MEGs note that a merger can lessen or prevent competition in two ways: first, by facilitating interdependent behaviour among firms, and second, by enhancing the unilateral exercise of power of the merging firms. A merger among banks can lessen competition if it enables the merged entity to raise prices unilaterally, or if it is likely to bring about a price increase by expanding the opportunity for interdependent behaviour in the

market. Interdependent behaviour includes an understanding among firms that they will increase prices or compete less vigorously. Competition can also be lessened if the merger allows firms to lower quality or service profitably, or to reduce product variety.

The Bank MEGs outline the stages in the Bureau's merger review process. The first stage consists of defining the relevant market. Since there is both a product dimension and a geographic dimension to the market, the Bank MEGs note that there will be many relevant markets in assessment of a bank merger.

The next stage is to apply market share and concentration thresholds in order to distinguish mergers that are unlikely to have anti-competitive consequences from those requiring further analysis. The Bank MEGs state that, generally, mergers will not be challenged on the basis of concerns to do with the unilateral exercise of market power in cases where the post-merger market share of the merging parties would be less than 35%. In addition, mergers will not be challenged on the basis of concerns to do with the interdependent exercise of market power where the post-merger market share of the four largest firms would be less than 65% and that of the merging parties would be less than 10%.

Market shares are calculated for existing market participants and for firms that could come into the market within one year with minimal investment. In general, the Bureau will determine whether a firm not at present supplying the relevant market could profitably respond to a small but significant increase in the price of a product within one year. Firms that are likely to have an impact on the market after one year, but within two years of the merger, or whose entry requires a substantial investment are considered in the Bureau's analysis of the barriers to entering the market.

According to the Bank MEGs, the Bureau will not conclude that a merger is likely to substantially lessen or prevent competition only on the basis that the market shares or concentration levels in the relevant markets are above the threshold levels. Where either of the thresholds is exceeded, the Bureau will also undertake a full analysis of the competitive effects for the markets. The factors set out in section 93 of the *Competition Act* are assessed in relation to these markets to determine whether the merging parties can sustain a price increase for more than two years.

The Bank MEGs outline the Bureau's treatment of the efficiency exception set out in the *Competition Act*. Despite the fact that a bank merger may substantially lessen or prevent competition, the Competition Tribunal cannot block the merger if the elements of the efficiency exception are met. In the first place, the efficiencies must represent cost savings to the economy that would not be realized if a remedial order against the merger were made. Second, the cost savings must represent real savings in economic resources, rather than private gains to the merging parties that would result, for example, from an increase in bargaining power with suppliers. The Bank MEGs state that the standard adopted by the Bureau for

analyzing efficiencies in a bank merger situation is the same as that used in respect of mergers in other sectors of the economy.

F. Operation of the Law

1. Mergers

The Competition Tribunal has rendered a number of decisions relating to mergers. In several of the merger cases the Tribunal had been called upon to issue consent orders which would allow the mergers to proceed on the terms negotiated by the Director and the respective parties.

In the first merger case (*Palm Dairies*), the Tribunal refused to grant a consent order because it could not satisfy itself that the order would be enforceable or effective in meeting the objectives of the *Competition Act*. In two other cases (*Air Canada/Canadian Airlines International Computer Reservations Merger* and *Asea Brown Boveri/Westinghouse*), consent orders were issued and the mergers were allowed to proceed. In another case (*Imperial Oil/Texaco*), a consent order was approved after Imperial Oil addressed various competition concerns raised by the Tribunal in its rejection of the original consent order proposal agreed to by Imperial and the Director.

The reasons given by the Tribunal for granting the consent order in the *Air Canada* case are noteworthy because in them the Tribunal defined its role in a consent order proceeding as being to ensure that, as a result of merger (the terms and conditions of which are embodied in the consent order), there is no substantial lessening of competition. In addition, the Tribunal pointed out that, in consent order proceedings, it has no mandate to impose its own terms and conditions on the parties.

In the *Imperial Oil/Texaco* case the Tribunal stated that a consent order can be challenged if it is not likely to accomplish the objectives that the Director believes it will. It then went on to suggest some reasons why a consent order might be unacceptable. These include: inconsistent or contradictory terms, and ineffectiveness due to lack of enforceability because of imprecision, incapability of monitoring or because a breach would be possible to prove. It has been suggested that the Imperial decision may make the burden on parties to a consent proceeding more onerous than that of a contested matter.

In another case (*Alex Couture*) the Director applied to the Tribunal for an order dissolving certain mergers that had taken place in the meat rendering industry in Quebec. The parties to the mergers initiated an action in the Quebec Superior Court challenging the constitutionality of the *Competition Tribunal Act* and the *Competition Act* as being *ultra vires* the powers of Parliament. The case also included a challenge to both the Competition Tribunal and certain sections of the *Competition Act* on the basis of the *Canadian Charter of Rights and Freedoms*.

In a decision on 6 April 1990 in the *Couture* case, the Quebec Superior Court declared the Competition Tribunal unconstitutional and struck down parts of the *Competition Act* relating to the power of the Tribunal to dissolve or block mergers. The Court declared that these provisions violated the right to freedom of association guaranteed by the Charter.

The Tribunal, which is composed of lay and judicial members and functions as a court, was found to be unconstitutional because it lacks the attributes of independence and impartiality that normally characterize a court. These shortcomings are manifested in the method of appointment and the role of the lay members of the Tribunal. In addition, the Court held that the presence of the lay members infringes the right to a fair and impartial hearing. This decision was overturned by the Quebec Court of Appeal in September 1991.

In its decisions in contested merger cases, the Competition Tribunal set out what must be examined when determining the likely effects of a merger. First, it is necessary to determine the boundaries of the "relevant market"; such identification has both a product dimension and a geographic dimension.

In identifying the product dimensions of the market, first it is necessary to identify the product or products with respect to which the firms were in competition prior to the merger. The next step is to determine if the product has close substitutes, to which consumers could easily switch if prices were raised. Products should be included in the same product market if there are close substitutes when sold at marginal cost.

In identifying the geographic dimension, it is necessary to ask whether there is a geographic area within which the merged firm, either alone or with others, would exercise market power. This requires an assessment of whether a significant number of consumers in the alleged area would be willing to turn to suppliers outside that area to obtain a product or service and whether there are suppliers outside the area who could supply customers.

Next, the Tribunal must determine if the merger lessens competition substantially. A merger will lessen competition if it increases the ability of the merging parties to exercise market power by preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. Whether the increase is substantial depends upon the degree of the increase and the facts of the case; it is determined by reference to a number of factors, such as market share and concentration, excess capacity, the market environment and barriers to entry.

2. Abuse of Dominant Position

On 4 October 1990, the Tribunal rendered its first decision in relation to abuse of dominant position. In this case, the Director alleged that the NutraSweet Company had engaged in a series of anti-competitive acts in connection with the sale of the artificial sweetener aspartame. The Tribunal held that a number of NutraSweet's contract terms, such as those requiring purchasers to use only the NutraSweet brand of aspartame, price discounts for displaying the NutraSweet name and logo, and provisions allowing the company to match a competitor's price served to inhibit competitors from entering or making gains in the aspartame market.

In January 1992, the Tribunal handed down its decision in the abuse of dominant position case against Laidlaw Waste Systems Ltd. (*Laidlaw*).

In 1991, the Director commenced an action before the Tribunal alleging that Laidlaw had abused and was abusing its dominant position in commercial waste collection and disposal services in a number of markets on Vancouver Island.

Laidlaw engaged in a practice of acquiring competitors and having them agree to a broad non-competition arrangement upon completion of the purchase. It also employed standard form contracts which provided for automatic price increases, lengthy contractual periods, exclusivity clauses, automatic renewals and the payment of liquidated damages for early termination.

The Tribunal found that Laidlaw's acquisition practices were anti-competitive and buttressed by the creation of artificial barriers to entry through its standard form contracts had the effect of lessening competition substantially in the relevant markets. Among other things, the Tribunal ordered that Laidlaw be prohibited from acquiring any competitor for a period of three years and that a number of the terms and conditions of Laidlaw's standard form contract be removed or modified.

In the *Interac* case, the Director applied to the Competition Tribunal for a consent order in relation to the electronic banking network established by nine founding members of *Interac* – Canada's major banking and financial institutions. The Tribunal discussed its role in relation to consent orders in abuse of dominance cases as being to determine whether a consent order meets a minimum test, and not whether it provides an optimum solution. This test is whether the consent order is likely to eliminate the substantial lessening of competition presumed to have resulted from the anti-competitive acts identified in the application. The Director and the parties bear the ultimate burden of proving to the Tribunal that the order meets this test. As a practical matter, however, the Tribunal treats the Director with initial deference, and assumes that the order will meet its stated objectives. Evidence that the consent order is not adequate, therefore, must come from the interveners. In effect, once the Director has made a *prima facie* case, the interveners must point out flaws in the proposal.

The proposed order need not address or cure all of the anti-competitive acts identified in the application. Prohibiting some of these acts, or taking some other positive action, may alleviate the substantial lessening of competition despite the continuation of some anti-competitive conduct. Also, if there are available alternatives for restoring competition, the Tribunal is required to adopt the least intrusive course of action.

G. Proposed Amendments

On 28 June 1995, the Bureau of Competition Policy issued a discussion paper presenting eight different areas of the *Competition Act* where changes could be made. Although many of the proposed changes would not touch the substance of the merger and abuse of dominant position provisions of the Act, some would have implications for these provisions.

The present merger provisions require prenotification for certain transactions that exceed prescribed thresholds. Concerns have been raised about the information required to be filed; amendments could provide for making this more relevant. In addition, the obligation to prenotify for certain transactions having no effect on competition could be eliminated, while prenotification could be extended to transactions involving the acquisition of interests in partnerships.

The discussion paper suggests that the Act could be amended to allow private parties to initiate proceedings before the Competition Tribunal. This proposal could affect the merger provisions, although the paper notes that it might be appropriate to exclude mergers from this proposal.

In October 1995, the Director established a Consultative Panel to assess the suitability and feasibility of proposals for legislative change to the *Competition Act* put forward by the Competition Bureau and to make recommendations relating to them. The Panel's report was released in April 1996.

The Panel recommended improved pre-merger notification information provisions and an extension of the existing notification waiting periods. In addition, the Panel recommended that the Director periodically review the thresholds for pre-merger notification.

The Panel recommended that the present interim order threshold under the Act be lowered in order to give the Director a more effective mechanism for delaying the completion of a merger transaction where the Competition Bureau has serious concerns.

The Panel examined the question of asset securitizations and concluded that they should be exempted from the prenotification requirements.

The Panel also recommended that the amount of the fine for failure to notify be increased to a level that would better reflect the significance of the obligation to notify.

On 7 November 1996, Bill C-67, An Act to amend the Competition Act, was introduced in the House of Commons. The bill would have established a new civil regime for dealing with misleading advertising and deceptive marketing practices, created new criminal provisions pertaining to deceptive telemarketing, clarified the regular price claims provision, revised aspects of the merger pre-notification process and amended the prohibition order provisions of the Act. Bill C-67 died on the Order Paper when Parliament was dissolved on 27 April 1997.

Another bill to amend the *Competition Act*, Bill C-20, was introduced in the House of Commons on 20 November 1997. Bill C-20 is substantially the same as Bill C-67, but with some changes, one of which would change the title of the Director to the "Commissioner of Competition."

PARLIAMENTARY ACTION

A. Competition Bill 1971

Government action toward reform began in 1971 with the introduction of Bill C-256, which incorporated many of the 1969 recommendations of the Economic Council of Canada. The bill was fiercely opposed by the business community. In July 1973, it was announced that reform of Canada's competition policy would be split into two stages, with changes respecting mergers and monopolies to be part of Stage II.

B. Competition Bills 1977

In March 1977, Bill C-42, containing the Stage II amendments, was introduced in the House of Commons. The bill was referred to the House of Commons Standing Committee on Finance, Trade and Economic Affairs for study. The Committee's report contained a number of recommendations on the merger and monopoly provisions. The Standing Senate Committee on Banking, Trade and Commerce also recommended changes to the bill in its report published in July 1977. Subsequently, in November 1977, Bill C-13, which incorporated several changes to Bill C-42, was introduced. The bill was referred to the Standing Senate Committee on Banking, Trade and Commerce for study. That Committee, which published its report in June 1978, recommended that Bill C-13 be withdrawn and reconsidered. Bill C-13 was allowed to die after first reading.

C. Competition Bill 1984

On 2 April 1984, Bill C-29, incorporating changes to the merger and monopoly law received first reading in the House of Commons. It died on the Order Paper with the calling of a federal election.

D. Competition Bill 1985

On 17 December 1985, Bill C-91 was introduced in the House of Commons. It received Royal Assent on 17 June 1986 and was proclaimed in force on 19 June 1986, except for the pre-merger notification provisions, which were proclaimed in force on 15 July 1987.

E. Competition Bill 1996

On 7 November 1996, Bill C-67 was introduced in the House of Commons. The bill, which would have modified the administration of the merger notification process, died on the Order Paper with the dissolution of Parliament and the calling of the 1997 federal election.

F. Competition Bill 1997

On 20 November 1997, Bill C-20 was introduced in the House of Commons. Like its predecessor, Bill C-67, the bill would modify the administration of the merger notification process.

CHRONOLOGY

1923 - Provisions aimed at controlling mergers and monopolies that were detrimental to the public were included in the *Combines Investigation Act*.

1960 - The Crown lost two important merger cases Canadian Breweries and B.C. Sugar.

July 1969 - The Economic Council of Canada published its Interim Report on Competition Policy, recommending new legislation aimed at controlling mergers and monopolies.

June 1971 - Bill C-256, containing changes to the merger and monopoly law was introduced in the House of Commons.

June 1973 - The Minister of Consumer and Corporate Affairs announced that competition law reform would be divided into two stages, with the proposals to reform the merger and monopoly provisions to be part of the second stage.

June 1976 - The report Dynamic Change and *Accountability in a Canadian Market Economy* was published. Written by an independent committee appointed by the Minister of Consumer and Corporate Affairs, it recommended various changes to the merger and monopoly law.

November 1976 - The Supreme Court of Canada rendered its decision in the *K.C. Irving* case, making the merger and monopoly provisions of the *Combines Investigation Act* virtually ineffective.

March 1977 - Bill C-42, incorporating changes to the merger and monopoly law, was introduced in the House of Commons.

July 1977 - The Standing Senate Committee on Banking, Trade and Commerce published its interim report on Bill C-42.

August 1977 - The House of Commons Standing Committee on Finance, Trade and Economic Affairs published its report, *Proposals for Change*, on Bill C-42.

November 1977 - Bill C-13, revising Bill C-42, was introduced in the House of Commons.

May 1978 - The Report of the Royal Commission on Corporate Concentration was published. The report included an overview of general considerations for merger and monopoly policy and a critical analysis of Bill C-13.

June 1978 - The Standing Senate Committee on Banking, Trade and Commerce published its report on Bill C-13.

September 1980 - Kent Commission was established to enquire into concentration of ownership in the newspaper industry and the effect on the public of the closing of newspapers.

April 1981 - Department of Consumer and Corporate Affairs circulated a discussion paper containing proposed amendments (Stage II) to the *Combines Investigation Act*.

August 1981 - Kent Commission Report was released.

July and
August 1982 - Spokespeople for the Minister of Consumer and Corporate Affairs and the Minister himself indicated that amendments to the *Combines Investigation Act* to deal with mergers and monopolies would be presented to Parliament in the fall.

March and
April 1983 - Following Cabinet's December 1982 approval in principle of proposed competition policy legislative action, the Minister of Consumer and Corporate Affairs conducted a round of consultations with key business groups.

December 1983 - Charges against Thomson Newspapers and Southam Inc. under the *Combines Investigation Act* provisions on mergers and monopolistic conduct were dismissed by the Ontario Supreme Court.

April 1984 - Bill C-29, incorporating changes to the merger and monopoly provisions of the *Combines Investigation Act*, received first reading in the House of Commons.

November 1984 - The Speech from the Throne announced that changes to the competition laws would be forthcoming.

February and
September 1985 - Federal-provincial-territorial meetings of Ministers of Consumer and Corporate Affairs discussed competition policy reform.

March 1985 - The Department of Consumer and Corporate Affairs released a consultation paper entitled Reform of Competition Policy in Canada.

September 1985 - Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission) advocated reform of the merger and monopoly laws.

December 1985 - Bill C-91, incorporating changes to the merger and monopoly provisions of the CIA received first reading in the House of Commons.

19 June 1986 - Bill C-91 was proclaimed in force, except for the provisions dealing with pre-merger notification.

15 July 1987 - The pre-merger notification provisions of the *Competition Act* were proclaimed in force.

April 1990 - The Quebec Superior Court declared the Competition Tribunal to be unconstitutional and struck down certain sections of the *Competition Act* relating to the powers of the Tribunal to block or dissolve mergers.

July 1990 - The Federal Court of Appeal held that the Competition Tribunal does not have the power to punish for contempt those who fail to comply with a final order of the Tribunal made under Part VIII of the *Competition Act*.

October 1990 - The Competition Tribunal rendered its first decision in relation to abuse of dominant position (*NutraSweet*).

November 1990 - The Director of Investigation and Research issued draft Merger Enforcement Guidelines in which the Bureau of Competition Policy's approach to merger review was presented.

April 1991 - The Director of Investigation and Research issued the final version of the Merger Enforcement Guidelines.

September 1991 - The Quebec Court of Appeal unanimously overturned the 1990 decision of the Quebec Superior Court which had declared the Competition Tribunal unconstitutional and struck down certain sections of the *Competition Act* relating to mergers.

January 1992 - The Competition Tribunal issued its second decision in relation to abuse of dominant position (*Laidlaw*).

March 1992 - The Competition Tribunal refused to order the divestiture of a meat rendering business when Hillsdown Holdings (Canada) Limited acquired control of Canada Packers Inc.

June 1992 - The Competition Tribunal, in the *Southam* case, concluded that Southam's acquisition of certain community newspapers in the Vancouver area would not hurt competition for advertising between Southam's dailies and the community newspapers. It also concluded, however, that Southam's purchase of a community newspaper and a real estate paper serving the North Shore area near Vancouver would substantially lessen competition for real estate advertising there.

The Supreme Court of Canada overturned the July 1990 decision of the Federal Court of Appeal, which held that the Competition Tribunal had no authority to punish for contempt those who had breached one of its final orders. The Supreme Court concluded that the *Competition Tribunal Act* grants the Tribunal power over contempt for breaches of its orders.

November 1993 - The Competition Tribunal ruled that Canadian Airlines International Inc. must be released from its obligations under the "hosting contract" with Gemini for the management of Canadian's internal reservation system.

5 April 1994 - The Director of Investigation and Research launched an abuse of dominant position action against A.C. Nielsen Company of Canada Limited. The Director is asking the Competition Tribunal to prohibit Nielsen from enforcing or entering into contracts that restrict grocery and drug retail chains from making sales data available to Nielsen's competitors.

November 1994 - The Competition Tribunal issued a consent order in an abuse of dominant position case relating to the sale of "national advertising" in the Yellow Pages. (National advertising denotes advertising placed in the Yellow Pages of two or more publishers.) This was the first consent order in an abuse of dominance case.

December 1994 - The Director of Investigation and Research filed an application with the Competition Tribunal alleging that Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., two subsidiaries of Bell Canada Enterprises, had violated the abuse of dominance, tied selling and refusal to deal provisions of the *Competition Act*. The action involves the sale of advertising space in the Yellow Pages.

April 1995 - The Competition Tribunal issued its decision in the Competition Bureau's abuse of dominance case against D & B Companies of Canada Ltd. (A.C. Nielsen Company). The Tribunal found that Nielsen had controlled the supply of scanner-based market tracking services throughout Canada by entering into exclusive contracts with retailers. The Tribunal issued an Order that prohibits Nielsen from enforcing its existing exclusive contracts with retailers and from entering into future contracts that require or induce retailers to provide scanner data only to Nielsen.

28 June 1995 - The Bureau of Competition Policy released the discussion paper *Competition Act Amendments* and announced the commencement of public consultations to update the *Competition Act*.

August 1995 - The Federal Court of Appeal issued decisions on appeals filed against the Competition Tribunal's decisions in the *Southam* case. In its 1992 decision, the Tribunal denied an application by the Director for an order requiring Southam Inc. to divest itself of certain community newspapers in the Vancouver area but ordered *Southam* to sell either of two real estate advertising publications. The Federal Court of Appeal held that the Competition Tribunal had failed to apply the proper test in determining the product market. In a second decision, the Court of Appeal dismissed Southam's appeal of the Tribunal's remedies decision, which had ordered the divestiture of either the *North Shore News* or the *Real Estate Weekly*. The Federal Court of Appeal decision was appealed to the Supreme Court of Canada.

October 1995 - The Director established a Consultative Panel to review responses to the Competition Bureau's discussion paper and to make recommendations with respect to each of the areas of the *Competition Act* to be amended.

November 1995 - The Director released an enforcement information bulletin providing guidance on the Director's enforcement policy with respect to strategic alliances in relation to the merger review and criminal conspiracy provisions of the *Competition Act*.

December 1995 - The Director filed an application for a consent order with the Competition Tribunal against Interac Inc. and Canada's major financial institutions which are Charter members of the Interac Association. The application alleges that Interac's Charter members have created the dominant shared electronic services network in Canada and have abused their power in a number of ways.

March 1996 - The Director filed an application with the Competition Tribunal with respect to two mergers. The application opposes acquisitions of Seaspan International Ltd. and Norsk Pacific Steamship Company Ltd. The Director's application alleges that the mergers

prevent or lessen, or are likely to prevent or lessen, competition substantially in the provision of tug boat services used to berth ships in Vancouver, and in the provision of barging services in British Columbia's coastal waters.

April 1996 - The report of the Consultative Panel established with respect to proposed *Competition Act* amendments was released to the public.

June 1996 - The Competition Tribunal issued a consent order against Interac Inc. and the nine Charter members of Interac. The order requires Interac to broaden the representation on its Board and to amend its rules and by-laws in order to eliminate restrictions on access as well as the present restraints on product innovation and price competition. Interac will be required to open its network to potential participants on a non-discriminatory basis. It will also be prohibited from continuing the practice of charging new member entry fees based on card issuance.

7 November 1996 - Bill C-67, An Act to amend the Competition Act, was introduced in the House of Commons. The bill died on the Order Paper when Parliament was dissolved on 27 April 1997.

20 December 1996 - In a transaction merging the two key carriers in the international containerized shipping industry operating out of Montreal, Cast North America Inc. had been acquired by a subsidiary of Canadian Pacific Limited in March 1995. The Director filed an application with the Competition Tribunal alleging that the merger substantially prevented or lessened competition with respect to the provision of intermodal non-refrigerated shipping services operating through Montreal to Europe, the United Kingdom, Ontario and Quebec.

29 January 1997 - The Competition Tribunal issued a consent order in the *Seaspan* case. The case involved the provision of ship berthing, wood chip and covered barging services in British Columbia coastal waters. The consent order included the divestiture of three sets of assets to address the Director's competition concerns.

26 February 1997 - The Competition Tribunal issued its reasons and order in the *Tele-Direct* abuse of dominance/tied selling case. Among other things, the Director alleged that, in relation to advertising in the Yellow Pages, Tele-Direct had abused its dominant position by engaging in a practice of anti-competitive acts in relation to three groups: independent publishers of telephone directories, advertising agencies, and consultants who provide services related to directory advertising. The Tribunal dismissed certain allegations of anti-competitive acts but upheld others. For instance, it rejected allegations that Tele-Direct was engaged in a practice of anti-competitive acts against entrants into telephone directory publishing but accepted the allegations of anti-competitive acts against consultants.

20 March 1997 - The Supreme Court of Canada issued its decision in the *Southam* appeal. In finding that the Federal Court of Appeal should not have overturned the Competition Tribunal's decision, the SCC concluded that the proper standard for appeal was not "correctness" but "reasonableness." The SCC held that the Tribunal's decision on market

definition was not unreasonable and therefore found for *Southam*. The SCC also dismissed *Southam's* appeal of the North Shore print real estate market decision. *Southam* must divest itself of either the *North Shore News* or the *Real Estate Weekly*.

16 April 1997 - The Competition Tribunal released a consent order in the Canadian Waste Services Inc. (CWS) merger. The Director had alleged that the acquisition by CWS of the non-hazardous solid waste management business of Laidlaw throughout Canada would result in a substantial lessening of competition in relation to commercial waste management services in four local markets. The order requires CWS to sell certain portions of the waste management operations in those markets.

8 May 1997 - The Competition Tribunal issued a consent order arising from the acquisition by ADM Agri-Industries of the Canadian flour milling assets of Maple Leaf Mills in February 1997. The Director had alleged that the merger would likely prevent or lessen competition in the supply of bulk hard wheat flour in the Quebec/Atlantic Canada market. The order requires ADM to sell a mill in Montreal along with a supply agreement.

9 September 1997 - In response to the planned entry of a competing service in the market, the Competition Bureau announced that it was seeking a stay of proceedings in relation to the application challenging the acquisition of Cast North America Inc. by Canadian Pacific Ltd. The Competition Tribunal issued the stay on 17 September 1997.

20 November 1997 - Bill C-20, An Act to amend the Competition Act and to make consequential amendments to other Acts, was introduced in the House of Commons.

23 April 1998 - The Competition Tribunal issued a consent order in the Canadian Waste/Capital Resource case. The order arose from the 1997 acquisition by Canadian Waste Services Inc. of the solid waste assets from WMI Waste Management of Canada Inc.

14 July 1998 - The Competition Bureau released the final version of its Merger Enforcement Guidelines as Applied to a Bank Merger (Bank Merger Enforcement Guidelines).

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* The original version of this Current Issue Review was published in January 1991; the paper has been regularly updated since that time.

This is Exhibit “28” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

First Session, Thirty-seventh Parliament,
49-50-51 Elizabeth II, 2001-2002

STATUTES OF CANADA 2002

CHAPTER 16

An Act to amend the Competition Act and the Competition Tribunal Act

BILL C-23

ASSENTED TO 4th JUNE, 2002

Première session, trente-septième législature,
49-50-51 Elizabeth II, 2001-2002

LOIS DU CANADA (2002)

CHAPITRE 16

Loi modifiant la Loi sur la concurrence et la Loi sur le Tribunal de la concurrence

PROJET DE LOI C-23

SANCTIONNÉ LE 4 JUIN 2002

RECOMMENDATION

Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled ''*An Act to amend the Competition Act and the Competition Tribunal Act*''.

RECOMMANDATION

Son Excellence la gouverneure générale recommande à la Chambre des communes l'affectation de deniers publics dans les circonstances, de la manière et aux fins prévues dans une mesure intitulée « *Loi modifiant la Loi sur la concurrence et la Loi sur le Tribunal de la concurrence* ».

SUMMARY

This enactment amends the *Competition Act* and the *Competition Tribunal Act*. The amendments include the following:

– amendments to facilitate cooperation with foreign competition authorities for the enforcement of civil competition and fair trade practices laws;

– amendments prohibiting deceptive prize notices;

– amendments streamlining the Competition Tribunal process by providing for cost awards, summary dispositions and references;

– amendments broadening the scope under which the Tribunal may issue temporary orders; and

– some housekeeping items.

SOMMAIRE

Le texte modifie la *Loi sur la concurrence* et de la *Loi sur le Tribunal de la concurrence* et y ajoute de nouvelles dispositions. Les modifications ont notamment pour objet :

– de faciliter la coopération internationale en ce qui touche l'application de dispositions non pénales en matière de concurrence et de pratiques de commerce;

– d'interdire l'envoi de documentation trompeuse;

– de permettre au Tribunal de la concurrence d'accorder, dans certains cas, des frais, de rendre des jugements sommaires et d'entendre des renvois;

– d'étendre le pouvoir du Tribunal de la concurrence en ce qui a trait aux ordonnances provisoires;

– de faire certaines modifications d'ordre administratif.

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http://www.parl.gc.ca

49-50-51 ELIZABETH II

CHAPTER 16

An Act to amend the Competition Act and the Competition Tribunal Act

[*Assented to 4th June, 2002*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

COMPETITION ACT

R.S., c. C-34; R.S., c. 19 (2nd Supp.), s. 19

R.S., c. 19, (2nd Supp.), s. 24; 1999, c. 2, par. 37(*d*)

1. Paragraph 11(1)(*b*) of the *Competition Act* is replaced by the following:

(*b*) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

2. Section 18 of the Act is amended by adding the following after subsection (1):

Certified copies

(1.1) The Commissioner need not return any copy of a record produced pursuant to section 11.

2.1 (1) Subsection 29(1) of the Act is amended by striking out the word "or" at the end of paragraph (*c*), by adding the word "or" at the end of paragraph (*d*) and by adding the following after paragraph (*d*):

(*e*) any information provided voluntarily pursuant to this Act.

R.S., c. 19 (2nd Supp.), s. 26

(2) Subsection 29(2) of the Act is replaced by the following:

49-50–51 ELIZABETH II

CHAPITRE 16

Loi modifiant la Loi sur la concurrence et la Loi sur le Tribunal de la concurrence

[*Sanctionnée le 4 juin 2002*]

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

LOI SUR LA CONCURRENCE

L.R., ch. C-34; L.R., ch. 19 (2e suppl.), art. 19

L.R., ch. 19 (2e suppl.), art. 24; 1999, ch. 2, al. 37*d*)

1. L'alinéa 11(1)*b*) de la *Loi sur la concurrence* est remplacé par ce qui suit :

b) de produire auprès du commissaire ou de son représentant autorisé, dans le délai et au lieu que prévoit l'ordonnance, les documents — originaux ou copies certifiées conformes par affidavit — ou les autres choses dont l'ordonnance fait mention;

2. L'article 18 de la même loi est modifié par adjonction, après le paragraphe (1), de ce qui suit :

Copies certifiées conformes

(1.1) Le commissaire n'est pas tenu de retourner les copies qui ont été produites en conformité avec l'article 11.

2.1 (1) Le paragraphe 29(1) de la même loi est modifié par adjonction, après l'alinéa *d*), de ce qui suit :

e) des renseignements fournis volontairement dans le cadre de la présente loi.

L.R., ch. 19 (2e suppl.), art. 26

(2) Le paragraphe 29(2) de la même loi est remplacé par ce qui suit :

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

3. The Act is amended by adding the following before the heading "PART IV":

PART III

MUTUAL LEGAL ASSISTANCE

Interpretation

Definitions

30. The definitions in this section apply in this Part.

"agreement" « *accord* »

"agreement" means a treaty, convention or other international agreement to which Canada is a party that provides for mutual legal assistance in competition matters, other than a matter in respect of which the *Mutual Legal Assistance in Criminal Matters Act* applies.

"conduct" « *comportement* »

"conduct" means conduct or matters within the meaning of the relevant agreement in respect of which mutual legal assistance may be requested in accordance with this Part.

"data" « *données* »

"data" means representations, in any form, of information or concepts.

"foreign state" « *État étranger* »

"foreign state" means a country other than Canada, and includes any international organization of states.

"judge" « *juge* »

"judge" means

(*a*) in Ontario, a judge of the Superior Court of Justice;

(*b*) in Quebec, a judge of the Superior Court;

(*c*) in Nova Scotia, British Columbia, Newfoundland, the Yukon Territory and the Northwest Territories, a judge of the Supreme Court, and in Nunavut, a judge of the Nunavut Court of Justice;

(*d*) in New Brunswick, Manitoba, Saskatchewan and Alberta, a judge of the Court of Queen's Bench;

(*e*) in Prince Edward Island, a judge of the trial division of the Supreme Court; and

Exception

(2) Le présent article ne s'applique ni à l'égard de renseignements qui sont devenus publics ni à l'égard de renseignements dont la communication a été autorisée par la personne les ayant fournis.

3. La même loi est modifiée par adjonction, avant l'intertitre « PARTIE IV », de ce qui suit :

PARTIE III

ENTRAIDE JURIDIQUE

Définitions

Définitions

30. Les définitions qui suivent s'appliquent à la présente partie.

« accord » "agreement"

« accord » Tout traité, toute convention ou tout autre accord international auquel le Canada est partie et qui traite de l'entraide juridique en matière de concurrence, sauf en ce qui concerne les questions auxquelles la *Loi sur l'entraide juridique en matière criminelle* s'applique.

« comportement » "conduct"

« comportement » Comportement ou affaire, au sens de l'accord applicable, pour lesquels une demande est présentée dans le cadre de la présente partie.

« données » "data"

« données » Toute forme de représentation d'informations ou de notions.

« État étranger » "foreign state"

« État étranger » Pays autre que le Canada, y compris une organisation internationale d'États.

« juge » "judge"

« juge »

a) En Ontario, un juge de la Cour supérieure de justice;

b) au Québec, un juge de la Cour supérieure;

c) en Nouvelle-Écosse, en Colombie-Britannique et à Terre-Neuve, ainsi qu'au Yukon et dans les Territoires du Nord-Ouest, un juge de la Cour suprême et, au Nunavut, un juge de la Cour de justice;

d) au Nouveau-Brunswick, au Manitoba, en Saskatchewan et en Alberta, un juge de la Cour du banc de la Reine;

e) à l'Île-du-Prince-Édouard, un juge de la section de première instance de la Cour suprême;

(*f*) in any province or territory, a judge of the Federal Court — Trial Division.

Functions of the Minister of Justice

Agreements respecting mutual legal assistance

30.01 Before Canada enters into an agreement, the Minister of Justice must be satisfied that

(*a*) the laws of the foreign state that address conduct that is similar to conduct prohibited or reviewable under this Act are, in his or her opinion, substantially similar to the relevant provisions of this Act, regardless of whether the conduct is dealt with criminally or otherwise;

(*b*) any record or thing provided by Canada under the agreement will be protected by laws respecting confidentiality that are, in his or her opinion, substantially similar to Canadian laws;

(*c*) the agreement contains provisions in respect of

(i) the circumstances in which Canada may refuse, in whole or in part, to approve a request, and

(ii) the confidentiality protections that will be afforded to any record or thing provided by Canada;

(*d*) the agreement contains the following undertakings by the foreign state, namely,

(i) that it will provide assistance to Canada comparable in scope to that provided by Canada,

(ii) that any record or thing provided by Canada will be used only for the purpose for which it was requested,

(iii) that any record or thing provided by Canada will be used subject to any terms and conditions on which it was provided, including conditions respecting applicable rights or privileges under Canadian law,

(iv) that, at the conclusion of the investigation or proceedings in respect of which any record or thing was provided by Canada, the foreign state will return the record or thing and any copies to

f) dans toute province ou tout territoire, un juge de la Section de première instance de la Cour fédérale.

Rôle du ministre de la Justice

Conclusion d'accords d'entraide juridique

30.01 Le ministre de la Justice doit, avant qu'un accord ne soit conclu par le Canada, être convaincu de ce qui suit :

a) le droit de l'État étranger visant les comportements qui sont semblables à ceux qui sont susceptibles de poursuite ou d'examen en vertu de la présente loi est, à son avis, semblable, au fond, aux dispositions correspondantes de la présente loi, que ces comportements relèvent ou non du droit criminel;

b) les documents ou autres choses transmis par le Canada en vertu de l'accord seront protégés par des lois en matière de confidentialité qui sont semblables, au fond, aux lois canadiennes;

c) l'accord traitera :

(i) des circonstances dans lesquelles le Canada a le droit de refuser, en tout ou en partie, une demande,

(ii) des modalités de protection, en matière de confidentialité, des documents ou autres choses transmis par le Canada;

d) l'accord comportera les engagements suivants de la part de l'État étranger :

(i) donner au Canada une aide comparable à celle que celui-ci lui donne,

(ii) n'utiliser les documents ou autres choses transmis par le Canada qu'aux fins auxquelles ils ont été demandés,

(iii) n'utiliser les documents ou autres choses transmis par le Canada qu'aux conditions — y compris celles qui portent sur les droits et privilèges applicables en droit canadien — et que selon les modalités dont la transmission est assortie,

(iv) à la fin de l'enquête ou des procédures, retourner au Canada les documents ou autres choses transmis ainsi que les reproductions de ceux-ci, sauf, dans ce

Canada or, with the consent of Canada, return the record or thing to Canada and destroy any copies,

(v) subject to subparagraph (ii), that it will, to the greatest extent possible consistent with its laws, keep confidential any record or thing obtained by it pursuant to its request, and oppose any application by a third party for disclosure of the record or thing, and

(vi) that it will promptly notify the Minister of Justice in the event that the confidentiality protections contained in the agreement have been breached; and

(*e*) the agreement contains a provision in respect of the manner in which it may be terminated.

dernier cas, consentement du Canada à leur destruction,

(v) sous réserve du sous-alinéa (ii) et dans la mesure compatible avec ses lois, préserver la confidentialité des documents ou autres choses obtenus en vertu d'une demande qu'il présente et s'opposer à toute demande de communication de ces documents ou choses faite par un tiers,

(vi) notifier sans délai au ministre de la Justice toute violation des dispositions relatives à la protection, en matière de confidentialité, des documents ou autres choses;

e) l'accord prévoira les modalités selon lesquelles il peut y être mis fin.

Publication of Agreements

Publication des accords

Publication in *Canada Gazette*

30.02 (1) An agreement must be published in the *Canada Gazette* no later than 60 days after the agreement comes into force, unless it has already been published under subsection (2).

Gazette du Canada

30.02 (1) À moins qu'il ne soit publié en conformité avec le paragraphe (2), l'accord est publié dans la *Gazette du Canada*, dans les soixante jours suivant son entrée en vigueur.

Publication in *Canada Treaty Series*

(2) An agreement may be published in the *Canada Treaty Series* and, if so published, the publication must be no later than 60 days after the agreement comes into force.

Recueil des traités du Canada

(2) L'accord peut être publié dans le *Recueil des traités du Canada*, auquel cas la publication est faite dans les soixante jours suivant son entrée en vigueur.

Judicial notice

(3) Agreements published in the *Canada Gazette* or the *Canada Treaty Series* are to be judicially noticed.

Notoriété publique

(3) L'accord ainsi publié dans la *Gazette du Canada* ou dans le *Recueil des traités du Canada* est de notoriété publique.

Requests Made to Canada from Abroad

Demandes présentées par un État étranger

Requests

Demandes

Requests

30.03 The Minister of Justice is responsible for dealing with a request made by a foreign state under an agreement, in accordance with the agreement and this Part.

Agrément des demandes

30.03 Le ministre de la Justice traite les demandes présentées par les États étrangers sous le régime des accords, en conformité avec l'accord applicable et la présente partie.

Search and Seizure

Perquisitions et saisies

Application of sections 15, 16 and 19

30.04 Sections 15, 16 and 19 apply, with any modifications that the circumstances require, in respect of a search or a seizure under this Part, except to the extent that those sections are inconsistent with this Part.

Application des articles 15, 16 et 19

30.04 Les articles 15, 16 et 19 s'appliquent, compte tenu des adaptations nécessaires, aux perquisitions ou saisies visées par la présente partie, sauf incompatibilité avec celle-ci.

Approval of request for search and seizure

30.05 (1) If the Minister of Justice approves a request of a foreign state to have a search and seizure carried out in respect of conduct that is the subject of the request, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for a search warrant.

Autorisation

30.05 (1) Le ministre de la Justice, s'il autorise la demande d'un État étranger d'effectuer une perquisition et une saisie à l'égard d'un comportement visé par la demande, fournit au commissaire les documents ou renseignements nécessaires pour lui permettre de présenter une demande de mandat de perquisition.

Application for search warrant

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* for a search warrant to a judge.

Demande

(2) Le commissaire ou son représentant autorisé présente une demande *ex parte*, en vue de la délivrance d'un mandat de perquisition, à un juge.

Warrant for entry of premises

30.06 (1) A judge to whom an application is made under subsection 30.05(2) may issue a search warrant authorizing the person named in it to execute it anywhere in Canada where the judge is satisfied by information on oath or solemn affirmation that there are reasonable grounds to believe that

(*a*) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place;

(*b*) evidence in respect of the conduct referred to in paragraph (*a*) will be found in any premises; and

(*c*) it would not, in the circumstances, be appropriate to make an order under subsection 30.11(1).

Mandat de perquisition

30.06 (1) Le juge saisi de la demande visée au paragraphe 30.05(2) peut délivrer un mandat de perquisition autorisant la personne qui y est nommée à l'exécuter partout au Canada s'il est convaincu, d'après une dénonciation faite sous serment ou affirmation solennelle, qu'il existe des motifs raisonnables de croire que les conditions suivantes sont réunies :

a) un comportement qui fait l'objet de la demande présentée par l'État étranger a lieu, a eu lieu ou est sur le point d'avoir lieu;

b) des éléments de preuve relatifs au comportement seront trouvés dans un local;

c) il ne serait pas opportun, dans les circonstances, de recourir à l'ordonnance visée au paragraphe 30.11(1).

Authorization

(2) A search warrant issued under subsection (1) authorizes the person named in it to enter the premises specified in the warrant, subject to any conditions that may be specified in the warrant, and to search the premises for any record or thing specified in the warrant and to examine and seize it.

Autorisation

(2) Le mandat de perquisition autorise la personne qui y est nommée à pénétrer dans le local mentionné, sous réserve des conditions fixées, à perquisitionner en vue d'obtenir les documents ou autres choses mentionnés, à les examiner et à les emporter.

Hearing re execution

(3) A judge who issues a search warrant under subsection (1) shall fix a time and place for a hearing to consider the execution of the warrant as well as the report referred to in section 30.07.

Audition

(3) Le juge qui délivre le mandat de perquisition fixe l'heure, la date et le lieu de l'audition qui sera tenue en vue d'examiner l'exécution du mandat et le rapport visé à l'article 30.07.

Contents of warrant

(4) A search warrant issued under subsection (1) must

(*a*) set out the time and place for the hearing mentioned in subsection (3);

(*b*) state that, at that hearing, an order will be sought for the sending to the foreign state

Contenu du mandat

(4) Le mandat de perquisition mentionne :

a) l'heure, la date et le lieu de l'audition prévue au paragraphe (3);

b) le fait qu'à cette audition une ordonnance de transmission à l'État étranger des documents ou autres choses emportés en exécution du mandat sera demandée;

of the records or things seized in execution of the warrant; and

(*c*) state that every person from whom a record or thing is seized in execution of the warrant and any person who claims to have an interest in a record or thing so seized may make representations at the hearing before any order is made concerning the record or thing.

c) le fait que la personne de qui les documents ou autres choses ont été pris et toute autre personne qui prétend avoir des droits sur ceux-ci peuvent présenter des observations à l'audition avant qu'une ordonnance à l'égard de ces documents ou autres choses ne soit rendue.

Duty of persons in control of premises

(5) Every person who is in possession or control of any premises, record or thing in respect of which a search warrant is issued under subsection (1) shall, on presentation of the warrant, permit the person named in the warrant to enter the premises, search the premises and examine the record or thing and seize it.

Devoir de la personne ayant la charge du local

(5) Quiconque est en possession ou a le contrôle du local, d'un document ou d'une autre chose que vise le mandat de perquisition doit, sur présentation de ce mandat, permettre à la personne nommée dans le mandat de pénétrer dans ce local, d'y perquisitionner, d'y examiner le document ou la chose et de les emporter.

Where admission or access refused

(6) Where a person, in executing a search warrant issued under subsection (1), is refused access to any premises, record or thing or where the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the *ex parte* application of the Commissioner or the authorized representative of the Commissioner, may by order direct a peace officer to take any steps that the judge considers necessary to give access to the person named in the warrant.

Entrée ou accès refusés

(6) Lorsque, dans le cadre de l'exécution d'un mandat de perquisition, la personne se voit refuser l'accès à un local, à un document ou à une autre chose, ou encore lorsque le commissaire a des motifs raisonnables de croire que l'accès en question lui sera refusé, le juge qui a délivré le mandat ou un juge du même tribunal peut, sur demande *ex parte* du commissaire ou de son représentant autorisé, ordonner à un agent de la paix de prendre les mesures que ce juge estime nécessaires pour donner à la personne nommée dans le mandat l'accès en question.

Report

30.07 (1) The person who executes a search warrant shall, at least five days before the time of the hearing to consider its execution, file with the court of which the judge who issued the warrant is a member a written report concerning the execution of the warrant that includes a general description of the records or things seized.

Rapport

30.07 (1) La personne qui exécute un mandat de perquisition dépose, au moins cinq jours avant le jour qui est fixé pour l'audition visée au paragraphe 30.06(3), auprès du tribunal où siège le juge qui a délivré le mandat un rapport d'exécution comportant une description générale des documents ou autres choses emportés.

Copy to Minister of Justice

(2) The person who files the report under subsection (1) shall send a copy of it to the Minister of Justice promptly after its filing.

Envoi au ministre de la Justice

(2) La personne envoie au ministre de la Justice une copie de son rapport d'exécution immédiatement après l'avoir déposé.

Sending abroad

30.08 (1) At the hearing referred to in subsection 30.06(3), after having considered any representations of the Minister of Justice, the Commissioner, the person from whom a record or thing was seized and any person who claims to have an interest in the record or thing, the judge who issued the search warrant or another judge of the same court may

Transmission

30.08 (1) Le juge qui a délivré le mandat ou un autre juge du même tribunal peut, à l'audition visée au paragraphe 30.06(3), après avoir entendu les observations du ministre de la Justice, du commissaire, de la personne de qui on a pris le document ou l'autre chose et de toute autre personne qui prétend avoir des droits sur ceux-ci :

(*a*) where the judge is not satisfied that the warrant was executed according to its terms and conditions or where the judge is satisfied that an order should not be made under paragraph (*b*), order that a record or thing seized be returned to

(i) the person from whom it was seized, if possession of it by that person is lawful, or

(ii) the lawful owner or the person who is lawfully entitled to its possession, if the owner or that person is known and possession of the record or thing by the person from whom it was seized is unlawful; or

(*b*) in any other case, order that a record or thing seized be sent to the foreign state mentioned in subsection 30.05(1) and include in the order any terms and conditions that the judge considers desirable, including terms and conditions

(i) necessary to give effect to the request mentioned in that subsection,

(ii) in respect of the preservation and return to Canada of any record or thing seized, and

(iii) in respect of the protection of the interests of third parties.

a) s'il n'est pas convaincu que le mandat de perquisition a été exécuté en conformité avec ses conditions et modalités, ou s'il est d'avis qu'une ordonnance prévue à l'alinéa *b*) ne devrait pas être rendue, ordonner que le document ou l'autre chose soient restitués :

(i) à la personne de qui on les a pris, si elle en avait la possession légitime,

(ii) dans le cas contraire, au propriétaire ou à la personne qui a droit à leur possession légitime si ces personnes sont connues;

b) dans les autres cas, ordonner que le document ou l'autre chose soient transmis à l'État étranger; l'ordonnance de transmission est assortie des conditions et modalités qu'il estime indiquées, notamment en vue :

(i) de la suite à donner à la demande présentée par l'État étranger,

(ii) de la conservation du document ou de l'autre chose et de leur retour au Canada,

(iii) de la protection des droits des tiers.

Requiring record, etc., at hearing

(2) At the hearing mentioned in subsection (1), the judge may require that a record or thing seized be brought before him or her.

Ajournement

(2) Lors de l'audition, le juge peut ordonner que le document ou l'autre chose emportés lui soient remis.

Terms and conditions

30.09 No record or thing seized that has been ordered under section 30.08 to be sent to a foreign state shall be so sent until the Minister of Justice is satisfied that the foreign state has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing.

Conditions et modalités

30.09 Le document ou l'autre chose emportés et visés par une ordonnance rendue en vertu de l'article 30.08 ne peuvent être transmis à l'État étranger avant que le ministre de la Justice ne soit convaincu que cet État accepte de se conformer aux conditions et modalités de l'ordonnance.

Evidence for Use Abroad

Éléments de preuve destinés à l'étranger

Approval of request to obtain evidence

30.1 (1) If the Minister of Justice approves a request of a foreign state to obtain, by means of an order of a judge, evidence in respect of conduct that is the subject of the request, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for the order.

Autorisation

30.1 (1) Le ministre de la Justice, s'il autorise la demande présentée par un État étranger en vue d'obtenir, par l'ordonnance d'un juge, des éléments de preuve à l'égard du comportement visé dans la demande, fournit au commissaire les documents ou renseignements nécessaires pour lui permettre de présenter une demande d'ordonnance.

Application for order

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* to a judge for an order for the gathering of evidence.

Demande

(2) Le commissaire ou son représentant autorisé présente une demande *ex parte*, en vue de la délivrance d'une ordonnance d'obtention d'éléments de preuve, à un juge.

Evidence-gathering order

30.11 (1) A judge to whom an application is made under subsection 30.1(2) may make an order for the gathering of evidence where the judge is satisfied that there are reasonable grounds to believe that

(*a*) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place; and

(*b*) there will be found in Canada evidence in respect of the conduct referred to in paragraph (*a*).

Ordonnance d'obtention d'éléments de preuve

30.11 (1) Le juge saisi de la demande visée au paragraphe 30.1(2) peut rendre une ordonnance d'obtention d'éléments de preuve s'il est convaincu qu'il existe des motifs raisonnables de croire :

a) d'une part, qu'un comportement qui fait l'objet de la demande présentée par l'État étranger a lieu, a eu lieu ou est sur le point d'avoir lieu;

b) d'autre part, que des éléments de preuve relatifs au comportement seront trouvés au Canada.

Provisions of order

(2) An order made under subsection (1) must provide for the manner in which the evidence is to be obtained in order to give effect to the request mentioned in subsection 30.1(1) and may

(*a*) order the examination, on oath or otherwise, of a person named in the order, order the person to attend at the place fixed by the person designated under paragraph (*c*) for the examination and to remain in attendance until he or she is excused by the person so designated, order the person so named, where appropriate, to make a copy of a record or to make a record from data and to bring the copy or record with him or her, and order the person so named to bring with him or her any record or thing in his or her possession or control, in order to produce them to the person before whom the examination takes place;

(*b*) order a person named in the order to make a copy of a record or to make a record from data and to produce the copy or record to the person designated under paragraph (*c*), order the person to produce any record or thing in his or her possession or control to the person so designated and provide, where appropriate, for any affidavit or certificate that, pursuant to the request, is to accompany any copy, record or thing so produced; and

Conditions et modalités

(2) L'ordonnance fixe les modalités d'obtention des éléments de preuve visés afin de donner suite à la demande présentée par l'État étranger; elle peut contenir les dispositions suivantes :

a) l'ordre de procéder à l'interrogatoire, sous serment ou d'une autre façon, d'une personne visée et l'ordre à celle-ci de se présenter au lieu que la personne chargée de l'interrogatoire fixe pour celui-ci et de demeurer à disposition ainsi que, s'il y a lieu, l'ordre à la personne visée de faire une copie d'un document ou d'en établir un à partir de données et d'apporter la copie ou le document avec elle, et celui d'apporter avec elle tout document ou autre chose en sa possession ou sous son contrôle afin de les remettre à la personne chargée de l'interrogatoire;

b) l'ordre à une personne visée de faire une copie d'un document ou d'en établir un à partir de données et de remettre la copie ou le document à une personne désignée ou celui de remettre à une telle personne tout document ou autre chose en sa possession ou sous son contrôle, ainsi que des indications concernant l'affidavit ou le certificat qui, s'il y a lieu, doit accompagner la copie, le document ou l'autre chose, à la demande de l'État étranger;

(*c*) designate a person before whom the examination referred to in paragraph (*a*) is to take place or to whom the copies, records, things, affidavits and certificates mentioned in paragraph (*b*) are to be produced.

c) la désignation de la personne chargée de l'interrogatoire visé à l'alinéa *a*) ou de la réception des documents ou autres choses, copies, affidavits et certificats visés à l'alinéa *b*).

Designation of judge

(3) For greater certainty, a judge who makes an order under subsection (1) may designate himself or herself or another person, including a judge of a Canadian or foreign court, under paragraph (2)(*c*).

(3) Il demeure entendu, pour l'application de l'alinéa (2)*c*), que le juge qui rend l'ordonnance peut soit se charger lui-même des fonctions mentionnées à cet alinéa, soit désigner une autre personne — y compris un autre juge d'un tribunal canadien ou étranger — pour ce faire.

Désignation du juge

Order effective throughout Canada

(4) An order made under subsection (1) may be executed anywhere in Canada.

(4) L'ordonnance peut être exécutée en tout lieu du Canada.

Exécution

Terms and conditions of order

(5) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of a person named in the order and of third parties.

(5) Le juge peut assortir l'ordonnance des conditions et modalités qu'il estime indiquées, notamment quant à la protection des droits de la personne qu'elle vise ou des tiers.

Conditions et modalités

Variation

(6) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

(6) Le juge qui a rendu l'ordonnance ou un autre juge du même tribunal peut modifier les conditions et modalités de celle-ci.

Modifications

Other laws to apply

(7) A person named in an order made under subsection (1) shall answer questions and produce records or things to the person designated under paragraph (2)(*c*) in accordance with the laws of evidence and procedure in the foreign state that presented the request, but may refuse if answering the questions or producing the records or things would disclose information that is protected by the Canadian law of non-disclosure of information or privilege.

(7) La personne visée par l'ordonnance d'obtention d'éléments de preuve répond aux questions et remet certains documents ou autres choses à la personne désignée en conformité avec l'alinéa (2)*c*) en application des règles de droit sur la preuve et la procédure de l'État étranger qui a présenté la demande, mais peut refuser de le faire dans la mesure où la réponse aux questions et la remise des documents ou des autres choses communiqueraient des renseignements autrement protégés par le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges.

Refus d'obtempérer

Execution of order to be completed

(8) If a person refuses to answer a question or to produce a record or thing, the person designated under paragraph (2)(*c*)

(*a*) may, if he or she is a judge of a Canadian or foreign court, make immediate rulings on any objections or issues within his or her jurisdiction; or

(*b*) shall, in any other case, continue the examination and ask any other question or request the production of any other record or thing mentioned in the order.

(8) En cas de refus de répondre à une question ou de remettre un document ou autre chose, la personne désignée en conformité avec l'alinéa (2)*c*) :

a) si elle est juge d'un tribunal canadien ou étranger, peut rendre sur-le-champ des décisions sur toute objection ou question qui relève de sa compétence;

b) sinon, doit poursuivre l'interrogatoire et poser les autres questions ou demander les

Effet non suspensif

autres documents ou les autres choses visés par l'ordonnance.

Statement of reasons for refusal

(9) A person named in an order made under subsection (1) who, under subsection (7), refuses to answer one or more questions or to produce certain records or things shall, within seven days, give to the person designated under paragraph (2)(*c*), unless that person has already ruled on the objection under paragraph (8)(*a*), a detailed statement in writing of the reasons on which the person bases the refusal to answer each question that the person refuses to answer or to produce each record or thing that the person refuses to produce.

Exposé des motifs de refus

(9) En cas de refus au titre du paragraphe (7), la personne visée présente dans les sept jours, par écrit, à la personne désignée en conformité avec l'alinéa (2)*c*), sauf dans le cas où celle-ci est juge d'un tribunal canadien ou étranger qui s'est déjà prononcé sur la question en vertu de l'alinéa (8)*a*), un exposé détaillé des motifs de refus dont elle entend se prévaloir à l'égard de chacune des questions auxquelles elle refuse de répondre ou de chacun des documents ou autres choses qu'elle refuse de remettre.

Expenses

(10) A person named in an order made under subsection (1) is entitled to be paid the travel and living expenses to which the person would be entitled if the person were required to attend as a witness before the judge who made the order.

Frais

(10) La personne visée par l'ordonnance d'obtention d'éléments de preuve a droit au paiement de ses frais de déplacement et de séjour au même titre qu'un témoin assigné à comparaître devant le juge qui a rendu l'ordonnance.

Contents of order

(11) An order made under subsection (1) must state that a person named in the order, and any person who claims an interest in any record or thing provided pursuant to the order, may make representations referred to in subsection 30.13(2) before any order is made under subsection 30.13(1).

Contenu de l'ordonnance

(11) L'ordonnance doit mentionner que toute personne visée par elle et toute autre personne prétendant avoir des droits sur les documents ou autres choses remis en vertu de l'ordonnance peuvent présenter des observations dans le cadre du paragraphe 30.13(2) avant qu'une ordonnance ne soit rendue dans le cadre du paragraphe 30.13(1).

Report

30.12 (1) A person designated under paragraph 30.11(2)(*c*) in an order made under subsection 30.11(1) shall make a report to the judge who made the order, or another judge of the same court, accompanied by

(*a*) a transcript of every examination held under the order;

(*b*) a general description of every record or thing produced to the person under the order and, if the judge so requires, a record or thing itself; and

(*c*) a copy of every statement given under subsection 30.11(9) of the reasons for a refusal to answer any question or to produce any record or thing.

Rapport

30.12 (1) La personne désignée en conformité avec l'alinéa 30.11(2)*c*) remet au juge qui a rendu l'ordonnance ou à un autre juge du même tribunal un rapport d'exécution accompagné :

a) du procès-verbal de tout interrogatoire fait en conformité avec l'ordonnance;

b) d'une description générale de tout document ou de toute autre chose remis en conformité avec l'ordonnance et, si le juge l'exige, du document ou de la chose eux-mêmes;

c) le cas échéant, d'une copie de l'exposé des motifs que la personne visée a pu présenter en conformité avec le paragraphe 30.11(9).

Copy to Minister of Justice

(2) The person designated under paragraph 30.11(2)(*c*) shall send a copy of the report to the Minister of Justice promptly after it is made.

Envoi au ministre de la Justice

(2) La personne désignée en conformité avec l'alinéa 30.11(2)*c*) envoie immédiatement une copie de son rapport d'exécution au ministre de la Justice.

Refusals

(3) If any reasons contained in a statement given under subsection 30.11(9) are based on the Canadian law of non-disclosure of information or privilege, a judge to whom a report is made shall determine whether those reasons are well-founded and, if the judge determines that they are, that determination shall be mentioned in any order that the judge makes under section 30.13, but if the judge determines that they are not, the judge shall order that the person named in the order made under subsection 30.11(1) answer the questions or produce the records or things.

Détermination de la validité des refus : droit canadien

(3) Le juge qui reçoit le rapport détermine la validité des motifs de refus fondés sur le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges; s'il les rejette, il ordonne à la personne visée par l'ordonnance de répondre aux questions auxquelles elle avait refusé de répondre ou, selon le cas, de remettre les documents ou autres choses qu'elle avait refusé de remettre; s'il les accepte, il fait mention de cette décision dans l'ordonnance de transmission qu'il rend en vertu de l'article 30.13.

Refusals based on foreign law

(4) A copy of every statement given under subsection 30.11(9) that contains reasons that purport to be based on a law that applies to the foreign state shall be appended to any order that the judge makes under section 30.13.

Détermination de la validité des refus : droit étranger

(4) Le juge ajoute à l'ordonnance de transmission qu'il rend en vertu de l'article 30.13 une copie de l'exposé des motifs de refus présentés en conformité avec le paragraphe 30.11(9) et fondés sur une règle de droit en vigueur dans l'État étranger.

Sending abroad

30.13 (1) A judge to whom a report is made under subsection 30.12(1) may order that there be sent to the foreign state mentioned in subsection 30.1(1)

(*a*) the report, any transcript referred to in paragraph 30.12(1)(*a*) and any record or thing produced;

(*b*) a copy of the order made under subsection 30.11(1) accompanied by a copy of any statement given under subsection 30.11(9) that contains reasons that purport to be based on a law that applies to the foreign state; and

(*c*) any determination made under subsection 30.12(3) that the reasons contained in a statement given under subsection 30.11(9) are well-founded.

Transmission

30.13 (1) Le juge à qui le rapport d'exécution visé au paragraphe 30.12(1) est remis peut ordonner la transmission à l'État étranger :

a) du rapport, du procès-verbal visé à l'alinéa 30.12(1)*a*) et des documents et autres choses remis;

b) d'une copie de l'ordonnance visée au paragraphe 30.11(1), accompagnée d'une copie de tout exposé, présenté en conformité avec le paragraphe 30.11(9), des motifs de refus fondés sur une règle de droit en vigueur dans l'État étranger;

c) de toute décision qui, en vertu du paragraphe 30.12(3), déclare valides les motifs de refus fondés sur une règle de droit en vigueur au Canada.

Terms and conditions

(2) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, after having considered any representations of the Minister of Justice, the Commissioner, the person who produced any record or thing to the person designated under paragraph 30.11(2)(*c*) and any person who claims to have an interest in any record or thing so produced, including terms and conditions

(*a*) necessary to give effect to the request mentioned in subsection 30.1(1);

Conditions et modalités

(2) Le juge peut assortir l'ordonnance des conditions et modalités qu'il estime indiquées, après avoir entendu les observations du ministre de la Justice, du commissaire, de la personne qui a remis les documents ou autres choses et de toute autre personne qui prétend avoir des droits sur ceux-ci, notamment en vue :

a) de la suite à donner à la demande présentée par l'État étranger;

(*b*) in respect of the preservation and return to Canada of any record or thing so produced; and

(*c*) in respect of the protection of the interests of third parties.

b) de la conservation des documents ou autres choses remis et de leur retour au Canada;

c) de la protection des droits des tiers.

Further execution

(3) The execution of an order made under subsection 30.11(1) that was not completely executed because of a refusal, by reason of a law that applies to the foreign state, to answer one or more questions or to produce certain records or things to the person designated under paragraph 30.11(2)(*c*) may be continued, unless a ruling has already been made on the objection under paragraph 30.11(8)(*a*), if a court of the foreign state or a person designated by the foreign state determines that the reasons are not well-founded and the foreign state so advises the Minister of Justice.

Poursuite de l'exécution de l'ordonnance

(3) Sauf si une décision a déjà été rendue sur le refus en vertu de l'alinéa 30.11(8)*a*), l'exécution de l'ordonnance d'obtention d'éléments de preuve peut se poursuivre à l'égard des questions auxquelles la personne visée a refusé de répondre ou des documents ou autres choses qu'elle a refusé de remettre, en raison du droit dans l'État étranger, lorsque les motifs de son refus sont rejetés par un tribunal de cet État ou la personne désignée en l'espèce par celui-ci et que le même État en avise le ministre de la Justice.

Leave of judge required

(4) No person named in an order made under subsection 30.11(1) whose reasons for refusing to answer a question or to produce a record or thing are determined not to be well-founded, or whose objection has been ruled against under paragraph 30.11(8)(*a*), shall, during the continued execution of the order or ruling, refuse to answer that question or to produce that record or thing to the person designated under paragraph 30.11(2)(*c*), except with the permission of the judge who made the order or ruling or another judge of the same court.

Permission du juge

(4) La personne dont les motifs de refus fondés sur une règle de droit en vigueur au Canada ou dans l'État étranger ont été rejetés, ou dont le refus a fait l'objet d'une décision défavorable aux termes de l'alinéa 30.11(8)*a*), ne peut refuser de nouveau de répondre aux mêmes questions ou de remettre les documents ou autres choses demandés que si le juge qui a rendu l'ordonnance d'obtention d'éléments de preuve ou la décision ou un autre juge du même tribunal l'y autorise.

Terms and conditions

30.14 No record or thing that has been ordered under section 30.13 to be sent to the foreign state mentioned in subsection 30.1(1) shall be so sent until the Minister of Justice is satisfied that the foreign state has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing.

Conditions et modalités

30.14 Les documents ou autres choses visés par une ordonnance rendue en vertu de l'article 30.13 ne peuvent être transmis à l'État étranger pour donner suite à la demande de celui-ci avant que le ministre de la Justice ne soit convaincu que cet État accepte de se conformer aux conditions et modalités de cette ordonnance.

Approval of request to obtain evidence by video link, etc.

30.15 (1) If the Minister of Justice approves a request of a foreign state to compel a person to provide evidence or a statement in respect of conduct that is the subject of the request by means of technology that permits the virtual presence of the person in the territory over which the foreign state has jurisdiction, or that permits the person to be heard and examined, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for the order.

Témoignage à distance

30.15 (1) Le ministre de la Justice, s'il autorise la demande présentée par un État étranger en vue de contraindre une personne à déposer relativement au comportement qui fait l'objet de la demande par l'intermédiaire de moyens technologiques qui permettent sa présence virtuelle sur le territoire de l'État, ou qui permettent de l'interroger, fournit au commissaire les documents ou renseignements nécessaires pour lui permettre de présenter une demande d'ordonnance.

Application for order

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* to a judge for an order for the taking of evidence or a statement from the person.

Demande

(2) Le commissaire ou son représentant autorisé présente à un juge une demande *ex parte* en vue de la délivrance d'une ordonnance pour contraindre la personne visée au paragraphe (1) à déposer.

Order for video link, etc.

30.16 (1) A judge to whom an application is made under subsection 30.15(2) may make an order for the taking of evidence or a statement from a person where the judge is satisfied that there are reasonable grounds to believe that

(*a*) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place; and

(*b*) the foreign state believes that the person's evidence or statement would be relevant to the investigation or proceedings in respect of the conduct referred to in paragraph (*a*).

Facteurs à considérer

30.16 (1) Le juge rend l'ordonnance demandée dans le cadre du paragraphe 30.15(2) s'il est convaincu qu'il existe des motifs raisonnables de croire :

a) d'une part, qu'un comportement qui fait l'objet de la demande présentée par l'État étranger a lieu, a eu lieu ou est sur le point d'avoir lieu;

b) d'autre part, que l'État étranger croit que la déposition de la personne sera utile à l'enquête ou aux procédures relatives à ce comportement.

Provisions of order

(2) An order made under subsection (1) shall order the person

(*a*) to attend at the place fixed by the judge for the taking of the evidence or statement by means of the technology and to remain in attendance until the person is excused by the authorities of the foreign state;

(*b*) to answer any questions put to the person by the authorities of the foreign state or by any person authorized by those authorities;

(*c*) to make a copy of a record or to make a record from data and to bring the copy or record, when appropriate; and

(*d*) to bring any record or thing in his or her possession or control, when appropriate, in order to show it to the authorities by means of the technology.

Conditions et modalités

(2) L'ordonnance enjoint à la personne :

a) de se présenter au lieu que le juge fixe pour la prise de la déposition par l'intermédiaire de moyens technologiques et de demeurer à la disposition de l'État étranger à moins qu'elle n'en soit excusée par les autorités de l'État;

b) de répondre aux questions que lui posent les autorités de l'État étranger ou la personne autorisée par cet État;

c) de faire, si c'est utile, une copie d'un document ou d'en établir un à partir de données et d'apporter la copie ou le document avec elle;

d) d'apporter avec elle, si c'est utile, tout document ou toute autre chose en sa possession ou sous son contrôle afin de les faire voir aux autorités par l'intermédiaire des moyens technologiques.

Order effective throughout Canada

(3) An order made under subsection (1) may be executed anywhere in Canada.

Exécution

(3) L'ordonnance peut être exécutée en tout lieu du Canada.

Terms and conditions of order

(4) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of the person named in it and of third parties.

Conditions et modalités

(4) Le juge peut assortir l'ordonnance des conditions et modalités qu'il estime indiquées, notamment quant à la protection des droits de la personne qu'elle vise ou des tiers.

Variation

(5) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

Modifications

(5) Le juge qui a rendu l'ordonnance ou un autre juge du même tribunal peut modifier les conditions et modalités de celle-ci.

Expenses

(6) A person named in an order made under subsection (1) is entitled to be paid the travel and living expenses to which the person would be entitled if the person were required to attend as a witness before the judge who made the order.

Frais

(6) La personne visée par l'ordonnance a droit au paiement de ses frais de déplacement et de séjour au même titre qu'un témoin assigné à comparaître devant le juge qui a rendu l'ordonnance.

Other laws to apply

30.17 (1) When a person gives evidence or a statement pursuant to an order made under subsection 30.16(1), the person shall give the evidence or statement as though he or she were physically before the court or tribunal outside Canada, in accordance with the laws of evidence and procedure applicable to that court or tribunal, but may refuse to give evidence or a statement, in whole or in part, if giving the evidence or statement would disclose information that is protected by the Canadian law of non-disclosure of information or privilege.

Application du droit étranger

30.17 (1) La personne qui dépose par suite d'une ordonnance rendue en vertu du paragraphe 30.16(1) le fait comme si elle se trouvait devant le tribunal étranger, conformément au droit de la preuve et de la procédure qui régit le tribunal, mais elle peut refuser de faire toute déclaration ou de produire tout élément de preuve qui communiqueraient des renseignements autrement protégés par le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges.

Statement of reasons for refusal

(2) A person named in an order made under subsection 30.16(1) who refuses to give evidence or a statement on the grounds that it would disclose information that is protected by the Canadian law of non-disclosure of information or privilege shall, within seven days, give to the judge who made the order or another judge of the same court a detailed statement in writing of the reasons on which the person bases each refusal.

Exposé des motifs de refus

(2) En cas de refus de faire une déclaration ou de produire un élément de preuve qui communiqueraient des renseignements autrement protégés par le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges, la personne visée par une ordonnance rendue en vertu du paragraphe 30.16(1) présente dans les sept jours, par écrit, au juge qui a rendu l'ordonnance ou à un autre juge du même tribunal, un exposé détaillé des motifs du refus.

Refusals

(3) A judge to whom a statement is given under subsection (2) shall determine whether the reasons for refusal are well-founded and, if the judge determines that they are not, the judge shall order that the person named in the order made under subsection 30.16(1) give the evidence or statement.

Détermination de la validité des refus : droit canadien

(3) Le juge qui reçoit l'exposé détermine la validité des motifs de refus; s'il les rejette, il ordonne à la personne visée par l'ordonnance de faire la déclaration ou de produire l'élément de preuve.

Contempt of court in Canada

(4) When a witness gives evidence under section 30.16, the Canadian law relating to contempt of court applies with respect to a refusal by the person to answer a question or to produce a record or thing as ordered by the judge under that section.

Outrage au tribunal

(4) Le droit canadien en matière d'outrage au tribunal s'applique à la personne qui, déposant dans le cadre de l'article 30.16, refuse de répondre à une question ou de produire tout document ou toute autre chose visés dans l'ordonnance du juge.

Arrest warrant

30.18 (1) The judge who made the order under subsection 30.11(1) or 30.16(1) or another judge of the same court may issue a warrant for the arrest of the person named in the order where the judge is satisfied, on an information in writing and under oath or solemn declaration, that

(*a*) the person did not attend or remain in attendance as required by the order or is about to abscond;

(*b*) the order was personally served on the person; and

(*c*) in the case of an order made under subsection 30.11(1), the person is likely to give material evidence and, in the case of an order made under subsection 30.16(1), the foreign state believes that the testimony of the person would be relevant to the investigation or proceedings in respect of the conduct.

Mandat d'arrestation

30.18 (1) Le juge qui a rendu l'ordonnance visée aux paragraphes 30.11(1) ou 30.16(1) ou un autre juge du même tribunal peut délivrer un mandat d'arrestation visant la personne qui a fait l'objet de l'ordonnance s'il est convaincu, par une dénonciation écrite faite sous serment ou affirmation solennelle, que les conditions suivantes sont remplies :

a) la personne ne s'est pas présentée ou ne demeure pas à disposition en conformité avec l'ordonnance, ou est sur le point de s'esquiver;

b) l'ordonnance a été signifiée personnellement à cette personne;

c) la personne rendra vraisemblablement, au titre du paragraphe 30.11(1), un témoignage important ou, au titre du paragraphe 30.16(1), un témoignage que l'État étranger croit utile à l'enquête ou aux procédures relatives au comportement.

Warrant effective throughout Canada

(2) A warrant issued under subsection (1) may be executed anywhere in Canada by any peace officer.

Exécution

(2) Le mandat d'arrestation peut être exécuté en tout lieu du Canada par tout agent de la paix.

Order

(3) A peace officer who arrests a person in execution of a warrant issued under subsection (1) shall, without delay, bring the person or cause the person to be brought before the judge who issued the warrant or another judge of the same court who may, to ensure compliance with the order made under subsection 30.11(1) or 30.16(1), order that the person be detained in custody or released on recognizance, with or without sureties.

Ordonnance

(3) L'agent de la paix qui arrête la personne en exécution du mandat la conduit ou la fait conduire immédiatement devant le juge qui a délivré le mandat ou un autre juge du même tribunal; ce juge peut alors, afin de faciliter l'exécution de l'ordonnance rendue en vertu des paragraphes 30.11(1) ou 30.16(1), ordonner que cette personne soit détenue ou libérée sur engagement, avec ou sans caution.

Copy of information

(4) A person who is arrested in execution of a warrant issued under subsection (1) is entitled to receive, on request, a copy of the information on which the warrant was issued.

Copie de la dénonciation

(4) La personne arrêtée en exécution d'un mandat délivré sous le régime du présent article a le droit de recevoir, sur demande, une copie de la dénonciation qui a donné lieu au mandat.

Lending Exhibits

Prêt de pièces

Approval of loan request

30.19 (1) If the Minister of Justice approves a request of a foreign state under an agreement to have an exhibit that was admitted in evidence in a proceeding in respect of an offence in a court in Canada or in a proceeding before the Tribunal lent to the foreign state, the Minister shall provide the Commissioner with any documents or information necessary to apply for a loan order.

Autorisation

30.19 (1) Le ministre de la Justice, s'il autorise la demande d'un État étranger faite dans le cadre d'un accord d'emprunter des pièces admises en preuve dans des procédures à l'égard d'une infraction devant un tribunal canadien ou dans une procédure devant le Tribunal, fournit au commissaire les documents ou renseignements nécessaires pour lui

permettre de présenter une demande d'ordonnance de prêt de pièces.

Application for loan order

(2) The Commissioner or the authorized representative of the Commissioner shall apply for a loan order in respect of the exhibit to the court that has possession of the exhibit, or to the Tribunal if it has possession of the exhibit, after having given reasonable notice to the parties to the proceedings and to

(*a*) the Attorney General of Canada, in the case of an application to the Federal Court;

(*b*) the attorney general of the province in which the exhibit is located, in the case of an application to a court other than the Federal Court; or

(*c*) the Chairman of the Tribunal, in the case of an application to the Tribunal.

Demande

(2) Le commissaire ou son représentant autorisé présente une demande en vue de la délivrance de l'ordonnance de prêt au tribunal qui a la possession de ces pièces ou au Tribunal, si c'est lui qui a la possession des pièces, après avoir donné un préavis suffisant aux parties aux procédures et :

a) au procureur général du Canada, s'il s'agit d'une demande à la Cour fédérale;

b) au procureur général de la province où se trouvent les pièces, dans le cas d'une demande à un autre tribunal;

c) au président du Tribunal, dans le cas d'une demande à celui-ci.

Contents of application

(3) An application made under subsection (2) must

(*a*) contain a description of the exhibit requested to be lent;

(*b*) designate a person or class of persons to whom the exhibit is sought to be given;

(*c*) state the reasons for the request and, if any tests are sought to be performed on the exhibit, contain a description of the tests and a statement of the place where they will be performed;

(*d*) state the place or places to which the exhibit is sought to be removed; and

(*e*) specify the time at or before which the exhibit is to be returned.

Contenu de la demande

(3) La demande comporte les éléments suivants :

a) la description des pièces demandées;

b) la désignation de la personne ou de la catégorie de personnes autorisées à recevoir les pièces;

c) un exposé des motifs de la demande et, le cas échéant, une description de l'expertise à laquelle on entend les soumettre et une indication du lieu où celle-ci doit être faite;

d) le ou les lieux où l'on entend transporter les pièces;

e) la durée maximale prévue du prêt.

Making of loan order

30.2 (1) If the court or the Tribunal, as the case may be, is satisfied that the foreign state has requested the loan for a fixed period and has agreed to comply with the terms and conditions that the court or Tribunal proposes to include in any loan order, the court or Tribunal may, after having considered any representations of the persons to whom notice of the application was given in accordance with subsection 30.19(2), make a loan order.

Délivrance

30.2 (1) Après avoir entendu les observations des personnes à qui un préavis a été donné en conformité avec le paragraphe 30.19(2), le tribunal ou le Tribunal, selon le cas, peut rendre l'ordonnance de prêt s'il est convaincu que l'État étranger désire emprunter les pièces en cause pour une période déterminée et accepte de se conformer aux conditions dont il entend assortir l'ordonnance.

Terms of loan order

(2) A loan order made under subsection (1) must

(*a*) contain a description of the exhibit;

Contenu de l'ordonnance

(2) L'ordonnance de prêt comporte les éléments suivants :

a) la description des pièces;

(*b*) order the person who has possession of the exhibit to give it to a person designated in the order or who is a member of a class of persons so designated;

(*c*) contain a description of any tests authorized to be performed on the exhibit, as well as a statement of the place where the tests must be performed;

(*d*) fix the place or places to which the exhibit may be removed; and

(*e*) fix the time at or before which the exhibit must be returned.

b) l'ordre à la personne en possession des pièces de les remettre à la personne désignée par l'ordonnance ou qui fait partie d'une catégorie de personnes ainsi désignées;

c) le cas échéant, la description de l'expertise à laquelle les pièces peuvent être soumises et une indication du lieu où celle-ci doit être faite;

d) le ou les lieux où les pièces peuvent être transportées;

e) la date limite à laquelle les pièces doivent être retournées.

Terms and conditions

(3) A loan order made under subsection (1) may include any terms or conditions that the court or the Tribunal considers desirable, including those relating to the preservation of the exhibit.

Conditions et modalités

(3) Le tribunal ou le Tribunal, selon le cas, peut assortir l'ordonnance de prêt des conditions et modalités qu'il estime indiquées, notamment quant à la conservation des pièces visées.

Variation of loan order

30.21 A court or the Tribunal may vary the terms and conditions of any loan order made by it.

Modifications

30.21 Le tribunal ou le Tribunal, selon le cas, peut modifier les conditions et modalités de l'ordonnance de prêt qu'il a rendue.

Copy of order to custodian

30.22 A copy of a loan order and of an order varying it shall be delivered by the Commissioner to the Minister of Justice and to the person who had possession of the exhibit when the loan order was made.

Remise

30.22 Le commissaire remet une copie de l'ordonnance de prêt de pièces ou d'une ordonnance de modification de celle-ci au ministre de la Justice et à celui qui avait la possession des pièces au moment où l'ordonnance originale a été rendue.

Presumption of continuity

30.23 The burden of proving that an exhibit lent to a foreign state pursuant to a loan order made under subsection 30.2(1) and returned to Canada is not in the same condition as it was when the loan order was made or that it was tampered with after the loan order was made is on the party who makes that allegation and, in the absence of that proof, the exhibit is deemed to have been continuously in the possession of the court that made the loan order or the Tribunal, as the case may be.

Présomption

30.23 La partie qui allègue qu'une pièce prêtée à un État étranger a été modifiée ou n'est pas dans l'état où elle était au moment où l'ordonnance a été rendue a la charge de le prouver; en l'absence de preuve à cet effet, la pièce en question est réputée avoir toujours été en la possession du tribunal qui a rendu l'ordonnance de prêt ou du Tribunal, selon le cas.

Appeal

Appel

Appeal on question of law

30.24 (1) An appeal lies, with leave, on a question of law alone, to the court of appeal, within the meaning of section 2 of the *Criminal Code*, from an order or decision of a judge or a court in Canada made under this Part, other than an order or decision of the Federal Court — Trial Division or a judge of that Court, if the application for leave to

Appel — question de droit

30.24 (1) Il peut être interjeté appel, avec son autorisation et sur une question de droit seulement, auprès de la cour d'appel au sens de l'article 2 du *Code criminel* de toute décision ou ordonnance qu'un juge ou un tribunal au Canada — autre qu'un juge de la Section de première instance de la Cour fédérale ou un juge de cette cour ou que le

appeal is made to a judge of the court of appeal within fifteen days after the order or decision.

Tribunal — rend en vertu de la présente partie, à la condition d'en demander l'autorisation à un juge de la cour d'appel dans les quinze jours suivant la décision ou l'ordonnance.

Appeal on question of law

(2) An appeal lies, with leave, on a question of law alone, to the Federal Court of Appeal, from any order or decision of the Federal Court — Trial Division or the Tribunal made under this Part, if the application for leave to appeal is made to a judge of that Court within fifteen days after the order or decision.

Appel — question de droit

(2) Il peut être interjeté appel, avec son autorisation et sur une question de droit seulement, auprès de la Cour d'appel fédérale de toute décision ou ordonnance qu'un juge de la Section de première instance de la Cour fédérale ou le Tribunal rend en vertu de la présente partie, à la condition d'en demander l'autorisation à un juge de la Cour d'appel fédérale dans les quinze jours suivant la décision ou l'ordonnance.

Evidence Obtained by Canada from Abroad

Demandes présentées par le Canada

Evidence

30.25 The Minister of Justice shall, on receiving evidence sent by a foreign state in response to a request made by Canada under an agreement, send it promptly to the Commissioner.

Transmission des éléments de preuve au commissaire

30.25 Il incombe au ministre de la Justice, sur réception d'éléments de preuve reçus dans le cadre d'une demande présentée par le Canada en vertu d'un accord, de les transmettre sans délai au commissaire.

Foreign records

30.26 (1) In a proceeding in respect of which Parliament has jurisdiction, a record or a copy of a record and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record, sent to the Minister of Justice by a foreign state in accordance with a Canadian request under an agreement, is not inadmissible in evidence by reason only that a statement contained in it is hearsay or a statement of opinion.

Documents

30.26 (1) Les documents — ou une copie de ceux-ci — ainsi que les affidavits, certificats ou autres déclarations relatifs à ces documents et faits par la personne qui en a la garde ou qui en a connaissance, transmis au ministre de la Justice par un État étranger en conformité avec une demande canadienne présentée sous le régime d'un accord, ne sont pas inadmissibles en preuve dans des procédures qui relèvent de la compétence du Parlement du seul fait qu'ils contiennent un ouï-dire ou expriment une opinion.

Probative value

(2) For the purpose of determining the probative value of a record or a copy of a record admitted in evidence under Part VII.1 or VIII, the court hearing the matter, or the Tribunal in proceedings before it, may examine the record or copy, receive evidence orally or by affidavit, or by a certificate or other statement pertaining to the record in which a person attests that the certificate or statement is made in conformity with the laws that apply to a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state, including evidence as to the circumstances in which the information con-

Force probante

(2) Le tribunal saisi, ou le Tribunal dans le cas de procédures relevant de lui, peut, afin de décider de la force probante d'un document — ou de sa copie — admis en preuve en vertu des parties VII.1 ou VIII, procéder à son examen ou recevoir une déposition verbale, un affidavit ou un certificat ou autre déclaration portant sur le document, fait, selon le signataire, conformément aux lois de l'État étranger, qu'il soit fait en la forme d'un affidavit rempli devant un agent de l'État, y compris une déposition quant aux circonstances de la rédaction, de l'enregistrement, de la mise en mémoire ou de la reproduction des renseignements contenus dans le document ou

tained in the record or copy was written, stored or reproduced, and may draw any reasonable inference from the form or content of the record or copy.

la copie, et tirer de sa forme ou de son contenu toute conclusion fondée.

Foreign things

30.27 In a proceeding in respect of which Parliament has jurisdiction, a thing and any affidavit, certificate or other statement pertaining to the thing made by a person in a foreign state as to the identity and possession of the thing from the time it was obtained until its sending to the Commissioner by the Minister of Justice in accordance with a Canadian request under an agreement, are not inadmissible in evidence by reason only that the affidavit, certificate or other statement contains hearsay or a statement of opinion.

Choses

30.27 Les choses ainsi que les affidavits, certificats ou autres déclarations les concernant faits par une personne à l'étranger et attestant de leur identité et de leur possession à compter de leur obtention jusqu'à leur remise au commissaire par le ministre de la Justice en conformité avec une demande canadienne présentée sous le régime d'un accord, ne sont pas inadmissibles en preuve dans des procédures qui relèvent de la compétence du Parlement du seul fait que les affidavits, certificats ou déclarations contiennent un ouï-dire ou expriment une opinion.

Status of certificate

30.28 An affidavit, certificate or other statement mentioned in section 30.26 or 30.27 is, in the absence of evidence to the contrary, proof of the statements contained in it without proof of the signature or official character of the person appearing to have signed it.

Admissibilité des affidavits, certificats, etc.

30.28 Les affidavits, certificats ou déclarations mentionnés aux articles 30.26 ou 30.27 font foi de leur contenu, sauf preuve contraire, sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

General

Dispositions générales

Confidentiality of foreign requests and evidence

30.29 (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person, except for the purposes of the administration or enforcement of this Act,

(*a*) the contents of a request made to Canada from a foreign state or the fact of the request having been made; or

(*b*) the contents of any record or thing obtained from a foreign state pursuant to a Canadian request.

Confidentialité des demandes et éléments de preuve étrangers

30.29 (1) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la présente loi de communiquer ou de permettre que soient communiqués à une autre personne, sauf dans le cadre de l'application ou du contrôle d'application de la présente loi :

a) la teneur d'une demande présentée au Canada par un État étranger ou l'existence de celle-ci;

b) la teneur des documents ou autres choses obtenus d'un État étranger en vertu d'une demande canadienne.

Confidentiality of Canadian evidence

(2) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person, except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act, any information obtained under section 30.06 or 30.11.

Confidentialité des éléments de preuve canadiens

(2) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la présente loi de communiquer ou de permettre que soit communiqué à une autre personne, sauf à un organisme canadien chargé du contrôle d'application de la loi ou dans le cadre de l'application ou du contrôle d'application de la présente loi, l'un quelconque des renseignements obtenus en application des articles 30.06 ou 30.11.

Exception

(3) This section does not apply in respect of any information that has been made public.

Exception

(3) Le présent article ne s'applique pas aux renseignements qui sont devenus publics.

Records or other things already in Commissioner's possession

30.291 (1) For greater certainty, any evidence requested by a foreign state under an agreement may be obtained for the purposes of giving effect to the request only in accordance with the agreement and the procedure set out in this Part, even in the case of records or other things already in the possession of the Commissioner.

Documents ou autres choses déjà en la possession du commissaire

30.291 (1) Il est entendu que les éléments de preuve faisant l'objet d'une demande faite sous le régime d'un accord ne peuvent être obtenus pour donner suite à la demande qu'en conformité avec l'accord et les modalités prévues à la présente partie même s'il s'agit de documents ou d'autres choses déjà en la possession du commissaire.

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

Exception

(2) Le présent article ne s'applique ni à l'égard de renseignements qui sont devenus publics ni à l'égard de renseignements dont la communication a été autorisée par la personne les ayant fournis.

Preservation of informal arrangements

30.3 Nothing in this Part shall be construed so as to abrogate or derogate from any arrangement or agreement, other than an agreement under this Part, in respect of cooperation between the Commissioner and a foreign authority.

Maintien des autres arrangements de coopération

30.3 La présente partie n'a pas pour effet de porter atteinte aux accords autres que ceux visés par la présente partie, ou aux ententes, visant la coopération entre le commissaire et une autorité étrangère.

1990, c. 37, s. 29

4. Subsection 32(3) of the French version of the Act is replaced by the following:

1990, ch. 37, art. 29

4. Le paragraphe 32(3) de la version française de la même loi est remplacé par ce qui suit :

Traités

(3) Ces ordonnances ne peuvent être rendues que si elles sont compatibles avec les traités, conventions, arrangements ou engagements concernant des brevets d'invention, des marques de commerce, des droits d'auteur ou des topographies de circuits intégrés conclus avec tout pays étranger et auxquels le Canada est partie.

Traités

(3) Ces ordonnances ne peuvent être rendues que si elles sont compatibles avec les traités, conventions, arrangements ou engagements concernant des brevets d'invention, des marques de commerce, des droits d'auteur ou des topographies de circuits intégrés conclus avec tout pays étranger et auxquels le Canada est partie.

1999, c. 2, s. 10(1)

5. (1) The portion of paragraph 33(1)(*b*) of the Act before subparagraph (i) is replaced by the following:

(*b*) in the case of an offence under section 52.1 or 53, if the offence is committed or continued,

1999, ch. 2, par. 10(1)

5. (1) Le passage de l'alinéa 33(1)*b*) de la même loi précédant le sous-alinéa (i) est remplacé par ce qui suit :

b) dans le cas d'une infraction aux articles 52.1 ou 53, si l'infraction est commise ou se poursuit :

1999, c. 2, s. 10(1)

(2) Subparagraph 33(1)(*b*)(ii) of the Act is replaced by the following:

(ii) one or more persons are likely to suffer damage from the commission of the offence that will be substantially greater than any damage that persons named in the application are likely to suffer from an injunction issued under this subsection in the event that it is

1999, ch. 2, par. 10(1)

(2) Le sous-alinéa 33(1)*b*)(ii) de la même loi est remplacé par ce qui suit :

(ii) ou bien une ou plusieurs personnes subiront vraisemblablement, du fait de la perpétration de l'infraction, des dommages qui seront sensiblement plus graves que ceux que subira vraisemblablement une personne nommément désignée dans la demande du fait d'une injonction

subsequently found that an offence under section 52.1 or 53 has not been committed, was not about to be committed and was not likely to be committed.

prononcée en vertu du présent paragraphe s'il est ultérieurement constaté qu'une infraction aux articles 52.1 ou 53 n'a pas été commise, n'était pas sur le point d'être commise et n'allait vraisemblablement pas être commise.

1999, c. 2, s. 10(1)

(3) The portion of subsection 33(1.1) of the Act before paragraph (*b*) is replaced by the following:

1999, ch. 2, par. 10(1)

(3) Le passage du paragraphe 33(1.1) de la même loi précédant l'alinéa *b*) est remplacé par ce qui suit :

Deceptive telemarketing or notice

(1.1) An injunction issued in respect of an offence under section 52.1 or 53 may forbid any person from supplying to another person a product that is or is likely to be used for the commission or continuation of such an offence, where the person being supplied or, in the case of a corporation, any of its officers or directors was previously

Télémarketing ou documentation trompeuse

(1.1) L'injonction prononcée relativement à une infraction aux articles 52.1 ou 53 peut interdire à quiconque de fournir à une autre personne un produit qui est ou sera vraisemblablement utilisé pour la perpétration ou la continuation d'une telle infraction dans le cas où cette personne ou, dans le cas d'une personne morale, un dirigeant ou un administrateur de celle-ci a été antérieurement :

(*a*) convicted of an offence under section 52.1 or 53 or an offence under section 52 in respect of conduct prohibited by section 52.1 or 53; or

a) soit condamné pour infraction aux articles 52.1 ou 53 ou à l'article 52 pour des actes interdits par les articles 52.1 ou 53;

6. The Act is amended by adding the following after section 52.1:

6. La même loi est modifiée par adjonction, après l'article 52.1, de ce qui suit :

Deceptive notice of winning a prize

53. (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

Documentation trompeuse

53. (1) Nul ne peut, pour promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, envoyer ou faire envoyer par la poste, par courriel ou par tout autre mode de communication un avis ou toute documentation — quel que soit leur support —, si l'impression générale qui s'en dégage porte le destinataire à croire qu'il a gagné, qu'il gagnera — ou qu'il gagnera s'il accomplit un geste déterminé — un prix ou autre avantage et si on lui demande ou on lui donne la possibilité de payer une somme d'argent, engager des frais ou accomplir un acte qui lui occasionnera des frais.

Non-application

(2) Subsection (1) does not apply if the recipient actually wins the prize or other benefit and the person who sends or causes the notice or document to be sent

Non-application

(2) Le paragraphe (1) ne s'applique pas si le destinataire gagne véritablement le prix ou autre avantage et si l'auteur de l'avis ou de la documentation, à la fois :

(*a*) makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;

a) convenablement et loyalement, donne le nombre et la valeur approximative du prix ou autre avantage, indique la répartition des prix par région et mentionne tout fait qui modifie d'une façon importante, à sa connaissance, les chances de gain;

(*b*) distributes the prizes or benefits without unreasonable delay; and

(*c*) selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill, in any area to which the prizes or benefits have been allocated.

b) remet les prix ou avantages dans un délai raisonnable;

c) choisit les participants ou distribue les prix ou avantages au hasard — ou selon l'adresse des participants — dans la région à laquelle des prix ou avantages ont été attribués.

Due diligence

(3) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

Disculpation

(3) La personne accusée d'avoir commis une infraction au présent article ne peut en être déclarée coupable si elle établit qu'elle a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Offences by employees or agents

(4) In the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

Infractions par les employés ou mandataires

(4) Dans la poursuite d'une personne morale pour infraction au présent article, il suffit d'établir que l'infraction a été commise par un employé ou un mandataire de la personne morale, que l'employé ou le mandataire soit identifié ou non, sauf si la personne morale établit qu'elle a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Liability of officers and directors

(5) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

Personnes morales et leurs dirigeants

(5) En cas de perpétration par une personne morale d'une infraction au présent article, ceux de ses dirigeants ou administrateurs qui sont en mesure de fixer ou d'influencer les orientations qu'elle suit relativement aux actes interdits par le présent article sont considérés comme des coauteurs de l'infraction et encourent la peine prévue pour cette infraction, que la personne morale ait été ou non poursuivie ou déclarée coupable, sauf si le dirigeant ou l'administrateur établit qu'il a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Offence and punishment

(6) Any person who contravenes this section is guilty of an offence and liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both; or

(*b*) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Infraction et peine

(6) Quiconque contrevient au présent article commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Sentencing

(7) In sentencing a person convicted of an offence under this section, the court shall consider, among other factors, the following aggravating factors:

(*a*) the use of lists of persons previously deceived by the commission of an offence under section 52.1 or this section;

(*b*) the particular vulnerability of recipients of the notices or documents referred to in subsection (1) to abusive tactics;

(*c*) the amount of the proceeds realized by the person from the commission of an offence under this section;

(*d*) previous convictions of the person under section 52 or 52.1 or this section; and

(*e*) the manner in which information is conveyed, including the use of abusive tactics.

Détermination de la peine

(7) Pour la détermination de la peine à infliger au contrevenant, le tribunal prend notamment en compte les circonstances aggravantes suivantes :

a) l'utilisation de listes de personnes trompées antérieurement lors de la perpétration d'une infraction à l'article 52.1 ou au présent article;

b) le fait que les destinataires des avis ou de la documentation sont des personnes vulnérables aux tactiques abusives;

c) le montant des recettes du contrevenant qui proviennent de la perpétration d'infractions au présent article;

d) les condamnations antérieures du contrevenant pour infraction aux articles 52 ou 52.1 ou au présent article;

e) la façon de communiquer l'information, notamment l'utilisation de tactiques abusives.

7. The Act is amended by adding the following after section 65:

7. La même loi est modifiée par adjonction, après l'article 65, de ce qui suit :

Contravention of subsection 30.06(5)

65.1 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, contravenes subsection 30.06(5) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both.

Contravention du paragraphe 30.06(5)

65.1 (1) Quiconque, sans motif valable et suffisant dont la preuve lui incombe, contrevient au paragraphe 30.06(5) commet une infraction et encourt, sur déclaration de culpabilité par mise en accusation ou par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

Destruction or alteration of records or things

(2) Every person who destroys or alters, or causes to be destroyed or altered, any record or thing in respect of which a search warrant is issued under section 30.06 or that is required to be produced pursuant to an order made under subsection 30.11(1) or 30.16(1) is guilty of an offence and liable

(*a*) on conviction on indictment to a fine not exceeding $50,000 or to imprisonment for a term not exceeding five years, or to both; or

(*b*) on summary conviction to a fine not exceeding $25,000 or to imprisonment for a term not exceeding two years, or to both.

Destruction ou modification de documents ou autres choses

(2) Quiconque détruit ou modifie, ou encore fait détruire ou modifier, un document ou une autre chose qui sont visés à un mandat délivré en application de l'article 30.06 ou dont la production est exigée conformément à une ordonnance prévue aux paragraphes 30.11(1) ou 30.16(1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, une amende maximale de 50 000 $ et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 25 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

Refusal after objection overruled

65.2 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, refuses to answer a question or to produce a record or thing to the person designated under paragraph 30.11(2)(*c*) after a judge has ruled against the objection under paragraph 30.11(8)(*a*), is guilty of an offence and liable on conviction on indictment or on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both.

Refus d'obtempérer

65.2 (1) Commet une infraction et encourt, sur déclaration de culpabilité par mise en accusation ou par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines, la personne qui, après une décision défavorable d'un juge à l'égard du refus aux termes de l'alinéa 30.11(8)*a*), refuse, sans motif valable et suffisant dont la preuve lui incombe, de répondre à une question ou de remettre des documents ou autres choses à la personne désignée en conformité avec l'alinéa 30.11(2)*c*).

Refusal where no ruling made on objection

(2) Every person is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both, who, without good and sufficient cause, the proof of which lies on that person, refuses to answer a question or to produce a record or thing to the person designated under paragraph 30.11(2)(*c*), where no ruling has been made under paragraph 30.11(8)(*a*),

(*a*) without giving the detailed statement required by subsection 30.11(9); or

(*b*) if the person was previously asked the same question or requested to produce the same record or thing and refused to do so and the reasons on which that person based the previous refusal were determined not to be well-founded by

(i) a judge, if the reasons were based on the Canadian law of non-disclosure of information or privilege, or

(ii) a court of the foreign state or by a person designated by the foreign state, if the reasons were based on a law that applies to the foreign state.

Refus d'obtempérer

(2) Commet une infraction et encourt, sur déclaration de culpabilité par mise en accusation ou par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines, la personne qui, lorsqu'aucune décision n'a été rendue aux termes de l'alinéa 30.11(8)*a*), refuse, sans motif valable et suffisant dont la preuve lui incombe, de répondre à une question ou de remettre des documents ou autres choses à la personne désignée en conformité avec l'alinéa 30.11(2)*c*) :

a) soit sans remettre l'exposé détaillé visé au paragraphe 30.11(9);

b) soit après que la question lui a déjà été posée ou qu'on lui a déjà demandé de remettre les documents ou autres choses et que les motifs de refus ont été rejetés :

(i) par le juge, s'ils sont fondés sur le droit canadien relatif à la non-divulgation de renseignements et à l'existence de privilèges,

(ii) par un tribunal d'un État étranger ou une personne désignée par celui-ci, s'ils sont fondés sur une règle de droit en vigueur dans cet État.

1999, c. 2, s. 21

8. Subsection 73(1) of the Act is replaced by the following:

1999, ch. 2, art. 21

8. Le paragraphe 73(1) de la même loi est remplacé par ce qui suit :

Jurisdiction of Federal Court

73. (1) Subject to this section, the Attorney General of Canada may institute and conduct any prosecution or other proceedings under section 34, any of sections 45 to 51 and section 61 or, where the proceedings are on indictment, under section 52, 52.1, 53, 55, 55.1 or 66, in the Federal Court — Trial Division, and

Compétence de la Cour fédérale

73. (1) Sous réserve des autres dispositions du présent article, le procureur général du Canada peut entamer et diriger toutes poursuites ou autres procédures prévues par l'article 34, l'un des articles 45 à 51, l'article 61 ou, lorsqu'il s'agit de procédures par mise en accusation, par les articles 52, 52.1, 53, 55,

for the purposes of the prosecution or other proceedings, the Federal Court — Trial Division has all the powers and jurisdiction of a superior court of criminal jurisdiction under the *Criminal Code* and under this Act.

55.1 ou 66, devant la Section de première instance de la Cour fédérale, et, à l'égard de telles poursuites ou autres procédures, la Section de première instance de la Cour fédérale possède tous les pouvoirs et la compétence d'une cour supérieure de juridiction criminelle sous le régime du *Code criminel* et de la présente loi.

1999, c. 2, s. 22

9. Subsection 74.07(2) of the Act is replaced by the following:

9. Le paragraphe 74.07(2) de la même loi est remplacé par ce qui suit :

1999, ch. 2, art. 22

Non-application

(2) Sections 74.01 to 74.06 do not apply in respect of conduct prohibited by sections 52.1, 53, 55 and 55.1.

(2) Les articles 74.01 à 74.06 ne s'appliquent pas aux actes interdits par les articles 52.1, 53, 55 et 55.1.

Non-application

1999, c. 2, s. 22

10. (1) Subsection 74.11(2) of the Act is replaced by the following:

10. (1) Le paragraphe 74.11(2) de la même loi est remplacé par ce qui suit :

1999, ch. 2, art. 22

Duration

(2) Subject to subsection (5), the order has effect, or may be extended on application by the Commissioner, for such period as the court considers necessary and sufficient to meet the circumstances of the case.

(2) Sous réserve du paragraphe (5), l'ordonnance — originale ou prorogée — a effet pour la durée que le tribunal estime nécessaire et suffisante pour parer aux circonstances de l'affaire; la prorogation est prononcée par le tribunal à la suite de la demande que présente le commissaire.

Durée d'application

1999, c. 2, s. 22

(2) Subsection 74.11(5) of the Act is replaced by the following:

(2) Le paragraphe 74.11(5) de la même loi est remplacé par ce qui suit :

1999, ch. 2, art. 22

Duration of *ex parte* order

(5) An order issued *ex parte* shall have effect for such period as is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (3), the court extends the order for such additional period as it considers necessary and sufficient.

(5) L'ordonnance rendue *ex parte* s'applique pour la période d'au plus sept jours qui y est fixée, sauf si, sur demande ultérieure présentée en donnant le préavis prévu au paragraphe (3), l'ordonnance est prorogée pour la période supplémentaire que le tribunal estime nécessaire et suffisante.

Durée d'application

Duty of Commissioner

(6) Where an order issued under this section is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 arising out of the conduct in respect of which the order was issued.

(6) Lorsqu'une ordonnance a force d'application aux termes du présent article, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête visée à l'article 10 à l'égard du comportement qui fait l'objet de l'ordonnance.

Obligations du commissaire

1999, c. 2, s. 22

11. Sections 74.12 and 74.13 of the Act are replaced by the following:

11. Les articles 74.12 et 74.13 de la même loi sont remplacés par ce qui suit :

1999, ch. 2, art. 22

Consent agreement

74.12 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part may sign a consent agreement.

74.12 (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie peuvent signer un consentement.

Consentement

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of a court against that person, and may include other terms, whether or not they could be imposed by the court.

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par un tribunal; il peut également comporter d'autres modalités, qu'elles puissent ou non être imposées par le tribunal.

Registration

(3) The consent agreement may be filed with the court for immediate registration.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du tribunal qui est tenu de l'enregistrer immédiatement.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the court.

Effet de l'enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du tribunal, notamment quant à l'engagement des procédures.

Rescission or variation of consent agreement or order

74.13 The court may rescind or vary a consent agreement that it has registered or an order that it has made under this Part, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the court finds that

(*a*) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(*b*) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Annulation ou modification du consentement ou de l'ordonnance

74.13 Le tribunal peut annuler ou modifier un consentement qu'il a enregistré ou une ordonnance qu'il a rendue en application de la présente partie lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

R.S., c. 19 (2nd Supp.), s. 45; 1999, c. 2, par. 37(*w*)

11.1 (1) The portion of subsection 75(1) of the Act before paragraph (*a*) is replaced by the following:

L.R., ch. 19 (2e suppl.), art. 45; 1999, ch. 2, al. 37*w*)

11.1 (1) Le passage du paragraphe 75(1) de la même loi précédant l'alinéa *a*) est remplacé par ce qui suit :

Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

Compétence du Tribunal dans les cas de refus de vendre

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

(2) Subsection 75(1) of the Act is amended by striking out the word "and" at the end of paragraph (*c*), by adding the word "and" at the end of paragraph (*d*) and by adding the following after paragraph (*d*):

(*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

(2) Le paragraphe 75(1) de la même loi est modifié par adjonction, après l'alinéa *d*), de ce qui suit :

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

(3) Section 75 of the Act is amended by adding the following after subsection (3):

(3) L'article 75 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Application

(4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

R.S., c. 19 (2nd Supp.), s. 45; 1999, c. 2, par. 37(*y*)

11.2 (1) The portion of subsection 77(2) of the Act before paragraph (*a*) is replaced by the following:

L.R., ch. 19 (2e suppl.), art. 45; 1999, ch. 2, al. 37*y*)

11.2 (1) Le passage du paragraphe 77(2) de la même loi précédant l'alinéa *a*) est remplacé par ce qui suit :

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

Exclusivité ou ventes liées

(2) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que l'exclusivité ou les ventes liées, parce que pratiquées par un fournisseur important d'un produit sur un marché ou très répandues sur un marché, auront vraisemblablement :

R.S., c. 19 (2nd Supp.), s. 45; 1999, c. 2, par. 37(*y*)

(2) Subsection 77(3) of the Act is replaced by the following:

L.R., ch. 19 (2e suppl.), art. 45; 1999, ch. 2, al. 37*y*)

(2) Le paragraphe 77(3) de la même loi est remplacé par ce qui suit :

Market restriction

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or

Limitation du marché

(3) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que la limitation du marché, en étant pratiquée par un important fournisseur d'un produit ou très répandue à l'égard d'un produit, réduira vraisemblablement et sensiblement la concurrence à l'égard de ce produit, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est demandée de se livrer désormais à la limitation du marché et prescrire toute autre mesure nécessaire, à son

stimulate competition in relation to the product.

(3) Section 77 of the Act is amended by adding the following after subsection (6):

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

11.3 Section 77 of the Act is amended by adding the following after subsection (3):

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

11.4 Section 79 of the Act is amended by adding the following after subsection (3):

Administrative monetary penalty

(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than $15 million.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

(*a*) the frequency and duration of the practice;

(*b*) the vulnerability of the class of persons adversely affected by the practice;

(*c*) injury to competition in the relevant market;

(*d*) the history of compliance with this Act by the entity; and

(*e*) any other relevant factor.

avis, pour rétablir ou favoriser la concurrence à l'égard de ce produit.

(3) L'article 77 de la même loi est modifié par adjonction, après le paragraphe (6), de ce qui suit :

Application

(7) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

11.3 L'article 77 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Dommages-intérêts

(3.1) Il demeure entendu que le présent article n'autorise pas le Tribunal à accorder des dommages-intérêts à la personne à laquelle une permission est accordée en vertu du paragraphe 103.1(7).

11.4 L'article 79 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Sanction administrative pécuniaire

(3.1) Si l'entité qui fait l'objet d'une ordonnance en vertu des paragraphes (1) ou (2) exploite un service intérieur, au sens du paragraphe 55(1) de la *Loi sur les transports au Canada*, le Tribunal peut aussi prononcer à son égard une sanction administrative pécuniaire maximale de 15 000 000 $, à payer selon les modalités qu'il peut préciser.

Facteurs à prendre en compte

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

a) la fréquence et la durée du comportement;

b) la vulnérabilité des catégories de personnes qui souffrent du comportement;

c) le tort causé à la concurrence sur le marché pertinent;

d) le comportement antérieur de l'entité, en ce qui a trait au respect de la présente loi;

e) toute autre circonstance pertinente.

Purpose of order

(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

11.5 The Act is amended by adding the following after section 79:

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

12. The Act is amended by adding the following before section 104:

Leave to make application under section 75 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(*a*) is the subject of an inquiry by the Commissioner; or

(*b*) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(*a*) or (*b*) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à encourager l'entité à adopter un comportement compatible avec les objectifs du présent article et non à la punir.

11.5 La même loi est modifiée par adjonction, après l'article 79, de ce qui suit :

Sanctions administratives pécuniaires impayées

79.1 Les sanctions administratives pécuniaires imposées au titre du paragraphe 79(3.1) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

12. La même loi est modifiée par adjonction, avant l'article 104, de ce qui suit :

Permission de présenter une demande en vertu des articles 75 ou 77

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance en vertu des articles 75 ou 77 pourrait être rendue.

Certificat du commissaire

(3) Quarante-huit heures après avoir reçu une copie de la demande, le commissaire remet au Tribunal un certificat établissant si les questions visées par la demande :

a) soit font l'objet d'une enquête du commissaire;

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente survenue entre le commissaire et la personne à l'égard de laquelle une ordonnance en vertu des articles 75 ou 77 pourrait être rendue.

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)*a*) ou *b*) ou portant sur une question qui fait l'objet d'une demande présentée au Tribunal par le commissaire en vertu des articles 75 ou 77.

Avis du Tribunal

(5) Le plus rapidement possible après avoir reçu le certificat du commissaire, le Tribunal avise l'auteur de la demande, ainsi que toute personne à l'égard de laquelle une ordonnance pourrait être rendue, du fait qu'il pourra ou non entendre la demande.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Observations

(6) Les personnes à qui une copie de la demande est signifiée peuvent, dans les quinze jours suivant la réception de l'avis du Tribunal, présenter par écrit leurs observations au Tribunal. Elles sont tenues de faire signifier une copie de leurs observations aux autres personnes mentionnées au paragraphe (2).

Granting leave to make application under section 75 or 77

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

Octroi de la demande

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

Durée et conditions

(8) Le Tribunal peut fixer la durée de validité de la permission qu'il accorde et l'assortir de conditions. La demande doit être présentée au plus tard un an après que la pratique visée dans la demande a cessé.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Décision

(9) Le Tribunal rend une décision motivée par écrit et en fait parvenir une copie à l'auteur de la demande, au commissaire et à toutes les personnes visées au paragraphe (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

Limite applicable au commissaire

(10) Le commissaire ne peut, en vertu des articles 75, 77 ou 79, présenter une demande fondée sur des faits qui seraient les mêmes ou essentiellement les mêmes que ceux qui ont été allégués dans la demande de permission accordée en vertu du paragraphe (7) si la personne à laquelle la permission a été accordée a déposé une demande en vertu des articles 75 ou 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Application

(11) Le Tribunal ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

Enquête du commissaire

(12) Dans le cas où il a déclaré dans le certificat visé au paragraphe (3) que les questions visées par la demande font l'objet d'une enquête et que, par la suite, l'enquête est discontinuée pour une raison autre que la conclusion d'une entente, le commissaire est tenu, dans les meilleurs délais, d'en informer l'auteur de la demande.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) makes an application under section 75 or 77, the Commissioner may intervene in the proceedings.

Intervention du commissaire

103.2 Le commissaire est autorisé à intervenir devant le Tribunal dans les cas où une personne autorisée en vertu du paragraphe 103.1(7) présente une demande en vertu des articles 75 ou 77.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(*b*), issue an interim order

(*a*) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84; or

(*b*) to prevent the taking of measures under section 82 or 83.

Ordonnance provisoire

103.3 (1) Sous réserve du paragraphe (2), le Tribunal peut, sur demande *ex parte* du commissaire dans laquelle il atteste qu'une enquête est en cours en vertu de l'alinéa 10(1)*b*), rendre une ordonnance provisoire pour interdire :

a) soit la poursuite d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu des articles 75 à 77, 79, 81 ou 84;

b) soit la prise de mesures visées aux articles 82 ou 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(*a*) or (*b*) and that, in the absence of an interim order,

(*a*) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

(*b*) a person is likely to be eliminated as a competitor; or

(*c*) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

Restriction

(2) Le Tribunal peut rendre l'ordonnance s'il conclut que le comportement ou les mesures pourraient être du type visé aux alinéas (1)*a*) ou *b*) et qu'à défaut d'ordonnance, selon le cas :

a) la concurrence subira vraisemblablement un préjudice auquel le Tribunal ne pourra adéquatement remédier;

b) un compétiteur sera vraisemblablement éliminé;

c) une personne subira vraisemblablement une réduction importante de sa part de marché, une perte importante de revenu ou des dommages auxquels le Tribunal ne pourra adéquatement remédier.

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84 by an entity incorporated under the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit*

Consultation obligatoire

(3) Le commissaire consulte le ministre des Finances au sujet de la santé financière d'une entité constituée sous le régime de la *Loi sur les banques*, la *Loi sur les sociétés de fiducie et de prêt*, la *Loi sur les associations coopératives de crédit* ou la *Loi sur les sociétés d'assurances* avant de présenter à l'égard de

Associations Act or a subsidiary of such an entity, the Commissioner must consult with the Minister of Finance respecting the safety and soundness of the entity.

cette entité ou de l'une de ses filiales une demande d'interdiction de poursuite d'un comportement visé aux articles 75 à 77, 79, 81 ou 84.

Duration

(4) Subject to subsections (5) and (6), an interim order has effect for 10 days, beginning on the day on which it is made.

Durée de l'ordonnance

(4) Sous réserve des paragraphes (5) et (6), l'ordonnance est en vigueur pendant dix jours à compter de celui où elle est rendue.

Extension or revocation of order

(5) The Tribunal may, on application by the Commissioner on 48 hours notice to each person against whom the interim order is directed,

(*a*) extend the interim order once or twice for additional periods of 35 days each; or

(*b*) rescind the order.

Prorogation de l'ordonnance

(5) Le Tribunal peut, à la demande du commissaire, après avoir donné un avis de quarante-huit heures à chaque personne visée par l'ordonnance :

a) soit proroger l'ordonnance à deux reprises pour une période supplémentaire de trente-cinq jours chaque fois;

b) soit l'annuler.

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 35-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the interim order.

Demande de prolongation présentée au Tribunal

(5.1) Le commissaire peut, avant l'expiration de la deuxième période supplémentaire visée au paragraphe (5) ou de la période que le Tribunal fixe en vertu du paragraphe (7), demander au Tribunal une nouvelle prorogation de l'ordonnance provisoire.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the interim order is made.

Avis

(5.2) Un préavis de la demande que le commissaire présente en vertu du paragraphe (5.1) doit être donné à la personne visée par l'ordonnance au moins quarante-huit heures avant l'audition.

Extension of interim order

(5.3) The Tribunal may order that the effective period of the interim order be extended if

(*a*) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

(*b*) the information was requested during the initial period that the interim order had effect, within the first 35 days after an order extending the interim order under subsection (5) had effect, or within the first 35 days after an order extending the interim order made under subsection (7) had effect, as the case may be, and

Prolongation de l'ordonnance provisoire

(5.3) Le Tribunal peut ordonner que la période de validité de l'ordonnance provisoire soit prorogée si les conditions suivantes sont réunies :

a) le commissaire démontre que les renseignements nécessaires à l'enquête n'ont pas encore été fournis ou qu'un délai supplémentaire est nécessaire pour les étudier;

b) les renseignements ont été demandés au cours de la période initiale de validité de l'ordonnance provisoire, avant l'expiration de la première période supplémentaire visée au paragraphe (5) ou dans les trente-cinq premiers jours de validité d'une ordonnance de prolongation de l'ordonnance provisoire rendue en vertu du paragraphe (7) et que :

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(*c*) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under any section referred to in paragraph (1)(*a*) or (*b*).

(i) soit le commissaire a reçu l'engagement écrit portant que les renseignements en question lui seraient fournis,

(ii) soit les renseignements doivent être fournis au titre d'une ordonnance rendue en vertu de l'article 11;

c) les renseignements sont raisonnablement nécessaires pour déterminer s'il existe des motifs suffisants justifiant la présentation par le commissaire d'une demande en vertu de l'un des articles visés aux alinéas (1)*a*) ou *b*).

Terms

(5.4) An order extending an interim order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

Modalités

(5.4) L'ordonnance de prolongation visée au paragraphe (5.3) est en vigueur pendant la période que le Tribunal estime nécessaire pour permettre au commissaire de recevoir et étudier les renseignements visés à ce paragraphe.

Effect of application

(5.5) If an application is made under subsection (5.1), the interim order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

Conséquences

(5.5) Si une demande est présentée en vertu du paragraphe (5.1), l'ordonnance provisoire demeure en vigueur jusqu'à ce que le Tribunal décide d'accorder ou non une prolongation en vertu du paragraphe (5.3).

When application made to Tribunal

(6) If an application is made under subsection (7), an interim order has effect until the Tribunal makes an order under that subsection.

Durée de l'ordonnance en cas de contestation judiciaire

(6) En cas de présentation de la demande visée au paragraphe (7), l'ordonnance demeure en vigueur jusqu'à la date du prononcé de la décision du Tribunal.

Confirming or setting aside interim order

(7) A person against whom the Tribunal has made an interim order may apply to the Tribunal in the first 10 days during which the order has effect to have it varied or set aside and the Tribunal shall

(*a*) if it is satisfied that one or more of the situations set out in paragraphs (2)(*a*) to (*c*) existed or are likely to exist, make an order confirming the interim order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fix the effective period of that order for a maximum of 70 days, beginning on the day on which the order confirming the interim order is made; and

(*b*) if it is not satisfied that any of the situations set out in paragraphs (2)(*a*) to (*c*) existed or is likely to exist, make an order setting aside the interim order.

Modification ou annulation de l'ordonnance

(7) Toute personne faisant l'objet de l'ordonnance peut en demander la modification ou l'annulation au Tribunal pendant les dix premiers jours de validité de l'ordonnance. Le Tribunal :

a) confirme l'ordonnance, avec, le cas échéant, les modifications qu'il estime indiquées en l'occurrence, pour une période maximale de soixante-dix jours à compter du prononcé de sa décision, s'il est convaincu qu'une des situations prévues aux alinéas (2)*a*) à *c*) s'est produite ou se produira vraisemblablement;

b) annule l'ordonnance s'il n'est pas convaincu qu'une des situations prévues aux alinéas (2)*a*) à *c*) s'est produite ou se produira vraisemblablement.

Notice

(8) A person who makes an application under subsection (7) shall give the Commissioner 48 hours written notice of the application.

(8) Dans les quarante-huit heures suivant le moment où il présente sa demande au titre du paragraphe (7), le demandeur en avise par écrit le commissaire.

Avis

Representations

(9) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the interim order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

(9) Dans le cadre de l'audition de la demande visée au paragraphe (7), le Tribunal accorde au demandeur, au commissaire et aux personnes directement touchées toute possibilité de présenter des éléments de preuve et des observations sur l'ordonnance attaquée avant de rendre sa décision.

Possibilité de présenter des observations

Prohibition of extraordinary relief

(10) Notwithstanding section 13 of the *Competition Tribunal Act*, an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).

(10) Par dérogation à l'article 13 de la *Loi sur le Tribunal de la concurrence* mais sous réserve du paragraphe (7), l'ordonnance ne peut faire l'objet d'un appel ou d'une révision judiciaire.

Interdiction de recours extraordinaire

Duty of Commissioner

(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.

(11) Lorsqu'une ordonnance provisoire a force d'application, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête à l'égard du comportement qui fait l'objet de l'ordonnance.

Obligations du commissaire

R.S., c. 19 (2nd Supp.), s. 45; 1999, c. 2, par. 37(z.12)

13. (1) Subsection 104(1) of the Act is replaced by the following:

13. (1) Le paragraphe 104(1) de la même loi est remplacé par ce qui suit :

L.R., ch. 19 (2e suppl.), art. 45; 1999, ch. 2, al. 37z.12)

Interim order

104. (1) Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

104. (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75 ou 77, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.

Ordonnance provisoire

R.S., c. 19 (2nd Supp.), s. 45; 1999, c. 2, par. 37 (z.12)

(2) Subsection 104(3) of the Act is replaced by the following:

(2) Le paragraphe 104(3) de la même loi est remplacé par ce qui suit :

L.R., ch. 19 (2e suppl.), art. 45; 1999, ch. 2, al. 37z.12)

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

(3) Si une ordonnance provisoire est rendue en vertu du paragraphe (1) à la suite d'une demande du commissaire et est en vigueur, le commissaire est tenu d'agir dans les meilleurs délais possible pour terminer les procédures qui, sous le régime de la présente partie, découlent du comportement qui fait l'objet de l'ordonnance.

Obligation du commissaire

13.1 Section 104.1 of the Act is amended by adding the following after subsection (5):

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 30-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the temporary order.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the temporary order is made.

Extension of temporary order

(5.3) The Tribunal may order that the effective period of the temporary order be extended if

(*a*) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

(*b*) the information was requested within the initial period that the temporary order had effect, within the first 30 days after an order extending the temporary order under subsection (5) had effect, or within the first 30 days after an order extending the temporary order made under subsection (7) had effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(*c*) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under section 79.

Terms

(5.4) An order extending a temporary order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

13.1 L'article 104.1 de la même loi est modifié par adjonction, après le paragraphe (5), de ce qui suit :

Demande de prolongation présentée au Tribunal

(5.1) Le commissaire peut, avant l'expiration de la deuxième période supplémentaire visée au paragraphe (5) ou de la période que le Tribunal fixe en vertu du paragraphe (7), demander au Tribunal une nouvelle prorogation de l'ordonnance provisoire.

Avis

(5.2) Un préavis de la demande que le commissaire présente en vertu du paragraphe (5.1) doit être donné à la personne visée par l'ordonnance au moins quarante-huit heures avant l'audition.

Prolongation de l'ordonnance provisoire

(5.3) Le Tribunal peut ordonner que la période de validité de l'ordonnance provisoire soit prorogée si les conditions suivantes sont réunies :

a) le commissaire démontre que les renseignements nécessaires à l'enquête n'ont pas encore été fournis ou qu'un délai supplémentaire est nécessaire pour les étudier;

b) les renseignements ont été demandés au cours de la période initiale de validité de l'ordonnance provisoire, avant l'expiration de la première période supplémentaire visée au paragraphe (5) ou dans les trente premiers jours de validité d'une ordonnance de prolongation de l'ordonnance provisoire rendue en vertu du paragraphe (7) et que :

(i) soit le commissaire a reçu l'engagement écrit portant que les renseignements en question lui seraient fournis,

(ii) soit les renseignements doivent être fournis au titre d'une ordonnance rendue en vertu de l'article 11;

c) les renseignements sont raisonnablement nécessaires pour déterminer s'il existe des motifs suffisants justifiant la présentation par le commissaire d'une demande en vertu de l'article 79.

Modalités

(5.4) L'ordonnance de prolongation visée au paragraphe (5.3) est en vigueur pendant la période que le Tribunal estime nécessaire pour permettre au commissaire de recevoir et étudier les renseignements visés à ce paragraphe.

Effect of application

(5.5) If an application is made under subsection (5.1), the temporary order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

Conséquences

(5.5) Si une demande est présentée en vertu du paragraphe (5.1), l'ordonnance provisoire demeure en vigueur jusqu'à ce que le Tribunal décide d'accorder ou non une prolongation en vertu du paragraphe (5.3).

R.S., c. 19, (2nd Supp.), s. 45; 1999, c. 2, par. 37(z.13)

14. Sections 105 and 106 of the Act are replaced by the following:

L.R., ch. 19 (2e suppl.), art. 45; 1999, ch. 2, al. 37z.13)

14. Les articles 105 et 106 de la même loi sont remplacés par ce qui suit :

Consent agreement

105. (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3 or a temporary order under section 104.1, may sign a consent agreement.

Consentement

105. (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite d'une ordonnance provisoire rendue en vertu des articles 103.3 et 104.1 — peuvent signer un consentement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l'enregistrer immédiatement.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Effet de l'enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(*a*) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(*b*) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Annulation ou modification du consentement ou de l'ordonnance

106. (1) Le Tribunal peut annuler ou modifier un consentement ou une ordonnance rendue en application de la présente partie, à l'exception d'une ordonnance rendue en vertu des articles 103.3 ou 104.1 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

Directly affected persons

(2) A 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 may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

Personnes directement touchées

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

Consent agreement — parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75 or 77 and the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.

Consentement

106.1 (1) Lorsqu'une personne autorisée en vertu de l'article 103.1 présente une demande d'ordonnance au Tribunal en vertu des articles 75 ou 77, que cette personne et la personne à l'égard de laquelle l'ordonnance est demandée s'entendent sur son contenu et que l'entente est compatible avec les autres dispositions de la présente loi, un consentement peut être déposé auprès du Tribunal pour enregistrement.

Notice to Commissioner

(2) On filing the consent agreement with the Tribunal for registration, the parties shall serve a copy of it on the Commissioner without delay.

Signification au commissaire

(2) Les signataires du consentement en font signifier une copie sans délai au commissaire.

Publication

(3) The consent agreement shall be published without delay in the *Canada Gazette*.

Publication

(3) Le consentement est publié sans délai dans la *Gazette du Canada*.

Registration

(4) The consent agreement shall be registered 30 days after its publication unless a third party makes an application to the Tribunal before then to cancel the agreement or replace it with an order of the Tribunal.

Enregistrement

(4) Le consentement est enregistré à l'expiration d'un délai de trente jours suivant sa publication, sauf si, avant l'expiration de ce délai, un tiers présente une demande au Tribunal en vue d'annuler le consentement ou de le remplacer par une ordonnance du Tribunal.

Effect of registration

(5) Upon registration, the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Effet de l'enregistrement

(5) Une fois enregistré, le consentement a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

Commissioner may intervene

(6) On application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

Intervention du commissaire

(6) Le Tribunal peut, sur demande du commissaire, modifier ou annuler le consentement enregistré dans les cas où il conclut qu'il a ou aurait vraisemblablement des effets anti-concurrentiels.

Notice

(7) The Commissioner must give notice of an application under subsection (6) to the parties to the consent agreement.

Préavis

(7) Le commissaire fait parvenir aux signataires du consentement un préavis de la demande qu'il présente en vertu du paragraphe (6).

R.S., c. 19 (2nd Supp.), s. 45

15. The headings before section 125 of the Act are replaced by the following:

15. Les intertitres qui précèdent l'article 125 de la même loi sont remplacés par ce qui suit :

L.R., ch. 19 (2e suppl.), art. 45

PART X

GENERAL

PARTIE X

DISPOSITIONS GÉNÉRALES

Commissioner's Opinions

Avis du commissaire

Application for written opinion

124.1 (1) Any person may apply to the Commissioner, with supporting information, for an opinion on the applicability of any provision of this Act or the regulations to conduct or a practice that the applicant proposes to engage in, and the Commissioner may provide a written opinion for the applicant's guidance.

Demandes d'avis

124.1 (1) Toute personne peut, en fournissant les renseignements nécessaires, demander au commissaire de lui donner son avis sur l'applicabilité d'une disposition de la présente loi ou des règlements à un comportement ou une pratique qu'elle envisage de mettre en oeuvre; le commissaire peut alors lui remettre un avis écrit à titre d'information.

Opinion binding

(2) If all the material facts have been submitted by or on behalf of an applicant for an opinion and they are accurate, a written opinion provided under this section is binding on the Commissioner. It remains binding for so long as the material facts on which the opinion was based remain substantially unchanged and the conduct or practice is carried out substantially as proposed.

Valeur de l'avis

(2) L'avis lie le commissaire dans la mesure où tous les faits importants à l'appui d'une demande d'avis lui ont été communiqués et sont exacts, et tant que ni les faits eux-mêmes, ni la mise en oeuvre du comportement ou de la pratique envisagés ne font l'objet d'un changement important.

References to Tribunal

Renvois

Reference if parties agree

124.2 (1) The Commissioner and a person who is the subject of an inquiry under section 10 may by agreement refer to the Tribunal for determination any question of law, mixed law and fact, jurisdiction, practice or procedure, in relation to the application or interpretation of Part VII.1 or VIII, whether or not an application has been made under Part VII.1 or VIII.

Renvois consensuels

124.2 (1) Le commissaire et la personne visée par une enquête sous le régime de l'article 10 peuvent, d'un commun accord, soumettre au Tribunal toute question de droit, question mixte de droit et de fait ou question de compétence, de pratique ou de procédure liée à l'application ou l'interprétation des parties VII.1 ou VIII, qu'une demande ait été présentée ou non en vertu de l'une de ces parties.

Reference by Commissioner

(2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.

Renvois par le commissaire

(2) Le commissaire peut, en tout temps, soumettre au Tribunal toute question de droit, de compétence, de pratique ou de procédure liée à l'application ou l'interprétation des parties VII.1 à IX.

Reference by agreement of parties to a private action

(3) A person granted leave under section 103.1 and the person against whom an order is sought under section 75 or 77 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, if the Tribunal grants

Renvois par des parties privées

(3) Une personne autorisée en vertu de l'article 103.1 et la personne visée par la demande qu'elle présente en vertu des articles 75 ou 77 peuvent, d'un commun accord mais avec la permission du Tribunal, soumettre au Tribunal toute question de droit ou toute question mixte de droit et de fait liée à

them leave. They must send a notice of their application for leave to the Commissioner, who may intervene in the proceedings.

Reference procedure

(4) The Tribunal shall decide the questions referred to it informally and expeditiously, in accordance with any rules on references made under section 16 of the *Competition Tribunal Act*.

l'application ou l'interprétation de la partie VIII. Elles font parvenir un avis de leur demande de renvoi au commissaire, celui-ci étant alors autorisé à intervenir dans les procédures.

Procédure

(4) Le Tribunal tranche les questions qui lui sont soumises en vertu du présent article sans formalisme, en procédure expéditive, conformément aux règles sur les renvois prises en vertu de l'article 16 de la *Loi sur le Tribunal de la concurrence*.

Representations to Boards, Commissions or Other Tribunals

Observations aux offices fédéraux, commissions et autres tribunaux

R.S., c. 19, (2nd Supp.), Part I

COMPETITION TRIBUNAL ACT

LOI SUR LE TRIBUNAL DE LA CONCURRENCE

L.R., ch. 19 (2e suppl.), partie I

16. Paragraph 3(2)(*a*) of the *Competition Tribunal Act* is replaced by the following:

(*a*) not more than six members to be appointed from among the judges of the Federal Court — Trial Division by the Governor in Council on the recommendation of the Minister of Justice; and

16. L'alinéa 3(2)*a*) de la *Loi sur le Tribunal de la concurrence* est remplacé par ce qui suit :

a) d'au plus six membres nommés par le gouverneur en conseil sur recommandation du ministre de la Justice et choisis parmi les juges de la Section de première instance de la Cour fédérale;

1999, c. 2, s. 41

16.1 Subsection 8(1) of the Act is replaced by the following:

1999, ch. 2, art. 41

16.1 Le paragraphe 8(1) de la même loi est remplacé par ce qui suit :

Jurisdiction

8. (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

Compétence

8. (1) Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

17. The Act is amended by adding the following after section 8:

17. La même loi est modifiée par adjonction, après l'article 8, de ce qui suit :

Costs

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

Frais

8.1 (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

Payment

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

Award against the Crown

(3) The Tribunal may award costs against Her Majesty in right of Canada.

Costs adjudged to Her Majesty in right of Canada

(4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from Her Majesty in right of Canada in respect of the services so rendered.

Amounts to Receiver General

(5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.

18. Section 9 of the Act is amended by adding the following after subsection (3):

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

2000, c. 15. s. 16

19. Subsection 11(1) of the Act is replaced by the following:

Hearing of applications

11. (1) The Chairman of the Tribunal, sitting alone, or a judicial member designated by the Chairman, sitting alone, may hear and dispose of applications under subsection 4.1(2) or (4) or 100(1), section 103.1 or 103.3 or subsection 104(1) or 104.1(7) of the *Competition Act* and any related matters.

Détermination

(2) Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

Couronne

(3) Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.

Frais adjugés à Sa Majesté du chef du Canada

(4) Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou pour toute autre raison, admis à recouvrer de Sa Majesté du chef du Canada les frais pour les services ainsi rendus.

Versement au receveur général

(5) Les sommes d'argent ou frais accordés à Sa Majesté du chef du Canada sont versés au receveur général.

18. L'article 9 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Procédure sommaire

(4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la *Loi sur la concurrence* et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure.

Pouvoirs du juge

(5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.

2000, ch. 15, art. 16

19. Le paragraphe 11(1) de la même loi est remplacé par ce qui suit :

Demandes

11. (1) Le président, siégeant seul, ou un juge désigné par le président et siégeant seul, peut statuer sur les demandes d'ordonnance présentées en application des paragraphes 4.1(2) ou (4) ou 100(1), des articles 103.1 ou 103.3 ou des paragraphes 104(1) ou 104.1(7) de la *Loi sur la concurrence* ainsi que sur toute question afférente.

COMING INTO FORCE

Coming into force

20. The provisions of this Act, and the provisions of any Act as enacted by this Act, come into force on a day or days to be fixed by order of the Governor in Council.

ENTRÉE EN VIGUEUR

Entrée en vigueur

20. Les dispositions de la présente loi ou celles de toute autre loi édictées par elle entrent en vigueur à la date ou aux dates fixées par décret.

Published under authority of the Speaker of the House of Commons

Available from:
Public Works and Government Services Canada — Publishing,
Ottawa, Canada K1A 0S9

Publié avec l'autorisation du président de la Chambre des communes

En vente:
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Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

Government of Canada | Gouvernement du Canada

Competition Bureau

ENFORCEMENT GUIDELINES ON THE ABUSE OF DOMINANCE PROVISIONS

(Sections 78 and 79 of the *Competition Act*)

Canada

COMPETITION BUREAU

Competition Bureau

ENFORCEMENT GUIDELINES ON THE ABUSE OF DOMINANCE PROVISIONS

(Sections 78 and 79 of the *Competition Act*)

July 2001

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Cat. No. C2-566/2001
ISBN 0-662-65747-0
53377B

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EXECUTIVE SUMMARY

Purpose and Scope of These Guidelines

As part of the Competition Bureau's ("the Bureau's") continuing efforts to ensure a transparent and predictable enforcement policy, these guidelines provide an outline of the Bureau's approach to enforcing the abuse of dominance provisions contained in sections 78 and 79 of the *Competition Act* ("the Act").

The guidelines are organized into five parts:

Part 1 — overview of the abuse of dominance provisions;
Part 2 — institutional framework for enforcement;
Part 3 — key elements of section 79;
Part 4 — anti-competitive acts; and
Part 5 — remedies.

What Constitutes "Abuse of a Dominant Position"?

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. These provisions, contained in sections 78 and 79, establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in anti-competitive activities that damage or eliminate competitors and that maintain, entrench or enhance their market power.

The Bureau's enforcement policy is to vigorously pursue cases that meet the elements of section 79. These guidelines make it clear, however, that section 79 is not intended to prohibit dominance or the presence of market power. Rather, the section seeks to address the abuse of a dominant market position to substantially prevent or lessen competition. While the ability to raise prices or maintain high prices usually indicates dominance or market power, high prices do not in themselves prohibit or constrain competition. These guidelines make it clear that in enforcing these provisions the Bureau will not attempt to tilt the playing field in favour of any particular market participant, nor will it otherwise protect competitors from the challenges of legitimate competition.

Subsection 79(1) sets out three essential elements, all of which must be found to exist by the Competition Tribunal ("the Tribunal") for it to grant an order. The Tribunal must find that:

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

How the Bureau Establishes Dominance

The first question, then, that the Bureau must answer when examining an allegation of abuse is: Does the person or firm substantially or completely control a "class or species of business"? For the purposes of enforcing section 79, the Bureau treats the element "class or species of business" as synonymous with the relevant product market. Likewise, it approaches the element of "throughout Canada or any area thereof" as synonymous with the relevant geographic market. In defining relevant markets, the Bureau employs a standard economic approach that takes into account a variety of factors, the most important of which are the availability of close substitutes, transportation costs and customer switching costs.

The Bureau considers the element of "substantially or completely control," or "dominance" as it is commonly referred to, to be synonymous with market power. The most straightforward indication of the existence of market power is the ability to profitably raise prices above competitive levels for a considerable

period of time. It is sometimes difficult to measure market power directly. Consequently, the Bureau collects evidence and assesses a number of qualitative and quantitative factors, including technological change, recent entry into or exit from the market, industry supply capacity, and countervailing market power on the part of customers and distributors. However, the Bureau places the greatest emphasis on the key factors of market share and barriers to entry.

The objective of this analysis is to determine the extent to which a firm or group of firms is constrained from pricing above competitive levels because of the presence of effective competition or the likelihood of competitive entry. In the case of entry barriers, the Bureau will assess not only whether entry is possible or likely, but also the time period required for an entrant to become a viable and effective competitor.

All other things being equal, the higher the market share held by a firm or group of firms acting together, the greater the likelihood they will possess market power. Given that the attempted exercise of market power may be mitigated by other factors, and that the dispersion of market shares among other competitors may be significant, there is not always a direct correlation between market share and dominance. However, the Bureau's general approach in evaluating allegations of abuse of dominance is as follows.

- A market share of less than 35 percent will generally not give rise to concerns of market power or dominance.
- A market share of 35 percent or more will generally prompt further examination.
- In the case of a group of firms alleged to be jointly dominant, a combined market share equal to or exceeding 60 percent will generally prompt further examination.

The reference to "one or more persons" in section 79 contemplates a situation where a group of firms, none of which on its own is dominant, may collectively possess market power. In assessing cases where joint dominance is alleged, the Bureau will consider:

(a) whether the group of firms collectively accounts for a large share of the relevant market;
(b) whether there is coordinated behaviour and whether such behaviour is anti-competitive;
(c) barriers to entry into the group, as well as barriers to entry into the relevant market;
(d) whether actions have been taken by members of the group to inhibit intra-group rivalry; and
(e) whether customers can exercise countervailing market power to offset the attempted abuse.

"Practice of Anti-Competitive Acts"

Having defined a relevant product and geographic market, and determined sufficient conditions to give rise to a finding of dominance, the Bureau must establish as the second element required under section 79 that the firm or firms in question have engaged in a "practice of anti-competitive acts." The word "practice" normally denotes more than an isolated act. Within the meaning of section 79 and as reflected in the jurisprudence, a "practice" can encompass one occurrence that is sustained or systematic over a period of time, or a number of different acts taken together that have the effect of substantially preventing or lessening competition.

Section 78 provides a descriptive list of potentially anti-competitive acts. None of these acts, in and of itself, necessarily constitutes an abuse of dominance. Accordingly, for an act to be considered anti-competitive, there must be some element of anti-competitive design, purpose or object that is predatory, exclusionary or disciplinary.

The anti-competitive acts listed in section 78 are:

(a) margin squeezing by a vertically integrated supplier against a customer-competitor;
(b) acquisition by a supplier of a customer for the purpose of foreclosing a competitor;
(c) freight equalization on a competitor's plant to impede or eliminate competition;
(d) selective use of fighting brands to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor;
(f) buying up of products to prevent price erosion;
(g) adoption of incompatible specifications to prevent entry or eliminate a competitor;
(h) pressure on suppliers to sell only or primarily to certain customers;
(i) sale of articles below acquisition costs to discipline or eliminate a competitor;
(j) certain acts or conduct of a person operating a domestic air service; and
(k) denial of access to or refusal to supply on reasonable commercial terms, by a person operating a domestic air service, facilities or services that are essential to the operation in a market of an air service.[1]

The list of anti-competitive acts in section 78 is not exhaustive. In a number of cases, the Bureau has alleged, and the Tribunal has accepted, that practices not included in section 78 constituted anti-competitive acts that can be addressed under section 79. For example, contractual arrangements between suppliers and customers have been found to create exclusivity that forecloses market access to competitors. In addition to the discussion of anti-competitive acts that appears in Part 4 of these guidelines, Appendix III deals specifically with anti-competitive margin squeezing by vertically integrated suppliers.

The jurisprudence under section 79 has held that the element of anti-competitive intent or purpose can be established either with direct evidence or by inference, based on the likely effect of a practice on competition in the particular circumstances of a case.

Unlike the merger provisions of the Act, section 79 does not provide for an explicit efficiency defence in assessing acts that are considered to be anti-competitive, but that may enhance efficiency. Accordingly, where a practice of anti-competitive acts has been determined to meet the threshold of substantially lessening or preventing competition, the Bureau will attempt to resolve the competition issue with the party. If this is not possible, the Bureau will bring the matter before the Tribunal.

The Test of Substantial Prevention or Lessening of Competition

The meaning of "preventing or lessening competition substantially" is established in case law. The question is whether the anti-competitive acts engaged in by a firm or group of firms serve to preserve, entrench or enhance their market power. Focus is placed squarely on competition, rather than on individual competitors. In any given case, the degree of dominance, the nature and severity of the anti-competitive acts, and the degree of competition remaining in the market will all form part of the determination.

The Institutional Framework for Enforcement

The role of the Bureau is to carry out inquiries under the Act having regard to the public interest in competition. Under the Act, the Bureau does not have the authority to directly compel change in business behaviour. In order to do so, it must apply to the Tribunal and assume the role of litigant. In the case of section 79, the Bureau must provide evidence to satisfy the Tribunal that all of the elements of the section are met and that a remedial order is warranted.

During the course of an inquiry, the Bureau will usually present the parties with its concerns as to any contravention of the section. Parties whose conduct is the subject of inquiry are at liberty to propose an alternative means of dealing with the Bureau's competition concerns that does not require an application to the Tribunal.

Where the Bureau has grounds for an application to the Tribunal, a number of options are available. The Bureau may litigate a contested application.

1. On July 5, 2000, amendments to the *Competition Act* related to the airline industry came into force; on August 23, 2000, new airline regulations also came into effect. On February 8, 2001, the Bureau released for consultation its draft *Enforcement Guidelines on: the Abuse of Dominance in the Airline Industry*.

Alternatively, cases may be resolved on a consent order basis, where the firm or firms whose conduct is in question and the Bureau agree on a remedy to be submitted to the Tribunal for its approval.

Remedies

The abuse of dominance provisions grant broad powers of remedy to the Tribunal. Where the Tribunal finds that the elements of section 79 are met, it may make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively, if the Tribunal concludes that a prohibition order may not be adequate to restore competition, it may make an order directing any such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

Although the Tribunal has wide latitude to impose remedies under section 79, the section also contains a number of limitations, exceptions and clarifications with respect to orders of the Tribunal and applications by the Commissioner of Competition.

Conclusion

The Tribunal has, to date, rendered six decisions under the abuse of dominance provisions. These decisions provide jurisprudence on most of the key elements of section 79. However, there remain some areas, such as joint dominance and vertical squeezing, on which little or no jurisprudence exists.

Accordingly, the Bureau's approach in preparing these guidelines has been to both reflect the jurisprudence established under section 79 and to articulate the Bureau's enforcement position on aspects of the abuse of dominance provisions where there is no jurisprudence.

However, this document cannot provide guidance for every situation, and the circumstances of each case will ultimately determine how the Bureau will exercise its enforcement discretion. Pursuant to its Program of Advisory Opinions, the Bureau has historically provided its views on proposed actions by businesses. Consequently, anyone can seek advice on whether or not a proposed course of action would raise an issue under the Act.

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E-mail: **compbureau@ic.gc.ca**

PART 1: INTRODUCTION

1.1 Purpose of the Guidelines

The provisions of the *Competition Act* ("the Act") dealing with abuse of a dominant market position are, together with merger review and criminal conspiracy prohibitions, the cornerstones of Canadian competition policy legislation. These guidelines are intended to help the general public, business people, and their legal and economic advisors to better understand the intent of the abuse of dominance provisions and the general approach taken by the Competition Bureau ("the Bureau") to enforce these provisions.

Since these provisions came into effect in 1986, there have been a number of decisions by the Competition Tribunal ("the Tribunal"). As a result, there is a body of jurisprudence from the Tribunal on the key elements of the abuse of dominance provisions. However, there remain certain aspects of the law that the Tribunal has not yet had an opportunity to address in any of its decisions. The Bureau has therefore developed an enforcement approach for those aspects of the provisions where there is no jurisprudence available.

1.2 Organization of the Guidelines

These guidelines are organized into five parts and four appendixes as follows:

- Part 1 provides an introduction and an overview of the evolution of the abuse of dominance provisions.
- Part 2 sets out the institutional framework for enforcement of the provisions.
- Part 3 draws on the jurisprudence of the Tribunal to provide a detailed discussion of the key elements of section 79.
- Part 4 discusses the anti-competitive acts as set out in section 78.
- Part 5 deals with remedies available to the Tribunal under section 79.
- Appendix I contains the text of sections 78 and 79 and of other sections of the Act dealing with abuse of a dominant market position.
- Appendix II provides an overview of the essential elements established in the case law.
- Appendix III discusses the Bureau's approach to dealing with allegations of abuse of dominance in industries characterized by vertical integration and dual distribution.
- Appendix IV provides a brief summary of the cases that have been decided by the Tribunal.

1.3 Purpose of the Abuse of Dominance Provisions

The enactment of the Act in 1986 marked a significant change in the legislative treatment of monopolies and dominant firms. Prior to 1986, the *Combines Investigation Act* defined "monopoly" as a party or parties who substantially controlled a class or species of business and operated to the detriment or against the interest of the public. The *Combines Investigation Act* then created a "criminal offence of monopoly," as it was defined in the legislation. No legislative guidance on the issue of detriment was provided. Without such guidance, establishing proof of detriment to a criminal standard of reasonable doubt was exceedingly difficult. Over time, it became clear that dealing with the issue of abusive exercise of market power under criminal law was inappropriate.

The 1986 legislation moved the review of the activities of dominant firms and monopolies into the realm of civil law. Section 79 also clarified Parliament's intent that simply being

a dominant firm or even a monopoly, with the associated market power, is not in and of itself sufficient to warrant competition law intervention. Charging higher prices to customers, or offering lower levels of service and choice, than would be expected in a more competitive market does not in and of itself constitute an abuse of a dominant position.

Rather, the Tribunal has determined that an abuse occurs when a dominant firm or group of firms engages in conduct that constitutes exclusionary, disciplinary or predatory behaviour towards competitors or potential competitors, with the result that competition is prevented or lessened substantially.[2] This distinction is critical, as it is clear that the objective is to preserve competition within markets rather than to provide an umbrella of protection for individual competitors.

The objective of the abuse of dominance provisions is to create a market framework within which all firms have an opportunity to either succeed or fail on the basis of their ability to compete. Providing such a framework, however, does not mean establishing equality among competitors. Rather, the objective of the abuse provisions is to promote effective competition and not the interests of any one competitor or group of competitors. The provisions are not intended to be used to attempt to tilt the playing field in favour of market participants who, for example, lack the ability to compete with more efficient or better-managed rivals.

Competition policy exists to encourage competition rather than to penalize efficient, well-managed firms that engage in aggressive but legitimate competitive behaviour. In all markets some businesses will be better positioned than others to compete. Some may have superior products, more efficient distribution methods or greater marketing expertise. Firms may also employ different competitive strategies, including varying degrees of vertical integration. It is part of the normal competitive process that some firms will succeed while others will fail. The abuse provisions establish the bounds of competitive behaviour for dominant firms and provide for corrective action where such firms go beyond legitimate competitive behaviour in order to damage or eliminate competitors so as to maintain, entrench or enhance their market power.

To reach a determination regarding any alleged breach of the abuse of dominance provisions, the circumstances of the industry and the particular facts of each case must be investigated and carefully analysed. For example, anti-competitive acts employed by a firm with a relatively low market share in an industry with low or minimal barriers to entry would be unlikely to trigger an inquiry, or much less an application to the Tribunal. However, identical anti-competitive acts engaged in by a firm with a large share of the market in an industry with significant entry constraints could well trigger enforcement action by the Bureau. Therefore, in considering whether particular business conduct breaches the abuse of dominance provisions, it is necessary to evaluate the practices in question in the context of the structural and other characteristics specific to the market. In light of this, it is not possible in these guidelines to set hard and fast rules for all situations as to what would constitute an abuse of dominance. Nevertheless, the Bureau believes that, by drawing upon the existing jurisprudence and on the Bureau's experience in enforcing the abuse of dominance provisions, these guidelines will play a role in enhancing compliance with the Act and will further clarify how the Bureau will enforce the provisions.

2. *Canada (Director of Investigation and Research) v. NutraSweet Co.* [1990], 32 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *NutraSweet*].

PART 2: INSTITUTIONAL FRAMEWORK FOR ENFORCEMENT

2.1 Investigation and Adjudication

The *Competition Act* and the *Competition Tribunal Act*[3] create a clear separation between the functions of investigation and adjudication. The Commissioner of Competition[4] is responsible for inquiries under the Act and is provided with significant powers with which to carry them out.[5] The Competition Tribunal is responsible for adjudication of the civil provisions of the Act, including the abuse of dominance provisions.[6]

Only the Commissioner can make an application to the Tribunal for a remedial order. Likewise, the Tribunal can consider an issue under the Act only when it has received an application from the Commissioner. When an application has been filed with the Tribunal, the burden of proof is on the Commissioner to satisfy the Tribunal that all of the elements of section 79 are met and that an order of the Tribunal should be granted.[7] In other words, the Commissioner cannot directly compel change in business behaviour. The Commissioner must take on the role of litigant before the Tribunal and must produce evidence and prove that there are grounds for the making of an order.

2.2 The Examination/Inquiry Process

It is the duty of the Bureau to carry out inquiries on an impartial basis, having regard to the public interest in competition, as opposed to the effects on the private interests of market participants. Some complainants have misconstrued the purpose of the abuse of dominance provisions and attempted to seek protection from the impacts of legitimate market competition, or have otherwise attempted to assure their firm of a profitable position in the market. As indicated in Section 1.3 of these guidelines, this is not what the section is intended to accomplish. The Bureau pursues those complaints that meet the elements of the section and that raise a substantive issue of prevention or lessening of competition.

An application by the Commissioner to the Tribunal is preceded by an investigation or inquiry by the Bureau. Examinations under the Act typically begin with the receipt of a complaint. In abuse of dominance cases, complaints may be received from firms alleging that competitors' activities are inhibiting their ability to enter or compete in a market.

On receiving a complaint, the Bureau undertakes a preliminary examination to establish a factual basis to determine (i) whether there is a possible issue under the Act; (ii) whether grounds exist to pursue a formal inquiry under

3. Both of these statutes came into force in June 1986.
4. Known prior to the amendments to the *Competition Act* in March 1999 as the Director of Investigation and Research.
5. The Commissioner of Competition is appointed by the Governor in Council and, as head of the Competition Bureau, is responsible for administering and enforcing the *Competition Act*.
6. The Competition Tribunal is composed of judges of the Federal Court of Canada Trial Division, one of whom is Chair of the Tribunal, as well as lay members with expertise in the fields of business and economics.
7. The standard of proof required under the civil reviewable matters is "on a balance of probabilities."

the Act; and (iii) under which provisions of the Act the inquiry should proceed. The Commissioner orders an inquiry where he or she has reason to believe that grounds exist under Part VIII of the Act, which contains the abuse of dominance provisions. Once the inquiry has begun, formal powers of investigation may be used.[8]

Often, allegations of abuse of dominance can also be examined under other more specific civil and criminal provisions. The Commissioner's inquiries can be broad enough to consider possible contravention of the Act under a number of sections.[9] A final determination of which sections of the Act the Commissioner will proceed with will depend on the specific facts of the case. It should be noted, however, that a key feature of the abuse of dominance provisions is the breadth of possible remedies that can be obtained through an order by the Tribunal.

By using formal powers of investigation, the Commissioner may seek the authorization of the court to compel persons to provide the information required to complete the inquiry. Section 11 of the Act allows the Commissioner to obtain authorization from the court to compel the production of documents, written returns of information, and/or attendance of persons for an oral examination under oath. Section 15 provides for the search of premises and the seizure of evidence.

In the course of its inquiries, the Bureau will pursue various avenues of investigation to obtain all relevant information. This normally includes information in the possession of complainants, third party market participants, and the firm or firms that are the subject of the inquiry. This information is carefully analysed within the legal and economic framework of the legislation. Frequently, the Bureau will obtain specialized legal and economic advice or industry-specific expertise as part of its case assessment process. Where the evidence discloses that the Bureau has grounds for an application to the Tribunal, parties against whom an order would be sought are provided with a full opportunity to present information to the Bureau or to indicate what, if any, measures they may be prepared to undertake to address the competition concerns.

The inquiry process is governed by a number of safeguards, checks and balances. Subsection 10(3) of the Act requires that all inquiries be conducted in private. In addition, the Commissioner can only exercise formal powers of investigation by obtaining the prior authority of the courts to do so. The need to follow due process, the complexity of the issues, the volume of information and the degree of analysis required by the Bureau to make proper decisions on the disposition of inquiries combine to make the inquiry process both time-consuming and resource-intensive.

8. In addition to the authority of the Commissioner to commence an inquiry, section 9 of the *Competition Act* provides that six Canadian residents may apply to the Commissioner for an inquiry. Further, section 10 provides for the Minister of Industry to direct the Commissioner to cause an inquiry to be made. However, the vast majority of inquiries under the *Competition Act* are initiated by the Commissioner where a complaint and preliminary examination provide the requisite "reasonable grounds to believe" that a breach of the Act has occurred.
9. For example, an allegation of abuse may involve predatory conduct (also covered under subsection 50(1) of the criminal provisions); the refusal to supply a customer, which can be dealt with under section 75 or section 61; or exclusive dealing, which, along with market restrictions and tied selling, can be dealt with under section 77.

2.3 Disposition of Examinations/Inquiries

The final disposition of an examination or an inquiry depends upon whether or not the evidence establishes that the elements of subsection 79(1) are present. If the Commissioner concludes that the evidence does not establish the elements of 79(1), the inquiry is discontinued. The Commissioner then produces a formal report for the Minister of Industry, indicating the information obtained and the reason for the discontinuance.[10] Following this, the target of the examination as well as the complainant(s) are notified in writing of the status of the inquiry. Where the Commissioner has grounds to do so, an application can be made to the Tribunal. Part 5 of these guidelines discusses the remedies available under section 79, as well as alternative approaches to resolving competition concerns without resorting to litigation before the Tribunal.

2.4 The Competition Tribunal Process

Where the Commissioner concludes that grounds exist for an application to the Tribunal for a remedial order, an application may be filed on a consent basis.[11] This happens only when the respondent and the Commissioner agree to submit to the Tribunal a proposed remedy to address the competition problem. Where an agreement on a consent order has not been reached with the respondent, the Commissioner will file an application with the Tribunal. Whether cases come before the Tribunal on a consent or contested basis, the rules of the Tribunal provide for an open public hearing process in which affected third parties can apply for intervener status. Proceedings are governed by the Competition Tribunal Rules, which include procedures for the appearance of witnesses as well as the production of documentary evidence.

10. Section 22 governs discontinuances. In the case of inquiries commenced as a result of an application under section 9, the Commissioner is required to inform the "six resident applicants" of the discontinuance and the reasons for it.
11. Section 105 gives the Competition Tribunal the discretion to grant an order agreed to by the Commissioner and respondent firms without hearing the full evidence as it would in a contested proceeding. In proceedings commenced on a consent basis, the Tribunal will grant the remedial order only if it is satisfied that the order is adequate to alleviate the substantial lessening of competition alleged by the Commissioner.

PART 3: THE ELEMENTS OF SUBSECTION 79(1)

3.1 Statutory Provision

Subsection 79(1) of the Act provides:

> Where, on application by the Commissioner, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Thus, section 79 sets out the three essential elements. Paragraph 79(1)(*a*) clearly focusses the provisions on market power — the concern that a firm or group of firms may be able to enhance or entrench its market power. The Bureau considers market power to be the ability to profitably maintain prices above competitive levels (or similarly restrict non-price dimensions of competition) for a significant period of time, normally one year. The law does not imply that the mere existence of market power will give rise to grounds for a remedial order by the Tribunal. A dominant position from which a firm charges prices above the competitive level is not by itself grounds for an application under section 79. The abuse of dominance provisions are not intended to regulate prices, but rather to ensure that anti-competitive conduct is properly addressed.

Paragraph 79(1)(*b*) further qualifies that the provisions refer to behaviour that is anti-competitive. It is the abuse of a dominant position that gives rise to scrutiny under the Act. Examples of business practices that constitute anti-competitive acts are listed in section 78. The list, although broad, is non-exhaustive. Accordingly, the Tribunal has the latitude to address anti-competitive acts not defined in section 78 and has done so in a number of cases. In order to help differentiate between legitimate competitive activity and that which constitutes abuse within the meaning of section 79, the practices listed in section 78 all involve an element of purpose, object or design to undermine competition. Part 4 of this document provides more detail on these anti-competitive acts.

Finally, paragraph 79(1)(*c*) imposes a requirement of proof that the business conduct has had, is having or is likely to have the effect of "preventing or lessening competition substantially." This places the focus squarely on adverse effects on competition, rather than on individual competitors.

3.2 The Elements

3.2.1 "One or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business"

This paragraph of the Act contains a number of elements that need to be separately clarified: (i) the existence of a class or species of business in Canada or any area thereof; (ii) the meaning of "control"; and (iii) the meaning of "one or more persons."

3.2.1(a) "Class or species of business" — Product Market Definition

A precondition for assessing market power is identifying existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition. The 1986 provisions adopted the term "class or species of business" rather than the term "market" in the context of the control element. The Bureau approach is to consider defining a "class or species of business" as synonymous with defining a relevant product.[12] The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring. As in other areas of competition law, the examination then turns to determining whether competition from other product sources limits the ability of the firm(s) in question to exercise market power. The analysis focusses on whether there are close substitutes for the product(s) in question, such that buyers would turn to these substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time. In general, a 5 percent real price increase above competitive levels lasting one year is considered a significant and non-transitory amount.[13]

This approach was accepted by the Tribunal in *Laidlaw*,[14] and later in *Nielsen*,[15] where the Tribunal set its basic approach to product market definition:

> Direct evidence of switching behaviour in response to small changes in relative price would provide proof of substitutability. Where price and quantity changes are not in evidence, as was true in the instant case, it is necessary to answer the question less directly by examining the evidence of both buyers and suppliers regarding the characteristics, the intended use and the price of [the product market in question].[16]

Price increases are not the only indicator used to define product markets.[17] The Bureau also looks at many qualitative factors when determining the appropriate product and geographic market definition under the abuse of dominance provisions. These include:

- **The views, strategies, behaviour and identity of buyers**. Whether buyers have substituted between products in the past and whether they plan on doing so in the future can indicate whether a price increase is sustainable.
- **Trade views, strategies and behaviour**. Third parties who know the industry in question may provide helpful information regarding past and likely future developments that help to define the relevant market.
- **End use**. Functional interchangeability is generally a necessary, but not a sufficient, condition that must be met for two products to warrant inclusion in the same relevant market.
- **Physical and technical characteristics**. In general, the greater the value that buyers place on the actual or perceived unique physical or technical characteristics of a product, the more likely it is that the product will be found to be in a distinct relevant market.

12. In *NutraSweet* the Tribunal concluded that delineating a "class or species of business" is equivalent to defining a relevant product market.
13. This is consistent with the approach to defining markets outlined in the Bureau's *Merger Enforcement Guidelines*.
14. *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* [1992], 40 C.P.R. (3d) 289 (Comp. Trib.) [hereinafter *Laidlaw*].
15. *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* [1995], 64 C.P.R. (3d) 216 (Comp. Trib.)[hereinafter *Nielsen*].
16. *Nielsen, ibid.* at 241.
17. A variety of quantitative techniques is available, including price correlation analysis, price elasticity analysis and diversion ratio analysis.

- **Switching costs**. The extent to which the transaction costs that buyers would have to incur in order to retool, repackage, adapt their marketing, breach a supply contract, learn new procedures and so forth may be sufficient to make switching an unlikely response to a significant and non-transitory price increase.
- **Price relationships and relative price levels**. The absence of a strong correlation in price movements between two products over a significant period of time generally suggests that the products are not in the same relevant market. Similarly, if the prices of one firm have historically constrained the price movements of another, this is an indication that the two firms' products compete in the same market.

3.2.1(b) "Throughout Canada or any area thereof" — Geographic Market Definition

An analysis of the universe of existing competition also has a geographic dimension. The Bureau considers the determination of "throughout Canada or any area thereof" as equivalent to defining the relevant geographic market.[18] This is consistent with the jurisprudence.[19]

In addition to drawing on some of the available quantitative techniques used in product market definition, the Bureau also considers certain qualitative factors when determining geographic market definition under the abuse of dominance provisions:

- **The views, strategies, behaviour and identity of buyers.** Considerations relating to convenience or the particular characteristics of the product (e.g. fragility, perishability) may influence a buyer's choice of supplier in the event of prices rising above competitive levels.
- **Trade views, strategies and behaviour**. Third parties who know the industry in question may provide helpful information regarding past and likely future industry developments that help to define the relevant market.
- **Switching costs.** The extent to which the transaction costs that buyers would have to incur in order to retool, repackage, adapt their marketing, breach a supply contract, learn new procedures and so forth may be sufficient to make switching an unlikely response to a significant and non-transitory price increase.
- **Transportation costs**. In general, where prices in a distant area have historically been higher than prices in the relevant geographic area by an amount that exceeds the transportation costs, this is usually an indication that the distant area is in a separate relevant market. However, this may not be conclusive, because the postulated significant and non-transitory price increase above competitive levels may elevate prices to a level above the distant price plus transportation costs. Where it is profitable for distant sellers to ship the product into the relevant market, it is generally assumed that the supplier would likely do so.
- **Price relationships and relative price levels**. The absence of a strong correlation in price movements between two geographic areas over a significant period of time generally suggests that the areas are not in the same relevant market. Similarly, if the prices of distant sellers have historically constrained the price movements of local sellers, this

18. Despite the reference to "throughout Canada or any area thereof," the relevant geographic market, from an antitrust perspective, may include territory outside of Canada.
19. In *NutraSweet*, the Tribunal stated that the relevant geographic market encompassed "an area [that] is sufficiently isolated from price pressures emanating from other areas so that its unique characteristics can result in prices differing significantly for any period of time from those in other areas." See *supra* note 2 at 20-21.

indicates that the distant and local sellers compete in the same market.

- **Shipment patterns**. Significant shipments from one region to another generally suggest that the two regions are in the same geographic market. However, past trading patterns can be a poor indicator of the extent to which sellers in one area constrain sellers in another area, particularly where there is an absence of shipping.
- **Foreign competition**. While the above-noted principles apply equally to domestic and international sources of competition, there may be other considerations when examining the influence of foreign-based suppliers, including tariffs, quotas, regulations, antidumping complaints or duties, government procurement policies, intellectual property laws, exchange rate fluctuations, and international product standardization.

3.2.1(c) The Cellophane Fallacy

In defining both product and geographic markets in the context of allegations of an abuse of dominance, the Bureau will assess the extent to which prices would likely be lower than prevailing prices in the absence of the alleged anti-competitive acts. This means that the current price may not be the appropriate tool to use in defining the relevant market in which the alleged dominant firm competes. It is possible that some products that appear to be in the market would not be included in the market at price levels that would have existed in the absence of the anti-competitive practices. To include these products in a market definition would effectively overstate the product market from an antitrust perspective. This is because these products do not discipline the market but rather enter the market only at price levels that are higher than normal competitive levels. A similar situation occurs in defining the geographic parameters of the market. If the market is defined in terms of price levels reflecting a dominant player, the geographic parameters of the market will be overstated, as they will include areas that could not be included if competitive price levels prevailed. This problem, associated with measuring markets where it is alleged that dominance prevails, was first identified in the context of a case in the United States involving the producers of cellophane. As a result, it is referred to as the "cellophane fallacy."

Recognizing that market power exists, the Bureau will define the parameters of the product and geographic markets by first estimating what the approximate price level for the product would be in the absence of the alleged anti-competitive practices. With this estimate, the relevant markets can be defined more accurately.

3.2.1(d) "Substantially or completely control" — Market Power

Once the universe of existing competitors is delineated, it is necessary to assess the extent to which these rivals constrain any market power that the dominant firm(s) might otherwise possess. The Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time.[20] Market power may also be defined with respect to a material, non-transitory reduction in other factors of competition such as service, quality, variety, advertising and innovation. For ease of reference, market power is referred to here with respect to price increases but should be understood to also include non-price factors of competition. The Bureau normally regards a "considerable" period of time for the purposes

20. This approach was adopted by the Tribunal in *NutraSweet*, *supra* note 2, *Laidlaw*, *supra* note 14, and *Nielsen*, *supra* note 15.

of establishing market power to be one year. This does not mean that the Bureau will not pursue an abuse of dominance case where the exercise of market power has been in place for less than one year. In such instances, there is an analysis of the likelihood that this exercise of market power would continue if the Bureau did not intervene.

The Bureau recognizes that it is difficult to measure market power directly; consequently, a number of indicators — both qualitative and quantitative — of market power are normally relied upon. These indicators include, but are not necessarily limited to, the following:

- market share, including share stability and distribution;
- barriers to entry, including the conduct allegedly engaged in by the dominant firm(s); and
- other market characteristics, including extent of technological change, extent of excess capacity, and customer or supplier countervailing power.

Market Share

The case law indicates that one of the most important factors of market power, along with barriers to entry, is market share.[21] There is not, however, a definitive numeric market share that implies that a firm has market power. The Bureau has adopted the view that high market share is usually a necessary, but not sufficient, condition to establish market power.

With the focus on control by a single firm or group of firms, the purpose of the market power analysis is to measure the extent to which existing competitors (identified in the market definition exercise described previously) and/or potential competitors (discussed in the following section on entry barriers) or any other relevant factors (such as countervailing customer power) are likely to constrain any exercise of market power. When evaluating joint control, the analysis must consider the factors surrounding the scope and the nature of the coordination of the group of firms that jointly controls the market.

All other things being equal, the larger the share of the market held by remaining competitors, the less likely it is that the firm or group of firms in question would have been, or would be, able to exercise market power. Where remaining competitors have a large market presence, customers could pursue several competitive alternatives if a firm or group of firms attempts to increase price. Defection of a significant fraction of a firm's customer base may be enough to make an increase in price above competitive levels unprofitable.[22]

In the contested abuse of dominance cases heard to date,[23] the market shares of the dominant firms were very high, suggesting that in these instances customers had few alternatives to choose from in the event that the dominant firm increased price above competitive levels or otherwise substantially lessened competition.[24] In *Tele-Direct*, the Tribunal

21. In *NutraSweet, supra* note 2 at 28, the Tribunal states: "While this [the ability to set prices above the competitive level] is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control will vary from case to case."
22. The ability to defect may be mitigated by the speed and ease with which rival firms are able to accommodate increased demand for their products as the market price increases.
23. The cases are *NutraSweet, supra* note 2; *Laidlaw, supra* note 14; *Nielsen, supra* note 15; and *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* [1997], 73 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *Tele-Direct*].
24. NutraSweet supplied 95 percent of the aspartame market in Canada. Laidlaw was found to have market shares between 87 percent and 100 percent in various commercial waste collection markets. Nielsen had a 100 percent share of the market for scanner-based market tracking services, providing a prima facie finding of market power, or control, that required evidence of the absence of barriers to entry for rebuttal.

stated that it would require evidence of "extenuating circumstances, in general, ease of entry" to overcome a prima facie determination of control based on market shares of 80 percent and higher in local telephone directory advertising markets. In *Laidlaw*, the Tribunal observed that a market share of less than 50 percent would not give rise to a prima facie finding of dominance, but this does not imply that market power could never be found below 50 percent.

The Bureau considers that a market share of less than 35 percent will normally not give rise to concerns that a firm has engaged, or is engaging in, a practice of anti-competitive acts that is preventing or lessening competition substantially in a market. If a firm has a 35 percent or higher market share, the Bureau will normally continue its investigation.

The two cases involving joint dominance[25] were dealt with under consent orders where the element of joint dominance was taken as a given. As a guide, the Bureau will continue its examination when the combined market share of the group of firms alleged to be jointly dominant is equal to or exceeds 60 percent.

In addition to the dominant firm's market share, the distribution of the remaining market across competitors is also relevant. Other things being equal, a firm's likelihood of being able to sustain prices above competitive levels increases with its market share, and as the disparity between its market share and the market shares of its competitors increases. Consider the position of a single firm that holds 55 percent of a relevant market. That firm's ability to exercise market power may be at a certain level when it faces one competitor with a 45 percent market share, but at a very different level when facing a disparate group of smaller rivals, no one of which has a share larger than 10 percent.

In summary, the Bureau's general approach with regard to market share is as follows:

- A market share of less than 35 percent will generally not give rise to concerns of market power or dominance.
- A market share of 35 percent or more will generally prompt further examination.
- In the case of a group of firms alleged to be jointly dominant, a combined market share of 60 percent or more will generally prompt further examination.

Barriers to Entry

As noted above, high market share is not in itself sufficient to prove market power. Without barriers to entry, any attempt by a firm with high market share to exercise market power is likely to be met with entry or expansion of existing firms such that the firm with the high market share loses enough customers to its rivals that it is not profitable to attempt to raise prices above competitive levels. In general, entry is likely to be prevented by the presence of absolute cost differences between the incumbent and the entrant, or the need to make investments that are not likely to be recovered if entry is unsuccessful. These investments are referred to as "sunk costs." As the Tribunal noted in *Laidlaw*, the term "barriers to entry" carries with it the connotation of sustainability.[26] An entrant must not only be able to enter, but be able to become a viable competitor.

25. *Canada (Director of Investigation and Research) v. Bank of Montreal* [1996], 68 C.P.R. (3d) 527 (Comp. Trib.) [hereinafter *Interac*] and *Canada (Director of Investigation and Research) v. AGT Director Ltd. et al.* [1994], C.C.T.D. No. 24 Trib. Dec. No CT9402/19 [hereinafter *CANYPS*].
26. *Laidlaw*, *supra* note 14 at 74.

As the market shares of the dominant firm(s) rise, the jurisprudence articulates a relationship between market shares and the standard of proof that will be used in assessing barriers to entry. The Tribunal notes this in both *Nielsen* and *Tele-Direct*. In *Tele-Direct*, where market shares were 80 percent or higher, the Tribunal stated that it would require evidence of "extenuating circumstances, in general, ease of entry" to overcome a prima facie determination of control.[27]

Let us consider some examples of the issues of entry analysis examined in past Tribunal cases. In *NutraSweet*, the Tribunal found that barriers to entry into the aspartame market were high because of process patents associated with producing aspartame held by incumbents (the patent for aspartame has now expired in Canada), significant economies of scale and sunk costs, and a long start-up time of about two years. In *Laidlaw*, the Tribunal found that barriers to entry into the commercial waste collection industry were not generally high; however, Laidlaw's various contracting practices had the effect of raising barriers to entry. In *Tele-Direct*, the Tribunal concluded that barriers to entry — aside from targeted "niche" entry — to the telephone directory market were significant, given the requirement of significant sunk costs and the reputation of the incumbent, as well as the incumbent's affiliation with telephone companies.

3.2.1(e) "One or more persons" — Joint Dominance

The wording of the Act clearly contemplates cases where a group of unaffiliated firms may possess market power even if no single member of the group is dominant by itself. In joint dominance cases, there are three sources of competition that can defeat the profitability of a price increase. These are competition from existing rivals outside the allegedly jointly dominant group; competition from potential rivals (i.e. entrants) outside the allegedly jointly dominant group; and competition from within the allegedly jointly dominant group. Given this, an additional element of proof is necessary to establish control, or market power, by more than one firm, as compared to the case of a single dominant firm.

The jurisprudence provides only limited insights into the additional evidence necessary to establish control by a group of firms. To date, there have been only two cases involving joint dominance under the Act.[28] In both instances, the fact that joint dominance existed was taken as a given and was supported by an explicit agreement.

A group of firms that collectively possesses market power may be able to coordinate its actions in a manner that allows the market price to be profitably increased above the non-coordinated price levels without the firms entering into an explicit agreement. Firms within an oligopoly normally base their decisions on how their rivals have behaved in the past. In addition, firms recognize that their current decisions may affect their rivals' future reactions. The fact that firms recognize these interactions over a longer time period results in competitive response strategies becoming more complex. It is possible for firms to act in a "consciously parallel" fashion, thereby achieving higher profits than would be the case in a competitive environment.

27. *Tele-Direct*, *supra* note 23 at 83.
28. *Interac* and CANYPS, *supra* note 25.

The jurisprudence in respect of the criminal conspiracy provisions is clear in not condemning "conscious parallelism."[29] The Bureau has adopted a similar position with respect to the abuse provisions, recognizing that something more than mere conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities.

The ability of a group of firms to coordinate actions without entering into an explicit agreement can be addressed under the abuse provisions. To infer control by a group of firms, the Bureau will consider the following:

(a) whether the group of firms collectively accounts for a large share of the relevant market;
(b) any evidence that the alleged coordinated behaviour is intended to increase price or is for the purpose of engaging in some form of anti-competitive act;
(c) any evidence of barriers to entry into the group, or barriers to entrants into the relevant market;
(d) any evidence based on the particular facts of the case that members of the group have acted to inhibit intra-group rivalry;[30] and
(e) any evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.

3.2.2 "Have engaged in or are engaging in a practice of anti-competitive acts"

The second element of the abuse of dominance provisions examines whether "that person or those persons have engaged in or are engaged in a practice of anti-competitive acts." As noted above, the law does not imply that the mere existence of market power will give rise to grounds for a remedial order by the Tribunal. Paragraph 79(1)(*c*) provides that substantial or complete control (assuming it has been shown to exist) raises competition issues only when it is used in a manner that lessens or prevents competition substantially. Thus, it is the abuse of a dominant position that gives rise to scrutiny under the Act.

Paragraph 79(1)(*b*) can be usefully divided into two parts. The first part involves showing that there is or has been "a practice." The second part requires that it be shown that there is an anti-competitive act(s). In regard to the latter part of the element, illustrative examples of business practices that could constitute anti-competitive acts are provided in section 78 (see Appendix I).

3.2.2(a) Practice

The term "practice" was considered in the context of single firm dominance in the *NutraSweet* case, where the Tribunal adopted a broad view of the term and established that different individual anti-competitive acts, taken together, may constitute a practice.[31]

The Bureau considers that while a practice is normally more than an isolated act, it may also constitute one occurrence that is sustained and systemic or that has had a lasting impact on the state of competition. For example, a long-term exclusionary contract may effectively prevent or lessen competition even though the contract itself constitutes only one episode of an anti-competitive act. In joint abuse cases, an assessment of whether the anti-competitive act(s)

29. See *R. v. Canadian General Electric* [1974] 17 C.C.C. (2d) 433 and *R. v. Armco* [1974] 21 C.C.C. (2d) 129.
30. Facilitating practices may be aimed at improving the ability of firms to coordinate their actions, or at detecting deviations from the terms of coordination.
31. *NutraSweet*, *supra* note 2 at 23.

is sustained and systemic, or has had a lasting impact on the state of competition, would need to consider the pattern of business conduct by several firms.

The wording of the statute clearly indicates that the negative effects on competition may be past, present or future effects. A remedial order may be sought in respect of past practices. However, under subsection 79(6), the Commissioner cannot bring an application before the Tribunal with regard to practices that have ceased for three years or more.

3.2.2(b) Anti-Competitive Acts

Section 78 of the Act provides a non-exhaustive list of anti-competitive acts. In addition to these acts, there is some jurisprudence on anti-competitive acts not listed in section 78. The acts in section 78 all lessen competition when engaged in by a dominant firm for an anti-competitive purpose. The Tribunal tests for anti-competitive purpose by asking whether an act is done for a predatory, exclusionary or disciplinary reason.[32] The purpose or intent of the act may be proven by an inference or a conclusion to be drawn from the facts established in evidence. The verbal or written statements of the personnel of a company are likely to establish subjective intent. Consideration of the act itself may lead to an inferred purpose, because persons are assumed to intend the necessary and foreseeable consequences of their acts. As the Tribunal noted in *Nutrasweet*,[33] in most cases the purpose of the act will have to be inferred from the circumstances.

Section 79 does not, as section 96 of the merger provisions does, provide for an explicit efficiency defence in assessing acts that are considered to be anti-competitive. In situations where the Bureau is satisfied that an anti-competitive act has been established that meets the threshold of substantially lessening or preventing competition in a market, the Bureau will try to resolve the competition issue with the party. If this effort is unsuccessful, the Bureau will bring the matter before the Tribunal.

3.2.3 "The practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market"

The requirement of "preventing or lessening competition substantially in a market" puts the focus on the impact on competition rather than on competitors. As the Tribunal noted in *Tele-Direct*, "seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the market are made better off."[34]

The meaning of "lessening competition substantially" is established in the case law. The Tribunal in *NutraSweet* stated that "in essence, the question to be decided is whether the anti-competitive acts engaged in by NSC [NutraSweet] preserve or add to NSC's market power."[35]

32. *NutraSweet*, *supra* note 2 at 34.
33. *NutraSweet*, *supra* note 2 at 35.
34. *Tele-Direct*, *supra* note 23 at 196.
35. *NutraSweet*, *supra* note 2 at 47.

3.2.4 Assessing the Impact of Anti-Competitive Acts

The preservation or enhancement of market power can be achieved in a number of ways. The Bureau follows a non-exhaustive approach in assessing the effect on competition of various types of anti-competitive acts.

A firm can maintain or enhance market power by erecting or strengthening barriers to entry,[36] thus inhibiting potential competitors from challenging the market power of the dominant firm. In examining anti-competitive acts that involve the creation or enhancement of barriers of this type, the Bureau will focus its analysis on determining the state of competition in the market in the absence of these acts. If it can be demonstrated that, but for the anti-competitive acts, an effective competitor or group of competitors would emerge within a reasonable period of time to challenge the dominance of the firm(s), the Bureau will conclude that the acts in question constitute a substantial lessening or prevention of competition. In assessing the potential to provide effective competition with the removal of the anti-competitive acts, the Bureau considers a reasonable time period to be two years, consistent with the time frame considered acceptable for entry into a market.[37]

36. In the *Laidlaw* case, the Tribunal concluded that Laidlaw's acquisition of 100 percent of the market in some instances, along with the exclusivity provisions and litigation threats that raised barriers to entry, lessened competition substantially. In *Nielsen*, the Tribunal noted that Nielsen's contracts with its customers were long term and came up for renewal on a staggered basis; an entrant could not obtain the access to a broad supply of data required for effective entry. The Tribunal found that the practices lessened competition substantially.
37. This two-year time frame is consistent with the approach to analysing barriers to entry adopted in the Bureau's *Merger Enforcement Guidelines*.

PART 4: ANTI-COMPETITIVE ACTS: SECTION 78

4.1 The Economics of Anti-Competitive Acts

The Tribunal has, in the NutraSweet decision, made it clear that anti-competitive acts involve actions that are predatory, exclusionary or disciplinary. The Bureau's approach in assessing potentially anti-competitive activities is consistent with the Tribunal's interpretation, but focusses on determining whether the activities in question fall into one or more of the following categories: (i) acts that raise rivals' costs (or reduce rivals' revenues) or that foreclose existing or potential rivals from key inputs or facilities; (ii) predatory conduct; and (iii) acts intended to facilitate coordinated behaviour among firms (facilitating practices).

Many of the actions described in section 78 may be undertaken by a dominant firm without resulting in a substantial lessening of competition. For example, vertical acquisitions, discussed in paragraph 78(1)(*b*), can be pro-competitive because the newly integrated firm becomes a more efficient and effective competitor. Similarly, the introduction by a dominant firm of a new brand in response to entry, described in paragraph 78(1)(*d*), may well be a competitive response.[38] Therefore, in each abuse of dominance case, once the Bureau has established that a dominant firm has engaged in acts that fall under section 78, or in other acts that are potentially anti-competitive, it will consider whether these acts will result in a substantial lessening of competition.

4.2 Raising Rivals' Costs and Market Foreclosure

A dominant firm may undertake a number of strategies that raise the costs of a rival, rendering the rival a less effective competitor. By increasing certain costs of a rival, the dominant firm can have the effect of inducing the rival to raise its prices, allowing the dominant firm to profitably increase its own prices. This strategy will be profitable provided the ultimate price increase raises the dominant firm's revenues sufficiently to offset the costs of the strategy. Similarly, the dominant firm may also undertake a number of strategies that have the effect of eliminating existing competitors from the market, or of deterring entry by excluding current or potential rivals from the inputs necessary to compete. This may involve raising a rival's costs to the point where the rival is unable to remain in the market, but may also include pre-empting key facilities to deter entry. Again, such a strategy will be profitable for the dominant firm, provided the costs of the strategy are offset by the ultimate increase in revenue, or by the prevention of lost revenues due to entry.

38. An example of the pro-competitive potential is found in the Tribunal's decision in *Tele-Direct*. The Commissioner had alleged that Tele-Direct had abused its dominant position by aggressively targeting rivals in markets where entry into the telephone directory services market had occurred. The Commissioner contended that Tele-Direct used its significant profits in other markets to subsidize intense, "near-predatory" competition in those markets involving entry. In rejecting this contention, the Tribunal stated that "targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not."

Section 78 describes various means by which a dominant firm can raise its rivals' costs or exclude a rival from inputs or facilities. Paragraph 78(1)(*a*) describes vertical margin squeezing, premised on the ability of the dominant firm(s), operating at two levels of the distribution system, to raise the price of an input to a competitor operating only at the downstream level. This is commonly known as a "price squeeze" and may increase rivals' costs. However, this is an enforcement concern only when it harms both competitors and competition. Vertically integrated firm(s) may be more efficient in distribution than non-integrated firms. As a result, it may be difficult for a non-integrated firm to compete with an integrated firm in the downstream market for reasons that have little to do with squeezing. For more discussion of this topic, refer to Appendix III.

Paragraph 78(1)(*b*) describes the acquisition by a supplier of a customer that would otherwise be available to a competitor of the supplier, or the acquisition by a customer of a supplier that would otherwise be available to a competitor of the customer, for the purposes of impeding or preventing a competitor's entry or eliminating a competitor. Acquisition of a supplier by a dominant firm can allow the dominant firm to raise the price a rival must pay to obtain a key input. Alternatively, acquisition of a supplier can allow the dominant firm to deny access to the newly acquired supplier's products, requiring a rival to purchase inputs from other suppliers at a higher price. Acquisition of a supplier can, through raising a rival's costs, make it a weaker competitor, and may even exclude a rival from the market. Acquisition of a supplier can also have the effect of prohibiting entry, by denying entrants the inputs needed to compete. (Acquisition of a customer by a supplier is dealt with in section 4.2.1.)

Paragraph 78(1)(*e*) identifies the pre-emption of scarce facilities or resources required by a competitor as an anti-competitive act. For example, the dominant firm(s) may be able to bid up the price of a scarce input to the point where entry is unprofitable. Such a strategy may be profitable to the dominant firm(s) despite the higher price it also pays for the input, because it avoids the dissipation of profits that entry would bring. Alternatively, the dominant firm(s) may raise its rival's costs by pre-empting low cost inputs, forcing the rival to use higher cost inputs. Even if this strategy did not result in the exit of the rival, it could be profitable for the dominant firm if it resulted in the rival being a less effective competitor, allowing the dominant firm to increase its own prices. Pre-emption could also take the form of acquisition or control of the supply of a necessary input in production, such as production sites or facilities that are not easily replicated.

Similarly, paragraph 78(1)(*f*) describes buying up a product to prevent the erosion of price levels. When applied to a wholesale or input market, such behaviour could have the result of raising a rival's costs by increasing or maintaining the prices at which the rival must purchase its inputs.

The same result can be obtained by the dominant firm requiring or inducing a supplier not to supply a rival, behaviour that is described in paragraph 78(1)(*h*). This can increase the price at which the rival purchases its inputs and may exclude the rival from the market completely. Effective exclusion may result from exclusive dealing contracts or from contractual practices that create exclusivity. The *Nielsen* case, for example, involved exclusive dealing. Retailers agreed to sell scanner-based data to Nielsen only, which, in combination with a number of other factors, foreclosed entrants from participating in the scanner-based tracking services market.

Other contractual practices that may effectively create exclusivity include requirements contracts, which set out that a party must purchase all its requirements from a particular vendor. A "meet-or-release" clause may also work to discourage a potential supplier from seeking to sell to a buyer, because the potential supplier anticipates that the current suppliers will match the price. A most-favoured-nation (MFN) clause, which requires the seller to give a buyer the best price it offers to any other customer, could also result in exclusivity.[39] Such contractual practices can also aid a dominant firm in excluding competitors, by keeping the dominant firm informed about attempted entry or any actions of its rivals.

Although not specifically listed in section 78, refusing to allow a competitor access to an incumbent's facility, or imposing restrictive terms of access, can constitute an anti-competitive act.

4.2.1 Access to Consumers — Reducing Rivals' Revenues

Besides excluding a rival from access to necessary inputs or facilities, a dominant firm can engage in activities that limit a rival's or potential entrant's ability to attract customers. A dominant firm can implement technology, contracts or other practices that make it costly for a customer to switch to an alternative supplier. By fostering such switching costs, a dominant firm may be able to foreclose entry or limit the expansion of a competitor.

Paragraph 78(1)(*g*) describes a dominant firm that adopts product specifications that are incompatible with the products of a rival. Such incompatibility can have the effect of limiting the number of customers willing to purchase from the rival. Similarly, long-term contracts with automatic renewal provisions may create switching costs, thus foreclosing entry. An exclusive buying arrangement with even a subset of the consumers may foreclose entry if, as a result, not enough customers are available to an entrant to justify entering.[40] Alternatively, acquisition of a customer by a supplier, as described in paragraph 78(1)(*b*), may foreclose entry by excluding a potential competitor from sufficient customers to make entry profitable.

Abuse of judicial processes may create switching costs, decreasing a rival's demand. In *Laidlaw*, Laidlaw apparently threatened both its customers and its rivals with litigation. Laidlaw on occasion told customers contemplating switching suppliers that it would sue them for breach of contract as it had done to other customers. In fact, there was no evidence that Laidlaw had ever brought suit. Rivals contemplating servicing Laidlaw's customers were also threatened with actions for inducing breach of contract. The Tribunal found that this behaviour constituted a practice of anti-competitive acts.

39. For example, in *Nielsen*, sellers of retail scanner data agreed to an MFN clause, which effectively committed the sellers not to sell the data to any other buyer, since another firm (as a duopolist) would not have been able to pay as much for the data as Nielsen (as a monopolist).

40. In *NutraSweet*, the Commissioner alleged that NutraSweet had engaged in a practice of anti-competitive acts by using its U.S. patent on aspartame to exclude rivals from Canada. The Tribunal found that NutraSweet had persuaded a Canadian customer of aspartame to switch from a rival, Tosoh, to NutraSweet by offering rebates to the customer on the basis of aspartame used in products manufactured in the United States and imported into Canada. The rebate would depend on the difference between the U.S. and the Canadian prices. The Tribunal held, among other things, that the fact that NutraSweet was willing to offer the rebate regardless of the size of the U.S.–Canada price differential indicated an intention to limit the expansion of its competitors. It held that the use of the monopoly position conferred by the U.S. patent for anti-competitive purposes was an anti-competitive act. This illustrates how a rebate, which otherwise would be pro-competitive, would not be profitable but for the fact that it prevented the expansion of NutraSweet's rivals. In Tele-Direct, the dominant supplier of business telephone directories, Tele-Direct, induced a supplier of a product called "audiotext" to withhold supply from competing directories. Audiotext was a service providing information, such as the news and weather, which competing directories had linked to their products. The Tribunal observed: "The only perceptible effect on consumers and advertisers was a negative one. It would appear to us that the kind of conduct engaged in by Tele-Direct regarding audiotext in Sault Ste. Marie unequivocally falls within the class of anti-competitive acts against which section 79 is meant to guard."

4.3 Predatory Conduct

It is difficult to distinguish predatory pricing and competitive pricing since both, at least initially, involve lower prices. Predatory pricing by a dominant firm normally involves the ability to raise prices once rivals have been disciplined or have exited the market. Consequently, a key consideration in determining that low prices are in fact predatory and may lead to a substantial lessening of competition is whether the market is characterized by high barriers to entry.

Predatory pricing is often described as selling at a price below some measure of cost in order to harm a competitor. Predatory pricing can be profitable to the dominant firm, and hence harmful to competition, if the dominant firm is able to maintain or enhance market power, giving it the ability to recoup the losses from the predatory campaign. This could be achieved by eliminating a rival, if entry barriers would prohibit or discourage potential entrants from constraining the dominant firm from increasing prices post-predation. In the absence of such barriers, predation may be profitable if it deters potential competitors from entering the market for fear of a repeated predatory episode. Such a reputation for predation may also deter entry into other markets in which the dominant firm operates, thus increasing the incentives to engage in predation.

Dominant firms can also engage in predation in order to discipline competitors that have undertaken to challenge the market power of the dominant firm. The intent of disciplinary actions is to convince the target of the actions to cease a particular practice, rather than to eliminate or exclude the competitor from the market. The net result on competition can be the same as elimination of a rival, if the disciplining results in the elimination of the competitive threat of the target. Consider the example of a competitor seeking to obtain market share by lowering its prices. The dominant firm reacts by engaging in a predatory pricing strategy, aimed not at eliminating the competitor but rather at compelling the competitor to resume pricing at previous levels.

In the case of predatory behaviour by a dominant firm or group of firms, establishing dominance is sufficient to satisfy that market power exists and therefore recoupment is possible. The Bureau will also consider the extent to which the act of predation will deter entry through establishing a reputation for predation.

Having established dominance, the Bureau will consider whether the dominant firm is pricing below some measure of its costs. The Tribunal emphasized the importance of such a price-cost comparison in the *NutraSweet* case.[41] In conducting such price-cost comparisons, the Bureau will include in its measure all costs that are avoidable. That is, the Bureau will consider any costs that could have been avoided by not offering the product or service in the relevant time frame.

Several of the acts listed in section 78 describe predatory behaviour. Paragraph 78(1)(*i*) refers to an anti-competitive act involving the dominant firm(s) selling "articles at a price lower than acquisition cost for the purpose of eliminating or disciplining a competitor." While paragraph 78(1)(*i*) clearly describes a form of predatory pricing, it is limited by its reference

41. *NutraSweet*, *supra* note 2 at 43.

to "articles" and "acquisition cost." In *NutraSweet*, the Director of Investigation and Research attempted to apply paragraph 78(1)(*i*) to a manufacturer that was selling its product below its manufacturing cost. The Tribunal rejected this argument as not applicable to manufacturing situations where there is no purchase and resale of articles.[42] The Tribunal made it clear, however, that predatory pricing could generally be an anti-competitive act for the purpose of section 79.

A variant of predatory pricing may be found in paragraph 78(1)(*c*), which deals with freight equalization. In this form, predatory pricing occurs when a firm bases freight charges on the distance of a customer from the rival's plant, as opposed to the distance from the dominant firm's own plant. By using the rival's plant as a base point, the dominant firm(s) effectively earns a lower margin on customers located near its rival as compared to customers located near its own plant. This could amount to selective price cutting, that is, price cutting to buyers most likely to deal with the dominant firm's (firms') rival(s), with predatory intent.

Paragraph 78(1)(*d*) indicates that the introduction of "fighting brands" is an anti-competitive act. Fighting brands are introduced by a firm to inflict harm on a rival, either to limit or eliminate the rival's competitive significance, or to seek to temporarily punish a rival for competing too vigorously. Such brands are typically designed to be close competitors of the rival's product or services. For example, a dominant firm may open the retail outlets of a fighting brand near the retail outlets of a rival. Similarly, a dominant firm may adopt product specifications for a fighting brand that are similar to those of a rival. Because fighting brands are designed to provide a product or service that is similar to that provided by the rival, they can be especially effective when used as part of a predatory strategy. Fighting brands were central to the *Eddy Match* case, where Eddy Match was found to have introduced new brands of matches intending to eliminate entry to the wooden match market.[43]

4.4 Facilitating Practices

Facilitating practices enhance the ability of firms to coordinate their behaviour in order to increase or maintain prices. Thus, a group of firms would employ facilitating practices to ensure cooperation of the group members, which is required to sustain the group's joint dominance in the relevant market(s). Typically, such practices assist firms in monitoring each other to ensure that no one "cheats" on an arrangement, or allow firms to more effectively punish such deviations.

Examples of facilitating practices that allow firms to more effectively monitor members of the group include pre-announcing price increases and publicizing price lists. Delivered pricing can also be a facilitating practice. Delivered pricing can involve uniform delivered prices, by which firms charge the same delivered price to all customers regardless of location. Alternatively, firms can adopt the same base points from which transportation costs are added. Both forms of delivered pricing simplify price lists and result in customers facing the same price from each firm, thus making pricing more transparent to other firms and facilitating coordinated behaviour.

42. *NutraSweet*, *supra* note 2 at 43.
43. *R. v. Eddy Match Co. Ltd.* [1954], 20 C.P.R. 107 (Que. C.A.).

Contractual arrangements can also be used to enhance transparency and to allow for more effective punishments. "Meet-or-release" clauses can alert a firm to price cutting by other firms, thereby facilitating detection of deviations. Such clauses also allow for punishment by allowing the firm to match the offer, thus preventing the price cutter from making the sale. Similar practices incorporate stronger punishments, such as a firm promising to beat any rival's price by 10 percent. MFN clauses effectively commit a firm to punishing itself for offering a selective price cut to a particular customer, since that price cut would have to be offered to all customers with MFN clauses. Thus, MFN clauses can deter selective price cuts and stabilize interdependence among oligopolists.

PART 5: REMEDIES

5.1 Alternative Case Resolutions

If the Commissioner is satisfied that the evidence supports an application to the Tribunal, a number of options to remedy the situation are available. During the course of an examination or an inquiry, the Commissioner will present to the parties any preliminary concerns regarding the alleged contravention of the Act. The parties are afforded the opportunity to respond to the Commissioner's concerns and, at any time during the course of an examination or inquiry, can propose an alternative means of dealing with the Commissioner's concerns that does not necessitate an application to the Tribunal.

In most circumstances, the Commissioner's preference would be to have any proposed remedy agreed upon by the parties reviewed by the Tribunal pursuant to a consent order application. However, matters are dealt with on a case-by-case basis. Where a party whose conduct is the subject of an examination or inquiry voluntarily changes its business practices in a manner that addresses the Commissioner's concerns, the Commissioner may exercise discretion not to litigate the matter before the Tribunal. In appropriate circumstances, where a party has addressed the Commissioner's concerns, this may be sufficient for the Commissioner to discontinue the examination or inquiry.

In instances where an alternative (to litigation) course of action has been adopted to resolve the competition issues, the Commissioner will make the resolution public to ensure that the process remains transparent and that all interested parties have been informed of the fact that the matter has been resolved, and what means were used.

5.2 Orders of the Competition Tribunal

The abuse of dominance provisions provide broad powers of remedy to the Tribunal. Where, on application by the Commissioner, the Tribunal finds that the elements of section 79 are met, it may, pursuant to subsection 79(1), make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively, if the Tribunal finds that an order prohibiting the continuance of anti-competitive practices is not likely to restore competition in the affected market, the Tribunal may, pursuant to subsection 79(2), make an order directing any such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

Section 66 of the Act sets out the penalties associated with failing to comply with an order issued by the Tribunal. Any person who contravenes or fails to comply with such an order is guilty of an offence and liable on conviction of an indictment to a fine in the discretion of the court, or to imprisonment for a term not exceeding five years, or to both; or on summary conviction, such a person is liable to a fine not to exceed $25 000, or to imprisonment for a term not to exceed one year, or to both.

5.3 Limitations and Exceptions

Although the Tribunal has wide latitude to impose remedies under subsection 79(2), subsections 79(3) to 79(7) contain a number of limitations, exceptions and clarifications with respect to orders of the Tribunal and applications by the Commissioner. These provisions are briefly described below.

5.3.1 Subsection 79(3) — "Rights of any person"

Subsection 79(3) places a limitation on the scope of an order under subsection 79(2) to provide for an additional safeguard that protects the rights of persons against whom an order is directed. The intent here is to have an order that is aimed at restoring competition, and not one that goes beyond achieving this objective. In other words, the order should be remedial and not punitive. Subsection 79(3) stipulates that the scope of the order should not interfere with the rights of a person against whom the order is sought more than is needed to restore competition. This restriction is intended to protect existing private contractual relationships between persons, and other proprietary property such as trade secrets, unless a breach of these contracts or secrets is absolutely necessary to restore competition.

5.3.2 Subsection 79(4) — "Superior competitive performance"

Subsection 79(4) is intended to compel the Tribunal to consider whether the lessening of competition is attributable to the superior competitive performance of the dominant firm or firms. It does not call upon the Tribunal to balance superior competitive performance against the effects of anti-competitive acts.[44] Superior competitive performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act. Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.

5.3.3 Subsection 79(5) — "Exercise of intellectual property rights"

Exclusive rights provided by intellectual property law do not of themselves constitute abusive conduct by a dominant firm. Subsection 79(5) is intended to ensure that the legitimate use of intellectual property rights does not constitute an anti-competitive act. However, abuse of those rights could result in a violation of section 79.

5.3.4 Subsection 79(6) — Three-Year Limitation

Subsection 79(6) clarifies the point that no action can be taken against an anti-competitive act by a dominant firm or group of firms three years after the practice has ceased.

5.3.5 Subsection 79(7) — Acts Where Proceedings Have Been Commenced Under Section 45 or Section 92

Subsection 79(7) requires the Commissioner to choose between the conspiracy, the merger or the abuse of dominance provisions when electing to proceed with either a recommendation to the Attorney General (alleging criminal conspiracy) or an application to the Tribunal (under the civil provisions). The subsection codifies for merger, conspiracy and abuse of dominance the principle in common law that no person is to be placed in jeopardy twice for the same or substantially the same cause. The choice of which provision to pursue will depend on the facts of each case and the nature of the remedy sought to alleviate the competition issue.[45]

44. This is quite different from section 96 of the merger provisions, which calls for a balancing of efficiency gains with any substantial lessening or prevention of competition resulting from the merger.
45. Section 45 is the criminal conspiracy provision, and section 92 is the civil provision with respect to mergers.

APPENDIX I: THE ABUSE OF DOMINANCE PROVISIONS OF THE *COMPETITION ACT* (SECTIONS 78 AND 79)

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(*a*); and

(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.[46]

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

46. See footnote 1.

(a) specifying acts or conduct for the purpose of paragraph (1)(*j*); and
(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(*k*).
R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

79. (1) Where, on application by the Commissioner, the Tribunal finds that

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

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Industrial Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or
(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.
R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37.

APPENDIX II: OVERVIEW OF THE ESSENTIAL ELEMENTS ESTABLISHED BY THE CASE LAW

Control

"Control" means "market power" in the economic sense. (*NutraSweet*, *Laidlaw*, *Nielsen* and *Tele-Direct*)

"Market power" is "the ability to set prices above a competitive level for a considerable amount of time." (*Laidlaw*, *Nielsen*)

High market share, together with barriers to entry, will typically be sufficient to support a finding of "market power." (*NutraSweet*, *Laidlaw*, *Nielsen* and *Tele-Direct*)

High market share alone will give rise to a prima facie conclusion that a party is dominant. (*Laidlaw*, *Nielsen*)

In the absence of barriers to entry, firms with high market shares cannot exercise market power. (*Tele-Direct*)

The existence of sunk costs or economies of scale alone is insufficient to qualify as a barrier to entry. (*NutraSweet*, *Laidlaw*, *Nielsen*)

Class or Species of Business

"Class or species of business" is synonymous with "product market" in the economic sense. (*NutraSweet*, *Laidlaw*, *Nielsen* and *Tele-Direct*)

In Canada or an Area Thereof

The words "in Canada or an area thereof" are synonymous with "geographic market" in the economic sense. (*NutraSweet*, *Laidlaw*, *Nielsen* and *Tele-Direct*)

The same test used to define product market (i.e. substitutability) should be used to define geographic market. (*Laidlaw*)

The hypothetical monopolist test provided by the *Merger Enforcement Guidelines* (Competition Bureau, 2000) is inappropriate for defining geographic market in an abuse case, as the issue relates to an existing situation rather than the assessment of a prospective situation, as in a merger. (*Laidlaw*)

Practice of Anti-Competitive Acts

For a "practice" to exist, there must be more than an isolated act. Different anti-competitive acts, taken together, could constitute a "practice." (*NutraSweet* and *Nielsen*)

Subjective intent is not required for the Tribunal to conclude that a given practice is anti-competitive. (*NutraSweet*, *Laidlaw* and *Tele-Direct*)

In determining whether an alleged anti-competitive act falls within section 78, the nature and purpose of the act and the effect it has had on relevant markets must be determined. The analysis will take into account the commercial interests of the parties and the resulting restriction on competition. (*Nielsen* and *Tele-Direct*)

In the absence of convincing evidence to the contrary, parties are deemed to intend the effects of their actions. (*Laidlaw* and *Nielsen*)

The existence or non-existence of legitimate efficiency arguments and business justification are important in determining whether an act is anti-competitive. However, the Tribunal has cautioned that the existence of some legitimate business purpose will not on its own be sufficient to justify the use of anti-competitive acts when a party enjoys substantial market power. (*Nielsen* and *Tele-Direct*)

Substantial Lessening or Prevention of Competition

In order to assess the anti-competitive effect, the Tribunal will focus on the degree to which the anti-competitive acts enhance or preserve barriers to entry and, more generally, enhance or preserve market share. (*NutraSweet* and *Nielsen*)

The question of substantial lessening of competition can also be equated with the question of whether the anti-competitive acts engaged in "altered the prospects of economically feasible entry." (*Nielsen*)

Where a firm has a high degree of market power in a market that is uncompetitive to begin with, even a small impact on a competitor will be considered substantial. (*Tele-Direct*)

APPENDIX III: EXCLUSIONARY VERTICAL SQUEEZING

Introduction

The first anti-competitive act listed in section 78 is "squeezing." This practice is defined in the Act as follows:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market.

The practice described in section 78 is quite specific. It applies to sales by an upstream supplier to a downstream customer with whom that supplier also competes. Squeezing occurs when the supplier raises the wholesale price relative to the retail price, thus squeezing the margin between the wholesale and retail prices. It can also occur when the wholesale price remains the same but the supplier lowers the retail price, compelling his or her customer/competitor to follow suit.

From a competition policy perspective, the concept of squeezing is quite different from the notion of profit margin erosion, which results from the pressures of vigorous competition. If asked, most competitors will complain that their margins are inadequate and that cutthroat competition is to blame. The fact that margins are being squeezed may speak to the vigour of competition in the market concerned, and is not necessarily the result of predatory activity on the part of large firms in the market. Margins may be squeezed when a market is declining, overbuilt or requires rationalization in the face of changing consumer buying patterns. In this case, low margins are an appropriate signal for less efficient firms to exit the market.

The Theory of Anti-Competitive Forms of Squeezing

Section 79 is aimed at squeezing by a dominant firm or group of firms that engages in this practice *for the purpose of* excluding or predating competitors from the market, or disciplining competitors in the market who pose a competitive threat. The purpose of the squeeze is to deter or prevent entry into the downstream market, to confine downstream firms to small niches in the market, or to drive downstream competitors out of the market.

The consequence of an exclusionary squeeze is that downstream competition is lessened to the point that the firm responsible for the squeezing can exercise market power by increasing margins or lowering quality or service. The purpose of an exclusionary squeeze, therefore, is to earn excess profits. This is distinguishable from a normal loss-minimizing response to a lack of demand or changing buying patterns.

Structural Preconditions for Extending Market Power to Another Stage of Production

In assessing whether allegations of price squeezing raise an issue under section 79, the Bureau will examine the structural conditions of the market in question. In the absence of certain structural conditions, squeezing out a downstream competitor will not be a profitable strategy for a dominant integrated supplier. Certain structural conditions must be fulfilled in both the upstream and the downstream markets in order to make a vertical extension of market power a potentially profitable strategy. First, there must be secure and significant unilateral or joint market power upstream (i.e. in the wholesale market).

Otherwise, downstream customers can evade the squeeze by turning to other suppliers. Accordingly, a finding of dominance or joint dominance in the wholesale market is a necessary first step to establishing an anti-competitive price squeeze.

Where no single firm is dominant in the market, but a group of firms coordinates its activities to jointly abuse its collective market power, the coordination itself constitutes an anti-competitive act, as it artificially confers market power to members of a group that would otherwise have to compete with one another.

Establishing a Rationale for Anti-Competitive Squeezing

As previously indicated, the mere observation of margin squeezing or margin erosion is not sufficient to support a conclusion of anti-competitive conduct on the part of one or more large firms. Even where the firms in question may be in a dominant market position, it is necessary to closely analyse their pricing behaviour in order to distinguish conduct that provides grounds for an application to the Tribunal from otherwise legitimate market behaviour. As discussed in this section, the Bureau will contemplate a number of potential economic scenarios as part of its analysis.

In situations where it is established that one supplier (wholesaler) possesses the market power required to exercise control, and that this control has been acquired through means that do not contravene the Act, potential monopoly profits can be extracted simply by charging a monopoly price for the product at the wholesale level. This is not an abuse of market power. In these instances it is not in the supplier's interest to charge a price that would eliminate or discipline his or her customers, as he or she is already extracting the maximum return.

For extension of monopoly power to make sense, it must be shown that domination of one stage of production (e.g. the wholesale stage) is not sufficient; domination of two or more (e.g. the wholesale and retail) stages is necessary. There are several instances in which extension of market power to another stage of production could be profitable.

One such instance is known as the variable proportions case. If the input supplied by the upstream monopoly is not used by the downstream industry in fixed proportions, upstream monopoly power cannot be fully exploited simply by the setting of a monopoly price at wholesale, because the downstream users will substitute away from the monopolist's product as its price is increased. The monopolist would have to force the customer to use the input in higher proportions than would normally be the case.

Other instances in which the extension of market power from one stage to another could be profitable involve evasion of price regulation upstream or the exploitation of opportunities for price discrimination downstream.

When there is imperfect competition at both stages of production, integrated firms will always appear to be squeezing their non-integrated rivals. This is because a vertically integrated firm's markup under imperfectly competitive conditions is always less than the sum of the markups of a downstream firm and any unrelated upstream supplier. Economists refer to this as the double markup problem. Consider the example of a single dominant upstream firm supplying an input to two imperfectly competitive downstream firms that sell their product to consumers. If there is no vertical integration, the upstream firm sells its input to the downstream firms at a price in excess of marginal cost (the standard price in a perfectly competitive

market). The downstream firms charge an additional markup on their product when they sell it to consumers. This is the double markup — a markup at one stage piled on top of a markup at the previous stage.

Suppose that the upstream dominant firm integrates forward, merging with one of the downstream firms while continuing to supply the other non-integrated downstream firm(s). The upstream division of the vertically integrated firm now supplies the downstream division at marginal cost (no markup). The downstream division charges a markup on its sales to consumers. This single markup is less than the sum of the markups formerly charged by the upstream and downstream firms, so the vertically integrated firm's output expands, its price falls and its non-integrated downstream rival loses market share or is forced to lower its price and lose profits. Notwithstanding the loss in profits suffered by the non-integrated downstream rival, consumers and the economy benefit. With the lower combined markup of the integrated firm, non-integrated firms purchasing from integrated firms appear to be squeezed by the integrated firms. Yet this apparent squeezing need not have anything to do with any strategy of excluding them from the market, and would therefore not necessarily be considered an anti-competitive act.

Criteria for Determining Anti-Competitive Squeezing

Clearly, determining when squeezing is anti-competitive involves careful analysis. When presented with allegations of anti-competitive squeezing the Bureau will, once it has been established that the target of the complaint has control of the relevant market(s), consider whether the alleged squeezing has had the effect of substantially lessening competition. Establishing a substantial lessening of competition will require a determination that the disciplinary, predatory or exclusionary effects of the squeezing result in maintaining or enhancing the market power of the dominant firm or firm engaged in the squeezing. If this can be established, the Bureau will proceed on the assumption that the squeezing is anti-competitive.

There are many different market situations in which one competitor may squeeze the margins of another. Most are consistent with vigorous competition and raise no issue under the Act. The form of squeezing that contravenes section 79 involves situations where a vertically integrated dominant firm or group of firms may find it profitable to squeeze a non-integrated downstream rival either for disciplinary or exclusionary purposes, and where this will ultimately result in higher prices for consumers. The characteristics of these situations are as follows:

(1) The structural conditions for dominance or joint dominance at the relevant upstream (wholesale) stage of production must be satisfied. These criteria are set out in section 3.2.1(d) of these guidelines. The following conditions are necessary for inferring control by a group of firms:

   (a) The group of firms collectively accounts for a large share of the relevant market. Because of the inherent difficulties of unaffiliated competitors coordinating in a manner that allows them to exercise market power, the collective market share threshold should be more onerous than in cases involving single-firm dominance.
   (b) There is evidence that the effect of the action is to increase price or engage in some form of anti-competitive act.

(c) There is evidence of barriers to entry into the group as well as barriers to entrants into the relevant market. A successful coordinated equilibrium, by definition, raises prices within the group above competitive levels and thus creates increased incentives for outside firms to enter the group. One example of evidence of barriers to entry is the use of exclusionary actions that pre-empt entry into the group. As a rule, establishing such coordination suffers from the same difficulties as establishing the coordinated activity in the first instance; thus there should be evidence of an ability to exclude outside firms (e.g. an asymmetry that provides the jointly dominant firms with a unique advantage over the alleged victim).

(d) Even if coordinated activity is plausible, and there are sufficient barriers to entry into the group, the prospect of intra-group rivalry (i.e. so-called "cheating") is often a powerful constraint on the ability of a group of firms to profitably coordinate. Thus there should be concrete evidence that actions have been taken by members of the group to inhibit intra-group rivalry.[47]

(e) Finally, there should be evidence that a significant number of customers does not have the ability to employ counter-strategies. Large customers have an incentive, and may often have an ability, to structure procurement activities to counter efforts by a group of firms to dampen intra-group rivalry (for example, by using competitive bidding, by arranging secret transactions with select sellers or by purchasing output in discrete volumes in order to undermine the implicit output-sharing rule that is necessary to maintain coordinated conduct).

(2) It must be established that the elimination, or at least substantial reduction, of competition at the downstream (e.g. retail) stage of production is possible. This requirement can be met by showing that there are entry and re-entry barriers, that there are no close substitutes, and that the dominant firm or group already has a significant share of the relevant downstream market.

(3) It must be demonstrated that an exclusionary price squeeze has occurred and that it has been sufficiently sustained and systematic to constitute a practice.

(4) It must be established that the dominant firm has a profit motive for extending its market power to a subsequent stage of production. This requirement can be met by demonstrating that the dominant firm's ability to exploit its market power at the stage of production it dominates is limited.

47. Facilitating practices may be aimed at improving the ability of firms to coordinate their actions, or at detecting deviations from the terms of coordination. At the same time, however, such practices may be adopted for business reasons (such as providing price information to consumers or protecting incentives for relation-specific investments) that are unrelated to coordinated conduct. It is necessary to consider the rationale and likely effects of such practices before they are considered as evidence of joint control.

APPENDIX IV: SUMMARY OF COMPETITION TRIBUNAL DECISIONS

Introduction

This appendix provides a brief summary of the six decisions rendered by the Competition Tribunal since the abuse of dominance provisions were introduced in the *Competition Act* in 1986.[48] Four of these cases — *NutraSweet*, *Laidlaw*, *Nielsen* and *Tele-Direct* — involved contested applications. The other two cases, *Interac* and CANYPS, involved joint abuse and were resolved by way of consent orders. All six of these cases have resulted in an order by the Tribunal.

This summary of the decided cases illustrates the Tribunal's position on the key elements of section 79. It also provides specific examples of the type of conduct and the circumstances that the Tribunal has identified and defined as anti-competitive, and the scope and nature of remedies imposed under section 79.

NUTRASWEET

Key facts

Product market:	the artificial sweetener aspartame
Geographic market:	Canada
Market share:	95 percent
Application filed:	June 1989
Tribunal order:	October 1990

Anti-competitive acts

- contract clauses imposed by NutraSweet requiring or inducing exclusivity:
  - — clauses obligating customers to purchase all their aspartame from NutraSweet
  - — discounts and price allowances granted to customers for use of the NutraSweet logo and name
  - — promotional allowances awarded where only the NutraSweet product was used
  - — meet-or-release and most-favoured-nation clauses.

"Substantially lessening competition"

- high market share enjoyed by NutraSweet
- contracts covered 90 percent of the market
- contract exclusivity prevented the entry of competitors
- barriers to entry, including high customer switching costs, sunk costs, a two-year entry period and the economies of scale.

Order

- prohibited NutraSweet from enforcing the contractual terms requiring or inducing exclusivity
- prohibited NutraSweet from entering into future contracts containing these provisions.

Other issues

- The argument made that advantages due to the nonpayment of income taxes and predatory pricing were anti-competitive acts not accepted by the Tribunal.
- No order was made concerning allegations of selling below cost and rebates given to a party to take into account exchange differentials.
- The Tribunal rejected defences raised by NutraSweet of a superior competitive performance and a free rider (i.e. other parties taking advantage of NutraSweet's investment), as well as efficiency and business justifications.

48. *NutraSweet*, *supra* note 2; *Laidlaw*, *supra* note 14; CANYPS, *supra* note 25; Neilsen, *supra* note 15; *Interac*, *supra* note 25; *Tele-Direct*, *supra* note 23.

LAIDLAW

Key facts

Product market:	commercial waste services, collection and disposal
Geographic market:	four local communities on Vancouver Island
Market share:	87 percent
Application filed:	March 1991
Tribunal order:	January 1992

Anti-competitive acts

- acquisition of competitors
- lengthy non-compete clauses in purchase agreements of competitors
- contracting practices:
  - — long-term customer contracts with automatic renewal
  - — excessive liquidated damages
  - — rights of first refusal
  - — intimidation through litigation or its threat to inhibit customers from switching suppliers.

"Substantially lessening competition"

- existence of high prices and increases of these prices, indicating that Laidlaw possessed market power
- contracts between Laidlaw and its customers restricted competition
- high barriers to entry, including Laidlaw's contracting practices, which erected barriers to the development of the necessary client base for new entrants
- acquisition of competitors created local monopoly.

Order

- Laidlaw barred from further acquisitions in three affected markets for three years
- amendments and deletions made to Laidlaw's contracts with respect to rights of first refusal, non-compete clauses, exclusivity requirements and liquidated damages for early termination
- customers no longer obligated to disclose bids by competitors
- initial and renewal terms of contracts reduced to one year
- contract termination possible on 30 days' notice
- notification and information requirements imposed on Laidlaw:
  - — customers to be advised that contract clauses subject to the order were no longer to be applied
  - — Laidlaw required to explain any amendments of contracts to its customers
  - — existence of the order to be made known to customers and managers
  - — employees to be notified in writing that compliance with the Act was company policy
  - — copies of existing and future contracts to be provided to the Bureau.

Other issues

- Laidlaw advanced economic and business justifications for several of the contractual clauses based upon its investments. The Tribunal found that these clauses could not be justified on the basis of efficiency or consumer benefit. The only effect of the clauses was to ensure that customers remained with Laidlaw, thus creating a barrier to entry.
- Laidlaw argued that the mergers were covered by section 91 of the Act and, as such, could not be anti-competitive under section 78. The Tribunal rejected this proposition.
- The Tribunal condemned the use of litigation or Laidlaw's threats of litigation as reprehensible and anti-competitive conduct.

NIELSEN

Key facts

Product market:	scanner-based market tracking services
Geographic market:	Canada
Market share:	100 percent
Application filed:	October 1994
Tribunal order:	April 1995

Anti-competitive acts

- the use of exclusive contracts to deny competitors access to scanner data:
  - — long-term contracts (three years or longer)
  - — most-favoured-nation clause to ensure that no competitor is paid less for data than Nielsen

— strict conditions for termination, including lengthy notification requirements and monetary penalties for early termination
— renewals structured to occur at different times so as to limit the available sources of data, thus creating a barrier to entry
— payment for exclusive access to data, or financial penalties if a retailer supplied data to a competitor.

"Substantially lessening competition"

- 100 percent control by Nielsen, combined with the use of practices designed to bar entry, allowed it to maintain and increase its market power
- Nielsen's practices raised barriers where they did not formerly exist
- nature of the industry did not permit entry over time, since the data needed for comparison was required from the outset.
- intent of the contracts and results of their operation were anti-competitive.

Order

- amendments imposed to the Nielsen contracts:
  — provisions preventing or limiting the supply of data to any party declared to be null and void
  — clauses promoting exclusivity of scanner data rendered unenforceable
  — inducements to limit the supply of data banned
  — use of the most-favoured-nation clause prohibited for 24 months after the issuance of the order
  — same term imposed on all future contracts signed within 18 months of the date of the order
  — long-term contracts for Nielsen's services reduced
- Nielsen ordered to provide 15 months of data, calculated from the date requested by a new entrant competitor, Information Resources, Inc.

Other issues

- The Tribunal considered several arguments seeking to justify Nielsen's practices, but concluded that the denial of access could not be justified on business or efficiency grounds.
- In finding that the acts were anti-competitive, the Tribunal ruled that the existence of a valid business ground did not mitigate the conduct.
- Nielsen argued that its contracts were necessary to prevent a competitor from "free riding" on its investment. This proposition was not accepted by the Tribunal.

TELE-DIRECT

Key facts

Product market:	telephone directory advertising
Geographic market:	local markets across Canada
Market share:	96 percent of advertising space 25 percent of advertising services
Application filed:	December 1994
Tribunal order:	February 1997

Anti-competitive acts

- tied selling of space in Yellow Pages directories to sales services, including advice, design and administration
- discrimination against independent directory publishers, advertising agencies and consultants as to accounts and commissions
- targeted price reductions and other competitive strategies against competitive directories
- refusal to license trademarks.

"Substantially lessening competition"

- telephone directory advertising is a distinct market with no close substitutes
- Tele-Direct had an overwhelming share of the product market
- entry to the market was not easy.

Order

- Tele-Direct to cease the practice of tying space and services
- Tele-Direct to price space and services separately or offer an acceptable commission for the service function
- Tele-Direct to cease discrimination against consultants and customers who use consultants.

Other issues

- Allegations were dismissed with respect to:
  - — targeted anti-competitive acts against publishers, which the Tribunal found to be legitimate competitive responses to entry
  - — anti-competitive acts directed against advertising agencies, on the basis that Tele-Direct was not dominant in this sector of the market and there was no substantial prevention or lessening of competition
  - — witholding of the Yellow Pages and Walking Fingers logos, which the Tribunal found to be a legitimate exercise of rights under the *Trade-Marks Act*.

INTERAC

Key facts

Product market:	services associated with the electronic banking network, on which transactions are made through automated banking machines and debit cards
Geographic market:	Canada
Market share:	100 percent
Application filed:	December 1995
Tribunal order:	June 1996

Anti-competitive acts

- prohibition of new members
- higher membership fees for competing financial services providers
- service fees charged to entities that had no direct connection to the system but were obligated to go through another member
- limitations on price competition and services.

"Substantially lessening competition"

- high barriers to entry and no alternative networks
- limited access to the main system
- limited service and price competition.

Consent order

- required the respondents to amend the by-laws of Interac in order to:
  - — remove restrictions on membership by other financial institutions
  - — allow indirect access by other commercial entities
  - — modify the governance of Interac with respect to the composition of its board
  - — modify pricing practices and procedures for approving new network services.

CANYPS (Canadian Yellow Pages Service)

Key facts

Product market:	national Yellow Pages advertising
Geographic market:	Canada
Market share:	90 percent
Application filed:	September 1994
Tribunal order:	November 1994

Anti-competitive acts

- restrictions, known as the "head office rule," imposed on the sale of national advertising, requiring customers to arrange all national Yellow Pages advertising with the publisher serving the province where its head office was located.

"Substantially lessening competition"

- allegation by the Bureau that the arrangements among the members of CANYPS prevented competition between them and prevented the entry of independent sales agents into this market
- 90 percent of market controlled by respondents.

Consent order

- respondents prohibited from:
  - — maintaining the head office rule
  - — maintaining exclusive selling arrangements
  - — refusing to deal with selling companies

— discriminating between selling companies
— refusing to license Yellow Pages trademarks to selling companies
— agreeing on commissions or account eligibility criteria for commissions
— denying selling companies access to rates and other data published by CANYPS

- respondents required to provide the Bureau with minutes of all CANYPS meetings until July 1998, and a standard licensing agreement for trademarks.

This is Exhibit “30” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

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Competition Act

R.S.C. (Revised Statutes of Canada), 1985, c. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing

the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

(b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,

(c) deeds and instruments giving a right to recover or receive property,

(d) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(e) energy, however generated; (*article*)

business includes the business of

(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(b) acquiring, supplying and otherwise dealing in services.

It also includes the raising of funds for charitable or other non-profit purposes. (*entreprise*)

Commission [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

Commissioner means the Commissioner of Competition appointed under subsection 7(1); (*commissaire*)

Director [Repealed, 1999, c. 2, s. 1]

merger [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

Minister means the Minister of Industry; (*ministre*)

monopoly [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

product includes an article and a service; (*produit*)

record includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy or portion thereof; (*document*)

service means a service of any description whether industrial, trade, professional or otherwise; (*service*)

supply means,

(a) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and

(b) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service; (*fournir* ou *approvisionner*)

trade, industry or profession includes any class, division or branch of a trade, industry or profession; (*commerce, industrie ou profession*)

Tribunal means the Competition Tribunal established by subsection 3(1) of the *Competition Tribunal Act*. (*Tribunal*)

Affiliated corporation, partnership or sole proprietorship

(2) For the purposes of this Act,

(a) one corporation is affiliated with another corporation if one of them is the subsidiary of the other or both are subsidiaries of the same corporation or each of them is controlled by the same person;

(b) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other; and

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person.

Subsidiary corporation

(3) For the purposes of this Act, a corporation is a subsidiary of another corporation if it is controlled by that other corporation.

Control

(4) For the purposes of this Act,

(a) a corporation is controlled by a person other than Her Majesty if

(i) securities of the corporation to which are attached more than fifty per cent of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;

(b) a corporation is controlled by Her Majesty in right of Canada or a province if

(i) the corporation is controlled by Her Majesty in the manner described in paragraph (a), or

(ii) in the case of a corporation without share capital, a majority of the directors of the corporation, other than *ex officio* directors, are appointed by

(A) the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or

(B) a Minister of the government of Canada or the province, as the case may be; and

(c) a partnership is controlled by a person if the person holds an interest in the partnership that entitles the person to receive more than fifty per cent of the profits of the partnership or more than fifty per cent of its assets on dissolution.

R.S., 1985, c. C-34, s. 2; R.S., 1985, c. 19 (2nd Supp.), s. 20; 1992, c. 1, s. 145(F); 1995, c. 1, s. 62; 1999, c. 2, s. 1, c. 31, s. 44(F).

Binding on agents of Her Majesty in certain cases

2.1 This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

R.S., 1985, c. 19 (2nd Supp.), s. 21.

Defects of form

3 No proceedings under this Act shall be deemed invalid by reason of any defect of form or any technical irregularity.

R.S., c. C-23, s. 3.

Collective bargaining activities

4 (1) Nothing in this Act applies in respect of

(a) combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees;

(b) contracts, agreements or arrangements between or among fishermen or associations of fishermen and persons or associations of persons engaged in the buying or processing of fish relating to the prices, remuneration or other like conditions under which fish will be caught and supplied to those persons by fishermen; or

(c) contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession, whether effected directly between or among the employers or through the instrumentality of a corporation or association of which the employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.

Limitation

(2) Nothing in this section exempts from the application of any provision of this Act a contract, agreement or arrangement entered into by an employer to withhold any product from any person, or to refrain from acquiring from any person any product other than the services of workmen or employees.

R.S., c. C-23, s. 4; 1974-75-76, c. 76, s. 2.

Travel agents

4.1 (1) Sections 45 and 61 do not apply in respect of a contract, an agreement or an arrangement that is between or among travel agents and that is only in respect of the negotiation of commissions on ticket sales for domestic flights paid to travel agents by an airline that, with its affiliates, accounts for at least 60% of the revenue passenger-kilometers of all domestic services over the 12 months immediately before the contract, agreement or arrangement was entered into.

Tribunal certificate

(2) If, on application by an airline, the Tribunal finds that the airline and its affiliates account for less than 60% of the revenue passenger-kilometers of all domestic services over the 12 months immediately before the application, the Tribunal shall issue a certificate to that effect.

Effect of certificate

(3) Subsection (1) does not apply in respect of an airline that holds a certificate issued under subsection (2).

Revocation of certificate

(4) If, on application by a travel agent, the Tribunal finds that an airline that holds a certificate issued under subsection (2) and its affiliates account for at least 60% of the revenue passenger-kilometers of all domestic services over the 12 months immediately before the application, the Tribunal shall revoke the certificate.

Opportunity to be heard

(5) Before issuing a certificate under subsection (2) or revoking a certificate under subsection (4), the Tribunal shall afford the Commissioner and, in the case of revocation, any airline in respect of which the revocation of the certificate is sought, a reasonable opportunity to be heard.

Definitions

(6) The definitions in this subsection apply in this section.

airline means a person licensed under section 61 of the *Canada Transportation Act* to operate a domestic service. (*ligne aérienne*)

domestic service has the same meaning as in subsection 55(1) of the *Canada Transportation Act*. (*service intérieur*)

travel agent means a person who issues, on behalf of an airline, tickets for travel on a domestic service. (*agent de voyage*)

2000, c. 15, s. 11.

Underwriters

5 (1) Sections 45 and 61 do not apply in respect of an agreement or arrangement between or among persons who are members of a class of persons who ordinarily engage in the business of dealing in securities or between or among such persons and the issuer of a specific security, in the case of a primary distribution, or the vendor of a specific security, in the case of a secondary distribution, where the agreement or arrangement has a reasonable relationship to the underwriting of a specific security.

Definition of "underwriting"

(2) For the purposes of this section, “underwriting” of a security means the primary or secondary distribution of the security, in respect of which distribution

(a) a prospectus is required to be filed, accepted or otherwise approved pursuant to a law enacted in Canada or in a jurisdiction outside Canada for the supervision or regulation of trade in securities; or

(b) a prospectus would be required to be filed, accepted or otherwise approved but for an express exemption contained in or given pursuant to a law mentioned in paragraph (a).

R.S., 1985, c. C-34, s. 5; 1999, c. 2, s. 2.

Amateur sport

6 (1) This Act does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport.

Definition of *amateur sport*

(2) For the purposes of this section, ***amateur sport*** means sport in which the participants receive no remuneration for their services as participants.

1974-75-76, c. 76, s. 2.

PART II

Administration

Commissioner of Competition

7 (1) The Governor in Council may appoint an officer to be known as the Commissioner of Competition, who shall be responsible for

(a) the administration and enforcement of this Act;

(b) the administration of the *Consumer Packaging and Labelling Act*;

(c) the enforcement of the *Consumer Packaging and Labelling Act* except as it relates to food, as that term is defined in section 2 of the *Food and Drugs Act*; and

(d) the administration and enforcement of the *Precious Metals Marking Act* and the *Textile Labelling Act*.

Oath of office

(2) The Commissioner shall, before taking up the duties of the Commissioner, take and subscribe, before the Clerk of the Privy Council, an oath or solemn affirmation, which shall be filed in the office of the Clerk, in the following form:

I do solemnly swear (or affirm) that I will faithfully, truly and impartially, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as Commissioner of Competition. (*In the case where an oath is taken add* "So help me God".)

Salary

(3) The Commissioner shall be paid such salary as may be from time to time fixed and allowed by the Governor in Council.

R.S., 1985, c. C-34, s. 7; 1999, c. 2, ss. 4, 37.

Deputy Commissioners

8 (1) One or more persons may be appointed Deputy Commissioners of Competition in the manner authorized by law.

Powers of Deputy

(2) The Governor in Council may authorize a Deputy Commissioner to exercise the powers and perform the duties of the Commissioner whenever the Commissioner is absent or unable to act or whenever there is a vacancy in the office of Commissioner.

Powers of other persons

(3) The Governor in Council may authorize any person to exercise the powers and perform the duties of the Commissioner whenever the Commissioner and the Deputy Commissioners are absent or unable to act or, if one or more of those offices are vacant, whenever the holders of the other of those offices are absent or unable to act.

Inquiry by Deputy

(4) The Commissioner may authorize a Deputy Commissioner to make inquiry regarding any matter into which the Commissioner has power to inquire, and when so authorized a Deputy Commissioner shall perform the duties and may exercise the powers of the Commissioner in respect of that matter.

Powers of Commissioner unaffected

(5) The exercise, pursuant to this Act, of any of the powers or the performance of any of the duties of the Commissioner by a Deputy Commissioner or other person does not in any way limit, restrict or qualify the powers or duties of the Commissioner, either generally or with respect to any particular matter.

R.S., 1985, c. C-34, s. 8; 1999, c. 2, s. 5.

Application for inquiry

9 (1) Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that

(a) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,

(b) grounds exist for the making of an order under Part VII.1 or VIII, or

(c) an offence under Part VI or VII has been or is about to be committed,

may apply to the Commissioner for an inquiry into the matter.

Material to be submitted

(2) An application made under subsection (1) shall be accompanied by a statement in the form of a solemn or statutory declaration showing

(a) the names and addresses of the applicants, and at their election the name and address of any one of their number, or of any attorney, solicitor or counsel, whom they may, for the purpose of receiving any communication to be made pursuant to this Act, have authorized to represent them;

(b) the nature of

(i) the alleged contravention,

(ii) the grounds alleged to exist for the making of an order, or

(iii) the alleged offence

and the names of the persons believed to be concerned therein and privy thereto; and

(c) a concise statement of the evidence supporting their opinion.

R.S., 1985, c. C-34, s. 9; R.S., 1985, c. 19 (2nd Supp.), s. 22; 1999, c. 2, ss. 6, 37.

Inquiry by Commissioner

10 (1) The Commissioner shall

(a) on application made under section 9,

(b) whenever the Commissioner has reason to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII,

(ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, or

(c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

Information on inquiry

(2) The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.

Inquiries to be in private

(3) All inquiries under this section shall be conducted in private.

R.S., 1985, c. C-34, s. 10; R.S., 1985, c. 19 (2nd Supp.), s. 23; 1999, c. 2, ss. 7, 37, c. 31, s. 45.

Order for oral examination, production or written return

11 (1) Where, on the *ex parte* application of the Commissioner or the authorized representative of the Commissioner, a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that any person has or is likely to have information that is relevant to the inquiry, the judge may order that person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a

"presiding officer", designated in the order;

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

Records in possession of affiliate

(2) Where the person against whom an order is sought under paragraph (1)(b) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

Effect of order

(4) An order made under this section has effect anywhere in Canada.

R.S., 1985, c. C-34, s. 11; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 16, s. 1.

Witness competent and compellable

12 (1) Any person summoned to attend pursuant to paragraph 11(1)(a) is competent and may be compelled to give evidence.

Fees

(2) Every person summoned to attend pursuant to paragraph 11(1)(a) is entitled to the like fees and allowances for so doing as if summoned to attend before a superior court of the province in which the person is summoned to attend.

Representation by counsel

(3) A presiding officer shall permit a person who is being examined pursuant to an order under paragraph 11(1)(a) and any person whose conduct is being inquired into to be represented by counsel.

Attendance of person whose conduct is being inquired into

(4) Any person whose conduct is being inquired into at an examination pursuant to an order under paragraph 11(1)(a) and that person's counsel are entitled to attend the examination unless the Commissioner or the authorized representative of the Commissioner, or the person being examined or his employer, establishes to the satisfaction of the presiding officer that the presence of the person whose conduct is being inquired into would

(a) be prejudicial to the effective conduct of the examination or the inquiry; or

(b) result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer.

R.S., 1985, c. C-34, s. 12; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Presiding officer

13 (1) Any person may be designated as a presiding officer who is a barrister or advocate of at least ten years standing at the bar of a province or who has been a barrister or advocate at the bar of a province for at least ten years.

Remuneration and expenses

(2) A presiding officer shall be paid such remuneration, and is entitled to be paid such travel and living expenses, and such other expenses, incurred in the performance of his duties under this Act, as may be fixed by the Governor in Council.

R.S., 1985, c. C-34, s. 13; R.S., 1985, c. 19 (2nd Supp.), s. 24.

Administration of oaths

14 (1) The presiding officer may administer oaths and take and receive solemn affirmations for the purposes of examinations pursuant to paragraph 11(1)(a).

Orders of presiding officer

(2) A presiding officer may make such orders as he considers to be proper for the conduct of an examination pursuant to paragraph 11(1)(a).

Application to court

(3) A judge of a superior or county court or of the Federal Court may, on application by a presiding officer, order any person to comply with any order made by the presiding officer under subsection (2).

Notice

(4) No order may be made under subsection (3) unless the presiding officer has given to the person in respect of whom the order is sought and the Commissioner twenty-four hours notice of the hearing of the application for the order or such shorter notice as the judge to whom the application is made considers reasonable.

R.S., 1985, c. C-34, s. 14; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Warrant for entry of premises

15 (1) Where, on the *ex parte* application of the Commissioner or the authorized representative of the Commissioner, a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation

(a) that there are reasonable grounds to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,

(ii) grounds exist for the making of an order under Part VII.1 or VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, and

(b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be,

the judge may issue a warrant under his hand authorizing the Commissioner or any other person named in the warrant to

(c) enter the premises, subject to such conditions as may be specified in the warrant, and

(d) search the premises for any such record or other thing and copy it or seize it for examination or copying.

Contents of warrant

(2) A warrant issued under this section shall identify the matter in respect of which it is issued, the premises to be searched and the record or other thing, or the class of records or other things, to be searched for.

Execution of search warrant

(3) A warrant issued under this section shall be executed between six o’clock in the forenoon and nine o’clock in the afternoon, unless the judge issuing it, by the warrant, authorizes execution of it at another time.

Idem

(4) A warrant issued under this section may be executed anywhere in Canada.

Duty of persons in control of premises

(5) Every person who is in possession or control of any premises or record or other thing in respect of which a warrant is issued under subsection (1) shall, on presentation of the warrant, permit the Commissioner or other person named in the warrant to enter the premises, search the premises and examine the record or other thing and to copy it or seize it.

Where admission or access refused

(6) Where the Commissioner or any other person, in executing a warrant issued under subsection (1), is refused access to any premises, record or other thing or where the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the *ex parte* application of the Commissioner, may by order direct a peace officer to take such steps as the judge considers necessary to give the Commissioner or other person access.

Where warrant not necessary

(7) The Commissioner or the authorized representative of the Commissioner may exercise any of the powers set out in paragraph (1)(c) or (d) without a warrant if the conditions set out in paragraphs (1)(a) and (b) exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

Exigent circumstances

(8) For the purposes of subsection (7), exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (1) would result in the loss or destruction of evidence.

R.S., 1985, c. C-34, s. 15; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, ss. 8, 37.

Operation of computer system

16 (1) A person who is authorized pursuant to subsection 15(1) to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, may reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output and may seize the printout or other output for examination or copying.

Duty of person in control of computer system

(2) Every person who is in possession or control of any premises in respect of which a warrant is issued under subsection 15(1) shall, on presentation of the warrant, permit any person named in the warrant to use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system for data from which a record that that person is authorized to search for may be produced, to obtain a physical copy thereof and to seize it.

Order restricting operation of computer system

(3) A judge who issued a warrant under subsection 15(1) or a judge of the same court may, on application by the Commissioner or any person who is in possession or control of a computer system or a part thereof on any premises in respect of which the warrant was issued, make an order

(a) specifying the individuals who may operate the computer system and fixing the times when they may do so; and

(b) setting out any other terms and conditions on which the computer system may be operated.

Notice by person in possession or control

(4) No order may be made under subsection (3) on application by a person who is in possession or control of a computer system or part thereof unless that person has given the Commissioner twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

Notice by Commissioner

(5) No order may be made under subsection (3) on application by the Commissioner after a search has begun of the premises in respect of which the order is sought unless the Commissioner has given the person who is in possession or control of the premises twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

Definitions

(6) In this section, "computer system" and "data" have the meanings set out in subsection 342.1(2) of the *Criminal Code*.

R.S., 1985, c. C-34, s. 16; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Presentation of or report on record or thing seized

17 (1) Where a record or other thing is seized pursuant to paragraph 15(1)(d), subsection 15(7) or section 16, the Commissioner or the authorized representative of the Commissioner shall, as soon as practicable,

(a) take the record or other thing before the judge who issued the warrant or a judge of the same court or, if no warrant was issued, before a judge of a superior or county court or of the Federal Court; or

(b) make a report in respect of the record or other thing to a judge determined in accordance with paragraph (a).

Report

(2) A report to a judge under paragraph (1)(b) in respect of a record or other thing shall include

(a) a statement as to whether the record or other thing was seized pursuant to paragraph 15(1)(d), subsection 15(7) or section 16;

(b) a description of the premises searched;

(c) a description of the record or other thing seized; and

(d) the location in which it is detained.

Retention or return of thing seized

(3) Where a record or other thing is seized pursuant to section 15 or 16, the judge before whom it is taken or to whom a report is made in respect of it pursuant to this section may, if he is satisfied that the record or other thing is required for an inquiry or any proceeding under this Act, authorize the Commissioner to retain it.

R.S., 1985, c. C-34, s. 17; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37, c. 31, s. 46(F).

Commissioner to take reasonable care

18 (1) Where any record or other thing is produced pursuant to section 11 or seized pursuant to section 15 or 16, the Commissioner shall take reasonable care to ensure that it is preserved until it is returned to the person by whom it was produced or from whom it was seized or until it is required to be produced in any proceeding under this Act.

Certified copies

(1.1) The Commissioner need not return any copy of a record produced pursuant to section 11.

Access to records or things

(2) The person by whom a record or other thing is produced pursuant to section 11 or from whom a record or other thing is seized pursuant to section 15 or 16 is entitled, at any reasonable time and subject to such reasonable conditions as may be imposed by the Commissioner, to inspect the record or other thing.

Copy of record where returned

(3) The Commissioner may, before returning any record produced pursuant to section 11 or seized pursuant to section 15 or 16, make or cause to be made, and may retain, a copy thereof.

Detention of things seized

(4) Any record or other thing that is produced pursuant to section 11, or the retention of which is authorized under subsection 17(3), shall be returned to the person by whom it was produced or the person from whom it was seized not later than sixty days after it was produced or its retention was authorized, unless, before the expiration of that period,

(a) the person by whom it was produced or from whom it was seized agrees to its further detention for a specified period of time;

(b) the judge who authorized its production or retention or a judge of the same court is satisfied on application that, having regard to the circumstances, its further detention for a specified period of time is warranted and the judge so orders; or

(c) proceedings are instituted in which the record or thing may be required.

R.S., 1985, c. C-34, s. 18; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 16, s. 2.

Claim to solicitor-client privilege (section 11)

19 (1) Where a person is ordered to produce a record pursuant to section 11 and that person claims that there exists a solicitor-client privilege in respect thereof, the person shall place it in a package and seal and identify the package and place it in the custody of a person referred to in subsection (3).

Claim to solicitor-client privilege (section 15 or 16)

(2) Where, pursuant to section 15 or 16, any person is about to examine, copy or seize or is in the course of examining, copying or seizing any record and a person appearing to be in authority claims that there exists a solicitor-client privilege in respect thereof, the first-mentioned person, unless the person claiming the privilege withdraws the claim or the first-mentioned person desists from examining and copying the record and from seizing it or a copy thereof, shall, without examining or further examining it or making a copy or further copy thereof, place it and any copies of it made by him, and any notes taken in respect of it, in a package, and seal and identify the package and place it in the custody of a person referred to in subsection (3).

Custody of record

(3) A record in respect of which a solicitor-client privilege is claimed under subsection (1) or (2) shall be placed in the custody of

(a) the registrar, prothonotary or other like officer of a superior or county court in the province in which the record was ordered to be produced or in which it was found, or of the Federal Court;

(b) a sheriff of the district or county in which the record was ordered to be produced or in which it was found; or

(c) some person agreed on between the Commissioner or the authorized representative of the Commissioner and the person who makes the claim of privilege.

Determination of claim to privilege

(4) A judge of a superior or county court in the province in which a record placed in custody under this section was ordered to be produced or in which it was found, or of the Federal Court, sitting *in camera*, may decide the question of solicitor-client privilege in relation to the record on application made in accordance with the rules of the court by the Commissioner or the owner of the record or the person in whose possession it was found within thirty days after the day on which the record was placed in custody if notice of the application has been given by the applicant to all other persons entitled to make application.

Idem

(5) Where no application is made in accordance with subsection (4) within thirty days after the day on which a record is placed in custody under this section, any judge referred to in subsection (4) shall, on *ex parte* application by or on behalf of the Commissioner, order the record to be delivered to the Commissioner.

Authority of judge

(6) A judge referred to in subsection (4) may give any directions that the judge deems necessary to give effect to this section, may order delivery up to the judge out of custody of any record in respect of which he is asked to decide a question of solicitor-client privilege and may inspect any such record.

Prohibition

(7) Any person who is about to examine, copy or seize any record pursuant to section 15 or 16 shall not do so without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under this section.

Access to record in custody

(8) At any time while a record is in custody under this section, a judge of a superior or county court in the province in which the record is in custody, or of the Federal Court, may, on an *ex parte* application of a person claiming solicitor-client privilege under this section, authorize that person to examine the record or make a copy of it in the presence of the person who has custody of it or the judge, but any such authorization shall contain provisions to ensure that the record is repackaged and that the package is resealed without alteration or damage.
R.S., 1985, c. C-34, s. 19; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Inspection of records and things

20 (1) All records or other things obtained or received by the Commissioner may be inspected by the Commissioner and also by such persons as he directs.

Copies

(2) Copies of any records referred to in subsection (1), including copies by any process of photographic reproduction, on proof orally or by affidavit that they are true copies, are admissible in evidence in any proceedings under this Act and have the same probative force as the original.

Proof

(3) Where proof referred to in subsection (2) is offered by affidavit, it is not necessary to prove the signature or official character of the deponent, if that information is set out in the affidavit, or to prove the signature or official character of the person before whom the affidavit was sworn.

R.S., 1985, c. C-34, s. 20; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Counsel

21 Whenever in the opinion of the Commissioner the public interest so requires, the Commissioner may apply to the Attorney General of Canada to appoint and instruct counsel to assist in an inquiry under section 10, and on such an application the Attorney General of Canada may appoint and instruct counsel accordingly.

R.S., 1985, c. C-34, s. 21; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Discontinuance of inquiry

22 (1) At any stage of an inquiry under section 10, if the Commissioner is of the opinion that the matter being inquired into does not justify further inquiry, the Commissioner may discontinue the inquiry.

Report

(2) The Commissioner shall, on discontinuing an inquiry, make a report in writing to the Minister showing the information obtained and the reason for discontinuing the inquiry.

Notice to applicant

(3) Where an inquiry made on application under section 9 is discontinued, the Commissioner shall inform the applicants of the decision and give the grounds therefor.

Review of decision

(4) The Minister may, on the written request of applicants under section 9 or on the Minister's own motion, review any decision of the Commissioner to discontinue an inquiry under section 10, and may, if in the Minister's opinion the circumstances warrant, instruct the Commissioner to make further inquiry.

R.S., 1985, c. C-34, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 187, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37, c. 31, s. 47(F).

Reference to Attorney General of Canada

23 (1) The Commissioner may, at any stage of an inquiry under section 10, in addition to or in lieu of continuing the inquiry, remit any records, returns or evidence to the Attorney General of Canada for consideration as to whether an offence has been or is about to be committed against this Act and for such action as the Attorney General of Canada may wish to take.

Prosecution by Attorney General of Canada

(2) The Attorney General of Canada may institute and conduct any prosecution or other criminal proceedings under this Act, and for those purposes may exercise all the powers and perform all the duties and functions conferred by the *Criminal Code* on the attorney general of a province.

R.S., 1985, c. C-34, s. 23; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Regulations

24 (1) The Governor in Council may make regulations regulating the practice and procedure in respect of applications, proceedings and orders under sections 11 to 19.

Publication of proposed regulations

(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the *Canada Gazette* at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

Exception

(3) No proposed regulation need be published under subsection (2) if it has previously been published pursuant to that subsection, whether or not it has been amended as a result of representations made pursuant to that subsection.

R.S., 1985, c. C-34, s. 24; R.S., 1985, c. 19 (2nd Supp.), s. 24.

Staff

25 All officers, clerks and employees required for carrying out this Act shall be appointed in accordance with the *Public Service Employment Act*, except that the Commissioner may, with the approval of the Governor in Council, employ such temporary, technical and special assistants as may be required to meet the special conditions that may arise in carrying out this Act.

R.S., 1985, c. C-34, s. 25; R.S., 1985, c. 19 (2nd Supp.), s. 25; 1999, c. 2, s. 37.

Remuneration of temporary staff

26 (1) Any temporary, technical and special assistants employed by the Commissioner shall be paid such remuneration, and are entitled to be paid such travel and living expenses incurred in the performance of their duties under this Act, as may be fixed by the Governor in Council.

Remuneration and expenses payable out of appropriations

(2) The remuneration and expenses of the Commissioner and of the temporary, technical and special assistants employed by the Commissioner, and of any counsel instructed under this Act, shall be paid out of money appropriated by Parliament to defray the cost of administering this Act.

***Public Service Employment Act* applies**

(3) Subject to this section and section 7, the *Public Service Employment Act* and other Acts relating to the Public Service, in so far as applicable, apply to the Commissioner and to all other persons employed under this Act.

R.S., 1985, c. C-34, s. 26; R.S., 1985, c. 19 (2nd Supp.), s. 25; 1999, c. 2, s. 37.

Authority of technical or special assistants

27 Any technical or special assistant or other person employed under this Act, when so authorized or deputed by the Commissioner, has power and authority to exercise any of the powers and perform any of the duties of the Commissioner under this Act with respect to any particular inquiry, as may be directed by the Commissioner.

R.S., 1985, c. C-34, s. 27; 1999, c. 2, s. 37.

Minister may require interim report

28 The Minister may at any time require the Commissioner to submit an interim report with respect to any inquiry by him under this Act, and it is the duty of the Commissioner whenever thereunto required by the Minister to render an interim report setting out the action taken, the evidence obtained and the Commissioner's opinion as to the effect of the evidence.

R.S., 1985, c. C-34, s. 28; 1999, c. 2, s. 37.

Confidentiality

29 (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(a) the identity of any person from whom information was obtained pursuant to this Act;

(b) any information obtained pursuant to section 11, 15, 16 or 114;

(c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

(d) any information obtained from a person requesting a certificate under section 102; or

(e) any information provided voluntarily pursuant to this Act.

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

R.S., 1985, c. C-34, s. 29; R.S., 1985, c. 19 (2nd Supp.), s. 26; 2002, c. 16, s. 2.1.

Communication to Minister of Transport

29.1 (1) Notwithstanding subsection 29(1), the Commissioner may, if requested to do so by the Minister of Transport in accordance with subsection (3), communicate or allow to be communicated to that Minister any information referred to in subsection (2) that is specifically requested by that Minister.

Information

(2) The information that may be communicated under this section is

(a) the identity of any person from whom information was obtained under this Act;

(b) any information obtained in the course of an inquiry under section 10;

(c) any information obtained under section 11, 15, 16 or 114;

(d) any information obtained from a person requesting a certificate under section 102;

(e) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; and

(f) any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses.

Contents of request

(3) Requests under this section must be in writing and must

(a) specify the information referred to in any of paragraphs (2)(a) to (f) that is required; and

(b) state that the Minister of Transport requires the information for the purposes of section 56.1 or 56.2 of the *Canada Transportation Act* and identify the transaction being considered under that section.

Restriction

(4) The information communicated under subsection (1) may be used only for the purposes of section 56.1 or 56.2, as the case may be, of the *Canada Transportation Act*.

Confidentiality

(5) No person who performs or has performed duties or functions in the administration or enforcement of the *Canada Transportation Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to persons who perform duties or functions under section 56.1 or 56.2 of that Act.

2000, c. 15, s. 12.

Communication to Minister of Finance

29.2 (1) Notwithstanding subsection 29(1), the Commissioner may, if requested to do so by the Minister of Finance in accordance with subsection (3), communicate or allow to be communicated to the Minister of Finance any information referred to in subsection (2) that is specifically requested by the Minister of Finance.

Information

(2) The information that may be communicated under this section is

(a) the identity of any person from whom information was obtained under this Act;

(b) any information obtained in the course of an inquiry under section 10;

(c) any information obtained under section 11, 15, 16 or 114;

(d) any information obtained from a person requesting a certificate under section 102;

(e) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; and

(f) any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses.

Contents of request

(3) Requests under this section must be in writing and must

(a) specify the information referred to in any of paragraphs (2)(a) to (f) that is required;

(b) state that the Minister of Finance requires the information

(i) to consider a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*, or

(ii) to permit the Minister of Finance to determine whether he or she should provide the Commissioner with a certificate described in paragraph 94(b) in respect of such a merger or proposed merger;

and

(c) identify the merger or proposed merger.

Restriction

(4) The information communicated under subsection (1) may be used only for the purpose of making a decision in respect of the merger or proposed merger.

Confidentiality

(5) No person who performs or has performed duties or functions, in the administration or enforcement of the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to other persons who perform those duties or functions.
2001, c. 9, s. 578.

PART III

Mutual Legal Assistance

Interpretation

Definitions

30 The definitions in this section apply in this Part.

agreement means a treaty, convention or other international agreement to which Canada is a party that provides for mutual legal assistance in competition matters, other than a matter in respect of which the *Mutual Legal Assistance in Criminal Matters Act* applies. (*accord*)

conduct means conduct or matters within the meaning of the relevant agreement in respect of which mutual legal assistance may be requested in accordance with this Part. (*comportement*)

data means representations, in any form, of information or concepts. (*données*)

foreign state means a country other than Canada, and includes any international organization of states. (*État étranger*)

judge means

(a) in Ontario, a judge of the Superior Court of Justice;

(b) in Quebec, a judge of the Superior Court;

(c) in Nova Scotia, British Columbia, Newfoundland, the Yukon Territory and the Northwest Territories, a judge of the Supreme Court, and in Nunavut, a judge of the Nunavut Court of Justice;

(d) in New Brunswick, Manitoba, Saskatchewan and Alberta, a judge of the Court of Queen's Bench;

(e) in Prince Edward Island, a judge of the trial division of the Supreme Court; and

(f) in any province or territory, a judge of the Federal Court — Trial Division. (*juge*)

R.S., 1985, c. C-34, s. 30; R.S., 1985, c. 19 (2nd Supp.), s. 26; 2002, c. 16, s. 3.

Functions of the Minister of Justice

Agreements respecting mutual legal assistance

30.01 Before Canada enters into an agreement, the Minister of Justice must be satisfied that

(a) the laws of the foreign state that address conduct that is similar to conduct prohibited or reviewable under this Act are, in his or her opinion, substantially similar to the relevant provisions of this Act, regardless of whether the conduct is dealt with criminally or otherwise;

(b) any record or thing provided by Canada under the agreement will be protected by laws respecting confidentiality that are, in his or her opinion, substantially similar to Canadian laws;

(c) the agreement contains provisions in respect of

(i) the circumstances in which Canada may refuse, in whole or in part, to approve a request, and

(ii) the confidentiality protections that will be afforded to any record or thing provided by Canada;

(d) the agreement contains the following undertakings by the foreign state, namely,

(i) that it will provide assistance to Canada comparable in scope to that provided by Canada,

(ii) that any record or thing provided by Canada will be used only for the purpose for which it was requested,

(iii) that any record or thing provided by Canada will be used subject to any terms and conditions on which it was provided, including conditions respecting applicable rights or privileges under Canadian law,

(iv) that, at the conclusion of the investigation or proceedings in respect of which any record or thing was provided by Canada, the foreign state will return the record or thing and any copies to Canada or, with the consent of Canada, return the record or thing to Canada and destroy any copies,

(v) subject to subparagraph (ii), that it will, to the greatest extent possible consistent with its laws, keep confidential any record or thing obtained by it pursuant to its request, and oppose any application by a third party for disclosure of the record or thing, and

(vi) that it will promptly notify the Minister of Justice in the event that the confidentiality protections contained in the agreement have been breached; and

(e) the agreement contains a provision in respect of the manner in which it may be terminated.

2002, c. 16, s. 3.

Publication of Agreements

Publication in *Canada Gazette*

30.02 (1) An agreement must be published in the *Canada Gazette* no later than 60 days after the agreement comes into force, unless it has already been published under subsection (2).

Publication in *Canada Treaty Series*

(2) An agreement may be published in the *Canada Treaty Series* and, if so published, the publication must be no later than 60 days after the agreement comes into force.

Judicial notice

(3) Agreements published in the *Canada Gazette* or the *Canada Treaty Series* are to be judicially noticed.

2002, c. 16, s. 3.

Requests Made to Canada from Abroad

Requests

Requests

30.03 The Minister of Justice is responsible for dealing with a request made by a foreign state under an agreement, in accordance with the agreement and this Part.

2002, c. 16, s. 3.

Search and Seizure

Application of sections 15, 16 and 19

30.04 Sections 15, 16 and 19 apply, with any modifications that the circumstances require, in respect of a search or a seizure under this Part, except to the extent that those sections are inconsistent with this Part.

2002, c. 16, s. 3.

Approval of request for search and seizure

30.05 (1) If the Minister of Justice approves a request of a foreign state to have a search and seizure carried out in respect of conduct that is the subject of the request, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for a search warrant.

Application for search warrant

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* for a search warrant to a judge.

2002, c. 16, s. 3.

Warrant for entry of premises

30.06 (1) A judge to whom an application is made under subsection 30.05(2) may issue a search warrant authorizing the person named in it to execute it anywhere in Canada where the judge is satisfied by information on oath or solemn affirmation that there are reasonable grounds to believe that

(a) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place;

(b) evidence in respect of the conduct referred to in paragraph (a) will be found in any premises; and

(c) it would not, in the circumstances, be appropriate to make an order under subsection 30.11(1).

Authorization

(2) A search warrant issued under subsection (1) authorizes the person named in it to enter the premises specified in the warrant, subject to any conditions that may be specified in the warrant, and to search the premises for any record or thing specified in the warrant and to examine and seize it.

Hearing re execution

(3) A judge who issues a search warrant under subsection (1) shall fix a time and place for a hearing to consider the execution of the warrant as well as the report referred to in section 30.07.

Contents of warrant

(4) A search warrant issued under subsection (1) must

(a) set out the time and place for the hearing mentioned in subsection (3);

(b) state that, at that hearing, an order will be sought for the sending to the foreign state of the records or things seized in execution of the warrant; and

(c) state that every person from whom a record or thing is seized in execution of the warrant and any person who claims to have an interest in a record or thing so seized may make representations at the hearing before any order is made concerning the record or thing.

Duty of persons in control of premises

(5) Every person who is in possession or control of any premises, record or thing in respect of which a search warrant is issued under subsection (1) shall, on presentation of the warrant, permit the person named in the warrant to enter the premises, search the premises and

examine the record or thing and seize it.

Where admission or access refused

(6) Where a person, in executing a search warrant issued under subsection (1), is refused access to any premises, record or thing or where the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the *ex parte* application of the Commissioner or the authorized representative of the Commissioner, may by order direct a peace officer to take any steps that the judge considers necessary to give access to the person named in the warrant.

2002, c. 16, s. 3.

Report

30.07 (1) The person who executes a search warrant shall, at least five days before the time of the hearing to consider its execution, file with the court of which the judge who issued the warrant is a member a written report concerning the execution of the warrant that includes a general description of the records or things seized.

Copy to Minister of Justice

(2) The person who files the report under subsection (1) shall send a copy of it to the Minister of Justice promptly after its filing.

2002, c. 16, s. 3.

Sending abroad

30.08 (1) At the hearing referred to in subsection 30.06(3), after having considered any representations of the Minister of Justice, the Commissioner, the person from whom a record or thing was seized and any person who claims to have an interest in the record or thing, the judge who issued the search warrant or another judge of the same court may

(a) where the judge is not satisfied that the warrant was executed according to its terms and conditions or where the judge is satisfied that an order should not be made under paragraph (b), order that a record or thing seized be returned to

(i) the person from whom it was seized, if possession of it by that person is lawful, or

(ii) the lawful owner or the person who is lawfully entitled to its possession, if the owner or that person is known and possession of the record or thing by the person from whom it was seized is unlawful; or

(b) in any other case, order that a record or thing seized be sent to the foreign state mentioned in subsection 30.05(1) and include in the order any terms and conditions that the judge considers desirable, including terms and conditions

(i) necessary to give effect to the request mentioned in that subsection,

(ii) in respect of the preservation and return to Canada of any record or thing seized, and

(iii) in respect of the protection of the interests of third parties.

Requiring record, etc., at hearing

(2) At the hearing mentioned in subsection (1), the judge may require that a record or thing seized be brought before him or her.

2002, c. 16, s. 3.

Terms and conditions

30.09 No record or thing seized that has been ordered under section 30.08 to be sent to a foreign state shall be so sent until the Minister of Justice is satisfied that the foreign state has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing.

2002, c. 16, s. 3.

Evidence for Use Abroad

Approval of request to obtain evidence

30.1 (1) If the Minister of Justice approves a request of a foreign state to obtain, by means of an order of a judge, evidence in respect of conduct that is the subject of the request, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for the order.

Application for order

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* to a judge for an order for the gathering of evidence.

2002, c. 16, s. 3.

Evidence-gathering order

30.11 (1) A judge to whom an application is made under subsection 30.1(2) may make an order for the gathering of evidence where the judge is satisfied that there are reasonable grounds to believe that

(a) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place; and

(b) there will be found in Canada evidence in respect of the conduct referred to in paragraph (a).

Provisions of order

(2) An order made under subsection (1) must provide for the manner in which the evidence is to be obtained in order to give effect to the request mentioned in subsection 30.1(1) and may

(a) order the examination, on oath or otherwise, of a person named in the order, order the person to attend at the place fixed by the person designated under paragraph (c) for the examination and to remain in attendance until he or she is excused by the person so designated, order the person so named, where appropriate, to make a copy of a record or to make a record from data and to bring the copy or record with him or her, and order the person so named to bring with him or her any record or thing in his or her possession or control, in order to produce them to the person before whom the examination takes place;

(b) order a person named in the order to make a copy of a record or to make a record from data and to produce the copy or record to the person designated under paragraph (c), order the person to produce any record or thing in his or her possession or control to the person so designated and provide, where appropriate, for any affidavit or certificate that, pursuant to the request, is to accompany any copy, record or thing so produced; and

(c) designate a person before whom the examination referred to in paragraph (a) is to take place or to whom the copies, records, things, affidavits and certificates mentioned in paragraph (b) are to be produced.

Designation of judge

(3) For greater certainty, a judge who makes an order under subsection (1) may designate himself or herself or another person, including a judge of a Canadian or foreign court, under paragraph (2)(c).

Order effective throughout Canada

(4) An order made under subsection (1) may be executed anywhere in Canada.

Terms and conditions of order

(5) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of a person named in the order and of third parties.

Variation

(6) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

Other laws to apply

(7) A person named in an order made under subsection (1) shall answer questions and produce records or things to the person designated under paragraph (2)(c) in accordance with the laws of evidence and procedure in the foreign state that presented the request, but may

refuse if answering the questions or producing the records or things would disclose information that is protected by the Canadian law of non-disclosure of information or privilege.

Execution of order to be completed

(8) If a person refuses to answer a question or to produce a record or thing, the person designated under paragraph (2)(c)

(a) may, if he or she is a judge of a Canadian or foreign court, make immediate rulings on any objections or issues within his or her jurisdiction; or

(b) shall, in any other case, continue the examination and ask any other question or request the production of any other record or thing mentioned in the order.

Statement of reasons for refusal

(9) A person named in an order made under subsection (1) who, under subsection (7), refuses to answer one or more questions or to produce certain records or things shall, within seven days, give to the person designated under paragraph (2)(c), unless that person has already ruled on the objection under paragraph (8)(a), a detailed statement in writing of the reasons on which the person bases the refusal to answer each question that the person refuses to answer or to produce each record or thing that the person refuses to produce.

Expenses

(10) A person named in an order made under subsection (1) is entitled to be paid the travel and living expenses to which the person would be entitled if the person were required to attend as a witness before the judge who made the order.

Contents of order

(11) An order made under subsection (1) must state that a person named in the order, and any person who claims an interest in any record or thing provided pursuant to the order, may make representations referred to in subsection 30.13(2) before any order is made under subsection 30.13(1).

2002, c. 16, s. 3.

Report

30.12 (1) A person designated under paragraph 30.11(2)(c) in an order made under subsection 30.11(1) shall make a report to the judge who made the order, or another judge of the same court, accompanied by

(a) a transcript of every examination held under the order;

(b) a general description of every record or thing produced to the person under the order and, if the judge so requires, a record or thing itself; and

(c) a copy of every statement given under subsection 30.11(9) of the reasons for a refusal to answer any question or to produce any record or thing.

Copy to Minister of Justice

(2) The person designated under paragraph 30.11(2)(c) shall send a copy of the report to the Minister of Justice promptly after it is made.

Refusals

(3) If any reasons contained in a statement given under subsection 30.11(9) are based on the Canadian law of non-disclosure of information or privilege, a judge to whom a report is made shall determine whether those reasons are well-founded and, if the judge determines that they are, that determination shall be mentioned in any order that the judge makes under section 30.13, but if the judge determines that they are not, the judge shall order that the person named in the order made under subsection 30.11(1) answer the questions or produce the records or things.

Refusals based on foreign law

(4) A copy of every statement given under subsection 30.11(9) that contains reasons that purport to be based on a law that applies to the foreign state shall be appended to any order that the judge makes under section 30.13.
2002, c. 16, s. 3.

Sending abroad

30.13 (1) A judge to whom a report is made under subsection 30.12(1) may order that there be sent to the foreign state mentioned in subsection 30.1(1)

(a) the report, any transcript referred to in paragraph 30.12(1)(a) and any record or thing produced;

(b) a copy of the order made under subsection 30.11(1) accompanied by a copy of any statement given under subsection 30.11(9) that contains reasons that purport to be based on a law that applies to the foreign state; and

(c) any determination made under subsection 30.12(3) that the reasons contained in a statement given under subsection 30.11(9) are well-founded.

Terms and conditions

(2) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, after having considered any representations of the Minister of Justice, the Commissioner, the person who produced any record or thing to the person designated under paragraph 30.11(2)(c) and any person who claims to have an interest in any record or thing so produced, including terms and conditions

(a) necessary to give effect to the request mentioned in subsection 30.1(1);

(b) in respect of the preservation and return to Canada of any record or thing so produced; and

(c) in respect of the protection of the interests of third parties.

Further execution

(3) The execution of an order made under subsection 30.11(1) that was not completely executed because of a refusal, by reason of a law that applies to the foreign state, to answer one or more questions or to produce certain records or things to the person designated under paragraph 30.11(2)(c) may be continued, unless a ruling has already been made on the objection under paragraph 30.11(8)(a), if a court of the foreign state or a person designated by the foreign state determines that the reasons are not well-founded and the foreign state so advises the Minister of Justice.

Leave of judge required

(4) No person named in an order made under subsection 30.11(1) whose reasons for refusing to answer a question or to produce a record or thing are determined not to be well-founded, or whose objection has been ruled against under paragraph 30.11(8)(a), shall, during the continued execution of the order or ruling, refuse to answer that question or to produce that record or thing to the person designated under paragraph 30.11(2)(c), except with the permission of the judge who made the order or ruling or another judge of the same court.
2002, c. 16, s. 3.

Terms and conditions

30.14 No record or thing that has been ordered under section 30.13 to be sent to the foreign state mentioned in subsection 30.1(1) shall be so sent until the Minister of Justice is satisfied that the foreign state has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing.

2002, c. 16, s. 3.

Approval of request to obtain evidence by video link, etc.

30.15 (1) If the Minister of Justice approves a request of a foreign state to compel a person to provide evidence or a statement in respect of conduct that is the subject of the request by means of technology that permits the virtual presence of the person in the territory over which the foreign state has jurisdiction, or that permits the person to be heard and examined, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for the order.

Application for order

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* to a judge for an order for the taking of evidence or a statement from the person.

2002, c. 16, s. 3.

Order for video link, etc.

30.16 (1) A judge to whom an application is made under subsection 30.15(2) may make an order for the taking of evidence or a statement from a person where the judge is satisfied that there are reasonable grounds to believe that

(a) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place; and

(b) the foreign state believes that the person's evidence or statement would be relevant to the investigation or proceedings in respect of the conduct referred to in paragraph (a).

Provisions of order

(2) An order made under subsection (1) shall order the person

(a) to attend at the place fixed by the judge for the taking of the evidence or statement by means of the technology and to remain in attendance until the person is excused by the authorities of the foreign state;

(b) to answer any questions put to the person by the authorities of the foreign state or by any person authorized by those authorities;

(c) to make a copy of a record or to make a record from data and to bring the copy or record, when appropriate; and

(d) to bring any record or thing in his or her possession or control, when appropriate, in order to show it to the authorities by means of the technology.

Order effective throughout Canada

(3) An order made under subsection (1) may be executed anywhere in Canada.

Terms and conditions of order

(4) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of the person named in it and of third parties.

Variation

(5) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

Expenses

(6) A person named in an order made under subsection (1) is entitled to be paid the travel and living expenses to which the person would be entitled if the person were required to attend as a witness before the judge who made the order.

2002, c. 16, s. 3.

Other laws to apply

30.17 (1) When a person gives evidence or a statement pursuant to an order made under subsection 30.16(1), the person shall give the evidence or statement as though he or she were physically before the court or tribunal outside Canada, in accordance with the laws of evidence and procedure applicable to that court or tribunal, but may refuse to give evidence or a statement, in whole or in part, if giving the evidence or statement would disclose information that is protected by the Canadian law of non-disclosure of information or privilege.

Statement of reasons for refusal

(2) A person named in an order made under subsection 30.16(1) who refuses to give evidence or a statement on the grounds that it would disclose information that is protected by the Canadian law of non-disclosure of information or privilege shall, within seven days, give to the judge who made the order or another judge of the same court a detailed statement in writing of the reasons on which the person bases each refusal.

Refusals

(3) A judge to whom a statement is given under subsection (2) shall determine whether the reasons for refusal are well-founded and, if the judge determines that they are not, the judge shall order that the person named in the order made under subsection 30.16(1) give the evidence or statement.

Contempt of court in Canada

(4) When a witness gives evidence under section 30.16, the Canadian law relating to contempt of court applies with respect to a refusal by the person to answer a question or to produce a record or thing as ordered by the judge under that section.

2002, c. 16, s. 3.

Arrest warrant

30.18 (1) The judge who made the order under subsection 30.11(1) or 30.16(1) or another judge of the same court may issue a warrant for the arrest of the person named in the order where the judge is satisfied, on an information in writing and under oath or solemn declaration, that

(a) the person did not attend or remain in attendance as required by the order or is about to abscond;

(b) the order was personally served on the person; and

(c) in the case of an order made under subsection 30.11(1), the person is likely to give material evidence and, in the case of an order made under subsection 30.16(1), the foreign state believes that the testimony of the person would be relevant to the investigation or proceedings in respect of the conduct.

Warrant effective throughout Canada

(2) A warrant issued under subsection (1) may be executed anywhere in Canada by any peace officer.

Order

(3) A peace officer who arrests a person in execution of a warrant issued under subsection (1) shall, without delay, bring the person or cause the person to be brought before the judge who issued the warrant or another judge of the same court who may, to ensure compliance with the order made under subsection 30.11(1) or 30.16(1), order that the person be detained in custody or released on recognizance, with or without sureties.

Copy of information

(4) A person who is arrested in execution of a warrant issued under subsection (1) is entitled to receive, on request, a copy of the information on which the warrant was issued.
2002, c. 16, s. 3.

Lending Exhibits

Approval of loan request

30.19 (1) If the Minister of Justice approves a request of a foreign state under an agreement to have an exhibit that was admitted in evidence in a proceeding in respect of an offence in a court in Canada or in a proceeding before the Tribunal lent to the foreign state, the Minister shall provide the Commissioner with any documents or information necessary to apply for a loan order.

Application for loan order

(2) The Commissioner or the authorized representative of the Commissioner shall apply for a loan order in respect of the exhibit to the court that has possession of the exhibit, or to the Tribunal if it has possession of the exhibit, after having given reasonable notice to the parties to the proceedings and to

(a) the Attorney General of Canada, in the case of an application to the Federal Court;

(b) the attorney general of the province in which the exhibit is located, in the case of an application to a court other than the Federal Court; or

(c) the Chairman of the Tribunal, in the case of an application to the Tribunal.

Contents of application

(3) An application made under subsection (2) must

(a) contain a description of the exhibit requested to be lent;

(b) designate a person or class of persons to whom the exhibit is sought to be given;

(c) state the reasons for the request and, if any tests are sought to be performed on the exhibit, contain a description of the tests and a statement of the place where they will be performed;

(d) state the place or places to which the exhibit is sought to be removed; and

(e) specify the time at or before which the exhibit is to be returned.

2002, c. 16, s. 3.

Making of loan order

30.2 (1) If the court or the Tribunal, as the case may be, is satisfied that the foreign state has requested the loan for a fixed period and has agreed to comply with the terms and conditions that the court or Tribunal proposes to include in any loan order, the court or Tribunal may, after having considered any representations of the persons to whom notice of the application was given in accordance with subsection 30.19(2), make a loan order.

Terms of loan order

(2) A loan order made under subsection (1) must

(a) contain a description of the exhibit;

(b) order the person who has possession of the exhibit to give it to a person designated in the order or who is a member of a class of persons so designated;

(c) contain a description of any tests authorized to be performed on the exhibit, as well as a statement of the place where the tests must be performed;

(d) fix the place or places to which the exhibit may be removed; and

(e) fix the time at or before which the exhibit must be returned.

Terms and conditions

(3) A loan order made under subsection (1) may include any terms or conditions that the court or the Tribunal considers desirable, including those relating to the preservation of the exhibit.

2002, c. 16, s. 3.

Variation of loan order

30.21 A court or the Tribunal may vary the terms and conditions of any loan order made by it.

2002, c. 16, s. 3.

Copy of order to custodian

30.22 A copy of a loan order and of an order varying it shall be delivered by the Commissioner to the Minister of Justice and to the person who had possession of the exhibit when the loan order was made.

2002, c. 16, s. 3.

Presumption of continuity

30.23 The burden of proving that an exhibit lent to a foreign state pursuant to a loan order made under subsection 30.2(1) and returned to Canada is not in the same condition as it was when the loan order was made or that it was tampered with after the loan order was made is on the party who makes that allegation and, in the absence of that proof, the exhibit is deemed to have been continuously in the possession of the court that made the loan order or the Tribunal, as the case may be.

2002, c. 16, s. 3.

Appeal

Appeal on question of law

30.24 (1) An appeal lies, with leave, on a question of law alone, to the court of appeal, within the meaning of section 2 of the *Criminal Code*, from an order or decision of a judge or a court in Canada made under this Part, other than an order or decision of the Federal Court — Trial Division or a judge of that Court, if the application for leave to appeal is made to a judge of the court of appeal within fifteen days after the order or decision.

Appeal on question of law

(2) An appeal lies, with leave, on a question of law alone, to the Federal Court of Appeal, from any order or decision of the Federal Court — Trial Division or the Tribunal made under this Part, if the application for leave to appeal is made to a judge of that Court within fifteen days after the order or decision.

2002, c. 16, s. 3.

Evidence Obtained by Canada from Abroad

Evidence

30.25 The Minister of Justice shall, on receiving evidence sent by a foreign state in response to a request made by Canada under an agreement, send it promptly to the Commissioner.

2002, c. 16, s. 3.

Foreign records

30.26 (1) In a proceeding in respect of which Parliament has jurisdiction, a record or a copy of a record and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record, sent to the Minister of Justice by a foreign state in accordance with a Canadian request under an agreement, is not inadmissible in evidence by reason only that a statement contained in it is hearsay or a statement of opinion.

Probative value

(2) For the purpose of determining the probative value of a record or a copy of a record admitted in evidence under Part VII.1 or VIII, the court hearing the matter, or the Tribunal in proceedings before it, may examine the record or copy, receive evidence orally or by affidavit, or by a certificate or other statement pertaining to the record in which a person attests that the certificate or statement is made in conformity with the laws that apply to a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state, including evidence as to the circumstances in which the information contained in the record or copy was written, stored or reproduced, and may draw any reasonable inference from the form or content of the record or copy.

2002, c. 16, s. 3.

Foreign things

30.27 In a proceeding in respect of which Parliament has jurisdiction, a thing and any affidavit, certificate or other statement pertaining to the thing made by a person in a foreign state as to the identity and possession of the thing from the time it was obtained until its sending to the Commissioner by the Minister of Justice in accordance with a Canadian request under an agreement, are not inadmissible in evidence by reason only that the affidavit, certificate or other statement contains hearsay or a statement of opinion.

2002, c. 16, s. 3.

Status of certificate

30.28 An affidavit, certificate or other statement mentioned in section 30.26 or 30.27 is, in the absence of evidence to the contrary, proof of the statements contained in it without proof of the signature or official character of the person appearing to have signed it.

2002, c. 16, s. 3.

General

Confidentiality of foreign requests and evidence

30.29 (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person, except for the purposes of the administration or enforcement of this Act,

(a) the contents of a request made to Canada from a foreign state or the fact of the request having been made; or

(b) the contents of any record or thing obtained from a foreign state pursuant to a Canadian request.

Confidentiality of Canadian evidence

(2) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person, except to a Canadian law enforcement agency or for the purposes of the administration or

enforcement of this Act, any information obtained under section 30.06 or 30.11.

Exception

(3) This section does not apply in respect of any information that has been made public.
2002, c. 16, s. 3.

Records or other things already in Commissioner's possession

30.291 (1) For greater certainty, any evidence requested by a foreign state under an agreement may be obtained for the purposes of giving effect to the request only in accordance with the agreement and the procedure set out in this Part, even in the case of records or other things already in the possession of the Commissioner.

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

2002, c. 16, s. 3.

Preservation of informal arrangements

30.3 Nothing in this Part shall be construed so as to abrogate or derogate from any arrangement or agreement, other than an agreement under this Part, in respect of cooperation between the Commissioner and a foreign authority.

2002, c. 16, s. 3.

PART IV

Special Remedies

Reduction or removal of customs duties

31 Whenever, as a result of an inquiry under this Act, a judgment of a court or a decision of the Tribunal, it appears to the satisfaction of the Governor in Council that

(a) competition in respect of any article has been prevented or lessened substantially, and

(b) the prevention or lessening of competition is facilitated by customs duties imposed on the article, or on any like article, or can be reduced by a removal or reduction of customs duties so imposed,

the Governor in Council may, by order, remove or reduce any such customs duties.

R.S., 1985, c. C-34, s. 31; R.S., 1985, c. 19 (2nd Supp.), s. 27; 1999, c. 31, s. 48(F).

Powers of Federal Court where certain rights used to restrain trade

32 (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to

(a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,

(b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,

(c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or

(d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.

Orders

(2) The Federal Court, on an information exhibited by the Attorney General of Canada, may, for the purpose of preventing any use in the manner defined in subsection (1) of the exclusive rights and privileges conferred by any patents for invention, trade-marks, copyrights or registered integrated circuit topographies relating to or affecting the manufacture, use or sale of any article or commodity that may be a subject of trade or commerce, make one or more of the following orders:

(a) declaring void, in whole or in part, any agreement, arrangement or licence relating to that use;

(b) restraining any person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or licence;

(c) directing the grant of licences under any such patent, copyright or registered integrated circuit topography to such persons and on such terms and conditions as the court may deem proper or, if the grant and other remedies under this section would appear insufficient to prevent that use, revoking the patent;

(d) directing that the registration of a trade-mark in the register of trade-marks or the registration of an integrated circuit topography in the register of topographies be expunged or amended; and

(e) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use.

Treaties, etc.

(3) No order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents, trade-marks, copyrights or integrated circuit topographies to which Canada is a party.

R.S., 1985, c. C-34, s. 32; R.S., 1985, c. 10 (4th Supp.), s. 18; 1990, c. 37, s. 29; 2002, c. 16, s. 4(F).

Interim injunction

33 (1) A court may, on application by or on behalf of the Attorney General of Canada or the attorney general of a province, issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence, pending the commencement or completion of a proceeding under subsection 34(2) or a prosecution against the person, where it appears to the court, that the person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI or section 66, and that

(a) if the offence is committed or continued

(i) injury to competition that cannot adequately be remedied under any other provision of this Act will result, or

(ii) a person is likely to suffer, from the commission of the offence, damage for which the person cannot adequately be compensated under any other provision of this Act and that will be substantially greater than any damage that a person named in the application is likely to suffer from an injunction issued under this subsection in the event that it is subsequently found that an offence under Part VI or section 66 has not been committed, was not about to be committed and was not likely to be committed; or

(b) in the case of an offence under section 52.1 or 53, if the offence is committed or continued,

(i) injury to competition will result, or

(ii) one or more persons are likely to suffer damage from the commission of the offence that will be substantially greater than any damage that persons named in the application are likely to suffer from an injunction issued under this subsection in the event that it is subsequently found that an offence under section 52.1 or 53 has not been committed, was not about to be committed and was not likely to be committed.

Deceptive telemarketing or notice

(1.1) An injunction issued in respect of an offence under section 52.1 or 53 may forbid any person from supplying to another person a product that is or is likely to be used for the commission or continuation of such an offence, where the person being supplied or, in the case of a corporation, any of its officers or directors was previously

(a) convicted of an offence under section 52.1 or 53 or an offence under section 52 in respect of conduct prohibited by section 52.1 or 53; or

(b) punished for the contravention of an order made under this section or section 34 in respect of the commission, continuation or repetition of an offence referred to in paragraph (a).

Notice of application

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an injunction under subsection (1) shall be given by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, to each person against whom the injunction is sought.

***Ex parte* application**

(3) Where a court to which an application is made under subsection (1) is satisfied that

(a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte* but any injunction issued under subsection (1) by the court on *ex parte* application shall have effect only for such period, not exceeding ten days, as is specified in the order.

Terms of injunction

(4) An injunction issued under subsection (1)

(a) shall be in such terms as the court that issues it considers necessary and sufficient to meet the circumstances of the case; and

(b) subject to subsection (3), shall have effect for such period of time as is specified therein.

Extension or cancellation of injunction

(5) A court that issues an injunction under subsection (1), at any time and from time to time on application by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, or by or on behalf of any person to whom the injunction is directed, notice of which application has been given to all other parties thereto, may by order,

(a) notwithstanding subsections (3) and (4), continue the injunction, with or without modification, for such definite period as is stated in the order; or

(b) revoke the injunction.

Duty of applicant

(6) Where an injunction is issued under subsection (1), the Attorney General of Canada or the attorney general of a province, as the case may be, shall proceed as expeditiously as possible to institute and conclude any prosecution or proceedings arising out of the actions on the basis of which the injunction was issued.

Punishment for disobedience

(7) A court may punish any person who contravenes an injunction issued by it under subsection (1) by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

Definition of *court*

(8) In this section, ***court*** means the Federal Court or a superior court of criminal jurisdiction as defined in the *Criminal Code*.

R.S., 1985, c. C-34, s. 33; 1993, c. 34, s. 50; 1999, c. 2, s. 10; 2002, c. 16, s. 5.

Prohibition orders

34 (1) Where a person has been convicted of an offence under Part VI, the court may, at the time of the conviction, on the application of the Attorney General of Canada or the attorney general of the province, in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or prohibit the doing of any act or thing, by the person convicted or any other person, that is directed toward the continuation or repetition of the offence.

Idem

(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI, the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of the offence.

Prescriptive terms

(2.1) An order made under this section in relation to an offence may require any person

(a) to take such steps as the court considers necessary to prevent the commission, continuation or repetition of the offence; or

(b) to take any steps agreed to by that person and the Attorney General of Canada or the attorney general of the province.

Duration of order

(2.2) An order made under this section applies for a period of ten years unless the court specifies a shorter period.

Variation or rescission

(2.3) An order made under this section may be varied or rescinded in respect of any person to whom the order applies by the court that made the order

(a) where the person and the Attorney General of Canada or the attorney general of the province consent to the variation or rescission; or

(b) where the court, on the application of the person or the Attorney General of Canada or the attorney general of the province, finds that the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made, the order would not have been made or would have been ineffective in achieving its intended purpose.

Other proceedings

(2.4) No proceedings may be commenced under Part VI against a person against whom an order is sought under subsection (2) on the basis of the same or substantially the same facts as are alleged in proceedings under that subsection.

Appeals to courts of appeal and Federal Court

(3) The Attorney General of Canada or the attorney general of the province or any person against whom an order is made under this section may appeal against the order or a refusal to make an order or the quashing of an order

(a) from a superior court of criminal jurisdiction in the province to the court of appeal of the province, or

(b) from the Federal Court — Trial Division to the Federal Court of Appeal,

as the case may be, on any ground that involves a question of law or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

Appeals to Supreme Court of Canada

(3.1) The Attorney General of Canada or the attorney general of the province or any person against whom an order is made under this section may appeal against the order or a refusal to make an order or the quashing of an order from the court of appeal of the province or the Federal Court of Appeal, as the case may be, to the Supreme Court of Canada on any ground that involves a question of law or, if leave to appeal is granted by the Supreme Court, on any ground that appears to that Court to be a sufficient ground of appeal.

Disposition of appeal

(4) Where the court of appeal or the Supreme Court of Canada allows an appeal, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

Procedure

(5) Subject to subsections (3) and (4), Part XXI of the *Criminal Code* applies with such modifications as the circumstances require to appeals under this section.

Punishment for disobedience

(6) A court may punish any person who contravenes an order made under this section by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

Procedure

(7) Any proceedings pursuant to an information of the Attorney General of Canada or the attorney general of a province under this section shall be tried by the court without a jury, and the procedure applicable in injunction proceedings in the superior courts of the province shall, in so far as possible, apply.

Definition of "superior court of criminal jurisdiction"

(8) In this section, “superior court of criminal jurisdiction” means a superior court of criminal jurisdiction as defined in the *Criminal Code*.

R.S., 1985, c. C-34, s. 34; R.S., 1985, c. 19 (2nd Supp.), s. 28, c. 34 (3rd Supp.), s. 8; 1999, c. 2, s. 11.

Court may require returns

35 (1) Notwithstanding anything contained in Part VI, where any person is convicted of an offence under that Part, the court before whom the person was convicted and sentenced may, from time to time within three years thereafter, require the convicted person to submit such information with respect to the business of that person as the court deems advisable, and without restricting the generality of the foregoing, the court may require a full disclosure of all transactions, operations or activities since the date of the offence under or with respect to any contracts, agreements or arrangements, actual or tacit, that the convicted person may at any time have entered into with any other person touching or concerning the business of the person convicted.

Punishment

(2) The court may punish any failure to comply with an order under this section by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

R.S., c. C-23, s. 31.

Recovery of damages

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Evidence of prior proceedings

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

Jurisdiction of Federal Court

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

Limitation

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

R.S., 1985, c. C-34, s. 36; R.S., 1985, c. 1 (4th Supp.), s. 11.

PART V

[Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 29]

PART VI

Offences in Relation to Competition

Conspiracy

45 (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Idem

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

Evidence of conspiracy

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

Proof of intent

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement,

but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

Defence

(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

(a) the exchange of statistics;

(b) the defining of product standards;

(c) the exchange of credit information;

(d) the definition of terminology used in a trade, industry or profession;

(e) cooperation in research and development;

(f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;

(g) the sizes or shapes of the containers in which an article is packaged;

(h) the adoption of the metric system of weights and measures; or

(i) measures to protect the environment.

Exception

(4) Subsection (3) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

(a) prices,

(b) quantity or quality of production,

(c) markets or customers, or

(d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

Defence

(5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

Exception

(6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.

(d) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 30]

Defences

(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(a) in the practice of a trade or profession relating to the service; or

(b) in the collection and dissemination of information relating to the service.

Exception

(7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1).

Exception

(8) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate.

R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714.

Where application made under section 79 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection.

R.S., 1985, c. 19 (2nd Supp.), s. 31.

Foreign directives

46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication

is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Limitation

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 46; R.S., 1985, c. 19 (2nd Supp.), s. 32; 1999, c. 2, s. 37.

Definition of "bid-rigging"

47 (1) In this section, “bid-rigging” means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

Bid-rigging

(2) Every one who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Exception

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate.

R.S., 1985, c. C-34, s. 47; R.S., 1985, c. 19 (2nd Supp.), s. 33.

Conspiracy relating to professional sport

48 (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Matters to be considered

(2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to

(a) whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

Application

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

1974-75-76, c. 76, s. 15.

Agreements or arrangements of federal financial institutions

49 (1) Subject to subsection (2), every federal financial institution that makes an agreement or arrangement with another federal financial institution with respect to

(a) the rate of interest on a deposit,

(b) the rate of interest or the charges on a loan,

(c) the amount or kind of any charge for a service provided to a customer,

(d) the amount or kind of a loan to a customer,

(e) the kind of service to be provided to a customer, or

(f) the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld,

and every director, officer or employee of the federal financial institution who knowingly makes such an agreement or arrangement on behalf of the federal financial institution is guilty of an indictable offence and liable to a fine not exceeding ten million dollars or to imprisonment for a term not exceeding five years or to both.

Exceptions

(2) Subsection (1) does not apply in respect of an agreement or arrangement

(a) with respect to a deposit or loan made or payable outside Canada;

(b) applicable only in respect of the dealings of or the services rendered between federal financial institutions or by two or more federal financial institutions as regards a customer of each of those federal financial institutions where the customer has knowledge of the agreement or by a federal financial institution as regards a customer thereof, on behalf of that customer's customers;

(c) with respect to a bid for or purchase, sale or underwriting of securities by federal financial institutions or a group including federal financial institutions;

(d) with respect to the exchange of statistics and credit information, the development and utilization of systems, forms, methods, procedures and standards, the utilization of common facilities and joint research and development in connection therewith, and the restriction of advertising;

(e) with respect to reasonable terms and conditions of participation in guaranteed or insured loan programs authorized pursuant to an Act of Parliament or of the legislature of a province;

(f) with respect to the amount of any charge for a service or with respect to the kind of service provided to a customer outside Canada, payable or performed outside Canada, or payable or performed in Canada on behalf of a person who is outside Canada;

(g) with respect to the persons or classes of persons to whom a loan or other service will be made or provided outside Canada;

(h) in respect of which the Minister of Finance has certified to the Commissioner that Minister's request for or approval of the agreement or arrangement for the purposes of financial policy and has certified the names of the parties to the agreement or arrangement; or

(i) that is entered into only by financial institutions each of which is an affiliate of each of the others.

Definition of "federal financial institution"

(3) In this section and section 45, “federal financial institution” means a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*, a company to which the *Trust and Loan Companies Act* applies or a company or society to which the *Insurance Companies Act* applies.

R.S., 1985, c. C-34, s. 49; R.S., 1985, c. 19 (2nd Supp.), s. 34; 1991, c. 45, s. 548, c. 46, ss. 591, 593, c. 47, s. 715; 1993, c. 34, s. 51; 1999, c. 2, s. 37, c. 28, s. 153, c. 31, s. 49(F).

Illegal trade practices

50 (1) Every one engaged in a business who

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,

(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or

(c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Defence

(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

Cooperative societies excepted

(3) Paragraph (1)(a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to its members, suppliers or customers.

R.S., 1985, c. C-34, s. 50; 1999, c. 31, s. 50(F).

Definition of "allowance"

51 (1) In this section, “allowance” means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.

Grant of allowance prohibited except on proportionate terms

(2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser, which other purchasers are in this section called "competing purchasers", is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Definition of proportionate terms

(3) For the purposes of this section, an allowance is offered on proportionate terms only if

(a) the allowance offered to a purchaser is in approximately the same proportion to the value of sales to him as the allowance offered to each competing purchaser is to the total value of sales to that competing purchaser;

(b) in any case where advertising or other expenditures or services are exacted in return therefor, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of the advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to that competing purchaser; and

(c) in any case where services are exacted in return therefor, the requirements thereof have regard to the kinds of services that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed.

R.S., c. C-23, s. 35; 1974-75-76, c. 76, s. 17.

False or misleading representations

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Proof of deception not required

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.

Permitted representations

(1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

Representations accompanying products

(2) For the purposes of this section, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

Representations from outside Canada

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Deemed representation to public

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

General impression to be considered

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Offence and punishment

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Reviewable conduct

(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

Duplication of proceedings

(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 52; 1999, c. 2, s. 12.

Definition of "telemarketing"

52.1 (1) In this section, “telemarketing” means the practice of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest.

Required disclosures

(2) No person shall engage in telemarketing unless

(a) disclosure is made, in a fair and reasonable manner at the beginning of each telephone communication, of the identity of the person on behalf of whom the communication is made, the nature of the product or business interest being promoted and the purposes of the communication;

(b) disclosure is made, in a fair, reasonable and timely manner, of the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery; and

(c) disclosure is made, in a fair, reasonable and timely manner, of such other information in relation to the product as may be prescribed by the regulations.

Deceptive telemarketing

(3) No person who engages in telemarketing shall

(a) make a representation that is false or misleading in a material respect;

(b) conduct or purport to conduct a contest, lottery or game of chance, skill or mixed chance and skill, where

(i) the delivery of a prize or other benefit to a participant in the contest, lottery or game is, or is represented to be, conditional on the prior payment of any amount by the participant, or

(ii) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the person’s knowledge, that affects materially the chances of winning;

(c) offer a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of the fair market value of the first product and of any restrictions, terms or conditions applicable to its supply to the purchaser; or

(d) offer a product for sale at a price grossly in excess of its fair market value, where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.

General impression to be considered

(4) In a prosecution for a contravention of paragraph (3)(a), the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Exception

(5) The disclosure of information referred to in paragraph (2)(b) or (c) or (3)(b) or (c) must be made during the course of a telephone communication unless it is established by the accused that the information was disclosed within a reasonable time before the communication, by any means, and the information was not requested during the telephone communication.

Due diligence

(6) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

Offences by employees or agents

(7) Notwithstanding subsection (6), in the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

Liability of officers and directors

(8) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

Offence and punishment

(9) Any person who contravenes subsection (2) or (3) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Sentencing

(10) In sentencing a person convicted of an offence under this section, the court shall consider, among other factors, the following aggravating factors:

(a) the use of lists of persons previously deceived by means of telemarketing;

(b) characteristics of the persons to whom the telemarketing was directed, including classes of persons who are especially vulnerable to abusive tactics;

(c) the amount of the proceeds realized by the person from the telemarketing;

(d) previous convictions of the person under this section or under section 52 in respect of conduct prohibited by this section; and

(e) the manner in which information is conveyed, including the use of abusive tactics.

1999, c. 2, s. 13.

Deceptive notice of winning a prize

53 (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

Non-application

(2) Subsection (1) does not apply if the recipient actually wins the prize or other benefit and the person who sends or causes the notice or document to be sent

(a) makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person’s knowledge that materially affects the chances of winning;

(b) distributes the prizes or benefits without unreasonable delay; and

(c) selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill, in any area to which the prizes or benefits have been allocated.

Due diligence

(3) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

Offences by employees or agents

(4) In the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

Liability of officers and directors

(5) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

Offence and punishment

(6) Any person who contravenes this section is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Sentencing

(7) In sentencing a person convicted of an offence under this section, the court shall consider, among other factors, the following aggravating factors:

(a) the use of lists of persons previously deceived by the commission of an offence under section 52.1 or this section;

(b) the particular vulnerability of recipients of the notices or documents referred to in subsection (1) to abusive tactics;

(c) the amount of the proceeds realized by the person from the commission of an offence under this section;

(d) previous convictions of the person under section 52 or 52.1 or this section; and

(e) the manner in which information is conveyed, including the use of abusive tactics.

R.S., 1985, c. C-34, s. 53; 1999, c. 2, s. 14; 2002, c. 16, s. 6.

Double ticketing

54 (1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,

(a) on the product, its wrapper or container;

(b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or

(c) on an in-store or other point-of-purchase display or advertisement.

Offence and punishment

(2) Any person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding one year or to both.

1974-75-76, c. 76, s. 18.

Definition of *multi-level marketing plan*

55 (1) For the purposes of this section and section 55.1, ***multi-level marketing plan*** means a plan for the supply of a product whereby a participant in the plan receives compensation for the supply of the product to another participant in the plan who, in turn, receives compensation for the supply of the same or another product to other participants in the plan.

Representations as to compensation

(2) No person who operates or participates in a multi-level marketing plan shall make any representations relating to compensation under the plan to a prospective participant in the plan unless the representations constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person making the representations relating to

(a) compensation actually received by typical participants in the plan; or

(b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including

(i) the nature of the product, including its price and availability,

(ii) the nature of the relevant market for the product,

(iii) the nature of the plan and similar plans, and

(iv) whether the person who operates the plan is a corporation, partnership, sole proprietorship or other form of business organization.

Idem

(2.1) A person who operates a multi-level marketing plan shall ensure that any representations relating to compensation under the plan that are made to a prospective participant in the plan by a participant in the plan or by a representative of the person who operates the plan constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person who operates the plan relating to

(a) compensation actually received by typical participants in the plan; or

(b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including those specified in paragraph (2)(b).

Due diligence defence

(2.2) A person accused of an offence under subsection (2.1) shall not be convicted of the offence if the accused establishes that he or she took reasonable precautions and exercised due diligence to ensure

(a) that no representations relating to compensation under the plan were made by participants in the plan or by representatives of the accused; or

(b) that any representations relating to compensation under the plan that were made by participants in the plan or by representatives of the accused constituted or included fair, reasonable and timely disclosure of the information referred to in that subsection.

Offence and punishment

(3) Any person who contravenes subsection (2) or (2.1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

R.S., 1985, c. C-34, s. 55; 1992, c. 14, s. 1; 1999, c. 2, s. 15.

Definition of *scheme of pyramid selling*

55.1 (1) For the purposes of this section, ***scheme of pyramid selling*** means a multi-level marketing plan whereby

(a) a participant in the plan gives consideration for the right to receive compensation by reason of the recruitment into the plan of another participant in the plan who gives consideration for the same right;

(b) a participant in the plan gives consideration, as a condition of participating in the plan, for a specified amount of the product, other than a specified amount of the product that is bought at the seller's cost price for the purpose only of facilitating sales;

(c) a person knowingly supplies the product to a participant in the plan in an amount that is commercially unreasonable; or

(d) a participant in the plan who is supplied with the product

(i) does not have a buy-back guarantee that is exercisable on reasonable commercial terms or a right to return the product in saleable condition on reasonable commercial terms, or

(ii) is not informed of the existence of the guarantee or right and the manner in which it can be exercised.

Pyramid selling

(2) No person shall establish, operate, advertise or promote a scheme of pyramid selling.

Offence and punishment

(3) Any person who contravenes subsection (2) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

1992, c. 14, s. 1; 1999, c. 2, s. 16.

56 to 59 [Repealed, 1999, c. 2, s. 17]

Defence

60 Section 54 does not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada if he or she establishes that he or she obtained and recorded the name and address of that other person and accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his or her business.

R.S., 1985, c. C-34, s. 60; 1999, c. 2, s. 17.1.

Price maintenance

61 (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

Exception

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated corporations or directors, agents, officers or employees of

(a) the same corporation, partnership or sole proprietorship, or

(b) corporations, partnerships or sole proprietorships that are affiliated,

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

Suggested retail price

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

Idem

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

Exception

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to supply

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

(7) and (8) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 36]

Offence and punishment

(9) Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Where no unfavourable inference to be drawn

(10) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds

(a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person.

R.S., 1985, c. C-34, s. 61; R.S., 1985, c. 19 (2nd Supp.), s. 36; 1990, c. 37, s. 30; 1999, c. 31, s. 51(F).

Civil rights not affected

62 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of any civil right of action.

R.S., c. C-23, s. 39; 1974-75-76, c. 76, s. 18.

PART VII

Other Offences

Offences

63 [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 37]

Obstruction

64 (1) No person shall in any manner impede or prevent or attempt to impede or prevent any inquiry or examination under this Act.

Offence and punishment

(2) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both.

R.S., c. C-23, s. 41.

Contravention of Part II provisions

65 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, fails to comply with an order made under section 11 and every person who contravenes subsection 15(5) or 16(2) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both.

Failure to supply information

(2) Every person who, without good and sufficient cause, the proof of which lies on that person, contravenes section 114 or 123 is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $50,000.

Destruction or alteration of records or things

(3) Every person who destroys or alters, or causes to be destroyed or altered, any record or other thing that is required to be produced pursuant to section 11 or in respect of which a warrant is issued under section 15 is guilty of an offence and liable

(a) on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding two years or to both; or

(b) on conviction on indictment to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding five years or to both.

Liability of directors

(4) Where a corporation commits an offence under this section, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

R.S., 1985, c. C-34, s. 65; R.S., 1985, c. 19 (2nd Supp.), s. 38; 1999, c. 2, s. 18.

Contravention of subsection 30.06(5)

65.1 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, contravenes subsection 30.06(5) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both.

Destruction or alteration of records or things

(2) Every person who destroys or alters, or causes to be destroyed or altered, any record or thing in respect of which a search warrant is issued under section 30.06 or that is required to be produced pursuant to an order made under subsection 30.11(1) or 30.16(1) is guilty of an offence and liable

(a) on conviction on indictment to a fine not exceeding $50,000 or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction to a fine not exceeding $25,000 or to imprisonment for a term not exceeding two years, or to both.

2002, c. 16, s. 7.

Refusal after objection overruled

65.2 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, refuses to answer a question or to produce a record or thing to the person designated under paragraph 30.11(2)(c) after a judge has ruled against the objection under paragraph 30.11(8)(a), is guilty of an offence and liable on conviction on indictment or on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both.

Refusal where no ruling made on objection

(2) Every person is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both, who, without good and sufficient cause, the proof of which lies on that person, refuses to answer a question or to produce a record or thing to the person designated under paragraph 30.11(2)(c), where no ruling has been made under paragraph 30.11(8)(a),

(a) without giving the detailed statement required by subsection 30.11(9); or

(b) if the person was previously asked the same question or requested to produce the same record or thing and refused to do so and the reasons on which that person based the previous refusal were determined not to be well-founded by

(i) a judge, if the reasons were based on the Canadian law of non-disclosure of information or privilege, or

(ii) a court of the foreign state or by a person designated by the foreign state, if the reasons were based on a law that applies to the foreign state.

2002, c. 16, s. 7.

Contravention of Part VII.1 or VIII order

66 Every person who contravenes an order made under Part VII.1, except paragraph 74.1(1)(c), or under Part VIII is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding $25,000 or to imprisonment for a term not exceeding one year, or to both.

R.S., 1985, c. C-34, s. 66; R.S., 1985, c. 19 (2nd Supp.), s. 39; 1999, c. 2, s. 19.

Whistleblowing

66.1 (1) Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.

Confidentiality

(2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act.

1999, c. 2, s. 19.

Prohibition

66.2 (1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

(a) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has committed or intends to commit an offence under this Act;

(b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under this Act;

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order that an offence not be committed under this Act; or

(d) the employer believes that the employee will do anything referred to in paragraph (a) or (c) or will refuse to do anything referred to in paragraph (b).

Saving

(2) Nothing in this section impairs any right of an employee either at law or under an employment contract or collective agreement.

Definitions

(3) In this section, ***employee*** includes an independent contractor and ***employer*** has the corresponding meaning.

1999, c. 2, s. 19.

Procedure

Procedure for enforcing punishment

67 (1) Where an indictment is found against an accused, other than a corporation, for any offence against this Act, the accused may elect to be tried without a jury and where he so elects, he shall be tried by the judge presiding at the court at which the indictment is found, or the judge presiding at any subsequent sittings of that court, or at any court where the indictment comes on for trial.

Application of *Criminal Code*

(2) Where an election is made under subsection (1), the proceedings subsequent to the election shall be regulated in so far as may be applicable by the provisions of the *Criminal Code* relating to the trial of indictable offences by a judge without a jury.

Jurisdiction of courts

(3) No court other than a superior court of criminal jurisdiction, as defined in the *Criminal Code*, has power to try any offence under section 45, 46, 47, 48 or 49.

Corporations to be tried without jury

(4) Notwithstanding anything in the *Criminal Code* or in any other statute or law, a corporation charged with an offence under this Act shall be tried without a jury.

Option as to procedure under subsection 34(2)

(5) In any case where subsection 34(2) is applicable, the Attorney General of Canada or the attorney general of the province may in his discretion institute proceedings either by way of an information under that subsection or by way of prosecution.

Limitation period

(6) Proceedings in respect of an offence that is declared by this Act to be punishable on summary conviction may be instituted at any time within but not later than two years after the time when the subject-matter of the proceedings arose.

R.S., c. C-23, s. 44; 1974-75-76, c. 76, s. 19.

Venue of prosecutions

68 Notwithstanding any other Act, a prosecution for an offence under Part VI or section 66 may be brought, in addition to any place in which the prosecution may be brought by virtue of the *Criminal Code*,

(a) where the accused is a corporation, in any territorial division in which the corporation has its head office or a branch office, whether or not the branch office is provided for in any Act or instrument relating to the incorporation or organization of the corporation; and

(b) where the accused is not a corporation, in any territorial division in which the accused resides or has a place of business.

R.S., 1985, c. C-34, s. 68; 1999, c. 2, s. 20.

Definitions

69 (1) In this section,

agent of a participant means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant; (*agent d'un participant*)

document [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 40]

participant means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged. (*participant*)

Evidence against a participant

(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

R.S., 1985, c. C-34, s. 69; R.S., 1985, c. 19 (2nd Supp.), s. 40.

Admissibility of statistics

70 (1) A collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of

(a) the *Statistics Act*, or

(b) any other enactment of Parliament or of the legislature of a province,

is admissible in evidence in any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act.

Idem

(2) On request from the Minister or the Commissioner

(a) the Chief Statistician of Canada or an officer of any department or agency of the Government of Canada the functions of which include the gathering of statistics shall, and

(b) an officer of any department or agency of the government of a province the functions of which include the gathering of statistics may,

compile from his or its records a statement of statistics relating to any industry or sector thereof, in accordance with the terms of the request, and any such statement is admissible in evidence in any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act.

Privileged information not affected

(3) Nothing in this section compels or authorizes the Chief Statistician of Canada or any officer of a department or agency of the Government of Canada to disclose any particulars relating to an individual or business in a manner that is prohibited by any provision of an enactment of Parliament or of a provincial legislature designed for the protection of those particulars.

Certificate

(4) In any proceedings before the Tribunal, or in any prosecution or proceedings before a court under or pursuant to this Act, a certificate purporting to be signed by the Chief Statistician of Canada or the officer of the department or agency of the Government of Canada or of a province under whose supervision a record, report or statement of statistics referred to in this section was prepared, setting out that the record, report or statement of statistics attached thereto was prepared under his supervision, is evidence of the facts alleged therein without proof of the signature or official character of the person by whom it purports to be signed.

R.S., 1985, c. C-34, s. 70; R.S., 1985, c. 19 (2nd Supp.), s. 41; 1999, c. 2, s. 37.

Statistics collected by sampling methods

71 A collection, compilation, analysis, abstract or other record or report of statistics collected by sampling methods by or on behalf of the Commissioner or any other party to proceedings before the Tribunal, or to a prosecution or proceedings before a court under or pursuant to this

Act, is admissible in evidence in that prosecution or those proceedings.

R.S., 1985, c. C-34, s. 71; R.S., 1985, c. 19 (2nd Supp.), s. 42; 1999, c. 2, s. 37.

Notice

72 (1) No record, report or statement of statistical information or statistics referred to in section 70 or 71 shall be received in evidence before the Tribunal or court unless the person intending to produce the record, report or statement in evidence has given to the person against whom it is intended to be produced reasonable notice together with a copy of the record, report or statement and, in the case of a record or report of statistics referred to in section 71, together with the names and qualifications of those persons who participated in the preparation thereof.

Attendance of statistician

(2) Any person against whom a record or report of statistics referred to in section 70 is produced may require, for the purposes of cross-examination, the attendance of any person under whose supervision the record or report was prepared.

Idem

(3) Any person against whom a record or report of statistics referred to in section 71 is produced may require, for the purposes of cross-examination, the attendance of any person who participated in the preparation of the record or report.

R.S., 1985, c. C-34, s. 72; R.S., 1985, c. 19 (2nd Supp.), s. 43.

Jurisdiction of Federal Court

73 (1) Subject to this section, the Attorney General of Canada may institute and conduct any prosecution or other proceedings under section 34, any of sections 45 to 51 and section 61 or, where the proceedings are on indictment, under section 52, 52.1, 53, 55, 55.1 or 66, in the Federal Court — Trial Division, and for the purposes of the prosecution or other proceedings, the Federal Court — Trial Division has all the powers and jurisdiction of a superior court of criminal jurisdiction under the *Criminal Code* and under this Act.

No jury

(2) The trial of an offence under Part VI or section 66 in the Federal Court — Trial Division shall be without a jury.

Appeal

(3) An appeal lies from the Federal Court — Trial Division to the Federal Court of Appeal and from the Federal Court of Appeal to the Supreme Court of Canada in any prosecution or proceedings under Part VI or section 66 of this Act as provided in Part XXI of the *Criminal Code* for appeals from a trial court and from a court of appeal.

Proceedings optional

(4) Proceedings under subsection 34(2) may in the discretion of the Attorney General of Canada be instituted in either the Federal Court — Trial Division or a superior court of criminal jurisdiction in the province but no prosecution shall be instituted against an individual in the Federal Court — Trial Division in respect of an offence under Part VI or section 66 without the consent of the individual.

R.S., 1985, c. C-34, s. 73; 1999, c. 2, s. 21; 2002, c. 16, s. 8.

74 [Repealed, 1999, c. 2, s. 22]

PART VII.1

Deceptive Marketing Practices

Reviewable Matters

Misrepresentations to public

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

Ordinary price: suppliers generally

(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Ordinary price: supplier's own

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

References to time in subsections (2) and (3)

(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to

(a) the price at which products have been or are supplied; or

(b) the price at which products will be supplied.

Saving

(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

General impression to be considered

(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.
1999, c. 2, s. 22.

Representation as to reasonable test and publication of testimonials

74.02 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest, makes a representation to the public that a test has been

made as to the performance, efficacy or length of life of a product by any person, or publishes a testimonial with respect to a product, unless the person making the representation or publishing the testimonial can establish that

(a) such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or

(b) such a representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

1999, c. 2, s. 22.

Representations accompanying products

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).

Representations from outside Canada

(2) Where a person referred to in subsection (1) is outside Canada, a representation described in paragraph (1)(a), (b), (c) or (e) is, for the purposes of sections 74.01 and 74.02, deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Deemed representation to public

(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.

1999, c. 2, s. 22.

Definition of *bargain price*

74.04 (1) For the purposes of this section, ***bargain price*** means

(a) a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or

(b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily supplied.

Bait and switch selling

(2) A person engages in reviewable conduct who advertises at a bargain price a product that the person does not supply in reasonable quantities having regard to the nature of the market in which the person carries on business, the nature and size of the person's business and the nature of the advertisement.

Saving

(3) Subsection (2) does not apply to a person who establishes that

(a) the person took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond the person's control that could not reasonably have been anticipated;

(b) the person obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed the person's reasonable expectations; or

(c) after becoming unable to supply the product in accordance with the advertisement, the person undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied with it during the time when the bargain price applied, and the person fulfilled the undertaking.

1999, c. 2, s. 22.

Sale above advertised price

74.05 (1) A person engages in reviewable conduct who advertises a product for sale or rent in a market and, during the period and in the market to which the advertisement relates, supplies the product at a price that is higher than the price advertised.

Saving

(2) This section does not apply

(a) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained in it are subject to error if the person establishes that the price advertised is in error;

(b) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement;

(c) in respect of the supply of a security obtained on the open market during a period when the prospectus relating to that security is still current; or

(d) in respect of the supply of a product by or on behalf of a person who is not engaged in the business of dealing in that product.

Application

(3) For the purpose of this section, the market to which an advertisement relates is the market that the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.

1999, c. 2, s. 22.

Promotional contests

74.06 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product, or for the purpose of promoting, directly or indirectly, any business interest, conducts any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise disposes of any product or other benefit by any mode of chance, skill or mixed chance and skill whatever, where

(a) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the person that affects materially the chances of winning;

(b) distribution of the prizes is unduly delayed; or

(c) selection of participants or distribution of prizes is not made on the basis of skill or on a random basis in any area to which prizes have been allocated.

1999, c. 2, s. 22.

Saving

74.07 (1) Sections 74.01 to 74.06 do not apply to a person who prints or publishes or otherwise disseminates a representation, including an advertisement, on behalf of another person in Canada, where the person establishes that the person obtained and recorded the name and address of that other person and accepted the representation in good faith for printing, publishing or other dissemination in the ordinary course of that person's business.

Non-application

(2) Sections 74.01 to 74.06 do not apply in respect of conduct prohibited by sections 52.1, 53, 55 and 55.1.

1999, c. 2, s. 22; 2002, c. 16, s. 9.

Civil rights not affected

74.08 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action.

1999, c. 2, s. 22.

Administrative Remedies

Definition of "court"

74.09 In sections 74.1 to 74.14 and 74.18, “court” means the Tribunal, the Federal Court — Trial Division or the superior court of a province.

1999, c. 2, s. 22.

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

Duration of order

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

Saving

(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

Purpose of order

(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

Aggravating or mitigating factors

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) injury to competition in the relevant geographic market;

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.

Meaning of subsequent order

(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

1999, c. 2, s. 22.

Temporary order

74.11 (1) Where, on application by the Commissioner, a court finds a strong *prima facie* case that a person is engaging in reviewable conduct under this Part, the court may order the person not to engage in that conduct or substantially similar reviewable conduct if the court is satisfied that

(a) serious harm is likely to ensue unless the order is issued; and

(b) the balance of convenience favours issuing the order.

Duration

(2) Subject to subsection (5), the order has effect, or may be extended on application by the Commissioner, for such period as the court considers necessary and sufficient to meet the circumstances of the case.

Notice of application by Commissioner

(3) Subject to subsection (4), at least forty-eight hours notice of an application referred to in subsection (1) or (2) shall be given by or on behalf of the Commissioner to the person in respect of whom the order or extension is sought.

***Ex parte* application**

(4) The court may proceed *ex parte* with an application made under subsection (1) where it is satisfied that subsection (3) cannot reasonably be complied with or that the urgency of the situation is such that service of notice in accordance with subsection (3) would not be in the public interest.

Duration of *ex parte* order

(5) An order issued *ex parte* shall have effect for such period as is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (3), the court extends the order for such additional period as it considers necessary and sufficient.

Duty of Commissioner

(6) Where an order issued under this section is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 arising out of the conduct in respect of which the order was issued.

1999, c. 2, s. 22; 2002, c. 16, s. 10.

Consent agreement

74.12 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part may sign a consent agreement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of a court against that person, and may include other terms, whether or not they could be imposed by the court.

Registration

(3) The consent agreement may be filed with the court for immediate registration.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the court.

1999, c. 2, s. 22; 2002, c. 16, s. 11.

Rescission or variation of consent agreement or order

74.13 The court may rescind or vary a consent agreement that it has registered or an order that it has made under this Part, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the court finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

1999, c. 2, s. 22; 2002, c. 16, s. 11.

Evidence

74.14 In determining whether or not to make an order under this Part, the court shall not exclude from consideration any evidence by reason only that it might be evidence in respect of an offence under this Act or in respect of which another order could be made by the court under this Act.

1999, c. 2, s. 22.

Unpaid monetary penalty

74.15 The amount of an administrative monetary penalty imposed on a person under paragraph 74.1(1)(c) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

1999, c. 2, s. 22.

Proceedings commenced under Part VI

74.16 No application may be made by the Commissioner for an order under this Part against a person where proceedings have been commenced under section 52 against that person on the basis of the same or substantially the same facts as would be alleged in proceedings under this Part.

1999, c. 2, s. 22.

Rules of Procedure

Power of courts

74.17 The rules committee of the Federal Court, or a superior court of a province, may make rules respecting the procedure for the disposition of applications by that court under this Part.

1999, c. 2, s. 22.

Appeals

Appeal to Federal Court of Appeal

74.18 (1) An appeal may be brought in the Federal Court of Appeal from any decision or order made under this Part, or from a refusal to make an order, by the Tribunal or the Federal Court — Trial Division.

Appeal to provincial court of appeal

(2) An appeal may be brought in the court of appeal of a province from any decision or order made under this Part, or from a refusal to make an order, by a superior court of the province.

Disposition of appeal

(3) Where the Federal Court of Appeal or the court of appeal of the province allows an appeal under this section, it may quash the decision or order appealed from, refer the matter back to the court appealed from or make any decision or order that, in its opinion, that court should have made.

1999, c. 2, s. 22.

Appeal on question of fact

74.19 An appeal on a question of fact from a decision or order made under this Part may be brought only with the leave of the Federal Court of Appeal or the court of appeal of the province, as the case may be.

1999, c. 2, s. 22.

PART VIII

Matters Reviewable by Tribunal

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

75 (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

Definition of *trade terms*

(3) For the purposes of this section, the expression ***trade terms*** means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1.

Consignment Selling

Consignment selling

76 Where, on application by the Commissioner, the Tribunal finds that the practice of consignment selling has been introduced by a supplier of a product who ordinarily sells the product for resale, for the purpose of

(a) controlling the price at which a dealer in the product supplies the product, or

(b) discriminating between consignees or between dealers to whom he sells the product for resale and consignees,

the Tribunal may order the supplier to cease to carry on the practice of consignment selling of the product.

R.S., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Exclusive Dealing, Tied Selling and Market Restriction

Definitions

77 (1) For the purposes of this section,

exclusive dealing means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs; (*exclusivité*)

market restriction means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market; (*limitation du marché*)

tied selling means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs. (*ventes liées*)

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the “first” person) supplies or causes to be supplied to another person (the “second” person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then

sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3.

Abuse of Dominant Position

Definition of "anti-competitive act"

78 (1) For the purposes of section 79, “anti-competitive act”, without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a); and

(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

Regulations

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

(a) specifying acts or conduct for the purpose of paragraph (1)(j); and

(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

Prohibition where abuse of dominant position

79 (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than $15 million.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

(a) the frequency and duration of the practice;

(b) the vulnerability of the class of persons adversely affected by the practice;

(c) injury to competition in the relevant market;

(d) the history of compliance with this Act by the entity; and

(e) any other relevant factor.

Purpose of order

(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Where proceedings commenced under section 45 or 92

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4.

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

2002, c. 16, s. 11.5.

Delivered Pricing

Definition of *delivered pricing*

80 (1) For the purposes of section 81, ***delivered pricing*** means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

Definition of *trade terms*

(2) For the purposes of subsection (1), the expression ***trade terms*** means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Delivered pricing

81 (1) Where, on application by the Commissioner, the Tribunal finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him in the market, the Tribunal may make an order prohibiting all or any of such suppliers from engaging in delivered pricing.

Exception where significant capital investment needed

(2) No order shall be made against a supplier under this section where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality.

Exception where trade-mark used

(3) No order shall be made against a supplier under this section in respect of a practice of refusing a customer delivery of an article that the customer sells in association with a trade-mark that the supplier owns or in respect of which the supplier is a registered user where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign Judgments and Laws

Foreign judgments, etc.

82 Where, on application by the Commissioner, the Tribunal finds that

(a) a judgment, decree, order or other process given, made or issued by or out of a court or other body in a country other than Canada can be implemented in whole or in part by persons in Canada, by companies incorporated by or pursuant to an Act of Parliament or of the legislature of a province, or by measures taken in Canada, and

(b) the implementation in whole or in part of the judgment, decree, order or other process in Canada, would

(i) adversely affect competition in Canada,

(ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency,

(iii) adversely affect the foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Tribunal may, by order, direct that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or

(d) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs (b)(i) to (iv).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign laws and directives

83 (1) Where, on application by the Commissioner, the Tribunal finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province

(a) as a result of

(i) a law in force in a country other than Canada, or

(ii) a directive, instruction, intimation of policy or other communication to that person or company or to any other person from

(A) the government of a country other than Canada or of any political subdivision thereof that is in a position to direct or influence the policies of that person or company, or

(B) a person in a country other than Canada who is in a position to direct or influence the policies of that person or company,

where the communication is for the purpose of giving effect to a law in force in a country other than Canada,

and that the decision, if implemented, would have or would be likely to have any of the effects mentioned in subparagraphs 82(b)(i) to (iv), or

(b) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45,

the Tribunal may, by order, direct that

(c) in a case described in paragraph (a) or (b), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication, or

(d) in a case described in paragraph (a), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs 82(b)(i) to (iv).

Limitation

(2) No application may be made by the Commissioner for an order under this section against a particular company where proceedings have been commenced under section 46 against that company based on the same or substantially the same facts as would be alleged in the application.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign Suppliers

Refusal to supply by foreign supplier

84 Where, on application by the Commissioner, the Tribunal finds that a supplier outside Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the “first” person) at the instance of and by reason of the exertion of

buying power outside Canada by another person, the Tribunal may order any person in Canada (the “second” person) by whom or on whose behalf or for whose benefit the buying power was exerted

(a) to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or

(b) not to deal or to cease to deal, in Canada, in that product of the supplier.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Specialization Agreements

Definitions

85 For the purposes of this section and sections 86 to 90,

article includes each separate type, size, weight and quality in which an article, within the meaning assigned by section 2, is produced; (*article*)

registered means registered in the register maintained pursuant to section 89; (*inscrit*)

specialization agreement means an agreement under which each party thereto agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into, and includes any such agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement. (*accord de spécialisation*)

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Order directing registration

86 (1) Where, on application by any person, and after affording the Commissioner a reasonable opportunity to be heard, the Tribunal finds that an agreement that the person who has made the application has entered into or is about to enter into is a specialization agreement and that

(a) the implementation of the agreement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement and the gains in efficiency would not likely be attained if the agreement were not implemented, and

(b) no attempt has been made by the persons who have entered or are about to enter into the agreement to coerce any person to become a party to the agreement,

the Tribunal may, subject to subsection (4), make an order directing that the agreement be registered for a period specified in the order.

Factors to be considered

(2) In considering whether an agreement is likely to bring about gains in efficiency described in paragraph (1)(a), the Tribunal shall consider whether those gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic articles or services for imported articles or services.

Redistribution of income does not result in gains in efficiency

(3) For the purposes of paragraph (1)(a), the Tribunal shall not find that an agreement is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Conditional orders

(4) Where, on an application under subsection (1), the Tribunal finds that an agreement meets the conditions prescribed by paragraphs (a) and (b) of that subsection but also finds that, as a result of the implementation of the agreement, there is not likely to be substantial competition remaining in the market or markets to which the agreement relates, the Tribunal may provide, in an order made under subsection (1), that the order shall take effect only if, within a reasonable period of time specified in the order, there has occurred any of the following events, specified in the order:

(a) the divestiture of particular assets, specified in the order;

(b) a wider licensing of patents or registered integrated circuit topographies;

(c) a reduction in tariffs;

(d) the making of an order in council under section 23 of the *Financial Administration Act* effecting a remission or remissions specified in the order of the Tribunal of any customs duties on an article that is a subject of the agreement; or

(e) the removal of import quotas or import licensing requirements.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 32; 1999, c. 2, s. 37.

Registration of modifications

87 (1) On application by the parties to a specialization agreement that has been registered, and after affording the Commissioner a reasonable opportunity to be heard, the Tribunal may make an order directing that a modification of the agreement be registered.

Order to remove from register

(2) Where, on application by the Commissioner, the Tribunal finds that the agreement or a modification thereof that has been registered

(a) has ceased to meet the conditions prescribed by paragraph 86(1)(a) or (b), or

(b) is not being implemented,

the Tribunal may make an order directing that the agreement or modification thereof, and any order relating thereto, be removed from the register.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Right of intervention

88 The attorney general of a province may intervene in any proceedings before the Tribunal under section 86 or 87 for the purpose of making representations on behalf of the province.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Register of specialization agreements

89 (1) The Tribunal shall cause to be maintained at its Registry established pursuant to subsection 14(1) of the *Competition Tribunal Act* a register of specialization agreements, and modifications thereof, that the Tribunal has directed be registered, and any such agreements and modifications thereof shall be included in the register for the periods specified in the orders.

Public access to register

(2) The register shall be kept open to inspection by any person during normal business hours of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Non-application of sections 45 and 77

90 Section 45, and section 77 as it applies to exclusive dealing, do not apply in respect of a specialization agreement, or any modification thereof, that is registered.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Mergers

Definition of *merger*

91 In sections 92 to 100, ***merger*** means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Order

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Exception

94 The Tribunal shall not make an order under section 92 in respect of

(a) a merger substantially completed before the coming into force of this section;

(b) a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest — or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts; or

(c) a merger or proposed merger approved under subsection 56.2(6) of the *Canada Transportation Act* and in respect of which the Minister of Transport has certified to the Commissioner the names of the parties.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1991, c. 45, s. 549, c. 46, ss. 592, 593, c. 47, s. 716; 1999, c. 2, s. 37; 2000, c. 15, s. 14; 2001, c. 9, s. 579.

Exception for joint ventures

95 (1) The Tribunal shall not make an order under section 92 in respect of a combination formed or proposed to be formed, otherwise than through a corporation, to undertake a specific project or a program of research and development if

(a) a project or program of that nature

(i) would not have taken place or be likely to take place in the absence of the combination, or

(ii) would not reasonably have taken place or reasonably be likely to take place in the absence of the combination because of the risks involved in relation to the project or program and the business to which it relates;

(b) no change in control over any party to the combination resulted or would result from the combination;

(c) all the persons who formed the combination are parties to an agreement in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;

(d) the agreement referred to in paragraph (c) restricts the range of activities that may be carried on pursuant to the combination, and provides that the agreement terminates on the completion of the project or program; and

(e) the combination does not prevent or lessen or is not likely to prevent or lessen competition except to the extent reasonably required to undertake and complete the project or program.

Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any

prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than three years after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Where proceedings commenced under section 45 or 79

98 No application may be made under section 92 against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 79

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 79, as the case may be.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Conditional orders directing dissolution of a merger

99 (1) The Tribunal may provide, in an order made under section 92 directing a person to dissolve a merger or to dispose of assets or shares, that the order may be rescinded or varied if, within a reasonable period of time specified in the order,

(a) there has occurred

(i) a reduction, removal or remission, specified in the order, of any relevant customs duties, or

(ii) a reduction or removal, specified in the order, of prohibitions, controls or regulations imposed by or pursuant to any Act of Parliament on the importation into Canada of an article specified in the order, or

(b) that person or any other person has taken any action specified in the order

that will, in the opinion of the Tribunal, prevent the merger from preventing or lessening competition substantially.

When conditional order may be rescinded or varied

(2) Where, on application by any person against whom an order under section 92 is directed, the Tribunal is satisfied that

(a) a reduction, removal or remission specified in the order pursuant to paragraph (1)(a) has occurred, or

(b) the action specified in the order pursuant to paragraph (1)(b) has been taken,

the Tribunal may rescind or vary the order accordingly.
R.S., 1985, c. 19 (2nd Supp.), s. 45.

Interim order where no application under section 92

100 (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where

(a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse; or

(b) the Tribunal finds, on application by the Commissioner, that there has been a contravention of section 114 in respect of the proposed merger.

Notice of application

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Commissioner to each person against whom the order is sought.

***Ex parte* application**

(3) Where the Tribunal is satisfied, in respect of an application for an interim order under paragraph (1)(b), that

(a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte*.

Terms of interim order

(4) An interim order issued under subsection (1)

(a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and

(b) subject to subsections (5) and (6), shall have effect for such period of time as is specified in it.

Duration of order: inquiry

(5) The duration of an interim order issued under paragraph (1)(a) shall not exceed thirty days.

Duration of order: failure to comply

(6) The duration of an interim order issued under paragraph (1)(b) shall not exceed

(a) ten days after section 114 is complied with, in the case of an interim order issued on *ex parte* application; or

(b) thirty days after section 114 is complied with, in any other case.

Extension of time

(7) Where the Tribunal finds, on application made by the Commissioner on forty-eight hours notice to each person to whom an interim order is directed, that the Commissioner is unable to complete an inquiry within the period specified in the order because of circumstances beyond the control of the Commissioner, the Tribunal may extend the duration of the order to a day not more than sixty days after the order takes effect.

Completion of inquiry

(8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in respect of the proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 24, 37.

Right of intervention

101 The attorney general of a province may intervene in any proceedings before the Tribunal under section 92 for the purpose of making representations on behalf of the province.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Advance ruling certificates

102 (1) Where the Commissioner is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 92, the Commissioner may issue a certificate to the effect that he is so satisfied.

Duty of Commissioner

(2) The Commissioner shall consider any request for a certificate under this section as expeditiously as possible.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

No application under section 92

103 Where the Commissioner issues a certificate under section 102, the Commissioner shall not, if the transaction to which the certificate relates is substantially completed within one year after the certificate is issued, apply to the Tribunal under section 92 in respect of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

General

Leave to make application under section 75 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) makes an application under section 75 or 77, the Commissioner may intervene in the proceedings.

2002, c. 16, s. 12.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order

(a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84; or

(b) to prevent the taking of measures under section 82 or 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(a) or (b) and that, in the absence of an interim order,

(a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

(b) a person is likely to be eliminated as a competitor; or

(c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84 by an entity incorporated under the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act* or a subsidiary of such an entity, the Commissioner must consult with the Minister of Finance respecting the safety and soundness of the entity.

Duration

(4) Subject to subsections (5) and (6), an interim order has effect for 10 days, beginning on the day on which it is made.

Extension or revocation of order

(5) The Tribunal may, on application by the Commissioner on 48 hours notice to each person against whom the interim order is directed,

(a) extend the interim order once or twice for additional periods of 35 days each; or

(b) rescind the order.

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 35-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the interim order.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the interim order is made.

Extension of interim order

(5.3) The Tribunal may order that the effective period of the interim order be extended if

(a) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

(b) the information was requested during the initial period that the interim order had effect, within the first 35 days after an order extending the interim order under subsection (5) had effect, or within the first 35 days after an order extending the interim order made under subsection (7) had effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(c) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under any section referred to in paragraph (1)(a) or (b).

Terms

(5.4) An order extending an interim order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

Effect of application

(5.5) If an application is made under subsection (5.1), the interim order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

When application made to Tribunal

(6) If an application is made under subsection (7), an interim order has effect until the Tribunal makes an order under that subsection.

Confirming or setting aside interim order

(7) A person against whom the Tribunal has made an interim order may apply to the Tribunal in the first 10 days during which the order has effect to have it varied or set aside and the Tribunal shall

(a) if it is satisfied that one or more of the situations set out in paragraphs (2)(a) to (c) existed or are likely to exist, make an order confirming the interim order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fix the effective period of that order for a maximum of 70 days, beginning on the day on which the order confirming the interim order is made; and

(b) if it is not satisfied that any of the situations set out in paragraphs (2)(a) to (c) existed or is likely to exist, make an order setting aside the interim order.

Notice

(8) A person who makes an application under subsection (7) shall give the Commissioner 48 hours written notice of the application.

Representations

(9) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the interim order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

Prohibition of extraordinary relief

(10) Notwithstanding section 13 of the *Competition Tribunal Act*, an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).

Duty of Commissioner

(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.

2002, c. 16, s. 12.

Interim order

104 (1) Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order

as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Terms of interim order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 13.

Temporary order

104.1 (1) The Commissioner may make a temporary order prohibiting a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, from doing an act or a thing that could, in the opinion of the Commissioner, constitute an anti-competitive act or requiring the person to take the steps that the Commissioner considers necessary to prevent injury to competition or harm to another person if

(a) the Commissioner has commenced an inquiry under subsection 10(1) in regard to whether the person has engaged in conduct that is reviewable under section 79; and

(b) the Commissioner considers that in the absence of a temporary order

(i) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur, or

(ii) a person is likely to be eliminated as a competitor, suffer a significant loss of market share, suffer a significant loss of revenue or suffer other harm that cannot be adequately remedied by the Tribunal.

Notice not required

(2) The Commissioner is not obliged to give notice to or receive representations from any person before making a temporary order.

Notice to persons affected

(3) On making a temporary order, the Commissioner shall promptly give written notice of the order, together with the grounds for it, to every person against whom it was made or who is directly affected by it.

Duration of temporary order

(4) Subject to subsections (5) and (6), a temporary order has effect for 20 days.

Extension and revocation

(5) The Commissioner may extend the 20-day period for one or two periods of 30 days each or may revoke a temporary order. The Commissioner shall promptly give written notice of the extension or revocation to every person to whom notice was given under subsection (3).

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 30-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the temporary order.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the temporary order is made.

Extension of temporary order

(5.3) The Tribunal may order that the effective period of the temporary order be extended if

(a) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

(b) the information was requested within the initial period that the temporary order had effect, within the first 30 days after an order extending the temporary order under subsection (5) had effect, or within the first 30 days after an order extending the temporary order made under subsection (7) had effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(c) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under section 79.

Terms

(5.4) An order extending a temporary order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

Effect of application

(5.5) If an application is made under subsection (5.1), the temporary order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

When application made to Tribunal

(6) If an application is made under subsection (7), the temporary order has effect until the Tribunal makes an order under that subsection.

Confirmation

(7) A person against whom the Commissioner has made a temporary order may, within the period referred to in subsection (4), apply to the Tribunal to have the temporary order varied or set aside and the Tribunal shall

(a) if it is satisfied that one or more of the conditions set out in paragraph (1)(b) existed or are likely to exist, make an order confirming the temporary order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fixing the effective period of its order for a maximum of 60 days after the day on which it is made; and

(b) if it is not satisfied that one or more of the conditions set out in paragraph (1)(b) existed or are likely to exist, make an order setting aside the temporary order.

Notice

(8) The applicant shall give written notice of the application to every person to whom notice was given under subsection (3).

Commissioner is respondent

(9) In the event of an application under subsection (7), the Commissioner is the respondent.

Representations

(10) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the temporary order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

Prohibition of extraordinary relief

(11) Except as provided for by subsection (7),

(a) a temporary order made by the Commissioner shall not be questioned or reviewed in any court; and

(b) no order shall be made, process entered or proceedings taken in any court, whether by way of injunction, *certiorari*, *mandamus*, prohibition, *quo warranto*, declaratory judgment or otherwise, to question, review, prohibit or restrain the Commissioner in the exercise of the jurisdiction granted by this section.

Powers and duties not affected by order

(12) The making of a temporary order does not in any way limit, restrict or qualify the powers, duties or responsibilities of the Commissioner under this Act, including the Commissioner's power to conduct inquiries and to make applications to the Tribunal in regard to conduct that is the subject of the temporary order.

Registration of orders

(13) The Commissioner shall file each temporary order with the Registry of the Tribunal. Once registered, the order is enforceable in the same manner as an order of the Tribunal.

Duty of Commissioner

(14) When a temporary order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the investigation arising out of the conduct in respect of which the temporary order was made.

Immunity

(15) No action lies against Her Majesty in right of Canada, the Minister, the Commissioner, any Deputy Commissioner, any person employed in the public service of Canada or any person acting under the direction of the Commissioner for anything done or omitted to be done in good faith under this section.

2000, c. 15, s. 15; 2002, c. 16, s. 13.1.

Consent agreement

105 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3 or a temporary order under section 104.1, may sign a consent agreement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14.

Rescission or variation of consent agreement or order

106 (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Directly affected persons

(2) A 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 may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14.

Consent agreement — parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75 or 77 and the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.

Notice to Commissioner

(2) On filing the consent agreement with the Tribunal for registration, the parties shall serve a copy of it on the Commissioner without delay.

Publication

(3) The consent agreement shall be published without delay in the *Canada Gazette*.

Registration

(4) The consent agreement shall be registered 30 days after its publication unless a third party makes an application to the Tribunal before then to cancel the agreement or replace it with an order of the Tribunal.

Effect of registration

(5) Upon registration, the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Commissioner may intervene

(6) On application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

Notice

(7) The Commissioner must give notice of an application under subsection (6) to the parties to the consent agreement.

2002, c. 16, s. 14.

Evidence

107 In determining whether or not to make an order under this Part, the Tribunal shall not exclude from consideration any evidence by reason only that it might be evidence in respect of an offence under this Act or in respect of which another order could be made by the Tribunal under this Act.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

PART IX

Notifiable Transactions

Interpretation

Definitions

108 (1) In this Part,

operating business means a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work; (*entreprise en exploitation*)

person means an individual, body corporate, unincorporated syndicate, unincorporated organization, trustee, executor, administrator or other legal representative, but does not include a bare trustee; (*personne*)

prescribed means prescribed by regulations made under section 124; (*réglementaire*)

voting share means any share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing. (*actions comportant droit de vote*)

Corporations controlled by Her Majesty

(2) For the purposes of this Part, except for the purposes of section 113, one corporation is not affiliated with another corporation by reason only of the fact that both corporations are controlled by Her Majesty in right of Canada or a province, as the case may be.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 25.

Application

General limit relating to parties

109 (1) This Part does not apply in respect of a proposed transaction unless the parties thereto, together with their affiliates,

(a) have assets in Canada that exceed four hundred million dollars in aggregate value, determined as of such time and in such manner as may be prescribed, or such greater amount as may be prescribed; or

(b) had gross revenues from sales in, from or into Canada, determined for such annual period and in such manner as may be prescribed, that exceed four hundred million dollars in aggregate value, or such greater amount as may be prescribed.

Parties to acquisition of shares

(2) For the purposes of this Part, the parties to a proposed acquisition of shares are the person or persons who propose to acquire the shares and the corporation the shares of which are to be acquired.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 26.

Application of Part

110 (1) This Part applies only in respect of proposed transactions described in this section.

Acquisition of assets

(2) Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of any of the assets in Canada of an operating business where the aggregate value of those assets, determined as of such time and in such manner as may be prescribed, or the gross revenues from sales in or from Canada generated from those assets, determined for such annual period and in such manner as may be prescribed, would exceed thirty-five million dollars or such greater amount as may be prescribed.

Acquisition of shares

(3) Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of voting shares of a corporation that carries on an operating business or controls a corporation that carries on an operating business

(a) where

(i) the aggregate value of the assets in Canada, determined as of such time and in such manner as may be prescribed, that are owned by the corporation or by corporations controlled by that corporation, other than assets that are shares of any of those corporations, would exceed thirty-five million dollars, or such greater amount as may be prescribed, or

(ii) the gross revenues from sales in or from Canada, determined for such annual period and in such manner as may be prescribed, generated from the assets referred to in subparagraph (i) would exceed thirty-five million dollars, or such greater amount as may be prescribed, and

(b) where, as a result of the proposed acquisition of the voting shares, the person or persons acquiring the shares, together with their affiliates, would own voting shares of the corporation that in the aggregate carry more than

(i) twenty per cent or, if the person or persons own twenty per cent or more before the proposed acquisition, fifty per cent of the votes attached to all outstanding voting shares of the corporation, in the case of the acquisition of voting shares of a corporation any of the voting shares of which are publicly traded, or

(ii) thirty-five per cent or, if the person or persons own thirty-five per cent or more before the proposed acquisition, fifty per cent of the votes attached to all outstanding voting shares of the corporation, in the case of the acquisition of voting shares of a corporation none of the voting shares of which are publicly traded.

Amalgamation

(4) Subject to section 113, this Part applies in respect of a proposed amalgamation of two or more corporations where one or more of those corporations carries on an operating business or controls a corporation that carries on an operating business where

(a) the aggregate value of the assets in Canada, determined as of such time and in such manner as may be prescribed, that would be owned by the continuing corporation that would result from the amalgamation or by corporations controlled by the continuing corporation, other than assets that are shares of any of those corporations, would exceed seventy million dollars, or such greater amount as may be prescribed; or

(b) the gross revenues from sales in or from Canada, determined for such annual period and in such manner as may be prescribed, generated from the assets referred to in paragraph (a) would exceed seventy million dollars, or such greater amount as may be prescribed.

Combination

(5) Subject to sections 112 and 113, this Part applies in respect of a proposed combination of two or more persons to carry on business otherwise than through a corporation where one or more of those persons propose to contribute to the combination assets that form all or part of an operating business carried on by those persons, or corporations controlled by those persons, and where

(a) the aggregate value of the assets in Canada, determined as of such time and in such manner as may be prescribed, that are the subject-matter of the combination would exceed thirty-five million dollars, or such greater amount as may be prescribed; or

(b) the gross revenues from sales in or from Canada, determined for such annual period and in such manner as may be prescribed, generated from the assets referred to in paragraph (a) would exceed thirty-five million dollars, or such greater amount as may be prescribed.

Combination

(6) Subject to sections 111, 112 and 113, this Part applies in respect of a proposed acquisition of an interest in a combination that carries on an operating business otherwise than through a corporation

(a) where

(i) the aggregate value of the assets in Canada, determined as of such time and in such manner as may be prescribed, that are the subject-matter of the combination would exceed thirty-five million dollars or such greater amount as may be prescribed, or

(ii) the gross revenues from sales in or from Canada, determined for such annual period and in such manner as may be prescribed, generated from the assets referred to in subparagraph (i) would exceed thirty-five million dollars or such greater amount as may be prescribed, and

(b) where, as a result of the proposed acquisition of the interest, the person or persons acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles the person or persons to receive more than thirty-five per cent of the profits of the combination, or more than thirty-five per cent of its assets on dissolution or, where the person or persons acquiring the interest are already so entitled, to receive more than fifty per cent of such profits or assets.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 27.

Exemptions

Acquisition of Voting Shares, Assets or Interests

Acquisitions

111 The following classes of transactions are exempt from the application of this Part:

(a) an acquisition of real property or goods in the ordinary course of business if the person or persons who propose to acquire the assets would not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of a business;

(b) an acquisition of voting shares or of an interest in a combination solely for the purpose of underwriting the shares or the interest, within the meaning of subsection 5(2);

(c) an acquisition of voting shares, an interest in a combination or assets that would result from a gift, intestate succession or testamentary disposition;

(d) an acquisition of collateral or receivables, or an acquisition resulting from a foreclosure or default or forming part of a debt work-out, made by a creditor in or pursuant to a credit transaction entered into in good faith in the ordinary course of business;

(e) an acquisition of a Canadian resource property, as defined in subsection 66(15) of the *Income Tax Act*, pursuant to an agreement in writing that provides for the transfer of that property to the person or persons acquiring the property only if the person or persons acquiring the property incur expenses to carry out exploration or development activities with respect to the property; and

(f) an acquisition of voting shares of a corporation pursuant to an agreement in writing that provides for the issuance of those shares only if the person or persons acquiring them incur expenses to carry out exploration or development activities with respect to a Canadian resource property, as defined in subsection 66(15) of the *Income Tax Act*, in respect of which the corporation has the right to carry out those activities where the corporation does not have any significant assets other than that property.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 29, c. 31, s. 229.

Combinations

Combinations that are joint ventures

112 A combination is exempt from the application of this Part if

(a) all the persons who propose to form the combination are parties to an agreement in writing or intended to be put in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;

(b) no change in control over any party to the combination would result from the combination; and

(c) the agreement referred to in paragraph (a) restricts the range of activities that may be carried on pursuant to the combination, and contains provisions that would allow for its orderly termination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

General

General exemptions

113 The following classes of transactions are exempt from the application of this Part:

(a) a transaction all the parties to which are affiliates of each other;

(a.1) a transaction in respect of which the Minister of Finance has certified to the Commissioner under paragraph 94(b) that it is, or would be, in the public interest;

(b) a transaction in respect of which the Commissioner has issued a certificate under section 102;

(c) a transaction in respect of which the Commissioner or a person authorized by the Commissioner has waived the obligation under this Part to notify the Commissioner and supply information because substantially similar information was previously supplied in relation to a request for a certificate under section 102; and

(d) such other classes of transactions as may be prescribed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1991, c. 45, s. 550, c. 46, s. 594, c. 47, s. 717; 1999, c. 2, ss. 30, 37; 2001, c. 9, s. 580.

Notice and Information

Notice of proposed transaction

114 (1) Subject to this Part, where

(a) a person, or two or more persons pursuant to an agreement or arrangement, propose to acquire assets in the circumstances set out in subsection 110(2), to acquire shares in the circumstances set out in subsection 110(3) or to acquire an interest in a combination in the circumstances set out in subsection 110(6),

(b) two or more corporations propose to amalgamate in the circumstances set out in subsection 110(4), or

(c) two or more persons propose to form a combination in the circumstances set out in subsection 110(5),

the parties to the proposed transaction shall, before the transaction is completed, notify the Commissioner that the transaction is proposed and supply the Commissioner with information in accordance with this Part.

Information required

(2) The information required under subsection (1) is, at the option of the person supplying the information, prescribed short form information or prescribed long form information but, where a person provides prescribed short form information, the Commissioner or a person authorized by the Commissioner may, within fourteen days after receiving it, require the person to supply the prescribed long form information.

Corporation whose shares are acquired

(3) Where a proposed transaction is an acquisition of shares and the Commissioner receives information supplied under subsection (1) by a party to the transaction, other than the corporation whose shares are being acquired, before receiving such information from the corporation,

(a) the Commissioner shall immediately notify the corporation that the Commissioner has received from that party the prescribed short form information or prescribed long form information, as the case may be;

(b) the corporation shall supply the Commissioner with the prescribed short form information within ten days after being notified under paragraph (a) or the prescribed long form information within twenty days after being so notified, as the case may be; and

(c) where the corporation supplies the prescribed short form information, the Commissioner may require the corporation to supply the prescribed long form information and the corporation shall supply it within twenty days after being so required by the Commissioner.

Notice and information

(4) Any of the persons required to give notice and supply information under this section may

(a) if duly authorized to do so, give notice or supply information on behalf of and in lieu of any of the others who are so required in respect of the same transaction; or

(b) give notice or supply information jointly with any of those others.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 31, c. 31, s. 53(F).

Prior notice of acquisitions

115 (1) It is not necessary to comply with section 114 in respect of a proposed acquisition of voting shares or of an interest in a combination where a limit set out in subsection 110(3) or (6) would be exceeded as a result of the proposed acquisition within three years immediately following a previous compliance with section 114 required in relation to the same limit.

Notice of future acquisition

(2) Where a person or persons who propose to acquire voting shares or an interest in a combination are required to comply with section 114 because the twenty or thirty-five per cent limit set out in subsection 110(3) or the thirty-five per cent limit set out in subsection 110(6) would be exceeded as a result of the acquisition, the person or persons may, at the time of the compliance, give notice to the Commissioner of a proposed further acquisition of voting shares or of an interest in a combination that would result in a fifty per cent limit set out in that subsection being exceeded, and supply the Commissioner with a detailed description in writing of the steps to be carried out in the further acquisition.

Exemption for further acquisitions of voting shares

(3) It is not necessary to comply with section 114 in respect of a proposed further acquisition referred to in subsection (2) if

(a) notice of the further acquisition is given to the Commissioner under subsection (2) and it is carried out in accordance with the description supplied under that subsection; and

(b) an additional notice of the further acquisition is given to the Commissioner in writing within twenty-one, and at least seven, days before the further acquisition.

Limitation

(4) Subsection (3) does not apply in respect of a further acquisition unless the further acquisition is completed within one year after notice of it is given under subsection (2).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 32, 37.

Where information cannot be supplied

116 (1) If any of the information required under section 114 is not known or reasonably obtainable, or cannot be obtained without breaching a confidentiality requirement established by law or without creating a significant risk that confidential information will be used for an improper purpose or that information that should, for commercial reasons, be kept confidential will be disclosed to the public, the person who is supplying the information may, in lieu of supplying the information, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has not been supplied and why it has not been obtained.

Where information not relevant

(2) If any of the information required under section 114 could not, on any reasonable basis, be considered to be relevant to an assessment by the Commissioner as to whether the proposed transaction would or would be likely to prevent or lessen competition substantially, the person who is supplying the information may, in lieu of supplying the information, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has not been supplied and why the information was not considered relevant.

Where information previously supplied

(2.1) If any of the information required under section 114 has previously been supplied to the Commissioner, the person who is supplying the information may, in lieu of supplying it, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has previously been supplied and when it was supplied.

Commissioner may require information

(3) Where a person chooses not to supply the Commissioner with information required under section 114 and so informs the Commissioner in accordance with subsection (2) or (2.1) and the Commissioner or a person authorized by the Commissioner notifies that person, within seven days after the Commissioner is so informed, that the information is required, the person shall supply the Commissioner with the information.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 33, 37.

Saving

117 (1) Nothing in section 114 requires any person who is a director of a corporation to supply information that is known to that person by virtue only of his position as a director of an affiliate of the corporation that is neither a wholly-owned affiliate nor a wholly-owning affiliate of the corporation.

Wholly-owned affiliate

(2) For the purposes of subsection (1), one corporation is the wholly-owned affiliate of another corporation if all its outstanding voting shares, other than shares necessary to qualify persons as directors, are beneficially owned by that other corporation directly, or indirectly through one or more affiliates where all the outstanding voting shares of the affiliates, other than shares necessary to qualify persons as directors, are beneficially owned by that other corporation or each other.

Wholly-owning affiliate

(3) For the purposes of subsection (1), one corporation is the wholly-owning affiliate of another corporation if it beneficially owns all the outstanding voting shares of that other corporation, other than shares necessary to qualify persons as directors, directly, or indirectly through one or more affiliates where all the outstanding voting shares of the affiliates, other than shares necessary to qualify persons as directors, are beneficially owned by the corporation or each other.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Information to be certified

118 The information supplied to the Commissioner under section 114 shall be certified on oath or solemn affirmation

(a) in the case of a corporation supplying the information, by an officer thereof or other person duly authorized by the board of directors or other governing body of the corporation, or

(b) in the case of any other person supplying the information, by that person,

as having been examined by that person and as being, to the best of his knowledge and belief, correct and complete in all material respects.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Where transaction not completed

119 Where notice is given and information supplied in respect of a proposed transaction under section 114 but the transaction is not completed within one year thereafter or such longer period as the Commissioner may specify in any particular case, section 114 applies as if no notice were given or information supplied.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

120 to 122 [Repealed, 1999, c. 2, s. 34]

Completion of Proposed Transactions

Time when transaction may not proceed

123 (1) A proposed transaction referred to in section 114 shall not be completed before the expiration of

(a) fourteen days after the day on which information required under section 114 has been received by the Commissioner, where the information is prescribed short form information and the Commissioner has not, within that time, required prescribed long form information to be supplied under that section,

(b) except as provided in paragraph (c), forty-two days after the day on which information required under section 114 has been received by the Commissioner, where the information is prescribed long form information, or

(c) where the proposed transaction is an acquisition of voting shares that is to be effected through the facilities of a stock exchange in Canada and the information supplied is prescribed long form information, twenty-one trading days, or such longer period of time, not exceeding forty-two days, as may be allowed by the rules of the stock exchange before shares must be taken up, after the day on which the information required under section 114 has been received by the Commissioner,

unless the Commissioner or a person authorized by the Commissioner, before the expiration of that time, notifies the persons who are required to give notice and supply information that the Commissioner does not, at that time, intend to make an application under section 92 in respect of the proposed transaction.

Acquisition of voting shares

(2) In the case of an acquisition of voting shares to which subsection 114(3) applies, the periods of time referred to in subsection (1) shall be determined without reference to the day on which the information required under section 114 is received by the Commissioner from the corporation whose shares are being acquired.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 35.

Regulations

Regulations

124 (1) The Governor in Council may make regulations prescribing anything that is by this Part to be prescribed.

Publication of proposed regulations

(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the *Canada Gazette* at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

Exception

(3) No proposed regulation need be published under subsection (2) if it has previously been published pursuant to that subsection, whether or not it has been amended as a result of representations made pursuant to that subsection.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

PART X

General

Commissioner's Opinions

124.1 [Not in force]

References to Tribunal

Reference if parties agree

124.2 (1) The Commissioner and a person who is the subject of an inquiry under section 10 may by agreement refer to the Tribunal for determination any question of law, mixed law and fact, jurisdiction, practice or procedure, in relation to the application or interpretation of Part VII.1 or VIII, whether or not an application has been made under Part VII.1 or VIII.

Reference by Commissioner

(2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.

Reference by agreement of parties to a private action

(3) A person granted leave under section 103.1 and the person against whom an order is sought under section 75 or 77 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, if the Tribunal grants them leave. They must send a notice of their application for leave to the Commissioner, who may intervene in the proceedings.

Reference procedure

(4) The Tribunal shall decide the questions referred to it informally and expeditiously, in accordance with any rules on references made under section 16 of the *Competition Tribunal Act*.

2002, c. 16, s. 15.

Representations to Boards, Commissions or Other Tribunals

Representations to federal boards, etc.

125 (1) The Commissioner, at the request of any federal board, commission or other tribunal or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

Definition of *federal board, commission or other tribunal*

(2) For the purposes of this section, ***federal board, commission or other tribunal*** means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Representations to provincial boards, etc.

126 (1) The Commissioner, at the request of any provincial board, commission or other tribunal, or on his own initiative with the consent of the board, commission or other tribunal, may make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

Definition of *provincial board, commission or other tribunal*

(2) For the purposes of this section, ***provincial board, commission or other tribunal*** means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of the legislature of a province with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Report to Parliament

Annual report

127 The Commissioner shall report annually to the Minister on the operation of the Acts referred to in subsection 7(1), and the Minister shall cause the report to be laid before each House of Parliament on any of the first fifteen days after the Minister receives the report on which that House is sitting.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 36.

Regulations

Regulations

128 (1) The Governor in Council may make such regulations as are necessary for carrying out this Act and for the efficient administration thereof.

Publication of proposed regulations

(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the *Canada Gazette* at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

Exception

(3) No proposed regulation need be published under subsection (2) if it has previously been published pursuant to that subsection, whether or not it has been amended as a result of representations made pursuant to that subsection.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

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This is Exhibit “31” referred to in the Affidavit of Mary DeCaire sworn by Mary DeCaire at the City of Toronto, in the Province of Ontario, before me on May 5, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY



CANADA

House of Commons Debates

VOLUME 137 • NUMBER 054 • 1st SESSION • 37th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Thursday, May 3, 2001

Speaker: The Honourable Peter Milliken

(Motions deemed adopted, bill read the first time and printed)

GOVERNMENT ORDERS

● (1015)

[*English*]

COMPETITION ACT

Bill C-23. On the Order: Government Orders

April 4, 2001—the Minister of Industry—Second reading and reference to the Standing Committee on Industry, Science and Technology of Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

Hon. Lawrence MacAulay (for the Minister of Industry) moved:

That Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act, be referred forthwith to the Standing Committee on Industry, Science and Technology.

Mr. John Cannis (Parliamentary Secretary to Minister of Industry, Lib.): Madam Speaker, the purpose of the motion is to provide members of the House with a greater role in preparing legislation through House of Commons committees. It is only the third of three bills referred to committee before second reading in this parliament.

On behalf of the Minister of Industry I am very pleased that Bill C-23, an act to amend the Competition Act and its related statute, the Competition Tribunal Act, will be referred forthwith to the Standing Committee on Industry, Science and Technology. This will give members of parliament a greater role in the development and passage of legislation. It should also be noted that this government bill was developed on the principles underlying four private members' bills.

The initiatives proposed in the bill would ensure that key marketplace framework laws remain effective and efficient in promoting and protecting competition to the benefit of consumers and the business community.

The Competition Act maintains and encourages competition in order to enhance economic welfare, to ensure that small and medium size enterprises have an equitable opportunity to participate in the Canadian economy, and to provide consumers with competitive prices and product choices.

Last year the competition bureau, with the assistance of the public policy forum, undertook extensive consultations on the principles underlying four private members' bills that proposed amendments to the Competition Act. Stakeholders representing consumers, businesses, and the legal and academic communities were encouraged to provide their views. The bill is the product of that consultation process.

The bill proposes improvements to the Competition Act and the Competition Tribunal Act in four key areas: first, prohibiting deceptive contests; second, broadening the scope under which the tribunal may make temporary orders; third, streamlining the competition tribunal processes; and, fourth, facilitating co-operation with foreign competition authorities.

Let me say a bit about deceptive contests. Accurate information in the marketplace is critical to all Canadians. In 1999 provisions were introduced to the Competition Act to address telemarketing scams. However the competition bureau's crackdown on deceptive telemarketers has caused some con artists to migrate to other technologies such as mail and the Internet.

Deceptive contests involve the mass mailing of announcements which tell recipients that they have won a valuable prize. Sometimes the prospective victim is told that he or she must first pay a fee or taxes before delivery. In other cases the recipient is duped into telephoning a toll number to obtain further details or to claim the prize. In most cases the prize turns out to be worthless or of minimal value. That pales in comparison to the charges the recipient incurs.

The bill creates a new criminal offence to combat deceptive contests sent by mail or the Internet. This new provision will prohibit any person from sending by mail or otherwise material which gives the general impression that the recipient has won a prize and that in order to receive such a prize he or she must make a prior payment of money or incur a charge such as a telephone toll.

I will say a bit about temporary orders. Complex competition cases can often require extensive investigation by the competition bureau before any proceedings are commenced with the competition tribunal. In cases of serious anti-competitive conduct a victim might very well have gone out of business before the issue is resolved.

Effective enforcement of our competition laws calls for powers to put an immediate temporary halt to anti-competitive conduct where circumstances warrant. This type of injunctive power is presently available with respect to alleged offences under the criminal provisions of the Competition Act and with respect to the civil reviewable provisions once proceedings have been commenced before the tribunal.

Except in the case of a merger there is presently no interim remedy available to prevent anti-competitive conduct while the Competition bureau is investigating a matter but has not yet filed a case with a tribunal. The bill would fill that gap by enabling the

tribunal to issue temporary orders on application of the commissioner of competition.

● (1020)

Turning to streamlining competition tribunal processes, it is important that the competition tribunal not be impaired in its ability to make timely and relevant decisions. The proposals in the bill would amend the Competition Act and the Competition Tribunal Act to streamline the tribunal processes in three key areas.

First, the tribunal would be empowered to make an award of costs in order to discourage frivolous or vexatious litigation.

Second, the tribunal would be able to summarily dispose of an application without having gone through a full hearing in cases where there is no genuine issue or genuine defence.

Third, a means would be created by which references would be brought to the tribunal on a specific issue. In some cases the outcome of a tribunal case might depend on a single pivotal issue such as the appropriate definition of the market. An early ruling might obviate the need for a full hearing on all the remaining issues. These streamlining measures are consistent with similar procedures followed by most courts.

Facilitating international co-operation is very important. Continuing technological changes and falling trade barriers today have resulted in a rapidly changing global economy. It also raises the risk that the effects of anti-competitive conduct will spill across borders and that the evidence necessary to combat this activity will be located outside Canada. For these reasons we need to be able to exchange information with competition authorities for the purpose of evidence gathering if we are to ensure that our competition laws remain effective.

One of the key objectives of the bill is to provide for enhanced international co-operation on competition matters. There is no better example that I can provide of the benefits that flow from international co-operation than the recent series of cases involving international price fixing cartels. Let me point out that in the last few years there have been over 40 convictions of multinational corporations for price fixing offences under the Competition Act, resulting in fines in excess of $160 million.

These remarkable achievements in anti-cartel enforcement were due to the regime of international co-operation for criminal matters under the mutual legal assistance treaty. A similar tool is now required for the civil provisions of the Competition Act.

Canadians are being well served by our competition laws. The amendment initiatives before us today represent the latest step in a continuing legislative evolution which will ensure that Canadians and Canadian competition laws remain up to date and operate effectively and efficiently.

At this juncture I commend the member for Pickering—Ajax—Uxbridge, the member for Kitchener Centre and the member for Notre-Dame-de-Grâce—Lachine who worked diligently and hard through their private members' initiatives in shaping these amendments.

I note in closing that the public policy forum concluded from consultations that a consensus on private access might be possible. While there have been significant concerns expressed by some stakeholders on the subject, it has evoked some strong support from other quarters. This motion will give the committee the opportunity to explore the benefits and necessity of such a proposal. I personally look forward to seeing whether the committee can find consensus in this area.

I ask that the bill be referred to the House of Commons Standing Committee on Industry, Science and Technology before second reading. I look forward to hearing the committee's views on the government's proposed amendments.

Mr. Werner Schmidt (Kelowna, Canadian Alliance): Madam Speaker, it is indeed a beautiful morning and we have a beautiful piece of legislation to start the day off. I commend the parliamentary secretary opposite. This piece of legislation, although far from perfect, is a piece of legislation that we have to look at with some favour.

As the parliamentary secretary declared, the competition bureau has served Canadians well. Although many Canadians who have made appeals and requests of the competition bureau have not always received the redress they desired, or they were not dealt with as speedily as they should have been, it has served Canadians relatively well.

There were some deficiencies in the act which are being addressed this morning. I commend the government for bringing the bill forward.

● (1025)

For the benefit of our viewers this morning I should like to review some of the things the bill will actually do. First, it would facilitate the co-operation between Canadian and foreign competition authorities regarding evidence gathering or civil competition matters.

This is pretty significant. We are getting into a global economy. Industries are operating in other countries. Certain countries are becoming highly specialized in some areas and other countries in others. There is need for international trade. There is need to recognize our respective strengths and weaknesses and to co-operate in developing how we might do it best.

There is a greed element that comes into society every once in a while. Some people want to sort of dominate, take a dominant position in industry, and make everybody kowtow to their particu-

lar desires. We need to recognize that we need protection domestically. We also need protection internationally so that there is a fair and reciprocal exchange of information and that the rules of gathering information are comparable.

It would prohibit deceptive notices of a prize aimed at the general public and sent through the mail or Internet. I am sure all members of the House are aware that there are certain unscrupulous promoters out there who provide prizes. They make people think they are getting something. They receive phone calls congratulating them and telling them that we have won a $50 prize, only to discover that to collect the prize they have to send in $5, $10 or some other amount. Then they are thanked for the $10 and they discover that the prize is not really worth $50. It is a scam. It is amazing how many people have been fooled by so-called prizes. They are not prizes at all.

I remember one case mentioned before the industry committee involving the winning of a prize that was worth roughly $50,000. In order to collect the prize the person had to invest $10,000 and the prize was not forthcoming. This is a very significant amendment to the legislation.

Third, it would streamline the competition tribunal processes by providing the tribunal with a power to award costs, to make summary dispositions and to determine references.

We need to look at three points in this area. Sometimes people feel that some other group is unfairly competing with them when the competition is quite fair. They submit frivolous requests to the tribunal which wastes a lot of time and is not productive. These frivolous requests are added to a long list of other legitimate requests. The provision to avoid frivolous applications to the competition bureau is a reasonable one.

We should also look at the scope under which the competition bureau may issue temporary orders. That scope has now been broadened. I cannot emphasize that enough, because there are times when the competition bureau could deal with something that it is currently not empowered to deal with, simply because it is so restricted as to what it may deal with. Let me read a couple of things that can now happen.

At the present time an interim order can be issued by the competition tribunal only after litigation has begun. This lengthy period of time may elapse before the protective action is taken, with the consequence that the target of anti-competitive behaviour may already have taken place and have driven some people out of business.

That is difficult. I cannot help but refer to a particular case that happened in my constituency. I was able to assist a small company that had annual sales of roughly $3 million to $6 million. The source of material which it distributed was being stopped. It could not be supplied with material any longer because the suppliers wanted it themselves. They did not indicate the last part. They simply said they would not provide the material anymore, which meant they could not do business any longer. There was literally a domination in the marketplace. I think it was three companies that had 85% or 90% of the market. They said they could have the rest of the market, putting them into a monopoly situation.

● (1030)

On principle I object to any kind of monopoly. This particular case went to the competition bureau. The bureau had some difficulty dealing with this case but over time gradually saw the merits of the case and dealt with it. The case went to court and an injunction was issued. The companies that had taken advantage of their dominant position had to supply the material. These individuals are now in business and going forward.

Had the tribunal not been able to act in this case, the company would have been broke today. Had there not been a recognition by the tribunal that some serious injustices were taking place, these poor people would be bankrupt, having sunk a lot of money into their business. They still have not finished. They now have to recognize and claim for damages experienced as a result of the anti-competitive behaviour by these people. It looks like that is going forward. I cannot speak about it any further because it is before the courts. I hope it is resolved in favour of this small company and that it recovers its costs.

Some major changes were made to the Competition Act in 1999. I distinctly remember the debate which took place with regard to fraudulent telemarketing and the business of tied selling. This is when a company puts a condition on a price for a particular article. In other words, to get that price one must buy something else. For example, banks, and sometimes other institutions, say that if one buys a particular insurance policy, it will give it to the individual for a special rate, but to get that rate the individual also has to take a mortgage with the bank.

Also, there is the bundling of services to get a better price. For example, to get a lower price from the bank, a customer would have to take the whole package, such as a savings account, a current account, a chequing account and perhaps insurance. There is nothing wrong with that except when it becomes a condition. It really becomes a judgment call as to when one is a condition on the other.

Tied selling is one of those things that the Competition Act says should not ever be done. I agree with this. The question now becomes one of interpretation or one of judgment as to when it happens.

In my final minute I want to suggest the need for government to recognize that not only should the Competition Act be amended as suggested, it should to go beyond that. There are a couple of other proposals that would improve the Competition Act even further. That has to do with the distinction between criminal and civil cases.

[*Translation*]

Mr. Pierre Brien (Témiscamingue, BQ): Madam Speaker, this morning we are debating Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

In essence the bill brings together a number of initiatives from MPs' private members bills. It is a bit of a cobble of a number of bills and initiatives proposed by various members on, among other things, the practices and procedures of the competition tribunal.

There are four aspects to the bill. One concerns changes to the procedures of the competition tribunal in order to make it more effective.

● (1035)

Another aspect concerns the interim orders the competition tribunal can issue to prevent situations causing such lengthy prejudice that a corporation, even if it knows it is causing a prejudice, will eliminate a competitor and prevent his or her subsequent return.

The aim of it is to eliminate a practice that could make it advantageous to behave illegally, since it means that competitors will be eliminated and that the price to pay for this is perhaps less than the value of the resultant benefit. The tribunal could have more teeth and greater effectiveness as regards these two aspects.

There are also amendments to facilitate international co-operation. In this age of globalization and rapidly evolving communications technologies, we now know that greater international co-operation is needed to improve the effectiveness of the consumer protection measures in the Competition Act.

A fourth aspect of the bill, which everyone has heard about and which is perhaps the simplest to understand, includes amendments to prohibit deceptive contests, the kind that suggest we have won something and must pay money to receive our prize. The bill contains provisions which make it an offence to send a deceptive notice by electronic or regular mail to an individual suggesting that he or she has won a price and must pay money to receive it. We know that this kind of practice very often leads to abuses and questionable situations.

I therefore urge everyone to exercise the greatest caution. When people win something and have entered no contest they should be on their guard. There is something very fishy about this and, in general, the problems will be greater than the rewards. There have been so many abuses in this area that the time has come for legislators to send a clearer message that these practices will be dealt with much more severely.

The bill has many laudable goals. We will obviously have to examine it in greater detail in parliamentary committee. Then we will debate it in the House again. We will be able to hear from witnesses on various subjects they feel we should know more about. We will also have to take into account the jurisdictions of the various levels in order to ensure that the bill respects the work already being done by the provinces. I am thinking, for instance, of Quebec, with its Consumer Protection Act.

Before having had the opportunity to examine the bill in detail, one has to wonder how it will ensure that consumers are well protected when a province already has consumer protection legislation to regulate such practices and the federal government gets involved with the Competition Act? There is a grey area but I am sure that the work done in committee will shed more light on this issue.

This is what the bill is all about. My disappointment has to do with the fact that while the government is dealing with competition issues, one of the great frustrations and concerns of consumers right now is the gasoline issue and the behaviour of the oil industry.

If the government is serious about finding tools to improve business and competitive practices, the oil industry definitely deserves greater attention because gas prices are reaching record levels and are constantly increasing. The prospect of paying even more for a litre of gas is a major concern to consumers, to those whose livelihood is dependent on an industry in which transportation is an important component and to those who live in regions where transportation is an unavoidable reality and a major production cost.

That is the case in a region like mine, the Abitibi-Témiscamingue. We have to make heavy use of trucking to get our products out and others in, which adds considerably to our production costs. It affects agriculture and it affects the trucking industry. In the urban centres, it affects the taxi industry. Thus there are many groups affected by the rise in prices. I do not need to list them all but many people are seriously penalized by high gasoline prices.

● (1040)

It is not true that the increase in the price per barrel is the only reason we are paying such a high price at present. The trade practices of the major oil companies are dubious, to say the least, and unfortunately are not being given any specific scrutiny by the government.

We would have liked to have seen action on a number of fronts, such as, first, in the short term, helping out the consumer by doing something about the tax in order to keep the prices down. At the same time, however, something needs to be done about the variables of competition.

There is no way I will ever be convinced that it is normal competitive practice for major competitors such as the big oil companies to always all have the same prices at the same time, for gas stations on four corners of an intersection to raise prices at exactly the same time in one place, while another place only a few

kilometres away will have different prices. The transportation variable does not explain these price differences, nor do the variables of competition.

Certain trade practices are used to do in all the little independents. It is very clear that this is the strategy and action plan of the major companies. Obviously it is in their interest, and understandably so; they are in business to make money. If we do not do something they will use these strategies to increase their share of the market.

I cannot believe, and this is a common perception, that the business practices of these firms cannot comply with the usual rules of competition. There is a sort of collusion between these companies. A mechanism must be put in place to continually monitor the conduct of the oil industry. For example, let us give the competition bureau additional means to set up an oil industry monitoring section. Let us ensure that the law makes sentencing or proof of anti-competitive practices easier to obtain. In this regard, I wish the current bill had opened this window.

In committee, we will study the subjects presented. Obviously, people will appear before the committee, but I fear that when we study the bill we will limit ourselves to the subject matter of the bill and not deal with this very important section of the Competition Act or the ways in which competitive practices in the oil industry may be improved.

Here, I repeat remarks shared by many of the members opposite at one time. Over 50 of them signed a report stating that the Canadian market was a real treat for the oil companies. The report also stated that, on average, Canadian consumers were paying 4 cents or 5 cents more for a litre of gas than U.S. consumers, and that taxes should be removed because of competitive practices in Canada where the federal government's approach to promoting the establishment of a strong industry has gone too far, to the extent that this was done at consumers' expense.

I am somewhat surprised to see that only a few still hold this view, that the others have forgotten that they signed this report and that this issue is no longer one of their political priorities even though it is more important than ever to consumers.

I hope that at third reading some substantial amendments will have been made to improve competitive practices in the oil industry and to control these companies somewhat. People can no longer stand to see these companies making huge profits while they are paying exorbitant prices for gas.

This has to stop at some point. We must send the signal that we are concerned about this situation. Even though the bill has some good features, it overlooks an extremely important component in our daily lives, namely the oil industry. I find this difficult to accept.

I hope that in the end the bill will include a clause amending the mandate of the competition bureau regarding the oil industry.

[*English*]

Mrs. Bev Desjarlais (Churchill, NDP): Madam Speaker, it is not my intention to take a lot of time repeating the comments of other members that have encompassed the scope of the bill.

● (1045)

I want to read the summary of the bill so the listening public will know what it entails. It states:

> This enactment amends the Competition Act and Competition Tribunal Act. The amendments include the following:
>
> amendments to facilitate co-operation with foreign competition authorities for the enforcement of civil competition and fair trade practices laws;

It must have been a hard thing for the government to put in fair trade practices laws, but that is okay. The summary continues:

> amendments prohibiting deceptive prize notices;
>
> amendments streamlining the Competition Tribunal process by providing for cost awards, summary dispositions and references;
>
> amendments broadening the scope under which the Tribunal may issue temporary orders; and
>
> some housekeeping items.

A number of areas are being covered throughout the bill that need to be addressed. I want to comment a bit further on the amendments prohibiting deceptive prize notices.

My hon. colleague from the Alliance commented about the number of scams that are out there involving individuals. Toward the end of his comments he also mentioned whether or not something like this should be considered criminal or handled through a civil process.

In that area I am somewhat concerned that we would not look at deceptive prize projects as a criminal act. We are not talking about people being ripped off by a few thousand dollars. In a good many instances tens of thousands of dollars are involved. I know specifically of three people, who do have their wits about them but who got involved in very deceptive scams involving $5,000 to $10,000.

It is disappointing that we are not dealing with scams as a criminal issue rather than on the basis of it decreasing competition. Something seems to be amiss here.

There is another issue that will probably not be addressed in the bill but it is also deceptive. A small business operator in my riding purchased plans on how to access government grants and funding.

It was formatted in such a way, and with the coat of arms on it, that it appeared to be something put out by the Government of Canada. It included a number of things that were available through government services by accessing different departments, websites and so on.

One of the toughest things is to know exactly what grants and funding are available through different programs and how to access them. As a member of parliament, I receive a number of notices and often at the last minute. Two days before we can access funding, a government department will send out a notice saying that program funds are available. As MPs we scramble to let people in our riding, who might have some kind of interest in these funds, know that they are available.

In that one instance a small business owner paid $300 for this information. It definitely was presented in such a way that it looked like it came from the Government of Canada. There was a rider enclosed indicating that it had to be returned within so many days or the person lost money. There really was nothing the person could do about it.

The people who are getting caught up in these scams do have their wits about them. They are genuinely looking to benefit from some things. The saying is that ''if you are getting something for nothing, chances are you are getting nothing for something''. That is the bottom line with a scam.

I commend the members who were involved in that particular project because it is certainly one part of the legislation that each and every Canadian would be able to feel the impact of personally.

Another major part of the bill deals with co-operation between foreign countries, which is of course needed.

I do not know how other members of the industry committee feel, but apart from not necessarily wanting any more work on our plate at the committee, which was the only thing holding me back from saying that I did not want the legislation to go through, it would be good to get the bill to committee as soon as possible because it does involve a lot of discussion. I hope we get the opportunity to get on to it by September.

● (1050)

Mr. Bill Casey (Cumberland—Colchester, PC): Madam Speaker, it is a pleasure to speak on Bill C-23 today on behalf of our industry critic, the member for Kings—Hants, who has been very much involved with these issues.

All of us are involved with competition issues almost every day. During my former job as transportation critic there were several instances where the competition bureau was involved, especially during the evolution of the airline industry. There was a lot of involvement by the competition bureau when Canadian Airlines was consumed by Air Canada. There still is and will be for some time.

The competition bureau has outlined rules whereby Air Canada must allow competition to start and flourish in order to create a competitive environment in the aviation industry in Canada. Air Canada is so strong that it effectively could put new companies out of business before they even start. It can subsidize four revenue lines from its better revenue lines, thereby competing with other smaller airlines that do not have access to the more profitable lines. It can lower rates on its lower revenue lines by subsidizing from the higher revenue lines.

Everyone understands how the system works. Air Canada has complied quite astutely but the competition bureau has been involved in a couple of cases. That is just an example of what we are talking about here.

I have another example that is a little closer to home. A member of my family received a call saying that she had won a car or some huge prize. She had to call a 1-900 number and answer a few skill testing questions. I remember that the low end of the prize award was $2.73 and the high end was a car. When she called the number she was kept on the line for almost an hour. They charged her a lot of money, and sure enough she had won the $2.73. It was a total scam to make money on the phone call.

Another senior lady in my riding was scammed out of hundreds of thousands of dollars by two or three different outfits from the province of Quebec. They were the same people who just changed names, identities and addresses. They used all kinds of excuses to access this lady's money. In the end she lost her home and her money. It was a confidence scam. She should have had quick and easy access to the Competition Act to prevent this sort of thing from happening.

Our party is pleased to see these amendments come in. It is a credit to parliamentarians and private members' bills that have come before. They have all been generated by people who have come to us as members of parliament and advised us that they had been scammed, cheated or were victims of abuse in some way.

Members of parliament have responded by raising the issue with several private members' bills which are now reflected in Bill C-23. Quite often people do not give us credit but the system actually does work. It may take a while but it does work.

People are concerned about issues of conspiracy, bid rigging, predatory pricing, misleading advertising and deceptive marketing practices. Many of us have been victims of those practices, including me and certainly some of my constituents. When the bill is in its final form hopefully it will address those issues.

Non-criminal or reviewable matters include mergers, abuse of dominant positions and people taking advantage of others. They may not be criminal but they are reviewable and they are not fair.

This is where the competition commissioner should have the power to intervene and protect the citizens who have no other avenue or no other source of protection.

The competition tribunal and the competition commissioner have done a good job with the tools they have had to work with. Bill C-23 would give them more tools. In any case I have been involved in the competition commissioner has done a thorough investigation, has heard both sides of the story and has done a good job.

● (1055)

The bill was developed because parliamentarians responded to citizens through private members' bills. However it has also come about through consultations across the country, through public policy forums and a consultation paper that formed the basis of the discussions entitled ''Amending the Competition Act: A Discussion Paper on Meeting the Needs of the Global Economy''. All these sources of information certainly enhanced the bill.

Part of the issue is international co-operation. That is important because the same people from the province of Quebec who were scamming other people were doing the same in the United States. The American authorities had limited access to address this issue because of international rules. The bill would allow a closer relationship between the law enforcement offices and the competition bureaus of both countries to deal with these international issues.

The bill would deal with deceptive practices such as the notice of winning a prize as in the case of my family member. A lot of Canadian companies are providing these services or promoting these scams in the U.S. The same can happen the other way around. American companies can scam Canadians. There has to be some international co-operation, and the bill would do that.

The bill intends to streamline the litigation progress, which is a good thing. It would help the tribunal that manages each case it hears to be more efficient and to give easier access to people. The tribunal would be able to award costs against a party, which is also a good thing. Many people have taken on incredible legal bills to fight the mail and telephone scams I have mentioned. In a decision the tribunal would at least be able to award costs to the victims.

The tribunal would gain the power to summarily dispose of a matter that it believes has no genuine basis for application. That is a good thing as well. Frivolous actions are taken and it would have the power to determine whether or not an action is frivolous.

Under the new proposal the bureau would be able to issue temporary or interim orders prior to completion of the litigation. This was perhaps led by some of the Air Canada judgments. Powers would be given to the competition commissioner in the aviation case. It could make judgments early and immediately, before the case even comes to the tribunal.

Therefore there is a lot of good in the bill. Our party is anxious to get it to committee as well. We want to make sure that it has teeth, as the government has proposed. We want to make sure the teeth are actually there. We want to make sure the competition bureau is independent. We want to emphasize that this whole issue evolved from citizens complaining to members of parliament, who brought it forward in private members' bills and now in a government bill.

We will be pleased to see the bill go to committee and we will make our decisions and amendments there.

Mrs. Karen Redman (Kitchener Centre, Lib.): Madam Speaker, we have before the House today a package of amendments to the Competition Act and its companion statute, the Competition Tribunal Act. Together these statutes constitute a fundamental framework in the rules for the operation of free trade and a competitive marketplace for Canada.

The Competition Act is a broad based statute that affects virtually all industrial sectors and business entities in Canada, whether large or small, domestic or international, or involved in manufacturing, services or resources. The legislation seeks to enhance competitive market forces.

Competition is important. It is not a means to itself but rather a means to an end. Competition encourages firms to lower costs, reduce prices, improve services and develop new products.

Consumers are the prime beneficiaries of a competitive economy. After all, competition is driven by consumer demands. In a competitive environment consumers decide what they want to buy based on their individual needs, preferences and incomes. The marketplace responds efficiently to this demand by supplying consumers with the right product at the right price.

● (1100)

An amendment being considered today would make it an offence to promote deceptive contests by mail, fax or Internet. Under the new provision it would be a criminal offence to make people believe they have won a prize and that they must make a payment or incur a cost to collect it, to increase their chances of winning it or simply to get more information regarding it.

Deceptions of this sort hurt Canadians. I have talked to people across the country about the devastating effects on the people that have been duped. These practices also hurt responsible businesses and charities by undermining their legitimate marketing efforts and many of them damage our reputation abroad by targeting persons outside Canada.

For these reasons such rackets must be stopped, and the sooner the better. The new provision would add a valuable enforcement tool against deceptive marketing practices. It would complement existing provisions against deceptive advertising and telemarketing

and help ensure that consumers have the information they need to make informed choices.

Sellers would be rewarded for their ability to offer good products at low prices rather than their cunning ability to deceive the consumer. Honest businesses would no longer be threatened by the anti-competitive practices of dishonest businesses.

The amendments proposed in the bill would help keep Canada's competition laws up to date, but the work is clearly not over. Globalization and rapid technological developments are continually changing the marketplace and the ways in which business is conducted. To remain effective and relevant the Competition Act must remain both modern and dynamic.

The amendments constitute one step in the continuing evolution of our competition legislation. The changes constitute a balanced package of amendments that would better enable the Competition Act to protect free competition and the public interest.

The amendments would protect consumers and honest businesses alike. The bill would strengthen and improve the overall level of competition in the marketplace and benefit all Canadians.

I wholeheartedly endorse the amendments and believe they are worthy of the support of all members of the House.

[*Translation*]

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): Madam Speaker, I am very pleased to speak about this bill and about the new ground broken in terms of recognizing members' efforts to ensure that the legislation that comes before this parliament and its committees is an accurate reflection of the concerns we hear about in our ridings.

[*English*]

I have a lot to say on the bill and will try to be as brief as I can in the next nine and a half minutes. Much of the bill reflects the efforts of members on this side of the House to effect much needed changes to the Competition Act. It is for that reason that I thank the hon. Minister of Industry, his parliamentary secretary, the member for Scarborough Centre and the competition bureau that have been working very hard to ensure the Competition Act reflects the changes in market structure that we see throughout the country.

I will give a bit of background on why we are here today. The hon. member for Kelowna said earlier that it is a beautiful day. I think it is a wonderful day. There is finally a ray of hope that our competition policy will begin to look more globalist, will be open to small and large players, and will ultimately have more teeth.

In 1997 when gas prices were heading up, 52 members on this side of the House began a study of the industry, particularly at the retailing end, and found the level of concentration to be alarming.

● (1105)

For that reason one of the recommendations was to ensure that a more appropriate definition of predatory pricing be established. The House not only made private member's Bill C-235 votable. It also ensured that it would be properly studied by committee.

That clearly was not the case. Nevertheless, out of that came a more open process that allowed a number of issues to be studied, not just one area of competition policy. One such issue was that section 45 of the Competition Act, the conspiracy section, may not be relevant in addressing problems in the economy or in ensuring that strategic alliances which may look collusive but have very strong competitive effects are somehow segregated from the egregious types of collusion.

As for the issue of predatory pricing, a move was made with the help of the industry committee to review some of the criminal aspects which are difficult to enforce if not to detect. With the help of VanDuzer and Paquet we were able to propose changes to the Competition Act which would make it more user friendly and make criminal burdens of proof civilly reviewable.

We followed that up with a commitment by the previous Minister of Industry, the current Minister of Foreign Affairs, who must be acknowledged here. He began allowing the public policy forum to conduct a broad study of the Competition Act, particularly in terms of some of the legislation I brought forward.

I commend my two colleagues who spoke before me, the member for Kitchener Centre and my colleague from Mount Royal who brought forward the bill dealing with international co-operation. The public policy forum effectively criss-crossed the country last summer to determine the public's concern with respect to abusive dominance in the grocery industry and retail domination in almost any form.

The second recommendation dealt with private access, conspiracy, collusion and summary disposition of temporary orders which we see rolled up in the bill today. The package received a significant amount of interest. Most alarming, however, was the consistent pattern we saw among those with vested interests, particularly powerful lobbies that constituted themselves as a diversity of individuals but were really part of the same group that opposed almost any changes to the Competition Act.

Last week I explained who wrote the Competition Act in 1986. There are not only concerns that it is an act whose time has come in terms of need for change. There are questions as to who really wrote it. Most of us in the House know, as Peter C. Newman said in

the book *Titans* and in his interview with the chairman of the Business Council on National Issues, that it is interesting Canada is the only nation that has allowed its Competition Act to be written by the very people it was meant to police.

That has set off alarm bells in most circles and certainly in the House of Commons. However more important is the impact it has had on the competitive process. For that reason the competition bureau, in concert with the minister and with parliament, has taken a bold step today in saying that irrespective of what the interests are we must make sure the competitive process is honoured and that it flourishes.

Opportunities have been made clear on several occasions in the industry committee. People have testified to the committee suggesting that by the time the competition bureau makes a ruling the person it affects is out of business, the damage is done and it is irreparable. The initiatives taken today are extremely valuable and should ensure there is an ongoing process for amendments to the Competition Act to ensure that it is pragmatic and changes with changing times.

I want to make sure the House understands that the process before us today must be an open one. The government has initiated, through the wisdom of the minister, an opportunity that would allow members of parliament to ensure that issues of importance to them and to consumers have a voice on the floor of the House of Commons.

Many members are talking about one of the bills. My colleague from Kitchener Centre addressed the question of deceptive practices, particularly as transmitted through mail by using Canada Post or other means.

● (1110)

That is an extremely important issue with which the public readily identifies. However there are other issues the public may not have seen. Another initiative taken up here today is the whole question of international co-operation. Why is that important? Most Canadians do not know it, but for the past several years we have been part and parcel of a cartel that has forced up the price of citric acid, various important chemicals, certain vitamins and lycene.

Those issues were resolved, discovered, advocated and taken from the competition act in the U.S. For that reason it is important to ensure that where there are international cartels Canada can effectively prosecute no matter where it occurs in the world.

It is interesting that the competition bureau was successful in prosecuting these issues and bringing revenue back to Canada. That revenue, according to some, did not equal what the public lost in terms of higher prices, but it nonetheless helped the general revenues.

I will also point out something that is not in the bill but which the industry committee has nonetheless been effective in transmitting to parliament. I am talking about the need to ensure the competition bureau has the resources to carry out its very lofty mandate and to ensure the market remains balanced.

Questions are being raised in many areas. There is an opportunity for such questions to be addressed in the industry committee. I caution hon. members that the pinstripes and the big suits will be coming to the committee. I implore members of parliament to ensure a balance of the views of consumers and ordinary people out there who do not have a voice but who nonetheless are an important part of our economic structure. Those individuals count for everything in the economy and must count for something if the legislation is to be meaningful and successful.

Members of parliament will be lobbied by some of the most interesting people in the country. Members will need to decide for themselves, in committee and on the floor of the House of Commons, whether to enhance and maintain the competitive process for all Canadians or merely for those who happen to have the wealth and the power to influence them.

This is a very good day. There are obviously a number of concerns we must address. It is the beginning of a much larger process. It is vindication for a lot of the work I have done and which I have brought to the attention of the House of Commons and on which other hon. members have worked so diligently. Let us ensure that Canada remains ahead of the game, that its international reputation as a place for doing business remains pristine, and that Canadians benefit from a vibrant economic environment in which all people are meaningful participants and are treated as equals.

The Acting Speaker (Ms. Bakopanos): Is the House ready for the question?

Some hon. members: Question.

The Acting Speaker (Ms. Bakopanos): The question is on the motion. Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to)

The Acting Speaker (Ms. Bakopanos): Accordingly the bill stands referred to the Standing Committee on Industry, Science and Technology.

* * *

FEDERAL-PROVINCIAL FISCAL ARRANGEMENTS ACT

The House proceeded to the consideration of Bill C-18, an act to amend the Federal-Provincial Fiscal Arrangements Act, as reported (without amendment) from the committee.

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Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

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Commissioner for Taking Affidavits (or as may be)

JAKOB KELLY

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

INST COMMITTEE MEETING

Notices of Meeting include information about the subject matter to be examined by the committee and date, time and place of the meeting, as well as a list of any witnesses scheduled to appear. The ***Evidence*** is the edited and revised transcript of what is said before a committee. The ***Minutes of Proceedings*** are the official record of the business conducted by the committee at a sitting.

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Thursday, October 4, 2001

• 0908

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I'm going to call the meeting to order.

Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act, is our order of the day.

We're very pleased to welcome here this morning, from the Department of Industry, the Commissioner of Competition, Konrad von Finckenstein. With him today is Marcel Morin, the acting assistant deputy commissioner, and François-Bernard Côté, the director of the competition law division.

Without further ado, I'll turn it over to you, Mr. Commissioner.

Mr. Konrad von Finckenstein (Commissioner of Competition, Competition Act, Competition Bureau, Department of Industry): Thank you, Madam Chairman, and thank you for having invited me to talk to you about Bill C-23.

[*Translation*]

This bill reflects the valuable work of this committee's June 2000 report and initiatives taken by individual members of Parliament, some of whom are on this committee. As you know, there was an extensive national consultation process on this issue conducted by the Public Policy Forum. Twelve round tables were conducted across Canada.

As you know, the Competition Act is designed to promote competition and efficiency in the Canadian marketplace to ensure that all Canadians enjoy the benefit of low prices, product choice and quality service.

• 0910

[*English*]

The legislation before you is very important to keep up to date with changes in our economy and to give the Competition Bureau the tools it needs to do its job.

The bill basically has four items of great importance to us. It prohibits the sending of deceptive notices; it enables us to gather evidence located abroad; it will streamline the Competition Tribunal process; and it will give the Competition Tribunal the power to issue temporary orders.

Let me deal with these issues one by one.

In regard to deceptive notices, our bureau receives thousands of complaints each year regarding cleverly worded mail notices designed to deceive victims into believing they have won a prize, requiring the so-called winner to pay in order to receive the prize. Most often there's no prize, or the value of that prize does not exceed the amount that has to be paid.

Canadians who are targeted for these mailings are often the most vulnerable members of our society. They target specifically our seniors, and losses can amount to thousands of dollars per person. Increasingly, these scams also become international in scope. These scam artists locate in one location and target another one, and Canada, unfortunately, is in the process of gaining a reputation as a haven for these scam artists, who concentrate on the United States.

It's therefore very timely that we enact these provisions. They will also have, as a goal, to draw a difference between legitimate business contests and scams. The amendments create an offence that prohibits the sending of a notice by any means that a) leads recipients to believe they have won a prize; and b) requires them to pay anything to receive the prize. No offence would occur if the person actually wins a prize and the notice disclosures are satisfied.

You are going to hear from the bar and others who will appear before you. How are we going to do this? How do these things work out? There's a lot of discretion vested in the bureau. For that purpose, I have distributed to you today tentative draft enforcement guidelines that show how we would apply those provisions—what we consider a prize, what's considered payment, etc.—and hopefully, this will put some flesh on the bare bones of the legislation and give you a view of what we intend to do. It will also lead to greater certainty for business.

The next point was international cooperation.

[*Translation*]

The ability to obtain evidence located in other countries is crucial in administering and enforcing competition laws in today's global economy. In order to inquire fully into abusive dominance allegations concerning a large, multinational corporation, we need access to relevant evidence which is often located beyond our borders. Currently, there's no way to obtain that evidence.

The proposed amendments regarding mutual legal assistance will facilitate evidence-gathering on behalf of Canada regarding civil competition matters, such as abusive dominance and mergers. This will ensure that enforcement decisions affecting domestic competition are made in Canada.

The proposal sets minimum standards for treaties and essentially mirrors the existing tools with respect to criminal matters under the Mutual Legal Assistance in Criminal Matters Act.

[*English*]

Basically, what we are asking is to be able to do on the civil side what we can do now on the criminal side—gather evidence abroad and bring it into Canada so we can make decisions in Canada. Again, in order to explain what we have in mind, I have tabled with you a model treaty. The act would allow the Minister of Justice to make treaties with countries that have sufficient safeguards, and pursuant to that treaty, information would then be exchanged.

I think it is quite clear this new part III, which allows for the making of the treaty, and the model treaty show that we cannot obtain evidence in another country without significant safeguards. The safeguards are that the Minister of Justice has to be satisfied that this country has essentially the same confidentiality system as we have, and two judges have to order—the first one to gather the evidence and another one to remit the evidence to another country. So clearly, safeguards have been built in to provide protection for our business.

• 0915 

Let me just tell you in advance, when you hear from the Canadian Bar they will probably suggest that section 29, which deals with confidentiality of the act, also needs to be amended.

In our view, this is not the case. Part III, as set out, is a self-contained code that applies to the gathering of evidence abroad and has a built-in sufficient safeguard. There is no need to open up section 29, which in our view is established law and needs no amendment.

One final point on this subject. Nothing in the proposed provision authorizes the bureau to send information already in its possession to be used as evidence abroad, whether it was obtained voluntarily or compulsorily. Again you're going to hear that voluntarily surrendered information needs to be included. As I say, there's a self-contained code, and it has nothing to do with voluntarily submitted information.

The next point is the streamlining of the competition process. The Competition Tribunal has proven to be very costly and time consuming and therefore is of very little use.

The proposed amendments will allow the tribunal, first of all, to hear references on questions involving a specific aspect of a case or a specific issue, rather than having to litigate a whole case.

Secondly, it will give the tribunal the power to award costs so it can discipline the parties before it and prevent frivolous or strategic behaviour.

Thirdly, it will give it the power to make a summary disposition to dispose of a case quickly where it finds there is no genuine case or no genuine defence.

I think all three of these amendments are needed and will allow us to make better use of the tribunal and allow it to control its own process.

The last point concerns interim orders. The ability to act quickly and prevent irreparable harm in the market is a key issue in our fast-paced economy today. Currently the tribunal cannot issue an interim order under most circumstances, unless the bureau has applied to the tribunal. However, we can't apply to a tribunal until we've collected the evidence, which takes time. In the interim, very often, the victim of anti-competitive behaviour may go out of business.

So the proposed amendment would allow the tribunal to issue interim orders in three cases: if there's irreversible injury to competition; if a competitor would likely be eliminated; or if the person would likely suffer significant loss of market-share revenue or other harm that cannot be remedied by the tribunal.

These are the same powers the commissioner has right now regarding airlines. Here, we would apply to the tribunal, and the tribunal, on the basis of the same tests, could issue temporary orders giving us time to investigate. These orders would be interim and limited in time, and the final order, of course, could only be made after the bureau brings the case before the court for full litigation and a judgment.

[*Translation*]

There are some other amendments to the act, which we refer to as housekeeping amendments.

I wanted to refer briefly to some miscellaneous amendments included in the bill. These include the proposed revisions to the consent order process, revisions to the temporary order provisions in respect of deceptive marketing practices and making advisory opinions binding on the commissioner.

While essentially of a housekeeping nature, these amendments would nevertheless prove invaluable to the smooth functioning of the act.

[*English*]

For us, these so-called housekeeping amendments are of considerable importance in terms of the daily working of the bureau.

Now let me say a few words about something that is not in the bill but is essentially before you, which is private access.

You will remember that Bill C-472 proposed allowing private parties to apply directly to the tribunal for remedies concerning refusal to deal, tied selling, market restriction, and exclusive dealing—essentially the review of conduct under sections 75 and 77 of the Competition Act.

These kinds of disputes essentially involve private matters between buyers and sellers. The proposal contemplated in Bill C-472 would permit applications only with leave of the tribunal, to guard against strategic litigation. It would provide remedies by way of injunction only, so there are no damages and there's no incentive to sue for money. And lastly, they give the tribunal the power to award costs, so as to discipline and deal with frivolous proceedings.

• 0920 

The minister has referred Bill C-23 to the committee before second reading to provide the committee with an opportunity to explore private access and to determine whether consensus on the subject can be found.

You will recall that the Public Policy Forum pointed out in its report that there were diverse views amongst stakeholders on this proposal, but found "consensus might be possible if changes were made to the proposal".

As far as I can see, supporters of private access argue that there are some perceived deficiencies in the system and would make the following three points.

Number one is that the limited resources available to the bureau mean that some legitimate cases are not being taken to the tribunal. For example, cases that are very local in nature, or whose impact on the economy is small, will probably be given low priority by the bureau and therefore will not be argued. However, private access for such cases has a potential to complement public enforcement in this area.

Secondly, under the current system, a complainant is also left without an alternative if the case is given low priority by the bureau and is not pursued. Supporters of private access believe that people or companies should have the option to pursue their own cases in such instances, especially since it very often may mean that they go out of business if the issue is not addressed.

And thirdly, there is very little jurisprudence related to reviewable matters, and it's argued that private access would result in additional case law. This has been the experience in Australia, where most of the law in this area emanates from private cases. More jurisprudence would allow the business community to have a better understanding of how the law applies and conform with it.

Now, some powerful arguments are being made against private access. There's a strongly held belief by some that it will be used for strategic litigation. For example, a large firm with significant resources could initiate one or more applications against smaller firms with limited funds. Alternatively, it's also possible that firms of any size could initiate or threaten legal proceedings in the hope of deterring aggressive competition. This can be part of a negotiating strategy designed to harass a rival.

Secondly, they feel that the safeguards that are being proposed to deter strategic litigation will not work. They are doubtful that any safeguards, no matter how stringent, would work; that once you open the door to private litigation, strategic litigation will follow regardless of the safeguards.

And thirdly, they feel that while there is need for jurisprudence and it would be useful to have such jurisprudence, expansion of the case law is not a sufficient reason to expose Canadian business to the cost of disruption associated with more private litigation.

We at the bureau continue to believe that some form of private access is necessary in order to round out the provisions of the Competition Act. Whether the time is right for this now and what form such amendments should take is something your committee will have to study. As the minister has stated in a letter to the chairman of this committee, major changes to framework laws, such as the Competition Act, require broad consensus.

This committee will hear from all sides and will be well placed to determine, on the basis of their submissions, whether the required consensus to enact private access with substantial safeguards, along the lines examined during the PPF process, has been reached or not.

Now, let me just, for completeness' sake, deal with two other issues.

[*Translation*]

Other issues which were part of the consultation process included the conspiracy and abusive dominance provisions in the grocery sector. Participants in this consultation process expressed a desire to modernize the act's conspiracy provisions but generally felt that more discussion, analysis and consultation was required on such an important subject.

To facilitate the debate, the Bureau hired three experts well known for studies on this issue. Rob Russell, of Borden Ladner Gervais in Toronto, Al Gourley, of Macleod Dixon in Calgary, and Yves Bériault from McCarthy Tétrault in Montreal, were commissioned to undertake studies that are now on our Web site. A conference on this very subject initiated by the private sector on amending section 45 is taking place on October 12. Following the conference, the Bureau will be consulting stakeholders about reforming section 45 during the course of the winter and spring.

• 0925 

On the issue of possible abusive dominance in the grocery sector, the Bureau commissioned three studies to facilitate the debate. Dr. Stephen Ferris of Carleton University, Dr. Guofu Tan of the University of British Columbia and Dr. Jean-François Wen of the University of Calgary undertook studies which can be found on our Web site. The Bureau is basing itself on these studies to prepare guidelines for the grocery sector which will soon be published.

[*English*]

I hope by dealing in this way with section 45 and the bills of dominance in the grocery sector, we will be able to advance that issue further. But it's not part of your considerations today, and frankly these issues are not right. That's why we have commissioned these studies; that's why we're publishing them; and we hope to be advancing them further.

Last year I appeared before you in follow-up to the VanDuzer report. I also read your interim report. This report made several suggestions that we have followed up. First, we've taken your advice and issued abuse of dominance enforcement guidelines, which are now in place. These have been widely received with positive acclaim. Secondly, we are in the process of writing guidelines for unreasonably low pricing or reforming the existing policy.

So, Madam Chair, in short I'm sorry to have taken up so much time, but I wanted to give you an overview of where we stand with regard to all the issues that have come up before the Public Policy Forum. We think Bill C-23 is indeed timely. It represents concrete steps to deal with illicit contest scams and will give us the tools to obtain evidence abroad. It will streamline the Competition Tribunal and will give the tribunal the power to issue cease and desist orders. Ultimately Bill C-23 is designed to ensure that Canada has a modern and responsive Competition Act that promotes healthy and vigorous competition for the benefit of all Canadians.

Thank you very much, and I will gladly answer your questions.

The Chair: Thank you very much, Commissioner.

We're now going to turn to questions. We'll go back and forth, beginning with Mr. Rajotte, please.

Mr. Rajotte.

Mr. James Rajotte (Edmonton Southwest, Canadian Alliance): Thank you, Madam Chair.

Thank you, Commissioner, for your presentation this morning. I do want to ask about the issue of private access. You obviously endorse some form of private access here in your statement. Obviously, if it's something you favour, you must feel that the current system in place now is deficient in some way. So I would just like to ask some basic questions about how well the method in place works right now. How many cases are brought forward each year? How many cases are reviewed? How many cases are then put forward to the Competition Tribunal? I would also like to ask whether there are any other ways of dealing with the issue you raised concerning limited resources and other similar issues. I wonder whether you could address that.

Mr. Konrad von Finckenstein: The bill has consistently argued that it is probably necessary to round out the Competition Act so there would be some private access. As you appreciate, several provisions are difficult to enforce, because you have to draw the boundary between what is anti-competitive conduct and what's vigorous competition. That's not a clear boundary, and indeed it differs from case to case. Each case depends on its facts.

Right now the system works in the following way. If a company feels it is subject to anti-competitive behaviour—a fault under the civil provisions—it comes to us. It petitions us to investigate. We investigate, and if we find there's sufficient proof of such behaviour, we try to remedy it—usually without litigation—by convincing people to remedy the behaviour. If that doesn't happen, we go to court to get an order to try to have that company cease and desist such things.

We don't bring many cases. It's a difficult area of law, especially given our limited resources. Also, as is normal for a state agency, we focus on issues of great magnitude that have an economic impact on the whole country or a whole region, etc. The areas that are targeted here, such as refusal to deal, tied selling, etc., are essentially issues between two companies, usually a supplier and a distributor, and they are essentially private in nature. Very rarely do they have sufficient economic impact or involve sufficient complicated legal issues that we will take them forward. We resolve a lot of them through what we call alternative case resolution. But some

companies undoubtedly feel we don't do enough. I can't see any reason why we would not give those parties the ability to try on their own, with their own means, to convince the tribunal to get an order.

• 0930

Now, the safeguards that have been promoted, put in Bill C-472, and discussed before the PPF, such as leave of the tribunal, no monetary damages—you just get an injunction—and costs by the tribunal, would hopefully make sure that this is not being used for strategic purposes. Of course, you can never prevent people from strategic litigation and there is a certain risk. But we felt, on the whole, that this would round out the provisions. As the minister and his predecessor have made abundantly clear, this is framework law. The minister wants to proceed only if there is general consensus on these issues and they make good economic sense. He has basically asked this committee to determine that.

Mr. James Rajotte: In terms of the number of cases brought forward now, what percentage are resolved through what you call your alternative dispute resolution? How many or what percentage are brought forward to the Competition Tribunal?

Mr. Konrad von Finckenstein: I apologize. I don't have the numbers in front of me. I can certainly furnish them to the chairman for distribution to the committee.

Under the civil provisions, contested cases are one or two per year at most. That gives you an idea of how many. As to the alternate case resolution, I don't have the numbers at my fingertips. It's a significant number. Most cases get resolved through the alternate case resolution and do not go to court.

Mr. James Rajotte: On the issue of the strategic use of private access, you just now said there's no way to prevent that completely. So what assurances can you give to companies that are genuinely worried about this?

Mr. Konrad von Finckenstein: Well, people can always go to court and sue right now, even if it's not to the Competition Tribunal. The question is whether you have a legitimate case and whether you could get penalized. What we thought is that by having a leave provision to the tribunal, you have to convince the court, first of all, that you have an arguable case, and secondly, that there's no incentive for you to sue, because you're not going to get money—all you're going to get is an injunction—and lastly, you actually may have to pay costs for yourself and for your opponent if you're unsuccessful. This process would be a sufficient deterrent so that only genuine cases would come forward.

The opponent of private access always thinks this will take us to the U.S. model. The U.S. situation is totally different. First of all, you have no costs; secondly, you have class actions; and thirdly, you have triple damages—all of which we don't want; we're not going anywhere near that. This is such a very modest, limited approach. The scope for strategic action, while hou can't rule it out, in our view, is going to be very limited.

The Chair: Thank you.

Thank you very much, Mr. Rajotte.

Mr. McTeague, please.

Mr. Dan McTeague (Pickering—Ajax—Uxbridge, Lib.): Thank you, Madam Chair.

Good morning, Commissioner and your staff. We've gone several months on this issue of modernizing the Competition Act. We have before us the essence of the changes that were both necessary and very much the product of many years of work from all angles.

I'm interested, Commissioner, in ensuring that consumers and small businesses that constitute a fair chunk of our concern as members of Parliament are also considered in the legislation. For this reason, I understand the issue of private access may create concerns. As we saw in the PPF, the same group of individuals, organized by one or two groups, could recycle their members five and six times over and give the impression of never allowing broad consensus.

I'd like to talk to you, Commissioner, and ask a question about what has been said in a global context. Recently at a policy conference on competition policy on June 21, the following individuals made observations with respect to right of private access.

In Australia's case, it

> ...has given citizens the right to initiate competition actions. "It's been fairly important at times when the government has been cutting back on the budget of the public regulator." "Then private actions tend to increase."

That's Mr. Allan Fels, chairman of the Australian Competition and Consumer Commission.

The second quote:

> "I see no reason why it should be a matter of public policy that the commissioner is the only individual who has access to a tribunal...."

• 0935

That will be an individual with whom you're perhaps familiar, Mr. Howard Wetston, your predecessor in the same position, currently vice-chairperson in the Ontario Securities Commission, as appointed by the provincial government.

The final quote is from a Mr. Frédéric Jenny who is, of course, vice-chair of France's Conseil de la concurrence:

> "Previously, competition law was something (companies) could be victims of because the regulator could come after them for bad behaviour. Now (companies) can use competition law to defend themselves against abuses of others."

Commissioner, I was very interested in your comments that the bureau continues to believe some form of private access is necessary in order to round out the provisions of the Competition Act. Given what has already been taken out of my Bill C-472 with respect to interim orders and the safeguards you referred to in Bill C-472, are you of the belief now that concerns raised by individuals, that this would amount to strategic litigation, are in fact valid, or that the proposal you have before us would ensure private actions taken before the tribunal will be bona fide and not frivolous and vexatious strategic litigation?

Mr. Konrad von Finckenstein: Well, first of all, there's no proposal before you. What I was talking about was a proposal before the PPF. I just want to set the record straight. You ended up saying "the proposal before us".

Mr. Dan McTeague: I meant the interim orders and the issue you raised with respect to summary dispositions.

Mr. Konrad von Finckenstein: Oh, yes. Sorry. Absolutely.

On private access, what I said in my opening statement was we feel it needs to be rounded out. The bureau has done extensive work on private access. We have two studies on our website. One of them is an international comparison on how private access has been dealt with in other jurisdictions and what the effect is. The other one is a study on the cost benefits of litigation by the bureau, and how much it costs to mount these cases.

As I say, we feel it is necessary to round it out. There is some private litigation already under the Competition Act. You'll appreciate that if there is a criminal violation of one of the provisions of the Competition Act, the victim can now go to court on their own and sue for damages. And that happens. For instance, we had the big convictions on conspiracy in vitamins, and there are now several suits for purchases of vitamins against those companies wanting damages for having been subject to a past conspiracy.

There's also provision in the act right now that where the commissioner has gotten an order from a company telling them they may not do certain things, an injunction, and that is being breached, then the victim of that breach can go to a court and get damages. It's not as if this were virgin territory. There is already some relief for companies by way of proposed section 36. What we are talking about here is opening the tribunal for the four areas I mentioned, and, as you quoted, "other competition authorities who believe the time is right".

Our view of this is that these are essentially private matters between buyers and sellers—refusal to deal, tied selling, market restriction, and exclusive dealing. Most often, the victim in these cases is a small or medium-sized business, and they should have the ability—if they really feel it vitally affects their business and we do not believe so, or we don't believe the case is of sufficient import—to argue it themselves. That's essentially our position.

Mr. Dan McTeague: Commissioner, some of us here certainly find it interesting that you, as the only gatekeeper for cases that can be referred to the tribunal, would suggest there should be and might be other means or reasons for us to proceed with this, given the safeguards that might be proposed or that are currently in Bill C-23—safeguards that might also find themselves in the area of Bill C-472.

I'm wondering if you would agree.... There have been a number of studies that have suggested the private sector has the superior ability to detect anti-competitive conduct having an immediate impact on their markets, and given the length of time in which certain cases come before the tribunal—in the case of WestJet, for instance, a full year—would there not be an opportunity for some to bring their cases sooner? In the instances where your bureau believes it's not a case worth pursuing, is it not a fact that many people in this country may be subject to a denial of economic justice, without private access?

Mr. Konrad von Finckenstein: Well, I don't think I can agree with you there. As I said, we believe private access is needed to round it out. Whether the time is now and whether the consensus is there is something you have to determine. These cases are not easy to mount and to litigate, and they take so long because, as I mentioned, it's one of the most difficult decisions we make: what is anti-competitive conduct as opposed to vigorous competition?

• 0940

As to whether private parties will be able to mount cases more quickly or not, I wouldn't want to speculate on that. I just know from our experience that we agonize over those because we realize the importance of the decision. If we bring a case against a company alleging abuse of dominance, it has an effect on the company's reputation, on its share value, on its relationship with its contractors, etc. So we don't do this lightly. We do it only because we feel it needs to be done and it will bring economic justice.

Private parties should not be able to use these powers randomly either, and do damage or use them for strategic purposes. That's why the many safeguards have been suggested. Now, are they sufficient or not? That's something for you to determine. In our view, we thought this would deal with most instances of strategic litigation. But you can never rule out completely strategic litigation.

The Chair: Thank you very much, Mr. McTeague.

[*Translation*]

Mr. Bergeron, please.

Mr. Stéphane Bergeron (Verchères—Les-Patriotes, BQ): Thank you, Madam Chair.

Mr. von Finckenstein, Mr. Morin, Mr. Côté, welcome to the committee.

This is the first opportunity I have had to exchange ideas with you about the work of the Industry Committee. I am new to this committee and therefore I am still in the process of familiarizing myself with many different issues under the purview of this committee. However, I have been able to determine just how interesting this work may well be over the next few weeks.

I have two questions: one pertains to the provisions provided for in Bill C-23 and the other, unfortunately, does not. However, the committee may want to add certain provisions. I would like to hear your opinion on the matter.

First of all, as regards the elimination of deceptive practices, I was wondering about the provisions prohibiting the sending of deceptive notices about prizes to be won and all that. I was wondering if you had done the necessary checks to determine how this bill could have an impact on, or complete or short circuit legislation that is already in effect in certain provinces, particularly in Quebec, where we have the Consumer Protection Act and the Lotteries and Races Act, which may play a role on this area.

My other question pertains to a situation that underscored the potential importance of the Competition Bureau, namely, the whole issue of runaway gas prices or the fluctuating gas prices that we have witnessed over the past few months or weeks.

My colleague from Jonquière, in particular, sent you on July 10 and January 23, a little earlier in the year, complaints pertaining to the very high prices charged in the Saguenay—Lac- Saint-Jean region. It appears that the current provisions of the act do not enable you to initiate an investigation unless the complainant is able to provide you with written evidence of collusion. That would be under the provisions of section 25, where we interpret the word "unduly" very broadly.

First of all, would you be favourable to tightening the act so that you could have more flexibility in conducting this type of investigation? Secondly, to be more specific, how would you like to see this legislation tightened? What would you suggest we do in order to eventually tighten the legislation?

Mr. Konrad von Finckenstein: Thank you. I will ask my general counsel to talk about the constitutional nature of what we do. In a nutshell, we don't have any problems. The roles of the provincial and federal governments are very well defined. Mr. Côté will explain this matter to you in greater detail.

Mr. François-Bernard Côté (Director, Competition Law Division, Departmental Legal Services, Department of Industry): Mr. Bergeron, as far as the relationship between the federal and provincial governments in this area are concerned, it depends on what problem you're dealing with. What do we want to remedy with this act or bill?

• 0945

The Quebec legislation is designed to protect the consumer. We are concerned about activities involving fraudulent representations, deceptive representations which have an impact on both the consumer who, ultimately, is a fraud victim as a result of these practices, and the rest of the competition. If you are an honest competitor who does not attract clients through fraud and so on, you yourself are victimized because one of your competitors is acting in an illegal fashion. In my opinion, the federal legislation and the provincial legislation do not contradict each other whatsoever. They work together to protect the public in general.

The final aspect, and perhaps you will note that the commissioner alluded to this in his statement, is that, in practice, many of these activities are international. Consequently, when an activity is international, it falls perhaps more under the purview of the federal government than the provincial government, given the nature of our activities with foreign countries.

I hope that answers your question.

Mr. Stéphane Bergeron: To come back to the first question I asked you, would you say that this bill is complementary, that it would round out the legislation already in force in some provinces, including Quebec, which, as I was saying before, has its Consumer Protection Act and its Lotteries and Races Act.

Mr. François-Bernard Côté: Absolutely. We are not dealing with the same problem. The Office de la protection du consommateur and the board may deal with this problem indirectly, but we are approaching it from different angles.

Mr. Konrad von Finckenstein: As for the price of gas, you are lucky because Mr. Morin comes from the criminal division and knows all about that.

Marcel.

Mr. Marcel Morin (Acting Assistant Deputy Commissioner of Competition, Legislative Affairs Division, Competition Policy Branch, Department of Industry): I want to emphasize something that has to do with what François said.

When the committee studied Bill C-20, which dealt with the Competition Act, three years ago, some witnesses said that some provinces were not as advanced as Quebec with respect to the Consumer Protection Act. Provisions such as these will help strengthen the powers of provinces that have fewer of them.

As for Ms. Girard-Bujold's matters, the bureau has received documents in connection with those matters. The files have been reviewed.

With respect to the gathering of evidence, it is not just a matter of written evidence. Oral information counts too. The evidence does not necessarily have to be written. In matters of conspiracy, it is indeed difficult at times to obtain evidence. That is why we always clearly state that people with information must consult us in our offices. The bureau always examines these matters very seriously.

As far as Ms. Girard-Bujold's motion to strike the term "unduly" from the Competition Act is concerned, one of the problems we see with that is that "unduly" is a term that has been in the act for a number of years. Before removing it just like that, we should look into the matter to make sure that we do not do any damage by removing it.

For example, the word "unduly" means a significant impact on competition, and this has been argued at length before the courts. Before we just strike the work "unduly", we should do a serious assessment of all the consequences, because there are a number of existing agreements. For example, many franchise contracts and some strategic alliances would now be affected by section 45. This would therefore affect agreements that are not inherently anti-competitive and that could now come under section 45, if we suddenly struck the word "unduly".

Under the circumstances, as the commissioner just said in his statement, and with the studies that are currently being done with experts on section 45, one of the things they are contemplating is a criminal approach to the actual offences of price-fixing and conspiracies to fix prices and share markets.

• 0950

As for other agreements that might, in some cases, like that of strategic alliances, have an effect on competition, those could be dealt with under a civil system. In connection with that procedure, the "unduly" issue could be discussed. That debate will shed light on the issue and possibly give rise to amendments, if necessary, in the future.

[*English*]

The Chair: Thank you.

Mr. Bergeron, we'll come back to you again.

Mr. Lastewka, please.

Mr. Walt Lastewka (St. Catharines, Lib.): Commissioner, you were discussing with Mr. McTeague the pros and cons of private access, but in your report you mentioned that supporters of private access argued that there were limited resources available to the bureau, and sometimes you didn't get involved in certain cases. But you said during your testimony that you had limited resources. It seems that the bullet said that because of limited resources you might not, as a department, be involved in cases, so I'm not quite sure what you were saying there.

Mr. Konrad von Finckenstein: Like every law enforcement agency we have a limited budget, and there's more crime going on than can be addressed, so you have to establish priorities and deal with the ones that have the greatest impact, etc.

Obviously, when we come to the civil side, but also others, we look at cases brought before us or complaints made. We look at the economic impact. We look at the jurisprudence involved and whether it is a new area, etc. We look at the ramifications on the competition generally within the country.

You may have cases that are very local in nature and affect one business—let's say, the fuel supplied. Where there is no competitive impact over a large area or no known novel legal point of view, etc., we may try to resolve it without going to court. We may not go to court because we simply don't have all the resources necessary for it.

That's the reality of life. You have to make priorities and decide which cases you pursue and which you don't. To tell that to a small businessman for whom this may be vital is sometimes very difficult. Obviously, these cases are never clear-cut. It's very difficult to determine whether something is anti-competitive or vigorous competition. If the person is not willing to change and we can't persuade them or work out some compromise, trying to litigate that case is costly and lengthy, and sometimes we don't do it.

Private access suggests that if a small or medium-sized business feels this is absolutely vital, it should have the ability to fight for itself.

Mr. Walt Lastewka: I guess it will be interesting when we hear all the testimony. I take it that you have had discussions with the small business association groups. Is that correct?

Mr. Konrad von Finckenstein: Yes.

Mr. Walt Lastewka: It will be interesting to hear their point of view on whether they should have a mechanism to be able to argue their point, so the situation they may be discussing can be heard.

Mr. Konrad von Finckenstein: You know, when we had the Public Policy Forum, it was very good at bringing together all possible stakeholders at the 12 round tables that were held across the country.

Various business organizations, such as the CFIB, participated and gave their points of view. I assume they will appear before you and you can ask them that question. I wouldn't want to speak for them.

Mr. Walt Lastewka: Thank you, Madam Chair.

The Chair: Thank you very much, Mr. Lastewka.

Mr. Strahl, please.

Mr. Chuck Strahl (Fraser Valley, PC/DR): Thank you, Madam Chair, and good morning, gentlemen.

Like Mr. Bergeron, I'm new to this committee. There's nothing like getting a framework bill like this at the referral before second reading to dive into the deep end of the pool here. But I look forward to it. It's obviously a very important issue, for a variety of reasons.

I would just like to get clarification on a couple of points, on the international cooperation section of your briefing.

• 0955

You mentioned that the Canadian Bar is likely going to protest the fact that the provisions under this section put people's confidentiality at risk. You mentioned here that nothing in here authorizes the bureau to send information. Does this specifically prohibit the bureau from doing that?

Mr. Konrad von Finckenstein: No. I don't want to misstate what the bar is saying. The bar is saying that section 29, which deals with confidentiality issues, basically provides that when we make an inquiry and everything given to us is confidential, it cannot be disclosed except by court order. We, as a policy, will fight those court orders as much as we can by invoking privileges, and so on. That deals right now with our own domestic or international investigations. Those are the restraints that are being put upon us.

What we are asking for here is totally separate. It's a self-contained provision that says Canada may make treaties with other nations, such as the United States, for the gathering of civil evidence. If that's the case, the Minister of Justice will make a treaty.

She has to assure herself of various things, such as whether the country with whom we deal is responsible, has provisions regarding confidential information, and has due process in all of these things. So it has to be responsive to the advanced competition system.

Then she will make a treaty, and pursuant to the treaty, that party can make a request to us. We will take the request, go to a judge, get a court order, go and seize the document, go back to the judge and say, "We have seized the documents pursuant to your order. Can we now send them to the requesting party?" It's a totally separate self-contained provision. It will work and has nothing to do with section 29.

The bar thinks that's fine. Essentially, they have no problem with the new process. But they are saying, "You don't go far enough. You should also review section 29." I say, "That's not necessary at this point in time. Section 29, as it exists right now, causes me no problem. Everybody knows what it means. Why open another can of worms? We have enough issues before us."

Mr. Chuck Strahl: So that just has to do with the international gathering of evidence.

On that, and maybe you can just clarify it for me, right now there is no process to obtain information internationally.

Mr. Konrad von Finckenstein: That's true on civil cases. There is a process for criminal cases.

Mr. Chuck Strahl: Right. What does the bureau do, what should it do, or what can it do, if someone is in the midst of merger negotiations—yes, they like the merger more than a strategic alliance—and wants to merge a couple of big companies? These are, as you mention here, the problems of multinational corporations that have tentacles everywhere. They get approval in Canada because we think it's fine, then they proceed apace, only to find out that the United States or somebody else says she's a no-go.

This bill doesn't address that, I take it. But some company could spend millions of dollars and affect share prices, again worth billions of dollars perhaps, and yet not be able to proceed with a merger.

Mr. Konrad von Finckenstein: On the way it works right now, when you have one of these multinational mergers, you notify in all the jurisdictions in which you do business, and each competition authority has to approve. The competition authorities talk with each other. They may not exchange the data you have tabled, unless you get a waiver from the company, but you can talk generally about the business that's going on, the theory of the case, what the problems are, etc.

There's very close cooperation, especially among the major nations such as EU, the U.S., Australia, etc. We all try to share as much as we're allowed by law, and we usually come to fairly similar resolutions.

Of course, each agency is charged with the job of making sure the competitive system remains intact in its jurisdiction. A merger may have a different impact on one jurisdiction than another, so it's possible to have differential results. But that just means the merging party will have to restructure their proposed merger in such a way as to get approval everywhere, or else abandon it.

Mr. Chuck Strahl: Thank you, Madam Chair.

The Chair: Thanks, Mr. Strahl.

Mr. St. Denis, please.

Mr. Brent St. Denis (Algoma—Manitoulin, Lib.): Thank you, Madam Chair.

I thank the commissioner for being here with his colleagues. It's a very important and interesting subject.

• 1000

I have a couple of short questions, first in the area of the deceptive notices. I think we would all agree that whatever we can do to protect our citizens, in particular our more vulnerable seniors, we should do, and with a growing senior population, shall we say, the marketplace for those who would take advantage of others is growing.

That said, you make a statement here that Canada is gaining a reputation as a haven for scam artists. I'm sure that's quite true, but is there any quantitative data to that effect, or is it anecdotal? And what does it mean to be a haven? Does it mean that these operators operate in

Canada and do their illicit business somewhere else, or they operate somewhere else and do their scamming here, or they operate here and scam here? I wonder if you could clarify that a little.

Mr. Konrad von Finckenstein: You have scam artists who operate here and scam here, but the more difficult ones are the ones who operate here but scam in the U.S., and that's a bit of a growth industry. The number of complaints the U.S. authorities get about scams that are originating in Canada, but where the victims are in the U.S., is growing. Their statistics show a steady increase of Canada being one of the major originators of these scams. We want to go after them, and that's part of what this legislation is designed for.

We also have some of them who operate in Australia and New Zealand. The scams are there, but they originate from here. The really smart ones do not have any victims in Canada. There will be no complaints in Canada to provincial authorities, to the provincial attorneys general, and there won't be any to us, because there are no Canadian victims. The victims are located in Utah, or Florida, or something. They complain to the FTC. The FTC tells us and then on that basis we try to go after them, but we really don't have tools designed for it.

The second part of this, which I think is just as important, is you don't want to tar the innocent. There are a lot of people who run legitimate contests, with prizes, etc., and this legislation basically puts down a code of behaviour and says if you want to do a contest this is what you have to do. The guidelines I tabled with you explain that in more detail. They should be able to do that; there's nothing wrong with doing contests. What's wrong is running a contest where you're scamming people, where you're asking them to pay and they don't get a prize.

Mr. Brent St. Denis: I want to go on to the second part on the international cooperation and evidence gathering. You gave us a working model to consider. I take it from this that Canada would have to make an agreement with each other state; let's say, Canada and the U.S., and Canada and Australia, and Canada and France. Would there have to be a separate agreement with each country? There are no means to have an international protocol, like you had say with land mines? You have to do these one at a time?

Mr. Konrad von Finckenstein: That's because competition law in some countries is relatively new. There's no tradition. There's an agency that doesn't have a reputation yet, or hasn't established a track record, etc., so we would be doing those treaties only with the countries where we feel the other side in effect has a system of equal value, of equal guarantees, to what we have. Primarily, I see us doing one with the U.S. first and foremost, then the EU, probably with France, with the U.K., with Germany, etc.

Down the line we may have it with lots of countries as they develop. Competition is a growth industry where 40 years ago 10 countries had a competition regime; now about 100 have them. But they are at various stages of various sophistication, etc., and you would only do this with a country where you can be sure they will play by the rules, and things that are given to them, subject to certain conditions or confidentiality, will be treated that way.

Mr. Brent St. Denis: Are there any—

Mr. Konrad von Finckenstein: I'm sorry, my colleague would like to elaborate.

Mr. François-Bernard Côté: It's possible. It's been done in other areas, criminal areas, for example, where it could be that there is a multilateral agreement between a number of countries. If the conditions that are in the multilateral agreement, or treaty, are also conditions that are found in the proposed legislation, I would venture to say that this would be a valid cooperation agreement between those countries as long as Canada finds in those treaties what the legislation would require.

• 1005

Mr. Konrad von Finckenstein: This is very optimistic. We're not there yet by a long shot. But it is substantially correct.

Mr. Brent St. Denis: So I take it that, as good an idea as this is, no doubt, once the bill is in place, it could conceivably be years before we have.... Are there other agreements somewhere else now? Or are there discussions going on as we speak on these matters?

Mr. Konrad von Finckenstein: Yes, the origin of this bill is the U.S. legislation. The U.S. legislation specifically says that the U.S. may not make this type of treaty with another country unless that country has reciprocal legislation. So as soon as this is signed, we will sit down with the Americans and do one with the U.S.

Mr. Brent St. Denis: Thank you, Madam Chair.

The Chair: Thank you, Mr. Finckenstein.

Mr. Rajotte.

Mr. James Rajotte: Thank you, Madam Chair.

I'm going to touch on two of the broad aspects that the amendments cover. The first is streamlining the competition and tribunal processes by providing the tribunal with the power to award costs, make summary dispositions, and hear and determine references. And there is the fourth broad section, which is broadening the scope under which the Competition Tribunal may issue temporary orders.

These amendments are designed to streamline the process, which I think we can all favour here. But I think one of the possible negative side effects of increasing the power and influence of the Competition Tribunal was raised by a comment you made, Commissioner, about determining what is anti-competitive behaviour and what is true competition. So I would like you to address the concern about the negative side effects of possibly increasing the power and influence of the Competition Tribunal, and how do we determine what is anti-competitive behaviour versus true competition?

Mr. Konrad von Finckenstein: Actually it fits the other way around. Right now we're reluctant to go to the tribunal because it is a very crude instrument. It's a tribunal that does not have the power to award costs and as such cannot really control its process.

To give you an example, we had one merger case in the port of Montreal. We started litigation. We had 54 motions, and we never got to discovery because there is no penalty for bringing motions. In my view, that's the sort of abuse of process that would be cured. By putting these

streamlining provisions in the tribunal, it will be a more useful tool to use. It's still our decision as to whether to bring cases there or not, but we will bring cases there if we find out we're not going to be tied up in endless litigation but we're going to get a decision.

In terms of the references, when you have a merger, usually there's one bone of contention that turns the case around and it means approval or disapproval. We may disagree on it. We may disagree on interpretation of a section, or how to apply it. What this would allow us to do, with the consent of the other party, is go to the court and say, we are not going to argue the whole case; we know what the outcome will be. What we need is clarification. How do you read...whatever section it is, 96.2?

Let's argue that we get a decision and then it will accelerate the process. It will help both sides. For me it will mean fewer costs for the bureau in bringing the case before the tribunal. For the other side, they realize this is something that's key to them for their business plan. They are not willing to give it up unless they have to. Fine, let's find out whether the law says I have to or not. That's what the reference is meant to deal with.

I think on the whole these provisions will help us use the tribunal...will make, rather than what happens now.... We've been heavily criticized and observers feel the process doesn't work, that the bureau is omnipotent and makes a lot of decisions, and that people are not taking them to court because the court is such an unwieldy, crude instrument the way it's set up right now. It costs too much and takes too much time, and therefore cases are not being brought there. This will allow us to bring genuine differences of opinion for courts to resolve, which is what courts are for.

In terms of making a distinction with anti-competitive and rigorous competition, I can't give you a short answer. You have to look at the various provisions of the act, at what they stipulate, and then look at the effects of the individual case and see whether this conduct is such that it is designed to have that effect or it is only designed to maximize further profits.

It is not an easy decision. As I say, it is one of the most difficult ones and the cases are not usually clear-cut. We try to resolve them mostly through negotiation, but where they can't be, with a streamlined procedure we will again be able to find whether the activity can be considered anti-competitive or not.

• 1010

Mr. James Rajotte: Thank you.

The Chair: Thank you very much, Mr. Rajotte.

Ms. Torsney, please.

Ms. Paddy Torsney (Burlington, Lib.): Thank you.

It's great to see the game contest section of this act. It's something I had been working on prior to the bill becoming Ms. Redman's.

I've seen a lot of these game cards over the last number of years, and when I was reading the guidelines I had some concerns about some of the non-application sections.

Proposed paragraph 53(2)(a)—this is on page 2 of your notes—reads:

> makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the areas or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;

Would that still allow someone to charge you a fee for claiming the prize if you provide that information?

Mr. Konrad von Finckenstein: I'm sorry, you lost me. Where are you reading from?

Ms. Paddy Torsney: These are the proposed guidelines on the Competition Act, page 2—sorry, page 1—regarding non-application.

Regarding subparagraph 53(1), they say there's a scratch-and-win here, call this 1-900 number or send us $50 and you'll claim your prize. I get that part. But it does not apply if they say what?

Mr. Konrad von Finckenstein: That's if they say you can win a prize provided you pay $20. Then it is up to you to decide whether you want to. There's no deception. You know you are going to lose $20; that's the entry fee. You take your pick: You do it, or you don't. That's a fair contest.

If people want to run a contest that way, I'm not going to stop them. What we're trying to do is stop them saying, here, you can win, and you don't realize that by entering it will cost you $20.

Ms. Paddy Torsney: But what they do is write in really tiny, little print "Some charges may apply." Most people are so flipped about winning the prize after they've scratched that they don't even notice that.

Mr. Konrad von Finckenstein: That's why the words "adequate and fair disclosure" are there.

Ms. Paddy Torsney: So how do you decide that?

Mr. Konrad von Finckenstein: I can't do it in the abstract, but I can tell you that if there is fine print at the bottom, if it says I win $2,000, and down here in one millimetre size there is a disclosure, then obviously that's not adequate.

We actually have a definition of "adequate and fair disclosure" at the bottom of page 4.

Mr. François-Bertrand Côte: No, it's the bottom of page 3; it announces page 4.

Ms. Paddy Torsney: I'm glad you guys all got mixed up on that, because I did as well.

Mr. Konrad von Finckenstein: You see, it says:

> disclosure has been made in a reasonably conspicuous manner, at a time before the potential entrant is inconvenienced in some way.

That's why we issue the guidelines, precisely for this type of question. If you are a scam artist, you are going to try to get around it. If you are an honest participant, you look at them and say, what do I have to do to get the Competition Bureau off my back? Live up to these, and you'll know what to do.

Ms. Paddy Torsney: Except that, with respect, your "adequate" and my "adequate", based on our vision, are slightly different.

I've talked to some of these scam artists, and they think they've been perfectly clear in their information. Perhaps I can go through my files and pull out some, and we could have a little chat about what might and might not work, because that would give me a little more comfort.

Mr. Konrad von Finckenstein: Sure, I'd love to hear from you, but rest assured, we have gone after many scam artists under our present provisions, which are not as targeted in terms of it being misleading, and so on, and we've gotten quite a few of them to change or stop their behaviour—but not enough, I agree with you.

Ms. Paddy Torsney: It's not just seniors; I've had lots of people of all ages get scammed by these guys.

The other question I have is in the general principle section on page 3, the determination of cost incurred. In the second paragraph, it says:

> An example of such allowable costs would include: auto insurance premiums required to be paid prior to taking delivery of a free automobile.

That would be that someone would have to ensure that they do have automobile insurance, not that you have to buy auto insurance from this particular company, right?

Mr. Konrad von Finckenstein: Right.

Ms. Paddy Torsney: What I would be concerned about is, of course, an inflated insurance premium from somebody.

Mr. Konrad von Finckenstein: Precisely.

Ms. Paddy Torsney: Okay.

• 1015 

My other concern is that when we first brought this bill forward, there were two parts to it: one was on this game card, and the second one was on all those people who use a government logo on their envelopes that imply that it is official government business. They would use the Canadian flag, perhaps not both bars; they make it look like government type, they write "Tax Office", or something, instead of Revenue Canada or CCRA, or they use pseudo-government logos. They're all out there, and then I get complaints saying this office sent me this thing.

There's one right now that is pretty close to the line. That's somebody who is distributed through all the hotels and tells you that you can get your GST back if you use this company. It has a nice looking logo on it that kind of looks like Tourism Canada's, and in fact you have to pay a fee. I get complaints saying, get my money from this government department, yet it's a private company. I'm concerned that we haven't addressed that in this piece of legislation.

Mr. Konrad von Finckenstein: We actually have cases on that. We don't address it in this legislation because that's just misleading advertising. That's what you're doing; you're putting yourself forward as something you're not.

In cases like that, if you have a maple leaf on there and you use lettering or format that basically gives the impression that this is a government agency, then you are in violation of the act as it is right now. There is no need for specific provisions to deal with it.

We have several cases ongoing on exactly that. I know whereof you speak. Unfortunately, as soon as we put one out of business, another one crops up.

Ms. Paddy Torsney: Again I'll search through my files and make sure you're going after all those guys, because it really is disturbing to my constituents, and I think it cheapens the government logo.

Mr. Konrad von Finckenstein: Absolutely. I couldn't agree with you more.

Ms. Paddy Torsney: Okay.

The Chair: Thank you very much.

[*Translation*]

Mr. Bergeron.

Mr. Stéphane Bergeron: Thank you, Madam Chair. As we say where I am from, my, how time flies when you are in good company.

I am sorry to come back to the issue of gas price-fixing, but we did not have enough time to do the question justice earlier, at least from my point of view. Besides, as I was saying before, to most people, the Competition Bureau is something far away, an ivory tower. But mention gas price-fixing in any riding, and ears prick up, light bulbs go on in the heads of all Canadians.

I did hear you say that written evidence was unnecessary, that oral evidence could also do the job. I did understand that, but I had already understood that earlier. Do you not see a problem with the complainant having to provide the evidence before it is possible to proceed? It is like asking a person whose home has been broken into to find evidence before going to the police to report a burglary. Should it not be the Competition Bureau's job to find or identify that evidence instead of asking the complainant to do it?

Now, if, as I understood, eliminating the word "unduly" in section 45 is not the way to go to give the Competition Bureau a freer hand in investigating cases like that, what do you suggest? If you feel the current rules are too strict, what do you suggest to give yourself a free hand so that you can investigate much more easily than with the restrictive rules you currently have?

Mr. Konrad von Finckenstein: My colleague will answer your question on evidence, and I will answer the question on section 45.

Mr. François-Bernard Côté: I would like to make section 45 of the Competition Act perfectly clear. It is an offence to agree to increase prices unreasonably, or to restrain competition unduly.

The first thing the Crown must prove beyond a reasonable doubt is that there was an agreement. However, agreements are usually secret, because that is the essence of conspiracy: the conspiring is secretive.

• 1020

Mr. Stéphane Bergeron: That is the essence of conspiracy...

Mr. François-Bernard Côté: Exactly. So evidence of this agreement must be found. How do we usually receive complaints? Gas prices all go up at the same time; so a complaint is made to the Bureau. A person will claim there was an agreement because the prices all went up at the same time. So we investigate. The fact that the prices all go up at the same time may be the result of an illegal agreement, but could also simply be the result of one dealer raising the price by two cents, thus prompting the dealer across the street to raise his price by two cents too. There is a reasonable explanation for the situation. To go from there to proving beyond a reasonable doubt that there was an offence—

You are asking me if we have to investigate. Yes we investigate, but absent reasonable grounds or suspicions, it is hard to rely on traditional methods of investigation, that is, search warrants and wire tapping. When someone files a complaint and says that prices went up, it is hard for us to investigate. To investigate properly, we would have to infiltrate and start up our own gas dealership to see how things work on the inside. In the absence of any indication that one of the conspirators might be willing to talk to us, it is hard, just from a practical point of view, to investigate.

Mr. Konrad von Finckenstein: In terms of reform to section 45, our white paper, which was released in May of last year, suggested a solution. I think that basically, we are going to try to build a consensus around this approach. Conspiracy to fix prices will be a criminal offence. As for all the other types of offence, we are going to try to deal with them as civil proceedings. The term "unduly" is in the act to provide flexibility. There are types of action that have an effect on prices, but where the main activity is not price-fixing, but possibly an arrangement between companies.

Why don't we separate the two subjects? Price-fixing is a crime and action will be brought against those who are responsible for it. In the case of any other arrangement that might have an effect on prices, we will examine the provisions available in civil law, and if we find something that is unacceptable, we will issue an injunction.

People generally agree that this is the type of solution we require, but the devil is in the details. What is price-fixing, what are the criteria, etc.? That is why we have hired three experts. We have studied the issue and it will be discussed. This is the type of solution that we hope we will eventually come up with.

[*English*]

The Chair: Thank you very much, Mr. Rajotte.

Mr. Volpe, do you have any questions?

Mr. Joseph Volpe (Eglinton—Lawrence, Lib.): No.

The Chair: Okay.

Mr. Bagnell.

Mr. Larry Bagnell (Yukon, Lib.): Thank you. I have a couple of quick questions.

As to the deception, prize-notice serving is great, wonderful. My first question concerns the part where the exception is that they actually win the prize. In that case, I just want to know whether it is possible under the way the legislation is proposed that the costs of getting it will amount to more than the value of the prize.

Mr. Konrad von Finckenstein: You have to describe in your original notice what the prize is and what the value of the prize is. If someone actually got the prize and the value corresponded to what had been described, then there would be no offence. If, however, the prize's value were very much lower than what it had been held out to be, then there would be a violation.

Mr. Larry Bagnell: The notice is only by mail. Does it cover phone?

Mr. Konrad von Finckenstein: It is notice in any form, but it would cover the Internet, etc. When you talk about phone, that's really deceptive telemarketing. That is already in the act; the last amendment dealt with that. This essentially takes what we have for phones and extends it to things that are done in a legible form, be it by mail, the Internet, flyer, or whatever.

• 1025

Mr. Larry Bagnell: The last thing is—you don't have to answer this now, at least not as to details—I'm just curious as to the amount of funds available to ensure competition and enforce the provisions. For instance, you might have the percentage of our GDP compared to that of the other G-8 countries used to enforce similar types of legislation. You don't necessarily have to answer that now.

Mr. Konrad von Finckenstein: Since you give me the opening, let me tell you that when compared to other G-8 nations, I'm underfunded on whatever basis you want to do it: per capita, GDP, or economic activity. We come out pretty close to the bottom.

The Chair: Just to make note, this is one thing we can't add to this bill because of the royal proclamation at the beginning.

Mr. Strahl, please.

Mr. Chuck Strahl: Thank you.

After Ms. Torsney's intervention about the use of that government logo, I just wondered if the Competition Bureau has ever investigated that bumper sticker, the one that says "Don't steal, the government hates competition". Okay. That's not really related. I just thought it might be.

The Chair: Let's get back to the topic.

Mr. Chuck Strahl: I just want to follow up, and I realize we're talking about this international competition problem, merger issues, and the fact that we're in the embryonic stages of these international agreements. I'd just be interested to know if it first needs an example, the first example perhaps being an agreement with the United States. Maybe that's the way it has to go, but are there not any other serious discussions going on, say, with the G-8 or at the WTO?

It just seems to me that because we're dealing with world trade issues such as the free trade area of the Americas around the world, this is going to have to go hand in glove with that. International competition, mergers, and trading zones are going to be inextricably linked, and it just seems to me that discussions need to be bigger than just bilateral. They need to quickly...am I misreading something, or is this the way it has to go?

Mr. Konrad von Finckenstein: No. You're dead on. Competition is a big issue internationally. It's discussed in many fora. Actually, I'm not going to be here next week because I'm going to be in Paris to discuss exactly that subject at the OCDE.

The problem is you have to understand the nature of competition. In order to do it properly a competition authority needs information that's most sensitive to a company. It's about transmitting information and about getting strategic information and planning information. It's information about opening markets. They are very reluctant to share that. They will share it with us if they're forced to or if they need it as part of a merger.... But they only do it because they are assured that we will treat it confidentially, that it will not find its way into the hands of their competitors, and that it will only be released under a court order.

Now, when you apply this internationally, if you have a company that furnishes information here, it wants to make sure that if we give it to a foreign country, that foreign country will treat it with the same respect and will have this provision in its law to enable it to do it. That's why I say that for the U.S.A. there is no problem. With the EU, no problem. Some other countries have competition laws, but I don't think they would necessarily pass the tests set out in legislation for us to make a treaty at this time. That doesn't mean we won't do it in the future.

By the same token, all the international agreements we have negotiated, such as NAFTA, have a competition chapter. The new agreement with Costa Rica has a competition chapter, and the FTAA will have a competition chapter, but they're all in various stages of development.

The cooperation depends on the confidence you have in the agency on the other side, for the reasons I mentioned.

Mr. Chuck Strahl: Okay. Thank you.

The Chair: I have a couple more questions on this side, but just before I go to those, there are a few things I want to make sure we cover.

One is, as you mentioned, that you're going to be flying to Paris. Bill C-26 changes the framework of the Competition Act by providing an industry-specific types of power to you, the commissioner, because the tribunal didn't have the ability to issue cease and desist orders. Bill C-23 changes that, so should we not now be removing subsection 104(1)? I'm assuming members of the bar are going to raise that with us. I'd like some response to that.

• 1030 

Mr. Konrad von Finckenstein: The provisions regarding the air industry were put in because of the very specific situation in the air industry. We have a dominant carrier, which has somewhere in the eighties...in an industry where the assets are highly mobile. Through a shifting of their priorities, Air Canada could literally drive somebody out of business before they

got up and running, or, while they were up and running, seize.... So it was felt this was something of such urgency that the provision should be in there, and the commissioner should have the power.

As you know, we've only exercised it once so far. It has been litigated very heavily. It is still before the courts. We have so far won all rounds of the litigation. We've been litigating it on the merits. It's under appeal. It's also litigated on the constitutional grounds. The constitutional litigation is also under appeal. I don't think you need to amend it. As I say, it was very special for the airline industry.

The rest of our industry, fortunately, is not that concentrated. It's not that dominant. Therefore, the provisions that are here were meant to deal with those situations that are really not at the crisis point you had in the airline industry.

The Chair: If I understand correctly, that change was made because the tribunal didn't have that ability, and Bill C-23 now gives that same type of authority to the tribunal. I just want to make sure I'm clear on that. We are probably going to be questioned on it as we proceed.

Mr. Konrad von Finckenstein: You are absolutely clear, Madam Chairman. If the new provisions are enacted, one could argue that the airline provisions are no longer needed and should be deleted.

The Chair: The other question I have is there's normally a three-part test in law. Under proposed section 103.1, it's a different test. Can you explain to me why that is? Maybe Mr. Côté would be....

Mr. Konrad von Finckenstein: Normally, when you apply for an interlocutory injunction or something like that, you are trying to make sure it's irreparable damage and the situation is one that cannot be remedied. In a competition sense, basically the damage most often will be monetary, and that can be remedied. So getting interim orders, or interim injunctions, in the competition sense is very difficult. The reason the test here is slightly different is because you want to make sure the person who's a victim of an abuse is still around to be able to deal with the issue.

We are saying here loss of market share, being out of business, or something the tribunal can't repair, because the tribunal doesn't have the ability to give monetary awards. It is a very circumscribed and very limited power. As you know, the maximum is 80 days. It can't be extended beyond that. It's just if there were something that's so dramatic, we would go before the tribunal and say we feel this is going to do irreparable damage to competition, or this person will lose market share that you can't make up, therefore put a stop to it. And the stop can be at maximum 80 days.

It is a different test in a normal interim injunction. It's a different test on purpose, because we're dealing with a different situation. We want to maintain competition. It is not an issue of dealing with irreparable damages as you would normally—for instance, an interim injunction when somebody puts up a house and thereby ruins something in nature that's next to impossible to restore, or will take an awful long time to restore. That's why when it is pure money, courts are very reluctant to do it, because money, after all, can be replaced. We feel here it's not only money, it's the state of competition that will be jeopardized. Therefore it's a different test.

The Chair: Thank you. I now have Mr. McTeague, and then Ms. Torsney.

Mr. McTeague.

Mr. Dan McTeague: Thank you, Madam Chair.

Mr. Commissioner, a lot of members around the table may not be aware of the fact that when one is looking at the civil track for relief, or looking to you for help, particularly in instances where they can't hire big lawyers or they don't have huge accounts, certain conduct that you deem to be off limits, or conduct that is deemed to be anti-competitive, may not be enjoined, in other words, may not have a general application in law.

• 1035

A lot of other countries will say that if a certain conduct is subject to a prohibition order by yourself or by the tribunal, and the order office would be the tribunal in the first case, unless we're able to get some kind of an agreement prior to taking this to the tribunal, it is done on a case-by-case, individual basis. In fact there's probably the wrong signal being sent to the business community that there is no prohibition on a particular activity unless so ordered.

So we have a scenario where a lot of businesses may go under, may be subjected to the same kind of anti-competitive activity, and yet without the ability for you to intervene, Mr. Commissioner, they may not have an opportunity to raise significant and important issues such as the ones that have been expressed by my colleague from the Bloc Québécois with respect to the question on conspiracy and the question on the gasoline industry.

It was with this in mind, Mr. Commissioner, that I presented Bill C-472 with limited areas that I thought would touch on significant areas of the industry, particularly refusal to deal, market restriction, tied selling, and exclusive dealing. I have heard from others, and there's no doubt that this committee, Commissioner, will hear from people in the future who say that this simply isn't true, these things don't exist, it's a fantasy, and we should take an approach of see no evil, hear no evil, speak no evil.

Commissioner, I've spent a lot of time on this, and a lot of other members are now becoming aware of the problems that exist out there and that our competitors may very well have a situation where certain conduct in other countries is not illegal until so found in Canada. I'm wondering, because it's going to be specifically important to tell this committee where you stand heretofore, are there instances where you believe good points may be brought forward but cannot be resolved because of a question of resources, because of a question of a lack of perception of an issue, or because your Competition Act was written in 1986, arguably, some say, by the very people it was meant to police?

Mr. Konrad von Finckenstein: That's a whole host of questions.

The Chair: Five minutes.

Mr. Konrad von Finckenstein: First, the civil sections are, as I mentioned, difficult to apply, but they are specifically written in this way because you want to draw a distinction between anti-competitive conduct and vigorous competition and you don't want to shackle the economy, or put down a rigid code, etc. We have far too many activities in our economy for you to make

global rules. The act has this flexibility built in it that says the commissioner may investigate and if he feels the conduct is anti-competitive in light of the facts and in light of the provisions of the law, which are written in very general wording, then bring a case before the tribunal.

I think that's a good system. I think it gives us the benefit of both sides, a maximum flexibility, encouragement of the economy, by allowing entrepreneurs to see how they can maximize their profits. Yet there is a control that we can go in and stop. Are the penalties sufficient? Should there be damages as well as injunctive relief? That's a question one can argue about. Obviously, legislators had decided in 1986 that damages were inappropriate. Some voices now say maybe it's time to change that.

There was a suggestion in our white paper, and it went before the PPF, that purely private conduct between mostly two businessmen or companies doesn't need the attention of the whole apparatus of the Competition Bureau, etc. There should be an ability to resolve them. There may be instances where there are legitimate complaints that do not get resolved because of different priorities or restraints on resources.

I am fully in agreement with those voices saying that to round out the Competition Act, something along the lines of what was proposed to the PPF should be in the Competition Act. And I guess it's your job to decide whether now is the time to do it on the basis of the submissions before you come up with the necessary consensus.

Mr. Dan McTeague: Thank you.

The Chair: Thank you very much, Mr. McTeague.

Very briefly, Ms. Torsney.

Ms. Paddy Torsney: There are two things. One of the other places for a lot of these scam artists to send letters is from Nigeria. Are you working with the Nigerian government in stopping these kinds of letters?

• 1040

Mr. Konrad von Finckenstein: Those are really frauds, and they are basically loan frauds. The RCMP deals with those. When I get them, I send them over to the RCMP. To what extent they enjoy cooperation from the Nigerians, I just don't know.

Ms. Paddy Torsney: There is a second thing I wonder if you could explain to me. Canada Post has a process, I assume, where they have a way to check before large volumes of mail are distributed by them. Do they get companies to either submit something saying they have been approved by you or they are in compliance with the Competition Bureau guidelines on game cards? Or should there be a process? Frankly, it would certainly assist you to not have so many frauds or so many cases to investigate if these things weren't delivered in the first place.

Mr. Konrad von Finckenstein: It's one way to deal with the issue. It's not the way the whole system is set up right now.

We are basically an investigative agency dealing with complaints. We're not in the process of approving people beforehand or suggesting that they are in compliance or not. We have a program of compliance, so the companies worried about it can come to us and say, this is what

we want to do. We'll give them advice, etc. But it's on a voluntary basis.

Ms. Paddy Torsney: You charge them a fee?

Mr. Konrad von Finckenstein: Yes.

Ms. Paddy Torsney: What would be the fee to get some letter of indication that the game card, for instance, would be in compliance with your guidelines?

Mr. Konrad von Finckenstein: It's very little. It's $4,000, I believe. I can get you the exact number.

Ms. Paddy Torsney: Specifically on game cards, could you get back to this committee, if that's possible, on how difficult it would be? What would be the total cost in terms of the volumes of these cards if somebody spent whatever it is, one day a week, saying, check, this is acceptable; or this will not work, this is not in compliance, so that we can prevent...? It's a bit like the environmental example. You don't want to keep dealing end of pipe. Let's prevent it. Let's turn it off at the source.

Canada Post is primarily the one that distributes these things.

Mr. Konrad von Finckenstein: Yes, but you're now turning us into regulators, and that's really not our job.

Ms. Paddy Torsney: Just one half a person, once a week.

Mr. Konrad von Finckenstein: Obviously, if the legislation requires us to do it, we will be doing it. But right now we are investigators; we are not regulators.

Ms. Paddy Torsney: But your job would be so much easier if you could investigate the really big stuff and leave this one to the side.

Mr. Konrad von Finckenstein: So what exactly would you like from us on this point?

Ms. Paddy Torsney: What would it cost? What would you charge a company that wanted to distribute these kinds of things? Do you have any idea of what kinds of volumes are out there? How would it affect how much it would cost you guys?

Mr. Konrad von Finckenstein: I will attempt to get you that information.

Thank you.

Ms. Paddy Torsney: Thank you.

The Chair: Thank you, Ms. Torsney.

I have Mr. Bagnell, and then Mr. Rajotte.

Mr. Bagnell.

Mr. Larry Bagnell: Is it possible under the present provisions that you can be entered in a contest that you don't either choose to be entered in or that you enter by default by not putting in a form? Could *Reader's Digest* enter everyone who has a subscription, or send you a card that says, "If you don't send this back, you're automatically entered"?

Ms. Paddy Torsney: Negative option.

Mr. Konrad von Finckenstein: You want to know whether they can do it, or whether it would be in violation of the Competition Act?

Mr. Larry Bagnell: Yes, whether it's in violation of the new proposals.

Reader's Digest is a good example. All these seniors get all these cards saying they've been entered in a contest. I don't think they ever filled out a form saying they entered the contest.

Mr. Konrad von Finckenstein: Is any payment required from them? Was there any cost imposed upon them?

Mr. Larry Bagnell: That's not really my point. It turns out they have to mail back about 20 times to see if they get to the next stage. That's 20 stamps, which is a lot of money for a senior.

Mr. Konrad von Finckenstein: Where's the deception?

What we're trying to deal with here are where people are being deceived, where they are being led to believe they have won something and they haven't and they're being charged for something in advance.

In the situation the way you posit it, I don't see that there's any cost imposed upon them. They're not being misled, etc. If *Reader's Digest* or any company—I have no idea which one—chooses to enter its subscribers in a contest, there's nothing stopping them from doing it. It doesn't cost anything to the subscriber. The subscriber can ignore it or not.

So I am not quite sure who is victimized and how.

Mr. Larry Bagnell: I'll leave that one for people to think about for a while.

• 1045

Secondly, is it possible under the present proposal that they very well advertise a prize—a car is a prize and there are 10,000 one-dollar key chains as a prize—and that you'll have to call a 1-900 number to win, and they send a notice out and say you've won and it doesn't say which, the car or one of the key chains, and then they could keep you on the line for over a minute and they keep talking to you so it costs more than a five-dollar key chain? Is there anything in here that prevents the cost of claiming a prize to be more than the prize? And would that be a good idea?

Mr. Konrad von Finckenstein: Yes, that is explicitly in the provision that the cost of the prize has to be displayed.

Mr. Larry Bagnell: I know it has to be displayed, but I'm asking about the cost of collecting it. Is there anything that prohibits the cost of collecting being more than the prize?

Mr. Konrad von Finckenstein: You have to disclose the value of the prize. If there is a cost in collecting it, you have to disclose the value of the cost of it. If the prize is $20 but the cost of collection is $30, you've got to disclose that. Now, if somebody still wants to enter into it, so be it, but they do it fully realizing what the odds are.

Mr. Larry Bagnell: Someone mentioned earlier the 1-900 numbers. Depending on where you live in the country, the cost would be different, and you're never going to know that. You phone the number and you don't know how long the person's going to keep you on the line.

Mr. Konrad von Finckenstein: If you're using a 1-900 number then you have to point out that the 1-900 costs the caller money. It's not a 1-800 number, it's a 1-900 number, which means there will be a charge for making that phone call. That has to be disclosed.

Mr. Larry Bagnell: Okay. All I'm suggesting to think about is the fact that you just prohibit that the cost of collecting is never more than the prize. It would save some grief, I think, for people who don't understand these things.

Thank you.

Mr. Konrad von Finckenstein: Well, Mr. Bagnell, we issued these guidelines, and there will obviously be consultation on them. If they're not clear enough or if there are lacunas that need to be addressed, we will certainly do that. The idea is basically that people know what the risks are to enter this contest.

The Chair: Thank you.

Mr. Rajotte, please.

Mr. James Rajotte: Thank you, Madam Chair.

Commissioner, I think one of the concerns with businesses if private access is included in this bill is protecting their business information that they consider confidential. I'm wondering if you could provide some advice or guidance to the committee on ways in which we can ensure that confidential business information is protected if they are brought before the Competition Tribunal on a private access matter.

Mr. Konrad von Finckenstein: It would be in the same way as is in any other litigation they are involved in, whether it's under the Competition Act or not. If you are being sued civilly, then there is a process called discovery whereby you basically have to deliver to the opposing party essential documents on claims. However, there are provisions built into our court procedures for confidentiality in how it's handled and what you have to disclose and what you don't have to disclose, and they will equally apply in a private access. So using private access as a source to obtain competitors' information would be no more or no less used than it is right now by starting any other kind of civil action by one company against another.

François, do you have anything to add?

Mr. François-Bernard Côté: That's absolutely right. What exists right now for the protection of any confidential information would apply. It's generally done through a directive of the court or the tribunal, if you justify that this is important strategic business or trade information.

Mr. James Rajotte: But isn't it possible that one company could use this as a method to find out how weak or how strong a competitor is? How do you protect against that?

Mr. François-Bernard Côté: It's difficult to answer the question in a hypothetical situation. The protection is there for the person to claim and to obtain. I don't know in all cases whether that could never happen.

Mr. Konrad von Finckenstein: When we deal with mergers, especially contentious mergers, we are dealing probably with the most sensitive information a company has. It's pricing information, it's strategic information, and it's market information. The present process works to protect that information from third parties. That same process would apply when there's private access.

• 1050

The court has a very elaborate procedure to deal with confidential information and to make sure that one competitor cannot use the court process to gain information that he should not have. I've never heard anybody make the allegation that private access could somehow be a route to obtain information that you otherwise can't obtain.

Mr. James Rajotte: It wasn't a case brought before the Competition Tribunal, but a lot of former Canadian Airlines employees allege that in discussions with Air Canada years ago in having a merger, the books were open and Air Canada then saw the situation that Canadian Airlines was in and it decided to back away and wait until Canadian was in a more desperate situation so that they could then step in.

Now, it's not a specific case before the Competition Tribunal, but are there enough safeguards to ensure that something like that does not happen?

Mr. Konrad von Finckenstein: You see, that's a different situation. That's where two companies want to merge, and the company to be acquired always takes a risk when it starts entering into merger negotiations. The other side wants to kick the tires and wants to know what shape it is in. It may reveal too much and therefore make itself vulnerable to hostile takeovers, or the other company decides not to go ahead because it feels the price is too high, but on the other hand has obtained valuable information, which will help it in the competitive game.

This has nothing to do with court proceedings. These are the dangers inherent in playing the merger game.

Mr. James Rajotte: Yes.

The Chair: Thank you very much, Mr. Rajotte.

Commissioner, we are in the process of reviewing Bill C-23, and as we're undergoing that process we're looking at possibly some other aspects, such as private access. I guess I'm trying to get at a timeframe from you on your next round of amendments. When we talk about your next round of amendments, will that be in the form of actual legislation that we'll see them, or will there be another discussion paper? Maybe you can just give us some idea of where you're going.

Mr. Konrad von Finckenstein: We believe the Competition Act, the framework legislation, should be amended incrementally to make sure it stays up to date, and there are no major see-saw changes. After all, it has a tremendous impact on the industry across the country, and these changes need to be absorbed; we need to know the impact. And it's often very difficult to reverse some changes once they are made.

So our aim is to make sure that the Competition Act remains up to date. We have an amendment unit headed by Mr. Morin here, which constantly researches issues to make sure we are up to date.

The issues before you are all ripe for enactment, and basically there is consensus, except for the issue of private access, which we will discuss. We would prefer to see those enacted very quickly. We know the next round will have to deal with section 45. It's already on the table as a result of the PPF. As a result of your discussions and the testimony that you will hear, and also your final report on competition, you can suggest other areas that you feel need to be addressed.

For instance, let's say for argument's sake that you feel that abuse of dominance should result in monetary awards, not only injunctive relief. That's something you may very well put on the table. We would then incorporate it in the next round.

We always do the same thing: we start with a white paper, laying out the groundwork and saying what's involved, as we did in this one. Sometimes we attach private members' bills to it, because they raise issues that are very relevant and should be addressed. We hold consultation and then get the necessary cabinet approval and come back to you with legislation.

The Chair: Okay.

Just so everyone knows, the bells are for a quorum call, not for a vote.

Just to be clear as a committee, as we're undertaking our review of Bill C-23 and so as not to cloud all the issues, we've had some discussion on how to proceed. I know the minister has outlined in his letter that we look at private access.

One of the proposals we have before us right now is to deal with Bill C-23 and the issue of private access, and then possibly to deal with our interim report, so we can finalize that before you come out with your next round.

So what you're telling us today is that your next round will not actually be legislation, it will be another paper. Am I clear on that?

• 1055 

Mr. Konrad von Finckenstein: It will be both. It will be papers followed by legislation.

If you ask me, from our point of view the best thing would be if you concentrate on Bill C-23 and pass it with or without private access. You then could continue your report on the Competition Act, which we would then use for the next round of amendments and add it to what is already on the table, which is section 45.

The Chair: Okay. And do you have a timeframe for your next round?

Mr. Konrad von Finckenstein: It depends how quickly you enact Bill C-23. If, for argument's sake, Bill C-23 would be enacted by Christmas or by Easter, something like that, that's the kick-off for the next round, as far as I'm concerned.

The Chair: Okay. So from a committee standpoint, if there's consensus, then what we would probably do is in the next several weeks look at Bill C-23 and private access and then look at our interim report to be finalized, possibly with round-table discussions, as soon as we've completed Bill C-23, so as to continue to move the process along, if everyone's in agreement with that.

Thank you very much, Commissioner. I do want to invite you back at the end of the hearing stage, possibly, once we've heard from all of our other witnesses, if you have anything to add. I'm sure you'll follow these meetings with some interest.

Mr. Konrad von Finckenstein: Thank you very much. I'll gladly come back. And if in the interim you hear from other witnesses who raise issues on which you'd like some information from the bureau, we'll be only too pleased to furnish it to you.

The Chair: Thank you very much. We appreciate this.

The meeting is now adjourned.