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# Canadian Competition Law Review

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# Revue canadienne du droit de la concurrence

Anciennement/formerly Canadian Competition Record

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The editorial board would like to thank Dominic Thérien for contributing to this issue while at McCarthy Tétrault LLP. Dominic is currently Assistant Deputy Commissioner with the Competition Bureau.

Le comité de rédaction remercie Dominic Thérien pour sa contribution à la préparation de ce numéro alors qu'il était chez McCarthy Tétrault S.E.N.C.R.L., s.r.l. Dominic est présentement sous-commissaire adjoint au Bureau de la concurrence.

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## MESSAGE FROM THE FORMER PUBLISHER

**Barry Zalmanowitz, Q.C.**  
**Partner, Fraser Milner Casgrain LLP**

The publication by the Canadian Bar Association National Competition Law Section of this issue marks an exciting new chapter in the history of the *Canadian Competition Record* (with this issue, re-named the *Canadian Competition Law Review*).

The first issue of the *Canadian Competition Policy Record*<sup>1</sup> appeared in June 1980, the creation of J. William Morrow, who was editor until June 1986 – the year that the *Competition Act*, with major amendments to competition law enforcement including merger review provisions, came into force triggering a greater interest in Canadian competition law and increased demand for lawyers with experience in competition law.

In 1986, Fraser Milner Casgrain Legal Publications Inc.<sup>2</sup> became publisher, with Lawson Hunter, a former Director of Investigation and Research under the *Competition Act*, acting as editor. Although associated with our law firm, the Record's mandate was to encourage discussion and report objectively on current developments in competition policy areas including enforcement matters under the *Combines Investigation Act*. To further this mandate, an editorial advisory board was established which included respected academics, lawyers and other professionals including representatives from the U.S. In those days, the Record did not compete with electronic media, and news of significant enforcement developments from Canada, the U.S., Europe and virtually any country that has anything resembling a competition law did not appear on our screens and mobile devices within minutes of their occurrence, at all hours of the day.

Subsequent editors of the Record included Sandra Simpson,<sup>3</sup> Randal Hughes, Jennifer Trent, Susan Paul and Barry Zalmanowitz, with Jennifer Trent doing much of the heavy lifting from 1999 to 2010.

Over the years, the editorial advisory board and contributors included the best and the brightest lawyers, academics, enforcement officials and professionals who had one thing in common: a keen interest in promoting an understanding and the development of Canadian competition law and policy.

While the Record continued to be the only publication devoted to Canadian competition law and policy, with many good writers willing to contribute articles, we at FMC involved in the publication of the Record concluded that a change was necessary to take it to the next level. Notwithstanding the availability of excellent foreign journals and an abundance of electronic sources of news and discussion groups there is still a need for a forum for serious, in-depth and scholarly articles about competition law and policy from a uniquely Canadian perspective.

As an active member and past chair of the Canadian Bar Association National Competition Law Section, I was aware of the similarity of the Section's mandate to that of the Record. I, along with many others, benefited from the Section's success in promoting Canadian competition law and policy. About a year ago, I approached the Section Executive to ask if they would like to take over the publication of the Record. The response was enthusiastic.

We at FMC want to thank our subscribers and everyone involved in publishing, editing and contributing articles to the Record over the past 31 years. We are delighted to pass the legacy of the Record to the CBA National Competition Law Section and wish the new editors and publishers of the Canadian Competition Law Review every success.

### Endnotes

<sup>1</sup>In 1993 the name was changed to the Canadian Competition Record.

<sup>2</sup>Formerly, Fraser & Beatty Legal Publications Inc.

<sup>3</sup>Now, the Honourable Madame Justice Simpson of the Federal Court and Chair of the Competition Tribunal.

## Winners of the James H. Bocking Memorial Award 2010

### INSTITUTING AN INDIRECT PURCHASER CHECKPOINT: A CASE FOR BLOCKING ILLINOIS BRICK AT THE CANADIAN BORDER

**Aaron Levenstadt\***  
*Goodmans LLP, Toronto*

L'adoption de législations provinciales en matière de recours collectifs aux côtés de l'article 36 de la *Loi sur la concurrence* a mené à une augmentation fulgurante du nombre de recours en compensation pour pertes résultant de complots de fixation des prix. Ce développement a incité des spécialistes en droit de la concurrence à se demander si des acheteurs indirects en aval d'un long réseau de distribution peuvent réclamer des dommages-intérêts de ceux qui fixent les prix en amont de ce réseau de distribution. Pour bien analyser cette question, Aaron Levenstadt juxtapose des précédents et des politiques canadiens et américains. Au terme de son analyse, M. Levenstadt conclut que l'interdiction aux acheteurs indirects de réclamer des dommages-intérêts en vigueur aux États-Unis ne devrait pas être incorporée en droit de la concurrence canadien.

In contrast to the American antitrust experience Canadian competition laws, for most of their history, have been characterized exclusively by public enforcement. In Canada, anti-competitive monitoring has largely been left to the Competition Bureau, a governmental agency responsible for responding to complaints, conducting investigations and levying fines on violators.<sup>1</sup> It was not until 1975, when the predecessor to the current section 36 of the *Competition Act* was enacted, that private parties were given the right to seek damages resulting from violations of competition laws.<sup>2</sup> Section 36 affords any person who has incurred a loss as a result of conduct that the Act deems criminal, to recover an amount equal to the loss proved to have been suffered.<sup>3</sup> As detailed in Part VI, the Act imposes criminal liability on “Every one who conspires, combines, agrees or arranges with another person to prevent or lessen, unduly, competition in the production, manufacture, purchase... sale... or supply of a product.”<sup>4</sup> According to this provision, since 1975, injured parties have had the opportunity to recover damages against cartelized companies that have conspired to fix prices.

Despite the harm caused by the anticompetitive conduct, very few cases alleging price-fixing have been brought under the private action provided for by s.36.<sup>5</sup> The complexity and expense associated with competition-related litigation rendered the Canadian justice system largely inaccessible: the costs incurred to privately pursue a claim would, in all likelihood, be greater than the damages awarded to any one claimant. This cost-oriented calculus is particularly vexing for price-fixing victims as the losses suffered, more often than not, are trivial in comparison to the expense and effort entailed in a lawsuit. For that reason, prior to the enactment of class action statutes in Ontario, Quebec and British Columbia, there were virtually no Canadian cases seeking compensation for losses resulting from price-fixing conspiracies.<sup>6</sup>

The introduction of Canadian class actions has been correlated with a sharp rise in private claims alleging price-fixing. As Jason MacLean, a competition lawyer at Osler, Hoskin & Harcourt LLP notes, “There has been a surge in competition class actions in Canada in recent years.”<sup>7</sup> Mr. MacLean is certain that bolstering the *Competition Act* with provincial class action statutes has contributed to the dramatic increase in Canadian price-fixing litigation.<sup>8</sup> MacLean explains that banning together similarly afflicted claimants renders it rational to pursue the action because the aggregate damage claim can outweigh the litigation expense.

At the center of an expanding array of price-fixing class actions rests an important precedent. Until November of 2009, *Chadha v. Bayer [2002]* was the only contested price-fixing class action certification motion

that had been entertained by a Canadian appellate court.<sup>9</sup> The logical framework detailed by the Ontario Court of Appeal (OCA) in *Chadha* formed the basis for the courts' analyses of contested price-fixing class action certification motions. More recently, however, *Chadha* has come under attack by an emergent line of precedents. The Ontario Superior Court (OSC) in *Irving Paper Ltd. v. Atofina Chemicals Inc.* [2009]<sup>10</sup> and the British Columbia Court of Appeal (BCCA) in *ProSys Consultants Ltd. v. Infineon Technologies AG* [2009],<sup>11</sup> faced fact patterns that were remarkably similar to *Chadha*. Yet, they dramatically departed from *Chadha* in much the same way. The rigid doctrine detailed in *Chadha*, sits in irreconcilable conflict with the permissive and flexible approach adopted in *Irving Paper* and *ProSys*. In this paper, I strive to illuminate the benefits and drawbacks of the contrasting approaches as the inter-provincial nature of the conflict renders the contest ripe for Supreme Court review.

This paper begins by detailing the benefits of private actions. Then, I will summarize the Canadian experience with private price-fixing class action certifications. More specifically, I will emphasize differences between the stringent *Chadha* approach and the more recent case law. After examining the cases, I will train my focus on the policy implications of endorsing the rigid *Chadha* logic as opposed to the contemporary and progressive mode of analysis. This policy discussion will be illuminated by American and Canadian literature and precedents.

On first blush, *Chadha* might be applauded for its strict application of the *Competition Act*. A close reading of the Act would seem to support the bright-line rule it inscribes because s.36 demands each plaintiff demonstrate actual loss suffered as a result of the defendant's conduct.<sup>12</sup> However, the modern architecture elaborated in *Irving Paper* and *ProSys* more closely conforms to the intentions of the legislative draughtsmen and to the mutually reinforcing purposes underlying the *Competition Act* and the provincial *Class Proceedings Acts*. With respect to price-fixing private actions, Canada currently finds itself at a crossroads. Forty years of American experience with indirect purchaser class actions offer instructive signposts for charting the debate that the Supreme Court of Canada will likely entertain. After reviewing the work of American legal scholars, I find, for reasons pertaining to policy and principle, the Supreme Court of Canada should endorse the modern liberal certification structure. In so doing, the Court would overrule *Chadha*, endorse *ProSys* and *Irving Paper*, and it would ensure that the *Illinois Brick* doctrine does not encroach on core principles of Canadian justice.

### **The Case for Private Enforcement of Competition Laws**

Although Canada's private enforcement experiment in the competition sphere is but 35 years old, private enforcement of antitrust laws has a long history. The U.K. Statute of Monopolies, enacted in 1623, provided that an individual, financially injured by a restraint of trade, could bring suit and collect treble the quantum of damage suffered as a result of the anti-competitive activity.<sup>13</sup> Modeled on the U.K. Statute, section 7 of the American *Sherman Act* of 1890 stated, "any person who shall be injured in his business or property... by reason of anything forbidden... by this Act may sue therefore... and shall recover three fold the damages by him sustained..."<sup>14</sup> In the fifty years following the passage of the *Sherman Act*, only 175 cases were filed.<sup>15</sup> However, more recent American experience reflects a larger role for private antitrust suits. The Georgetown Private Antitrust Litigation Project collected and analyzed data on private antitrust cases filed between 1973 and 1983.<sup>16</sup> In 1977, across the five American districts analyzed, 1,611 private cases were recorded and the ratio of private to public cases was greater than 20:1.<sup>17</sup> In a separate study, Richard Posner concluded that, between 1890 and 1969, 9,728 private antitrust suits were filed in the U.S.<sup>18</sup>

While the Canadian experience with private actions has comparatively been limited, the robust private regimes operating in Britain and America attests to the possibility that meaningful policy objectives are advanced vis-a-vis the private right. For instance, in considering the goal of deterring would-be competition violators, Gary Becker and George Stigler have argued that the deterrence objective could be as effectively achieved if private individuals, as opposed to governmental entities, enforced the law.<sup>19</sup> This contention is premised on the notion that the aggrieved person, rather than the public official, has a greater incentive to seek justice. The injured individual, rather than the dispassionate public official, has a stronger reason

to exert the effort required to recover damages. For example, as Becker and Stigler point out, bureaucratic apathy, inaction and the possibility of malfeasance could all dissuade the Bureau from prosecuting a violator. According to this argument, it is more effective to reward private enforcers with a “bounty” instead of paying a fixed salary to public enforcers.<sup>20</sup>

When considering the deterrence objective, Becker and Stigler’s rationale resonates with the opinion of American Judge Jerome Frank. In the seminal case of *Associated Industries of New York State v. Ickes [1943]*, Frank J. discussed the importance for what he referred to as “private attorney generals” (PAG). Frank J. noted that private litigants could usefully supplement the enforcement efforts of public authorities in achieving critical deterrence objectives.<sup>21</sup> Judge Frank’s PAG theory is grounded in the notion that a positive public good can be secured when a private litigant, in advancing her own interests, also vindicates a publicly endorsed standard or norm.<sup>22</sup> Akin to Becker and Stigler’s analysis, Frank J.’s PAG theory also focuses on incentives. The theory assumes that private litigants, because of their financial or ideological interests in the matter, will have the requisite incentives to invest in investigation and litigation. Should the PAG be successful in her quest for justice, the public interest would also be decisively advanced.<sup>23</sup>

Judge Frank’s PAG theory has been endorsed outside of the courtroom. Professor John Coffee, in his article, *Rescuing the Private Attorney General*, notes, “absent these private actions, the monetary penalties for antitrust... plainly would be insufficient to deter.”<sup>24</sup> In Coffee’s opinion, from a deterrence perspective, it is better to “leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics.”<sup>25</sup> As PAGs have a vested interest in recovering damages, they are more likely than their public counterparts to initiate challenging competition actions. The incentives are strengthened by the PAG’s close proximity to the violation, which likely means that the costs to detect the infringement and to gather evidence are less than would be incurred by a governmental bureau that is removed from the circumstances surrounding the offence.<sup>26</sup> Put differently, a firm operating within the impugned industry has regular and repeated interactions with the alleged violator; a critical perspective that a bureaucrat would lack. The firm would therefore have better knowledge about industry practice and would be better able to detect aberrations in industry pricing. From this privileged position, the PAG is able to conduct relatively inexpensive investigations, altering the litigation cost/benefit calculus.<sup>27</sup> In thinking about the deterrence objective, the PAG can reinforce public efforts securing fuller compensation for the damages caused by violations of the *Competition Act*. Larger awards levied on violators will have a stronger deterrent effect.

Canadian academics also note that supplementing public with private actions meaningfully advances the deterrence objective. In a recent article, Michael Trebilcock and Margaret Sanderson noted that the Competition Bureau is constrained both by finances and politics.<sup>28</sup> In speaking to the Bureau’s incapacity, the authors find, “The probability of the penalty being successfully imposed will depend on the probability of detection, which in turn is a function of the resources dedicated to uncovering the offence, and the probability that following detection the penalty will in fact be imposed.”<sup>29</sup> This finding should be a cause for concern because it implies that public enforcers may be more interested in maximizing their own budgets or political support than in enforcing the law.<sup>30</sup> Coffee, concurring with his Canadian colleagues, discussed a phenomenon whereby institutional pressures can suffocate enforcement efforts:

Private enforcement also performs an important failsafe...by... ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers or the vagaries of the budget process and that the legal system emits clear and consistent signals to those who might be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies.<sup>31</sup>

In other words, according to Coffee, Trebilcock and Sanderson, at times, public enforcers may be more interested in advancing their own agenda than in purely enforcing competition law. Seen from this vantage point, it is better to have many private enforcers to complement the public bureau; as the latter might be buckling under budgetary constraints or retreating in the face of political pressures. The public prosecutor’s decision not to prosecute a matter can be scrutinized by the private enforcer who elects to bring the claim.

Challenging bureaucratic apathy in such a manner can be an important incentive for public enforcers, as a successful private action would lead to the inevitable determination that the government's reluctance would have resulted in a violator's reaping the proceeds of anticompetitive conduct.<sup>32</sup> In this sense, private enforcement imposes an important check on public accountability.

Gary Becker's article, *Crime and Punishment*, supports the notion that private enforcement can increase public agency accountability, especially in compelling the agency to justify its expenditures.<sup>33</sup> By challenging the government's resource expenditure decisions, private enforcers, impose additional accountability on the Bureau's Commissioner. In bolstering Becker's claim, Roach and Trebilcock point to our limited understanding of the incentives operating on politicians and bureaucrats, "...it is inconsistent with general norms of public accountability to vest an enforcement monopoly in the Bureau and its political overseers."<sup>34</sup> Somewhat ironically, the authors conclude, it is particularly incongruous to maintain a public monopoly in the context of the enforcement of competition laws that aim to redress the undesirable social consequences of private monopoly.<sup>35</sup>

On the whole, the case for private enforcement of *Competition Act* violations is strong. For one, private enforcers often find themselves better situated to detect anticompetitive behaviour. Second, because the private actor will be compensated directly for damage sustained, the PAG might be more motivated than the public enforcer to bring the violator to justice. Finally, compared to private enforcers, the Competition Bureau operates under political and financial pressures, and bureaucrats have limited knowledge regarding the impugned industry, rendering it more expensive for them to conduct the investigation. For all these reasons, private parties may be better equipped to effectively investigate and litigate competition violations. From a public interest perspective, private litigants are valuable as a means of holding the Bureau responsible for its prosecutorial decisions. In conclusion, as Jerry Mashaw asserted, "That private parties should want to add resources to those currently available, take on hard cases, or swim against local political currents when seeking to enforce nationally established or approved rules of conduct is no cause for alarm."<sup>36</sup>

### **Activating the Private Right of Action in the Canadian *Competition Act***

It took nearly one hundred years before a private remedy would be inscribed into the Canadian *Competition Act*. This occasion was supposed to signal a significant step toward furthering the deterrence and compensatory goals that lie at the Act's core. However, in 1975, Mr. Herb Gray, then Canadian Minister of Consumer and Corporate Affairs, stated, "Equally new is the proposal that anyone injured by a violation of the act would be able to sue for full damages and costs ... I believe that to be meaningful this right should be exercisable not only by an individual citizen or government but also by citizens through class or representative actions. It is my hope that the bill in the form in which it is finally approved by parliament will enable class actions to take place for damages caused by violations of it..."<sup>37</sup> Prior to the inscription of the private action into the *Competition Act*, Minister Gray foresaw the amendment's futility. Without a class or representative remedy, awards to be issued in individual cases would not be sizable enough to offset the costs of bringing the proceeding: the private remedy, standing alone, would not be able to provide the practical benefits it promised. Minister Gray's prediction would prove true. For nearly twenty years, price-fixing victims were consistently dissuaded from marshalling their claims.<sup>38</sup>

### ***Chadha v. Bayer* [2002] – The Continued Plight of the Indirect Purchaser**

With class action legislation now available to bolster s. 36 claims, the injured claimant had overcome a significant hurdle. However, a new set of challenges pertaining to class action certification emerged. The certification decision is pivotal because, should the court fail to certify the class, the action is halted and compensation will, in all likelihood, not follow. As the first contested class action certification motion to be heard by an appellate court, *Chadha* became a landmark decision.<sup>39</sup> Throughout the first decade of this century, the logical framework constructed by the Ontario Court of Appeal (OCA) in *Chadha*, has been the precedential authority governing the courts when evaluating price-fixing class action certification motions.

*Chadha* is also relevant because it marked the first time that a Canadian appellate court faced the ques-

tion of whether a class of indirect purchasers could recover under the *Competition Act*. In *Chadha*, the plaintiffs were considered indirect purchasers because they did not purchase the price-fixed goods directly. Rather, they were ultimate consumers at the end of a long distribution chain starting at the price-fixer at the top and ending with the plaintiffs' final purchase.

In the case itself, the plaintiff class alleged that between 1985 and 1991 the defendant corporations, major manufacturers and suppliers of iron oxide pigments, illegally colluded to fix and maintain prices of the bricks that were incorporated into their homes and buildings. In the class' pleading, it was alleged that as a result of the conspiracy, the price of real estate containing the price-fixed bricks was greater than what it would have been in a freely competitive market, and all class members suffered damage as a result of overpaying for their homes and buildings.<sup>40</sup>

At this early stage of the proceeding, the critical question was whether the Appellate Court would certify the plaintiff class. A positive decision would permit the action to proceed, whereas, a certification denial would effectively end the action. According to s.5(1) of the Ontario Class Proceedings Act, to certify a class action, the plaintiff must demonstrate: (a) a viable cause of action, (b) an identifiable class of two or more people who are willing to be represented by the representative plaintiff, (c) meaningful common issues, (d) that the class action is the preferable procedure and (e) an adequate representative plaintiff.<sup>41</sup>

From the outset, Justice Feldman, writing for the majority of the OCA, indicated that the court's certification decision would pivot around s.5(1)(c). To borrow Feldman's phraseology, this proceeding "turns on whether this is a case where all end-purchasers paid a higher price for their homes and therefore the loss can be proved on a class wide [common] basis."<sup>42</sup> This sort of evidence would, in Justice Feldman's estimation, satisfy the s.5(1)(c) commonality criterion. In an effort to meet this burden, the plaintiffs called on an expert witness to show that the class of indirect purchasers absorbed the anti-competitive damages stemming from the price-fixing conspiracy at the top of the distribution chain.<sup>43</sup> While not discrediting the expert testimony outright, Feldman expressed concern as, "That evidence does not address the issue of what method could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result."<sup>44</sup> Feldman J. then pointed out what she considered to be the expert's and, by extension, the plaintiffs' fundamental flaw: "... the appellant's expert effectively assumes that higher costs of products containing the respondents' iron oxide pigment would have been passed on to end-users."<sup>45</sup> In Feldman J.'s opinion, this unsupported premise was detrimental to the plaintiffs' case as, "it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified..."<sup>46</sup> In the majority's opinion, the plaintiffs' inability to trace the impact of the collusion from the price-fixers at the top of the distribution chain to the final purchaser at the end was a fatal omission; it left open the possibility that other participants in the distribution chain absorbed the overcharge. The defendants successfully countered the plaintiffs' claims by asserting that it was not possible to prove that the overcharge was passed through the chain to any of the end-user class members.

For Feldman J., it was important that the plaintiffs show a workable methodology to calculate the magnitude of the damage borne by the class members.<sup>47</sup> The plaintiffs' failure to distinguish between the fact that damage was levied, and the extent to which they were affected by it, precluded certification. In the judge's words, "By seeking to equate the respondents' gain with the class members' alleged loss, the appellants effectively skip over the process of determining who in the chain... absorbed the loss."<sup>48</sup> Although the existence of the cartel was uncontested, Feldman J. was not "... satisfied of certain basic facts required by s.5 of the CPA as the basis for a certification order."<sup>49</sup> In so holding, Justice Feldman set a high evidentiary bar for indirect purchasers alleging price-fixing crimes pursuant to the *Competition Act*.

### Section 24 of the Ontario CPA – A New Hope

On the facts of *Chadha*, Feldman concluded that the obstacles to an effective class proceeding overrode its potential benefits.<sup>50</sup> However, she was careful to limit the scope of her decision. In obiter, Feldman noted, "The appellants were unsuccessful in this case because they did not present the evidentiary basis for a certi-

fying court to be satisfied that loss as a component of liability could be proved on a class-wide basis. Whether such evidence could have been obtained is not clear.<sup>51</sup> Therefore, “in this jurisdiction it remains to be determined whether in a particular case a sufficient evidentiary record can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done is a question left open for future cases.”<sup>52</sup>

Justice Rady, writing on behalf of the Ontario Superior Court (OSC) in *Irving Paper Ltd. v. Atofina Chemicals Inc.* [2009], sought to answer that question. This case featured a class of indirect purchasers of hydrogen peroxide alleging that between 1984 and 2005 the defendants “conspired to and did, in fact, allocate markets, restrict supply and increase the price of hydrogen peroxide in Canada...”<sup>53</sup> In a similar fashion to the *Chadha* defendants, here, the hydrogen peroxide manufacturers pointed to serious issues with respect to the ‘passing-on’ defence; it is not clear whether direct purchasers passed on all, some, or any of the price increase to the indirect purchaser class.<sup>54</sup> The defendant manufacturers maintained that the evidence required to demonstrate any overcharge was passed through all points in the chain, without being absorbed, was too complex and costly to decipher.<sup>55</sup> The defendants cited *Chadha* in an effort to persuade the court that the same complicated individual inquiries that overwhelmed the *Chadha* court were as relevant here. Extending the *Chadha* reasoning, the defendants submitted that the complexities relating to proof of damage should cause the certification test to fail on the s. 5(1)(c) commonality prong.

Justice Rady reviewed the array of post-*Chadha* price-fixing certification motions and concluded, “For those cases that have proceeded to a certification hearing, the results have not been encouraging to plaintiffs.”<sup>56</sup> This observation was disconcerting because “the Ontario legislature in drafting the CPA... made a conscious attempt to avoid setting the bar for certification too high.”<sup>57</sup> In addition, the Supreme Court of Canada stated that, “The CPA is to be given a broad and liberal interpretation. It should be construed generously and an overly restrictive approach must be avoided in order to realize the objectives of the legislation, namely access to justice, judicial economy and behaviour modification.”<sup>58</sup> Given the legislative intent, and the Supreme Court’s interpretation of the statute, Rady J. was concerned with the barrier *Chadha* erected.<sup>59</sup>

With that concern in mind, rather than rely solely on *Chadha* and its progeny, Rady J. turned to certification assessments outside of the competition sphere. She shifted her focus to the credit card interest rate cases of *Markson v. MBNA Canada Bank of Canada* [2007] and *Cassano v. Toronto Dominion Bank* [2007].<sup>60</sup> Justice Rady readily acknowledged, “Neither of these cases were price-fixing conspiracies but some have argued that they represent a sea change in the approach motions judges should take to certification.”<sup>61</sup>

In *Markson*, the plaintiffs alleged that the defendant received illegal interest on cash advances in violation of s. 347(1)(b) of the *Criminal Code*.<sup>62</sup> The motions judge held that because the class action would require the bank to review approximately eight million transactions it would be unmanageable. In a decision that mirrored the *Chadha* reasoning, the judge denied certification because many individual, rather than common, issues would dominate the class action.<sup>63</sup> On appeal to the OCA, Justice Rosenberg reasoned that s.24 provided a mechanism by which to calculate class-wide damages for claims that would otherwise have to be determined on a case-by-case basis.<sup>64</sup> The relevant portion of s. 24 states, “The court may determine the aggregate or a part of a defendant’s liability to class members and give judgment accordingly where... no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability.”<sup>65</sup> On his reading of s. 24, Rosenberg J. determined that the purpose of the section was to offer a solution to the common issues problem. Markedly departing from *Chadha*, Rosenberg J. opined, “The defendant submits that liability turns on individual assessments. If the defendant is correct, the kind of action sought to be pursued in this case will almost never be capable of certification... In my view... liability and entitlement to a remedy are sufficient to trigger the application of s.24.”<sup>66</sup>

Justice Winkler, in *Cassano*, reinforced Rosenberg J.’s reading of s.24.<sup>67</sup> Winkler J. proclaimed, “It would hardly be sound policy to permit a defendant to retain a gain made from a breach of contract because the defendant estimates its costs of calculating the amount of the gain to be substantial...To give any effect to [this] economic argument... would be to pervert the policy undermining the statute.”<sup>68</sup> In sharp contrast to

*Chadha, Markson* and *Cassano* stand for the proposition that certification should not be denied because the defendant's business affairs masks the evidence the plaintiff class requires to prove it suffered damage.

Both *Markson* and *Cassano* held s.24 to mean that even when damages are not amenable to aggregate assessment, certification can still be granted. Supporting this statutory interpretation, Rosenberg J. held, "The subsection [of s.24] therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient... It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2)"<sup>69</sup> Justices Rosenberg and Winkler realized that there was a trade-off to be made between plaintiff class and defendant corporations. In light of the fact that guilt was established, Rosenberg J. and Winkler J. preferred some class members be overcompensated then the defendant go unpunished. In infusing s.24 with this policy tradeoff, the justices ushered in a paradigm shift in how the judiciary conceived of class action certifications – the plaintiff class need not provide a workable methodology showing that all class members were similarly affected by the impugned conduct.

In extending the s. 24 analyses from the credit card cases to the case at hand, Rady J. noted that the defendants had already entered guilty pleas in criminal proceedings in the United States and Europe.<sup>70</sup> She assumed that these admissions carried over to the Canadian context. Hence, with the admissions on the record, in applying her s.24 test, no questions of law or fact pertaining to liability remained. In examining the competition claim Rady J. reiterated, "*Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis."<sup>71</sup> According to Rosenberg J., the purpose of s. 24 is to offer a solution to the common issues problem. More precisely, "...condition (b) [of s.24] is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments."<sup>72</sup> Armed with this flexible and permissive ruling, Justice Rady extended the implications of the *Markson-Cassano* s.24 analyses to price-fixing class actions.

With the s.24 threshold set at the low *Markson* level, Rady examined the possibility that the overcharge reached at least some class members. Both experts agreed that "the more inelastic the demand, the more profitable it is for a seller to pass on increases in its prices to those who purchase from it."<sup>73</sup> The experts also agreed that certain products at issue, including paper, which requires significant amounts of hydrogen peroxide, have an inelastic demand profile. Such products "possess market characteristics that would enable suppliers to passthrough anti-competitive increases in the price of hydrogen peroxide."<sup>74</sup> Following this assessment through, Justice Rady was satisfied in that the overcharge might have been passed on to class members, and with the *Markson-Cassano* tradeoff in mind, she certified the indirect purchaser class. By invoking s. 24 to override the commonality prong of s.5 of the CPA, Rady J. broke with the OCA's decision in *Chadha*, and carved out a more promising path for classes alleging price-fixing.

### ***Chadha* Reexamined at the Appellate Level**

While Justice Rady was considering *Irving Paper* in Ontario, *ProSys* was working its way through the courts in British Columbia. In *ProSys*, the plaintiffs were a group of computer purchasers who indirectly bought pre-installed dynamic access random memory (DRAM). They alleged that the defendants, a consortium of DRAM manufacturers, were part of a global price-fixing scheme setup to artificially raise the price of DRAM and, hence, the computers they purchased.<sup>75</sup> Although it was handed down in a different province, Justice Marshura, of the British Columbia Supreme Court (BCSC) acknowledged the Ontario decision of *Markson*. However, unlike Rady J. who read the case as stating "that not every class member need have suffered a loss... to show damages on a class-wide basis,"<sup>76</sup> Marshura J. took the precedent to mean that the plaintiff still needs to show a model to prove that at least some class members suffered harm at the hands of the defendants. He concluded, only if "this hurdle is overcome, the aggregate damage provisions of the act are triggered."<sup>77</sup> On this interpretation of *Markson*, Marshura J. found that the plaintiff class had not demonstrated that it could prove on common evidence that the overcharge was passed through the distributing and marketing chains. Therefore, Marshura J. concluded that the indirect purchasers did not meet the evidentiary burden estab-

lished in *Chadha*. He stated, "In my view, *Chadha* remains good law in precluding the plaintiff from resorting to the aggregation provisions of the Act to establish liability."<sup>78</sup>

In November of 2009, Justice Smith, of the British Columbia Court of Appeal (BCCA) overruled the lower court's holding. Smith J. "necessarily rejected the conclusion... that an aggregate award cannot be a common issue..."<sup>79</sup> In *ProSys*, like in *Irving Paper*, the defendants' entered guilty pleas to the conspiracy charges in the United States. Thus, Smith J. took wrongful conduct as a given and held the defendants' attempt to unjustly enrich themselves as sufficient to establish liability.<sup>80</sup> This section of the holding critically breaks from *Chadha* wherein Feldman J. demanded expert evidence tracing the overcharge from the price-fixer at the top of the supply chain through to the class members at the bottom. Without that guidance, she refused to certify the class because she held that the liability the defendants owed the plaintiffs had not been established. To the contrary, Smith J. was satisfied certifying the class with only the expert's aggregate assessment alongside the defendants' wrongful conduct.

The BCCA deviated from the OCA in *Chadha* in a remarkable fashion. Smith J. held that certification need not hinge on the class' capability to prove that they, in fact, suffered any damage. Theoretically speaking, all of the price-fixing impact could have been absorbed upstream yet, according to *ProSys*, the class could still be certified. To support this decision, Smith interpreted s.29 of the B.C. CPA, the analogue to Ontario's s.24, as affording him the power to "affirm the certification of an aggregate monetary award under the CPA as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct..."<sup>81</sup> On this flexible reading of s.29, *ProSys* sits in irreconcilable conflict with *Chadha*. The former permits, and the latter precludes, certification simply by proving that the gains to the defendant would not have been amassed but for their wrongful conduct.

### The Canadian Judiciary at a Crossroads

Two competing lines of logic, one elaborated in *Chadha* and the other in *ProSys* are courting the Canadian judiciary. Each mode of reasoning professes to provide the most appropriate evaluative framework for determining whether classes of indirect purchasers alleging price-fixing should be certified. In weighing the benefits and drawbacks of the divergent approaches, I turn to key American precedents and legal scholarship that will serve to illuminate the Canadian debate.

Eight years ago when *Chadha* was handed down, a very heavy evidentiary burden was placed on the plaintiff class. At the time, Michael Osborne, a class action lawyer at Affleck Greene McMurtry LLP stated, "...class actions for price-fixing by indirect purchasers that are at the end of a long distribution chain are virtually dead in Canada."<sup>82</sup> *Chadha* seemed to de facto, if not de jure, impose a complete bar on indirect purchaser claims. In that respect, *Chadha* mirrors the American case of *Illinois Brick Co. v. Illinois [1977]*.<sup>83</sup> The bright-line rule had, until the *Irving Paper-ProSys* renaissance, also been the status quo in Canada. I now turn to arguments canvassed in the United States, with the aim of questioning whether the Supreme Court of Canada should endorse the bar on indirect purchaser standing.

### The Development of the American *Illinois Brick* Doctrine

Throughout the 1960s, a number of consumer class actions were launched in various American states wherein both plaintiffs and defendants invoked passing-on to bolster their respective arguments.<sup>84</sup> Defendant-sellers argued that direct purchaser plaintiffs sustained no injury because overcharges were passed on to the next participant in the distribution chain. Conversely, plaintiff-purchasers sought to prove injury by showing that middlemen passed overcharges on to them.<sup>85</sup>

Given the complexity associated with passing-on generally, the judiciary was rightly confused regarding how to handle the contrasting claims. Various district and appellate courts recognized passing-on as a valid defence to private antitrust claims.<sup>86</sup> For example, in a series of actions known as the "oil jobber" cases, courts permitted the passing-on defence.<sup>87</sup> The permissive stance that US courts had adopted, was altered by the Court's ruling in *Hanover Shoe, Inc. v. United Shoe Machinery Corp. [1968]*.<sup>88</sup>

The plaintiff, Hanover Shoe, a shoe manufacturer and customer of United Shoe Machinery Corp., brought the action against United Shoe alleging monopolization of the shoe machinery industry.<sup>89</sup> The question was whether Hanover Shoe could recover damages for United Shoe's decision to not sell certain manufacturing machines. The plaintiff sought damages for the difference between the amount it paid for the machines and the amount it would have paid had it been able to purchase the machines from United Shoe. In response, the defendant argued that any loss suffered by Hanover Shoe has been passed on to its customers and that the company therefore suffered "no legally cognizable injury."<sup>90</sup>

The U.S. Supreme Court rejected the pass-on defence, holding that a direct purchaser could recover all illegal overcharges, whether or not they had passed them on.<sup>91</sup> Justice White, writing for the majority, stated, "We think it sound to hold that, when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high, and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of § 4 [of the Clayton Act]."<sup>92</sup> Moreover, "...if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product."<sup>93</sup> In addition to this compensatory rationale, the majority also noted that permitting the passing-on defence reduces the efficacy of the deterrent force of private antitrust enforcement. Reason being, direct purchasers will be reluctant to launch suits if manufacturers can relieve themselves from liability by deploying the passing-on defence. The majority was troubled by the prospect of monopolizing manufacturers using the passing-on defence to retain the "fruits of their illegality."<sup>94</sup> To compensate victims and to dissuade would-be offenders, in *Hanover Shoe*, the U.S. Supreme Court categorically rejected the use of the passing-on defence.

The implication of this decision was that direct purchasers were assumed to have fully absorbed the illegal price increases. Nearly a decade later, in *Illinois Brick*, the Court converted this logical corollary into law. In the case itself, the State of Illinois and 700 governmental affiliates alleged that a cartel of concrete block manufacturers were illegally conspiring to raise the prices of the bricks bought by the indirect purchaser governmental organizations.

In keeping with *Hanover Shoe*, Justice White also delivered the opinion of the *Illinois Brick* Court, and he extended the passing-on prohibition from the defendant to the plaintiff. White J. held, "If a pass-on theory may not be used defensively by an antitrust violator (defendant) against a direct purchaser (plaintiff), that theory may not be used offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant). Therefore, unless *Hanover Shoe* is to be overruled or limited, it bars respondents' pass-on theory."<sup>95</sup> Justice White continued, "The Court's perception in *Hanover Shoe* of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world, rather than an economist's hypothetical model,' applies with equal force to the assertion of pass-on theories by plaintiffs as it does to such assertion by defendants."<sup>96</sup>

In extending the prohibition to indirect purchaser plaintiffs, one of the Court's main concerns pertained to duplicative liability. Should an indirect purchaser successfully establish a claim for damages, under *Hanover Shoe*, the direct purchaser would still automatically recover the full amount of the overcharge.<sup>97</sup> In large part, to avoid the prospect of multiple recoveries, the United States Supreme Court barred any indirect purchaser from bringing an antitrust claim in the federal courts.

Unlike *Hanover Shoe*, which was well received by those who regarded private actions as an important means of deterring antitrust violation, *Illinois Brick* was far more contentious. George Benston, a law and economics professor at Emory University, observed, "The *Illinois Brick* decision...brought forth a flood of protests..."<sup>98</sup> Editorials in some of the country's largest newspapers framed the decision as manifestly unjust to consumers.<sup>99</sup> In response to the public outcry, various American states put forward bills and, in some cases, enacted legislation that granted indirect purchasers standing. These *Illinois Brick* repealer states were motivated because of the perceived need to compensate those "actually harmed" by price-fixing.<sup>100</sup>

The following section of this paper strives to assess the merits of the arguments for and against upholding *Illinois Brick* in the United States and more formally adopting the rule in Canada. I will pivot this analysis around the deterrence and victim compensation objectives. Finally, I will evaluate the tradeoffs of the different approaches and will conclude with a recommendation.

### **The Case for the *Illinois Brick* Doctrine**

In 1986, George Benston published an article in the *Antitrust Law Journal* in which he comprehensively examined the costs and benefits associated with the *Illinois Brick* rule. After weighing all the factors, Benston came out in support of the doctrine. His primary reason for bolstering *Illinois Brick* revolved around the costs and complexities of proving that the illegal overcharges were, in fact, passed on. Benston noted that because elasticity of demand varies amongst consumers, passing-on is rarely an “all or nothing” phenomenon.<sup>101</sup> Rather, because suppliers must contend with the possibility that customers will substitute products, the percentage passed on will be strategically set to retain as many elastic customers as possible.<sup>102</sup> Thus, theoretically speaking, it should be possible to estimate the percentage passed on after determining the elasticity of the intermediary’s customer base. However, in practice, as Benston discovered, predicting price elasticities is nearly impossible. For example, assume a restaurant has purchased price-fixed produce from a supplier. The same restaurant then uses some of these vegetables, along with other ingredients, as part of an entrée. Benston asks, “How does one determine how much a restaurant patron pays for a meal as a consequence of price-fixed food... and how much is absorbed by the restaurant?”<sup>103</sup> If the elasticity of the meal purchaser is near impossible to decipher, than predicting the portion of the overcharge passed on is equally challenging.<sup>104</sup>

In addition to the expense entailed in proving passing-on, a second reason to support *Illinois Brick* is related to the efficiency of the damage recovery process. According to American academic William H. Page, the most efficient plaintiffs are direct purchasers because they have the greatest knowledge of the market in issue. As a consequence of their close proximity to the alleged price-fixer, they often have knowledge of the costs of production and industry-standard “markups.”<sup>105</sup> Hence, direct purchasers are best situated to distinguish legitimate price increases from illegal price hikes.<sup>106</sup> As an additional benefit, because of the direct purchaser’s specific knowledge of the alleged conspirator, they will be less likely to bring an action against an innocent producer. By decreasing the potential for frivolous and vexatious suits, while increasing the likelihood that true criminals are held accountable, Page concludes that *Illinois Brick* should be upheld.

*Illinois Brick* proponents also argue that restricting standing to direct purchasers instills an incentive structure that promotes the deterrence objective. Launching a lawsuit is an expensive endeavour. Moreover, as the class expands the costs increase, while the potential benefit to each class member decreases. Page found that, “While the evidence shows that direct purchasers will sue for the full overcharge, it is less clear that they will have adequate incentive to sue for an indeterminate share of the overcharge.”<sup>107</sup> In other words, price-fixers are more likely to be sued when the potential rewards to direct purchasers are not diluted by indirect purchaser claims.

This concern is heightened because the number of indirect purchasers is likely to be greater than the number of direct purchaser class members. Take the case of manufacturer-wholesaler-consumer relationship, there will likely be more end consumers than direct purchasing wholesalers. If the end consumer is granted standing, then, according to this argument, the wholesaler who detects price-fixing will be less likely to bring a claim. Reason being, if there are many indirect purchasers, the wholesaler’s share of the “bounty” might not only be diluted; it could effectively be drowned out. Overturning *Illinois Brick*, and thereby expanding the pool of potential claimants, would decrease the deterrent force dissuading would-be violators, as they would be cognizant of the collective action problem impeding the initiation of a lawsuit.

### **The Argument against the *Illinois Brick* Doctrine**

When *Illinois Brick* was handed down, advocates arguing against the bright-line rule were vociferous. The criticism began with the dissenters in the case itself. Justice Brennan emphasized the primary purpose

underlying American antitrust legislation: “Today’s decision goes far to frustrate Congress’ objectives in creating the treble-damages action.... In the Clayton Act of 1914, Congress extended the § 7 remedy to persons injured by ‘any violation of the antitrust laws. These actions were conceived primarily as opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giving the injured party ample damages for the wrong suffered.’”<sup>108</sup> Brennan J. centered his dissent on the majority’s neglecting to account for the legislature’s intent with respect to victim compensation.

One year after *Illinois Brick* was handed down, the U.S. Supreme Court in *Reiter v. Sonotone Corp.* [1978] accredited Brennan J’s dissent.<sup>109</sup> In *Reiter*, the Court held, “Congress designed the Sherman Act as a consumer welfare prescription.”<sup>110</sup> This sentiment guided the Court’s decision in that case. By upholding *Illinois Brick* on the one hand, and vindicating consumer rights on the other, the Court has attempted an awkward balancing act. Both before and after *Illinois Brick*, state and federal courts have struggled in weighing these competing interests.

The American academy has attempted to articulate a more methodical, and less arbitrary, approach to balancing the interests. The legal-academic team of Bares, Fanelli, Gordon and Murphy put forward a compelling case against the continued application of the *Illinois Brick* doctrine. According to the authors, the difficulty with the decision begins with the realization that the direct purchasers very rarely absorb the entire overcharge.<sup>111</sup> The authors found that the bulk of price-fixing damage is passed on and eventually falls on the consumer.<sup>112</sup> Building on this finding, the authors deduced, “the lack of direct compensation for purchasers actually injured reduces the [*Illinois Brick*] mechanism’s attractiveness... to the extent that those injured are not those who benefit... windfall gains result, thus compromising the compensatory goal of the antitrust laws.”<sup>113</sup> The crux of their claim revolves around aggressive direct purchasers that can “game” the system by passing-on the entirety of the overcharge and then suing the cartel. Thus, direct purchasers stand to gain a windfall by recovering damages that they did not suffer.

With competing concerns in mind, the authors conclude, the legislatures “should acknowledge the competing policies identified in *Illinois Brick*, and require courts to balance them on a case-by-case basis.”<sup>114</sup> In summary, the authors argue that *Illinois Brick* is an overly broad solution to a nuanced and complicated problem.

Another reason to support the anti-*Illinois Brick* movement is grounded in the supposition that direct purchasers will pass-on the overcharge when it is risk-free to do so and, at the same, avoid litigation. Lawsuits are expensive and there is no guarantee that the plaintiff class will be rewarded for their efforts. The time, cost and effort required to extract a potential reward might dissuade the rational direct purchaser from pursuing a legal avenue. Even if the direct purchaser is reasonably certain of the cartel’s existence, in simply passing-on the overcharge no expense has been incurred and resources that would have been absorbed by a lawsuit can be redirected to the intermediary’s core business. In *Illinois Brick*, the high likelihood that the direct purchaser would simply pass on the overcharge was not lost on Justice Brennan. In dissent he noted, “Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.”<sup>115</sup> Assuming elasticities permit, the direct purchaser would be acting rationally by deferring legal action and selecting the risk-free passing-on option.

Instead of acknowledging the possibility that the overcharge would be passed on, the *Illinois Brick* majority concentrated on the complexity and expense associated with proving that the overcharge was, in fact, passed on. Justice Feldman, in *Chadha*, mirrored the *Illinois Brick* mode of analysis when referring to the “... massive record-tracing exercise [that] will be required to establish the inclusion of the respondents’ product in any particular structure. The respondents point out that the period over which records must be obtained spans seventeen years. The respondents also point to the many intermediary parties from whom those records, if they exist, must be sought.”<sup>116</sup> The implication to be drawn from the *Illinois Brick*—*Chadha* reasoning is disconcerting because price-fixers can shield themselves from legal recourse by enmeshing their operations in sufficiently complicated corporate infrastructure.

Courts in the *Illinois Brick* repealer states have been particularly sensitive to this inference. In *Hyde v. Abbott Labs* [1996], the North Carolina Court of Appeal rejected the pharmaceutical company's complex corporate organization defence. In certifying the indirect purchaser class the *Hyde* majority explicitly rejected the *Illinois Brick-Chadha* rationale: "... fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser."<sup>117</sup> Then, in *Goda v. Abbott Laboratories* [1997] the District of Columbia Superior Court held, "If we disdain the expert's theories as does the *Illinois Brick* majority, and demand singular facts involving the particular individuals in the specific context of their market, the class action is virtually doomed in indirect purchaser cases. But if we assume the commission of a wrong that has resulted in some injury, albeit one difficult to measure, the allowance of 'reasoned estimation' and 'approximation' is not without appeal."<sup>118</sup>

Even American academic William Page who has argued in support of the *Illinois Brick* doctrine appears uncomfortable with the ramifications stemming from the complexity defence. Page wrote, "Most of the factors that preclude certification of classes of indirect purchasers have little to do with whether a price-fixing conspiracy actually existed or whether indirect purchasers bore an overcharge... Yet these factors may preclude certification because they make it impossible to establish harm to each class member by any kind of common proof."<sup>119</sup> In many cases, the harms resulting from price-fixing will "dissolve into the currents of the channels of distribution."<sup>120</sup>

The arguments proffered against the continued application of *Illinois Brick* are compelling. Although the *Illinois Brick* majority inscribed a bright line rule that denies indirect purchasers the opportunity for compensation, a chorus of American scholarship has staunchly supported a case-by-case approach to the question of indirect purchaser recovery.

### The Current Canadian Stance on Passing-on

While the arguments pertaining to the passing-on defence have been thoroughly canvassed in the United States, the issue is not all together foreign to the Canadian judiciary. In fact, the Supreme Court's decision in *British Columbia v. Canadian Forest Products Ltd.* [2004] squarely addressed the passing-on question.<sup>121</sup> In that case, the province claimed lost revenue from the destruction of harvestable trees that were damaged in a forest fire caused by the defendant company.<sup>122</sup> In its defence, the company claimed that the plaintiff suffered no loss because it proportionately raised the price for the other trees sold, leaving the province with the same overall revenue. In assessing this argument, Justice Binnie, held, "...it is not generally open to wrongdoers to dispute the existence of a loss on the basis that it has been passed on by the plaintiff."<sup>123</sup> In holding the defendant company liable, even though the plaintiff had not suffered any measureable loss, the Supreme Court of Canada supported the principle that defendants should not be able to avoid liability because of a fortuitous turn of events.

### Policy Reasons for Extending CFP to Price-Fixing Cases

*Canadian Forest Products (CFP)* encompassed a specific set of facts; however, Binnie's majority opinion addressed a broader inquiry. In his decision, Binnie questioned whether his refusal to accredit the 'passing-on' defence should "be extended to the whole of private law?"<sup>124</sup> In response, Binnie unequivocally stated, "My overall conclusion is that the passing-on defence, on the facts of this case **and generally**, must not be allowed to take hold in Canadian jurisprudence."<sup>125</sup> [emphasis added]

In analogous fashion to *Hanover Shoe*, the Supreme Court of Canada's categorical rejection of the passing-on defence in *CFP* was grounded in sound policy reasons. The Court felt it unjustly burdensome to request the plaintiff "engage in a very difficult economic analysis to show that it did not recoup losses by charging higher prices to customers."<sup>126</sup> Because, "On a macro-economic level, the Crown would be unable to separate the effect of the increased stumpage fees resulting from the forest fire from the effect of the increased stumpage stemming from other factors affecting the timber harvesting market in B.C."<sup>127</sup> The Court was concerned about the challenge the Crown would face in adducing the economic proof required to show that, after a lengthy period of post-tort business activity, it had suffered the same quantum of loss that was initially attributed to the tortious conduct.

In describing this difficulty, the Court points to a number of variables that could change between the time the tort was committed and the date of the trial. These factors include, “a single supply less expensive, general economic conditions more buoyant, or the labor market tighter”<sup>128</sup> To ask the plaintiff to account for these virtually unascertainable figures, all of which fluctuate with regular business activity, is to make a near-impossible request. Employing Justice Binnie’s turn of phrase, placing this burden on the Crown is unfair because of the “endlessness and futility of the effort the Crown would have to make to rebut the presumption that has been held against it.”<sup>129</sup>

The plaintiffs in price-fixing class action certifications face equally daunting economic terrain. In *Chadha*, Feldman pointed to a plethora of factors that preclude the plaintiffs from adducing the proof that a strict reading of s. 36 requires:

The appellants would have to show that the price increase (or a part of it) was passed through from the respondents to the building materials manufacturer and distributor, to the builder, to the purchaser and on to any subsequent purchaser. If the price increase was absorbed at any point, the chain would be broken.<sup>130</sup>

Feldman J. essentially concedes the impossibility of proving loss on a class-wide basis. Yet, because of her strict construction of the statute, she opined, “It is my view that the complexity of the proceeding favours rather than detracts from a class proceeding.”<sup>131</sup>

Justice Rosenberg, writing for the majority in *Markson*, took issue with Feldman’s perspective. The crux of his certification decision also turned on the complexity surrounding corporate activity. However, in contrast to *Chadha*, Rosenberg J. refused to hold the plaintiffs accountable for their inability to adduce evidence when this incapacity was a direct result of the defendant’s enigmatic corporate design. In speaking to the plaintiffs’ plight, Rosenberg J. stated, “the defendant has structured its affairs such that it is practically impossible to determine the extent of its breach... I should not be taken as having found that the defendant deliberately structured its affairs to avoid a possible class proceeding... The fact remains... that the precise extent of any violation of s. 347 can be determined only at great cost.”<sup>132</sup> Rosenberg J.’s policy concern seamlessly transfers to the price-fixing arena: Permitting an alleged conspirator to avoid liability by structuring its corporate affairs in a manner that conceals the exact evidence that the statute demands the plaintiff produce leads to an unconscionable result – defendants can retain unlawful gains by ensconcing themselves in complicated corporate arrangements.

Complementing Rosenberg J.’s rationale, Roach and Trebilcock offer an anti-*Illinois Brick* corrective justice argument. The authors begin by pointing to a postulate of corrective justice theory: “where one party engages in a form of wrongdoing... a legal obligation is recognized to correct for the consequences of that wrongdoing. This theory of corrective justice best explains why in various areas of private law we recognize the right of innocent parties to secure compensation from those who have wronged them.”<sup>133</sup> The authors then turned to well-trodden areas of the law wherein linking chains of causality can also be an arduous undertaking. For instance, they note, “In many tort and breach of contract actions, the ultimate incidence of an otherwise uncompensated loss is equally difficult to determine, yet this has not been regarded as a persuasive objection to the award of compensation for tortious and contractual wrongdoing.”<sup>134</sup> If in tort and contract cases plaintiffs are offered the opportunity to connect the causal chain, why should indirect purchasers be denied that same privilege in the competition arena? Roach and Trebilcock regard this difference in treatment as illogical, arbitrary and unjust.<sup>135</sup>

### **Critical Cross Border Differences**

In addition to the principled and policy reasons discussed in the previous section, the Supreme Court of Canada should refrain from endorsing the *Illinois Brick* doctrine because of three critical factors that differentiate Canada from its southern neighbour.

The first dissimilarity relates to the possibility that indirect purchasers launch vexatious “strike suits” against innocent corporate citizens.<sup>136</sup> As George Benston noted, “treble damage awards increase the incen-

tive for people to sue. The plaintiff incurs only the costs of time and of investigating and filing a complaint.”<sup>137</sup> Moreover, the reputational costs and legal fees associated with merely the prospect of facing a price-fixing action are formidable. Because of the costs that defendants, innocent or guilty, incur, “Attorneys, therefore, can find it desirable to threaten actions and then be willing to settle early in the game. This practice is particularly effective where there are a relatively large number of potential defendants... For lawyers who play this game, it matters less whether the producer actually is guilty of price-fixing than whether the producers are likely to settle.”<sup>138</sup> One of the reasons Benston supported *Illinois Brick* was because he was concerned with the possibility that innocent companies would be “bullied” into unjust settlements by entrepreneurial attorneys.

Benston’s apprehension over the extraction of illegitimate settlements should be alleviated in Canada. For one, Canadian law does not permit the court to award treble damages in antitrust actions. This difference, in and of itself, reduces the incentive to bring unmeritorious claims. Second, in Canada, courts review all class action settlements. Canadian judges can strike down any settlement considered to be unjust or counter to the CPA’s objectives. By comparing counsel’s proposed fee structure against its own calculations, “Canadian courts have avoided the enormous U.S.-type fees resulting from fee awards based on thirty-three or forty percent of the settlement amount.”<sup>139</sup> In sum, Benston’s compunctions regarding vexatious lawsuits are less prevalent in the Canadian context.

A second critical distinction between Canada and the US appertains to the possibility of multiple recoveries. In *Illinois Brick*, Justice White bolstered his decision to bar indirect purchasers because he was disturbed by the possibility that a defendant might be over penalized. For, “Allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants, since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still automatically recover the full amount of the overcharge that the indirect purchaser had shown to be passed on...”<sup>140</sup>

Canadian courts have been sensitive to concern. For example, in *ProSys*, Justice Smith, of the BCCA, acknowledged the lower court’s uneasiness and fashioned a solution by narrowing the proposed class “...to the exclusion of direct purchasers of DRAM who have settled in actions against the respondents in the United States”<sup>141</sup> By altering the class definition, Smith J. limited class membership to those purchasers who had not recovered in the American cases, and who had thus suffered an uncompensated loss. In practice, as *ProSys* attests to, class definitions have been deftly tailored to avoid the *Illinois Brick*’s “unseemly specter of duplicative liability.”<sup>142</sup>

Finally, the American apprehension associated with the complexity and expense of tracing the price-fixing impact is, in certain circumstances, not a relevant consideration in Canada. A modern line of Canadian case law interprets s.24 of the Ontario CPA, and its BC equivalent, as offering the courts the leeway to certify classes without considering complicated individual inquiries. Ostensibly, the purpose for including these “commonality override” provisions in the CPAs was to ensure that class actions are not derailed because of issues related to ultimate proof at the threshold certification stage when all questions regarding the defendant’s liability have been resolved. The presence of Ontario’s s.24, and its provincial equivalents are noticeably absent from the American class action statutes. Unlike courts in the United States, Canadian courts have been instructed to avoid the burdensome inquiries that the *Illinois Brick* and *Chadha* courts were distressed over.

These three critical differences significantly reduce the risks associated with indirect purchaser standing. In Canada, the absence of treble damages and court oversight reduces the risk of vexatious lawsuits. To date, Canadian courts have constructed classes to avoid duplicative liability. Finally, when no questions of liability remain, plaintiff classes are, vis-a-vis s. 24, exempt from the proof of passing-on requirement. For these three reasons, in conjunction with the policy reasons detailed above, the *Illinois Brick* doctrine should not be adopted in Canada. In comparison to the American system, the unique attributes of the Canadian judiciary render it particularly amenable to indirect purchaser class actions.

## Conclusion

When it comes to contested price-fixing certification motions, Canada sits at a crossroads. *Chadha* and its progeny set a high threshold for price-fixing class action certifications. However, the argumentative architecture detailed in *Chadha* has come under attack by a recent line of precedents that has proposed a competing evaluative matrix. The BCCA, in *ProSys*, handed down a decision that undermined the OCA in *Chadha*. The inter-provincial nature of this tension will likely attract the attention of the Supreme Court. Should Canada's highest court elect to entertain an indirect purchaser class action certification, only one of these approaches can be endorsed.

I began this paper by juxtaposing the logic deployed by the OCA in *Chadha* with the more recent case law of *Markson*, *Cassano*, *Irving Paper* and *ProSys*. I then shifted my focus to the forty years of American academic commentary and jurisprudence. I discovered that the key arguments supporting *Illinois Brick* were related to deterrence, a concern over the complexity of proving passing-on, and finally, misgivings regarding frivolous strike suits and duplicative recovery. On the other side of the *Illinois Brick* wall stand a cohort of American legal-academics that have argued for a case-by-case approach instead of a complete bar. In Canada, Laskin, Roach and Trebilcock also prefer offering indirect purchasers the opportunity to make their case. Finally, I illuminated critical differences in the application and administration of the class proceeding acts in Canada as compared to the United States. North of the border, court oversight and the operation of s.24 of the CPA are additional reasons to prevent the *Illinois Brick* doctrine from being incorporated into Canadian common law.

In light of the policy goals emphasized by both the CPA and the *Competition Act*, the Supreme Court should uphold *Prosys* and overrule *Chadha*. While *Chadha* might be applauded for strictly construing s. 36 of the *Competition Act*, *ProSys* conforms to the purpose underlying the nexus of the *Competition Act* and the provincial CPAs – to provide an effective and efficient mechanism to compensate victims and to deter those seeking to engage in conduct that violates the price-fixing criminal prohibition of the *Competition Act*.

A final reason to support the overturning of *Chadha* has not yet been canvassed, but it is no less important. *Chadha* was decided in 2002 in the context of a very different economic climate. Following a brief post-9/11 recession, the North American economy began a strong recovery. While I am admittedly speculating, it seems at least likely that against a backdrop of optimism and widespread economic prosperity, the public would not have been much concerned with minor harms arising from price-fixing.

In 2010, the world is facing a very different economic situation. The developed world is currently in the midst of the worst recession since the Second World War. With corporate corruption seemingly rampant, every state institution, courts included, should be troubled by the weak economy and the correlative metric of consumer confidence. For this reason, at this moment in time, the low evidentiary bar set in *ProSys* should be preferred over the restrictive rulings in *Illinois Brick* and *Chadha*. The possibility of a court meaningfully punishing a price-fixing conspiracy through class action certification could infuse the contemporary economic environment with an incentive structure that promotes corporate accountability. This ethical injection might have a positive effect on an ailing North American economy. To the contrary, offering sanctuary to alleged criminals who cloak their crimes in complexity diminishes the integrity of a judicial system that purports to be principled and fair.

## Endnotes

<sup>1</sup> Aaron Levenstadt – Student-at-Law, Goodmans LLP, Toronto, Canada – The author wishes to express his sincere gratitude to his colleagues at Goodmans LLP for exposing him to their passionate pursuit of competition law and for their extraordinary dedication to students. The author would also like to thank Professor Edward Iacobucci for his guidance and support in crafting this article. This paper won the 2010 James H. Bocking Memorial Award and was presented at the Canadian Bar Association's 2010 Competition Law Conference in Ottawa, Canada.

<sup>1</sup> Kent Roach & Michael Trebilcock, "Private Enforcement of Competition Laws" (1996) 34 Osgoode Hall L. J. 465.

<sup>2</sup> *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 31.1.

<sup>3</sup> *Competition Act*, R.S.C. 1985, c. C-34, s. 36.

<sup>4</sup> See *Competition Act*, *ibid.*, s. 45.

<sup>5</sup> Glen Leslie & Stephen Bodley, "The Record of Private Actions under Section 36 of the Competition Act" (1993) 14 Can. Comp. Rec. 50.

<sup>6</sup> Charles M. Wright & Matthew D. Baer, "Price-fixing Class Actions: A Canadian Perspective" (2003-04) 16 Loy. Consumer L. Rev. 463.

<sup>7</sup> Osler, Hoskin & Harcourt LLP, Media Release, "Canada: B.C. Court Of Appeal Certifies Class Action Arising From Multi-Jurisdictional Antitrust

Case" (17 November 2009) online: <<http://www.osler.com/resources.aspx?id=18720>>.

<sup>9</sup> *Ibid.*

<sup>9</sup> Margaret Sanderson & Michael Trebilcock, "Competition Class Actions: An Evaluation of Deterrence and Corrective Justice Rationales" in Stephen G.A. Pintel, *Litigating Conspiracy: An Analysis of Competition Class Actions* (Toronto: Irwin Law, 2006) at 30.

<sup>10</sup> *Irving Paper Ltd. v. Atofina Chemicals Inc.*, 2009 CarswellOnt 8610 (WLeC) [*Irving Paper*].

<sup>11</sup> *ProSys Consultants Ltd. v. Infineon Technologies AG*, 2009 CarswellBC 3035 (WLeC) [*ProSys*].

<sup>12</sup> *Supra* note 3.

<sup>13</sup> *An Act concerning monopolies and dispensations with Penal Laws and forfeitures thereof*, (U.K.), 21 Ja. I, c.3.

<sup>14</sup> *An Act to Protect trade and commerce against unlawful restraints and monopolies*, ch. 647, 26 Stat. 209 (1890).

<sup>15</sup> *Supra* note 1 at 465.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Gary Becker & George Stigler, "Law Enforcement, Malfeasance and Compensation of Enforcers" (1974) 3 J. Legal Stud. 1.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Associated Industries of New York State v. Ickes*, 1943, 134 F.2d 694 at 704.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Supra* note 1 at 478.

<sup>24</sup> John Coffee Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Md. L. Rev. 224-5.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Supra* note 1 at 480.

<sup>27</sup> *Ibid.* at 479-80.

<sup>28</sup> *Supra* note 9 at 16.

<sup>29</sup> *Ibid.* at 18.

<sup>30</sup> Mark Cohen & Paul Rubin, "Private Enforcement of Public Policy" (1985) 3 Yale J. on Reg. 170.

<sup>31</sup> *Supra* note 24 at 227.

<sup>32</sup> *Supra* note 1 at 483.

<sup>33</sup> Gary Becker, "Crime and Punishment: An Economic Approach" (1968) 76 Journal of Political Economy, at 169.

<sup>34</sup> *Supra* note 1 at 500.

<sup>35</sup> *Ibid.*

<sup>36</sup> Jerry Mashaw, "Private Enforcement of Public Regulatory Provisions: The 'Citizen Suit'" (1975) 4 Class Action Rep. at 34.

<sup>37</sup> *Supra* note 6 at 466.

<sup>38</sup> *Ibid.* at 463.

<sup>39</sup> *Chadha v. Bayer Inc.*, (2002) 168 O.A.C. 143, 63 O.R. (3d) 22 [*Chadha*].

<sup>40</sup> *Ibid.* at para. 1-2.

<sup>41</sup> See s. 5. Class Proceedings Act, 1992, S.O. 1992, c. 6.

<sup>42</sup> *Supra* note 39 at para 20.

<sup>43</sup> *Ibid.* at para 27.

<sup>44</sup> *Ibid.* at para. 30.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* at para 4.

<sup>48</sup> *Ibid.* at para. 61.

<sup>49</sup> *Ibid.* at para 29.

<sup>50</sup> *Ibid.* at para.64.

<sup>51</sup> *Ibid.* at para 65.

<sup>52</sup> *Ibid.* at par. 68.

<sup>53</sup> *Supra* note 10 at para 1.

<sup>54</sup> *Ibid.* at para 22.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* at para 36.

<sup>57</sup> *Ibid.* at para 50.

<sup>58</sup> *Ibid.* at para 32.

<sup>59</sup> *Ibid.* at para 64.

<sup>60</sup> *Ibid.* at paras 65-6.

<sup>61</sup> *Ibid.* at para 65.

<sup>62</sup> *Markson v. MBNA Canada Bank* (2007) ONCA 334, 85 O.R. (3d) 321 [*Markson*].

<sup>63</sup> *Ibid.* at para 23.

<sup>64</sup> *Ibid.* at para 43.

<sup>65</sup> See s. 24 . Class Proceedings Act, 1992, S.O. 1992, c. 6.

<sup>66</sup> *Supra* note 62 at paras 41-6.

<sup>67</sup> *Cassano v. Toronto Dominion Bank* (2007) ONCA 781, 87 O.R. (3d) 401 [*Cassano*].

<sup>68</sup> *Ibid.* at para 49.

<sup>69</sup> *Supra* note 62 at paras 49-50.

<sup>70</sup> *Supra* note 10 at para 3.

<sup>71</sup> *Ibid.* at 118.

<sup>72</sup> *Ibid.* at 71.

<sup>73</sup> *Ibid.* at 135.

<sup>74</sup> *Ibid.* at 136.

<sup>75</sup> *ProSys Consultants Ltd. v. Infineon Technologies AG*, 2008 CarswellBC 943 (WLeC) [*ProSys*].

Note: This citation references the British Columbia Supreme Court decision.

<sup>76</sup> *Supra* note 10.

<sup>77</sup> *Supra* note 75 at para 168.

<sup>78</sup> *Ibid.* at para 176.

<sup>79</sup> *Supra* note 11 at para 32.

<sup>80</sup> *Ibid.* at para 33.

<sup>81</sup> *Ibid.* at para 39.

<sup>82</sup> Michael Osborne, "Complex Distribution Chain Kills DRAM Class Action – Pro-Sys Consultants Ltd. v. Infineon Technologies AG" *Canadian Competition Record* (7 April 2009) online: <www.thelitigator.ca>.

<sup>83</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) [*Illinois Brick*].

<sup>84</sup> See *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830; *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 165 (1922).

<sup>85</sup> Barbra Bares, Cecilia Fanelli, Todd Gordon, William Murphy, "Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation" (1977-78) 63 *Cornell L. Rev.* 312.

<sup>86</sup> *Ibid.* at 314.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) [*Hanover Shoe*].

<sup>90</sup> *Ibid.* at 487.

<sup>91</sup> *Supra* note 85 at 314.

<sup>92</sup> *Supra* note 89 at para 489.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.* at para 494.

<sup>95</sup> *Supra* note 83.

<sup>96</sup> *Ibid.* at paras 731-33.

<sup>97</sup> *Ibid.* at paras 730-31.

<sup>98</sup> George Benston, "Indirect Purchasers' Standing To Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals To Change the *Illinois Brick* Rule" (1986) 55 *Antitrust L.J.* 214.

<sup>99</sup> *Ibid.*

<sup>100</sup> William Page, "The Limits of State Indirect Purchaser Suits: Class Certification In the Shadow of *Illinois Brick*" (1999-2000) 67 *Antitrust L.J.* 1-2.

<sup>101</sup> *Supra* note 98 at 221.

<sup>102</sup> *Ibid.* at 222.

<sup>103</sup> *Ibid.* at 225.

<sup>104</sup> *Ibid.* at 222.

<sup>105</sup> *Supra* note 100 at 29.

<sup>106</sup> *Supra* note 98 at 234.

<sup>107</sup> William Page, "Class interpleader: The Antitrust Modernization Commission's recommendation to overrule *Illinois Brick*" (2008) 53 *Antitrust Bull.* 737.

<sup>108</sup> *Supra* note 83.

<sup>109</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1978).

<sup>110</sup> *Ibid.* also see note 100 at 31.

<sup>111</sup> *Supra* note 85 at 312.

<sup>112</sup> *Ibid.* at 311.

<sup>113</sup> *Ibid.* at 327.

<sup>114</sup> *Ibid.* at 311.

<sup>115</sup> *Supra* note 83.

<sup>116</sup> *Supra* note 39 at para 57.

<sup>117</sup> *Supra* note 100 at 38.

<sup>118</sup> *Ibid.* at 20.

<sup>119</sup> *Supra* note 100 at 36.

<sup>120</sup> *Ibid.* at 36-37.

<sup>121</sup> *British Columbia v. Canadian Forest Products Ltd.* 2004 CarswellBC 1278 (WLeC) [*Canadian Forest Products*]

<sup>122</sup> *Ibid.* at para 3.

<sup>123</sup> *Ibid.* at para 111.

<sup>124</sup> *Ibid.* at para 201.

<sup>125</sup> *Ibid.* at para 197.

<sup>126</sup> *Ibid.* at para 203.

<sup>127</sup> *Ibid.* at para 205.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Supra* note 39 at para 45.

<sup>131</sup> *Ibid.* at para 23.

<sup>132</sup> *Supra* note 62 at para 67.

<sup>133</sup> *Supra* note 1 at 496.

<sup>134</sup> *Ibid.* at 495.

<sup>135</sup> *Supra* note 1 at 498.

<sup>136</sup> *Supra* note 85 at 335.

<sup>137</sup> *Supra* note 98 at 231.

<sup>138</sup> *Ibid.* at 241-42.

<sup>139</sup> Gary Watson "Class Actions: The Canadian Experience" (2001) 11 *Duke J. Comp & Int'l L.* 269, at 281-2.

<sup>140</sup> *Supra* note 83.

<sup>141</sup> *Supra* note 11, at para. 17.

<sup>142</sup> *Supra* note 85 at 319.

## THE REGULATED CONDUCT DOCTRINE: CANADIAN COMPETITION LAW AND THE POLITICS OF UNDUENESS

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La théorie de la conduite réglementée (TCR) est un moyen de défense établi par les juges qui exempte les organismes de réglementation provinciaux et les intervenants des dispositions de la *Loi sur la concurrence* qui prohibent les ententes de fixation de prix. La théorie s'est développée durant les premières années de la législation contre les coalitions alors que l'on tentait de faire reconnaître les lois sur la concurrence comme relevant des pouvoirs fédéraux en matière de droit criminel et de trafic et de commerce. L'auteur examine l'évolution historique de la TCR et discute de ses limites juridiques et économiques dans le contexte de questions constitutionnelles concernant les compétences fédérales et provinciales. En raison d'incertitudes concernant l'application de la TCR, l'auteur est d'avis qu'une délinéation plus précise de sa portée et de son applicabilité s'impose, préférablement au moyen d'une intervention législative.

*"The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury from any other standpoint."*

~ Per Kellock J. *Howard Smith Paper Mills et al v. The Queen* ~

### (i) Introduction

It is not uncommon for political ideals to pervade even the most carefully crafted statutory language. Nowhere is such influence more deeply entrenched than in the politically charged spheres of criminal law and economic policy. The former, concerned with the most coercive side of state action, naturally elicits heated political debates about the moral dimensions of fault and the rationales of punishment. The latter revisits the age old question of government's role in the economy and the desirability of free markets as tools of social engineering. It comes as no surprise, then, that competition policy, a field that enforces laissez faire economics with criminal prohibitions, is rife with political influences. Indeed, the origins of competition legislation lie in a populist revolt over the industrial concentration that spread across Canada and the United States in the late 19<sup>th</sup> century.<sup>1</sup> Instituting laws to curb market power was not a novel idea. The common law was used for centuries in England as a way of regulating both domestic and international monopolies incorporated under the Royal Charter.<sup>2</sup> Historically, anti-trust laws have vacillated between active support for monopolies in the mercantilist age to an outright revolt against them in the post enlightenment era. This illustrates how the process of economic regulation generally and competition law specifically is the result of changing political ideologies that influence the way governments develop policy and how courts interpret legislation.

The political dimension of competition law has important implications for the way it operates in Canada and for its viability as an instrument of economic policy. For the discussion in this paper, competition policy will be defined as a set of laws and enforcement mechanisms designed to enhance the competitiveness of markets and provide for greater efficiency and generation of wealth.<sup>3</sup> The federal nature of the Canadian state poses unique challenges to the application of competition policy. In particular, the political influences that have shifted English and American policies from active endorsement to criminalization of monopolies have largely been reproduced in Canadian jurisprudence where courts continue to grapple with the separation of powers under the *Constitution Act*.

It is this uncertain constitutional background that influences the tension between the federal government's interest in securing a competitive economy and the provinces' desires to protect certain industries. The Regulated Conduct Doctrine ("RCD") is the most prominent expression of this tension. The RCD was developed in response to conflicts between federal competition legislation and provincial regulatory regimes.<sup>4</sup>

This paper will discuss the legal and policy implications of the RCD in two stages. First, it will review the RCD from a policy based perspective. This will include an economic analysis of regulation and a review of the jurisprudence in which the doctrine developed. The analysis will show that the RCD defence suffers from a number of difficulties, many of which are rooted in unresolved constitutional problems relating to jurisdiction. These problems stem from the way in which this doctrine was developed—as a tool of statutory interpretation—which conflicts with most basic objectives of competition policy, including: (i) the prevention of abuses of economic power; (ii) maintaining free competition; and (iii) economic efficiency.<sup>5</sup>

In light of the RCD's deleterious effects on competition policy, a second aim of this paper will be to discuss methods of reconciling federal competition law with provincial regulation. It is indisputable that most modern economies rely on at least some legal or constitutional limits to competitive markets. The important debates centre on how best to make such limits legally perspicuous and adaptable to changing economic conditions. Wilson and Wydrzynski recognized that “the free competition value will clash with the value of regulation, both on a federal-provincial basis as well as intra-federally. Yet, in all of these conflicts, some constitutional interpretive doctrine must be found to respect the competing sovereign will(s).”<sup>6</sup> In this paper's submission, the common law has made little headway towards clarifying the separation of federal and provincial jurisdictions in the context of the RCD defence. A proposed reform advanced here is to integrate the RCD into the statute in a more comprehensive way that goes beyond the recent amendments to the *Competition Act*.<sup>7</sup>

## (ii) Outline

This paper is divided into sections that examine the RCD from the perspective of the economic theory of regulation and the substantive law supporting the doctrine. Section 1 will proceed with a discussion of the economic theory of regulated conduct and how it applies to the legal and policy issues raised by the RCD. Section 2 will provide an overview of the foundations of the doctrine and a critical examination of the early jurisprudence. Section 3 will assess the modern application of the RCD since the Supreme Court's seminal decision in *Jabour v. Law Society of British Columbia*.<sup>8</sup> Finally, section 4 will discuss the important questions left unanswered by the jurisprudence and section 5 will conclude with some remarks on the relationship between competition and regulation.

### [1] The Economics of Regulated Conduct

#### [1.1] Stigler's Theory of Regulation

The classical statement on the economics of regulation was articulated by Nobel Laureate George Stigler in “The Theory of Economic Regulation”.<sup>9</sup> Stigler developed what is known as the capture theory which predicts that interest groups and other political participants will seek to harness the coercive powers of the state by advocating for regulations designed principally for their benefit.<sup>10</sup> The empirical predictions of Stigler's theory are well known to public choice economists—regulation will predominate in industries where participants are well organized, share closely aligned interests, and have accumulated substantial political capital. Moreover, smaller groups tend to face lower mobilization costs and have an easier time lobbying for political support by the “free rider” problem which tends to increase in proportion to the size of a group.<sup>11</sup> In the Stiglerian tradition, regulation acts as “a fulcrum upon which contending interests seek to exercise leverage in their pursuit of wealth.”<sup>12</sup>

The theory of regulation provides a basis for understanding the political clout miring the application of the RCD. From an economic perspective, the question is twofold: what does it mean for an industry to be regulated, and which industries are most likely to become insulated from competition in this way? An answer to these questions can be found in both Stigler's and Sam Peltzman's contributions to the economic theory of regulation. For Stigler, government's coercive ability to tax, dispose of property, and institute regulations represents an opportunity for groups to secure their economic interests by acquiring state support for their trades. An industry becomes regulated in four major ways:<sup>13</sup> (i) direct subsidization of its business activities through, for example, government remittances; (ii) control over the entry of new rivals through

pricing policies, vertical integration, and licensing; (iii) protective tariffs and related trade barriers; and (iv) direct price fixing.

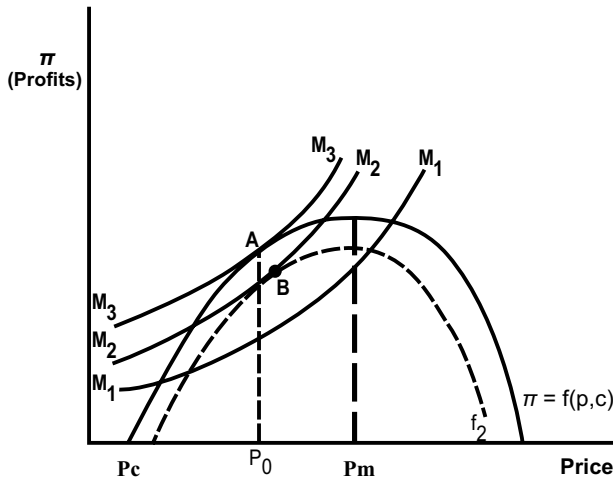
The second question, and the more interesting one for the purposes of this paper, is the question of which industries are most likely to benefit from the four methods of regulation identified by Stigler. Peltzman's analysis provides a partial answer that helps elucidate one of the principal difficulties with the RCD. For the purposes of this analysis we can assume that domestic regulation involves price restrictions and entry barriers. A look at most regulated professions or marketing boards confirms that these methods of regulation (or variants thereof) predominate.<sup>14</sup> Working with the assumption that politicians are rational actors, we can apply Peltzman's model to determine the type of industry that is more likely to become regulated. The following will reproduce Peltzman's model in an abbreviated form.<sup>15</sup>

[1.2] The Peltzman Model

The politician's objective is to maximize their political support function represented as:

$$M = M(p, \pi)$$

Where  $p$  represents the price of a good and  $\pi$  represents industry profit.  $M(p, \pi)$  is assumed to be decreasing in price because consumers increase their opposition when the price is raised via regulation and it increases in industry profit because firms respond with greater support as profits increase. The profit function denoted as  $\pi(p)$  is increasing over the range  $P_c$  (competitive price) and  $P_m$  (monopolistic price) and decreases thereafter as indicated in Figure 1 below:<sup>16</sup>



The crux of Peltzman's model is that the political support function  $M(p, \pi)$  represents a tradeoff between consumer and producer support based on price and profit.  $M(p, \pi)$  decreases in price because consumers withdraw their political support when the price is higher whereas it increases with industry profit since firms respond to higher prices with greater political support up to the level of price  $P_m$ . Profit depends on price where  $\pi = f(p, c)$  and  $c = c(Q)$  production costs are a function of quantity. The price that maximizes the political support function can be found by superimposing a politician's indifference curves onto the profit function. The curve  $M_1$  reflects all combination of price and profit that generate  $M_1$  level of political support. The slope of curves  $M_1$  to  $M_3$  is positive, reflecting the fact that political support increases when profit is high and prices are low, with  $M_3 > M_2 > M_1$ . The optimum at  $P_0$  indicates that politicians will neither settle for a perfectly competitive market (at  $P_c$ ) nor a monopolistic one ( $P_m$ ) because at either extrema they could increase their political support by increasing or decreasing the regulated price.

Peltzman's model has important implications for the RCD as a doctrine that straddles the boundary between policy making and statutory interpretation. First, the optimal solution with equilibrium price  $P_0$  im-

plies that the industries most likely to be regulated are those that are either highly monopolistic (as is the case with many natural monopolies such as railroads, gas utilities, telephones, etc.) or have the potential to be very competitive in the absence of regulation.<sup>17</sup> Examples of the latter include agriculture, trucking, taxi cabs, crude oil, and securities.<sup>18</sup> In the case of natural monopolies, the reasons for government intervention are clear: a broad base of the electorate will be affected by higher prices and this creates significant political pressure for price caps and revenue controls. With competitive industries, the explanation for selective regulation is not as obvious. The reason why certain competitive industries manifest price controls and entry regulation while others do not is a highly contextual socio-historical question. In terms of the RCD, however, Peltzman's analysis is important because it illustrates the struggle between competitive and regulatory pricing faced by legislators who must weigh the interests of consumers against those of producers in their effort to maximize votes. The basic conclusion of the model—that there is an incentive for legislators to regulate the prices of even highly competitive sectors—goes to the heart of the political problem affecting the RCD. The drive towards protective regulation frequently conflicts with the goal of preserving competition. The Peltzman model encapsulates this policy dilemma. If legislators have an incentive to regulate competitive industries the RCD runs the risk of becoming a judicial proxy for contentious policy decisions. By allowing judges to selectively immunize industries from the provisions of the *Competition Act* the RCD constructs a judicial veneer over highly politicized questions that are not suited to the confines of *stare decisis*. In what follows we will focus on the RCD in its role as a legal fiction assisting in the protection of industries that are potentially competitive yet continue to benefit from judicially protected regulation.

## [2] History of the RCD

### [2.1] Constitutional Difficulties

The RCD emerged as a by-product of the constitutional difficulties facing original anti-combines legislation in Canada. The early competition law went through three distinct phases.<sup>19</sup> The initial statute suffered from poor legislative drafting and the subsequent 1919 legislation was held to be *ultra vires* of the Parliament of Canada by the Privy Council.<sup>20</sup> Viscount Haldane viewed the legislation's purported justification under the criminal law power in s. 91(13) of the British North America Act to be going beyond the natural "domain of criminal jurisprudence."<sup>21</sup> The final draft of legislation, and modern predecessor to the *Competition Act* (the "Act")<sup>22</sup>, was the *Combines Investigation Act* (the "CIA") enacted in 1923 and constitutionally upheld in a 1929 reference<sup>23</sup> along with s.498 of the Criminal Code which was substantively similar to the current anti-conspiracy provision.<sup>24</sup> In the 1929 reference, the Supreme Court allowed for a more expansive interpretation of the federal government's criminal law powers but nevertheless urged for continued deference to areas of provincial competence, which, since *Citizens Insurance Co. v. Parsons* implied more deference to the provincial jurisdiction over civil rights and property.<sup>25</sup>

### [2.2] Birth of the Doctrine

From its inception the first valid legislation again encountered a jurisdictional dilemma. In 1929, only a few months after the constitutional reference was heard by the Supreme Court, a case came before the British Columbia Court of Appeal in which the accused, Chung Chuck, challenged the validity of the *Produce Marketing Act* under which he was convicted of marketing potatoes without the permission of the provincial marketing board.<sup>26</sup> The defendant relied upon the claim that the legislation was contrary to s. 498 of the *Criminal Code* because its provisions restrained trade. MacDonald J.A. dismissed this argument by appealing to the intent of the anti-conspiracy provision:<sup>27</sup>

There is no intent [in the *Produce Marketing Act*] to "unduly" limit the facilities for producing an article of commerce even though it may lead to under-production. There is no intent to restrict or injure trade in relation to farm produce. The purpose of the Act is to better conditions in an important industry. The object of traders in every line of industry is to secure as large a share of that trade as possible at remunerative returns. That is not unlawful.

MacDonald J.A.'s judgment involved reading down the conspiracy provisions in relation to the provincially

sanctioned conduct so that the orders of the provincial marketer were not interpreted as “undue” restraints on trade. The result was the birth of a common law doctrine that immunized certain industries from prosecution under the anti-conspiracy laws.<sup>28</sup>

The RCD represented a legal compromise to the politically charged issue of federalism. Combines legislation, after being denied the opportunity to operate under trade and commerce<sup>29</sup> struggled to establish itself under the federal government’s criminal law power via the inclusion of s. 498 in the *Criminal Code*. Indeed, its validity had been challenged twice before, and in the earlier decision by Viscount Haldane in the Privy Council, it was held that the power to legislate a board of inquiry that could monitor the contracts of particular businesses or trades fell outside the jurisdiction of the federal government.<sup>30</sup> Following the 1929 reference when the Privy Council reversed its earlier views<sup>31</sup> the same problem resurfaced in *Chung Chuck*. The solution of interpreting “undue” so as to preclude application of the conspiracy provisions to provincial regulators was inconsistent with earlier judgments, particularly those of Mr. Justice Duff in *Weidman v. Shragge* where he declared:

I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing all competition in that trade comes under the ban of the enactment.<sup>32</sup>

*Weidman*, which was a case predating the Privy Council’s decision in 1922,<sup>33</sup> pointed towards the rule that any trade restriction was *prima facie* grounds for triggering the application of the anti-combines legislation. What then motivated the court in *Chung Chuck* to interpret away the application of s. 498 of the *Criminal Code*? One view is that the use of the word “unduly” in the section was enough to support the conclusion that Parliament did not intend to restrict *all* monopolistic activities but only those that were contrary to the public interest.<sup>34</sup> From the legislative history, it is clear that not all combines were to be targeted, but it is also true that a central purpose of the legislation was to curb the inflationary effects of monopolizing industries.<sup>35</sup> The Parliamentarian to spearhead the first combines law in Canada, N. Clarke Wallace, made it clear from the outset that a key rationale for the legislation was to guard against unwarranted price increases and the transfer of income from consumers to producers.<sup>36</sup> Mr. Wallace had tried in 1891 to remove “unduly” and “unreasonably” from the Act in order to facilitate prosecution of combines, many of which were previously able to immunize their conduct by reference to these words. Other MPs at the time were of the view that the central rationale behind anti-combines legislation was to curb the rapid price increases that had spread across many concentrated industries.<sup>37</sup>

Normal rules of statutory interpretation require reading the words of an Act in their entire context and in their grammatical and ordinary sense and, where necessary, interpreting the purposes of the Act and the intentions of Parliament in order to deduce meaning.<sup>38</sup> In combines legislation the legislative history is of particular importance and this was recognized as early as the *P.A.T.A* decision in 1931 where Lord Atkin held that:<sup>39</sup>

Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires*; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

The ruling in *Chung Chuck* is difficult to reconcile with the rationales of combines legislation and the importance of its history in determining parliamentary intent and the question of jurisdiction. MacDonald J.A. simply dismissed the jurisdictional challenge by creating a defence premised on statutory interpretation.

### [2.3] Expanding the RCD

*Chung Chuck* was followed by a number of decisions using statutory interpretation to protect the activities of marketing boards. The first of these cases was *R. v. Simoneau* where the orders of the Quebec Dairy Commission were challenged on the grounds that they contravened either the *Criminal Code* or the *CIA*.<sup>40</sup> The court in that case decided that the actions of the Commission did not amount to an “agreement” within the meaning of the *Criminal Code*, and further, that there was no intent on the part of the Board to limit unduly the production or processing of milk products.<sup>41</sup> The importance of *Simoneau* was that it connected the language of undueness in s. 498 with “public interest”.<sup>42</sup> The court thus added a further interpretive layer to the approach taken in *Chung Chuck* by ruling that certain kinds of combines were not contrary to the public interest: “[A]ll combines are not prohibited, but only those which are to the detriment and against the interest of the public. Combines which are in the interest of the public or for its benefit or advantage are not prohibited.”<sup>43</sup>

### [2.4] Voluntary Conduct and the Presumption of Public Interest

The rulings in *Chung Chuck* and *Simoneau* were consolidated in the Supreme Court reference *Re Farm Products Marketing Act*.<sup>44</sup> In that case, the Court distinguished between voluntary and compelled conduct under a provincial statutory scheme. It held that voluntary conduct related to the actions of individuals or corporations who were conspiring to fix prices or limit supply whereas compelled conduct referred to activity that was required under a provincial scheme and therefore was lawful:

The provisions of the *Combines Investigation Act* and the *Criminal Code* envisage voluntary combinations or agreement by individuals against the public interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed.<sup>45</sup>

The 1957 reference case was advanced by the leading authority on the RCD in the pre-*Jabour* era: *R. v. Canadian Breweries Ltd.*<sup>46</sup> This case was the first to deal with the actions of regulatees (brewing magnates) rather than a challenge to the authority of a regulator. Interestingly *Canadian Breweries* was not a case involving the conspiracy provisions that were previously the focus of RCD case law. Instead, the RCD was applied as a defence to a prosecution under the merger provisions of the Act.<sup>47</sup> *Canadian Breweries* established a proposition, frequently cited in the modern jurisprudence, that provincial regulatory regimes, as long as they are *intra vires*, are assumed to have been legislated in the public interest. McRuer C.J.H.C. discussed this principle:

When a provincial legislature has conferred on a commission or board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest.<sup>48</sup>

An important aspect of Justice McRuer’s judgment is that he clarified the RCD’s application to private actors or regulatees engaged in potentially anti-competitive mergers where provincial regulation exists.<sup>49</sup>

### [2.5] Critique of the Early Doctrine

The history of the RCD illustrates several recurring themes. First, courts have been careful not to delve into constitutional debates over the separation of powers when provincial legislation is challenged, notwithstanding the existence of an operational conflict.<sup>50</sup> Second, the decision in *Canadian Breweries Ltd.* added a protective layer to provincially sanctioned restraints on trade by establishing the presumption that such legislation is made in the public interest. Third, *Canadian Breweries* also recognized that the RCD applies to regulatees (commercial businesses) as well as regulators (marketing boards). Finally, the history of the RCD before 1989 points to the constitutional uncertainty that results when courts use it to avoid the jurisdictional problem. Absent statutory interpretation, judges have not clarified how the conflict between competition legislation and provincial regulation will be resolved. The decision in *Canadian Breweries* has especially been

susceptible to criticism on the basis that the court in that case appeared to strengthen the jurisdiction of the provinces over the federal government by reference to the statutory language even though a conspiracy case was not before it. Wilson and Wyrzynsky argue that such a method of interpretation was overreaching, commenting on the impact of *Canadian Breweries* in later Supreme Court jurisprudence:

It must be emphasized that the interpretation of section 32 was not before the Court in *Canadian Breweries*, the section being used merely as a reference point. For the Supreme Court to employ this case as authority for its finding that public detriment is an element of section 32 is a novel and unsupported application of *stare decisis*. Beyond the case law under section 32, the legislative history of the section clearly reveals that public detriment was not intended by Parliament to be an element of the offence of conspiracy.<sup>51</sup>

Wilson and Wyrzynsky's critique of *Canadian Breweries* resonates given that the Supreme Court continues to rely on this principle even in the absence of authority outside the jurisprudence on the RCD. Indeed, as discussed in section 3.7 *infra*, the Supreme Court decision in *Howard Smith Paper Mills v. The Queen* clearly militated against an approach based on "public interest" or "public detriment".<sup>52</sup>

### [2.6] Historical Summary

The importance of the RCD's history is that it sheds light on the constitutional problems facing competition policy that have largely been ignored until the challenge to s. 31.1 in *General Motors v. City National Leasing*.<sup>53</sup> In that case Chief Justice Dickson clarified the portions of the Act that were justified under trade and commerce, but did little to resolve conflicts that arise in the application of the RCD such as direct operational conflicts as opposed to necessarily incidental incursions into provincial jurisdiction. If there is a challenge to provincial legislation on the grounds that it infringes sections of the Act the courts may have to take another look at the interaction between trade and commerce and civil rights and property. This could become more of an issue in light of the new amendments to s. 45 of the Act that lack the dampening language of "unduly".<sup>54</sup>

## [3] The Modern Landscape

### [3.1] Specific versus General Authorization

The modern approach to the RCD was articulated by Grange J.A. in *R. v. Independent Order of Foresters*:<sup>55</sup>

The doctrine simply means that a person obeying a valid provincial statute may, in certain circumstances, be exempted from the provisions of a valid federal statute. But there can be no exemption unless there is a direction or at least an authorization to perform the prohibited act.

Mr. Justice Grange's summary is important because it illuminates an aspect of the RCD that has gained controversy in recent years. This is the question of the degree of statutory authorization required in order for the doctrine to apply. The answer depends partly on how one interprets the seminal ruling in *Jabour v. Law Society of British Columbia*.<sup>56</sup> *Jabour* was a case that involved a lawyer disciplined by the Law Society of British Columbia for "conduct unbecoming" a solicitor. He was accused of advertising his practice in a manner contrary to the regulations of the Law Society.<sup>57</sup> The court in *Jabour* facilitated the application of the RCD in situations where conduct was generally rather than specifically authorized by a provincial statute granting discretion to a regulator or professional organization. It is important to note that in *Jabour* the Benchers had no authorization to regulate advertising beyond a general mandate to control many aspects of the legal profession. Section 1 of the *Legal Professions Act* defined "conduct unbecoming a member of the society" as:

Any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession.<sup>58</sup>

This indicates that the court's decision in *Jabour* was highly deferential to the B.C. Law Society's regulatory power in regards to conduct that it deemed to be contrary to either the public interest or the legal profession.

### [3.2] Leeway Language

More recently, in *Garland v. Consumers' Gas Co.*<sup>59</sup>, a case involving a conflict between *Criminal Code* provisions and rate orders made by the Ontario Energy Board, the Supreme Court held that in order for the RCD to apply the federal law must contain "leeway language" that would permit the court to override the general principle that Parliament is "not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness."<sup>60</sup> The importance of *Garland* is that it re-affirms the view that the RCD is essentially a doctrine of statutory interpretation, gaining its force from facilitative language in a federal statute. Indeed the Bureau recognized the impact of *Garland* on the RCD in its 2006 Bulletin where it adopted a "cautious approach" to the doctrine.<sup>61</sup> The Bulletin recognized that the specific wording in the Act is essential for determining Parliament's intent to make the defence available.

### [3.3] Reviewable Conduct and the RCD

Another important aspect of modern case law on the RCD is its application to reviewable matters under Part VIII of the Act. As discussed in section 2.2 the early cases on the RCD were based on criminal provisions in the *CIA*, and, prior to that on s. 498 of the *Criminal Code*.<sup>62</sup> Hence, post *Jabour* it was uncertain whether the defence could apply to conduct which did not fall under the Competition Bureau's criminal jurisdiction. This uncertainty has eroded to a certain extent with the decision of the B.C. Court of Appeal in *Industrial Milk Producers' Association v. British Columbia (Milk Board)* ("*Industrial Milk*").<sup>63</sup> In that case, Mr. Justice Reed held that the RCD could apply to s. 31.1 of the Act which allowed for a civil cause of action. This position gained further support in *Law Society of Upper Canada v. Canada (Attorney General)* ("*LSUC*")<sup>64</sup> where the court ruled that s. 61 of the *Law Society Act* which provided for a mandatory insurance scheme did not contravene the provisions of the Act prohibiting tied selling, exclusive dealing, and abuse of dominance.<sup>65</sup> It should be cautioned, however, that neither *Industrial Milk* nor *LSUC* contained a comprehensive discussion of the RCD and its relation to the civil provisions of the Act. In *Industrial Milk* there was simply reliance on a civil cause of action rather than a civil offence such as abuse of dominance. In *LSUC* the court merely followed the submissions of counsel who agreed that the RCD was applicable to civil provisions.<sup>66</sup> Consequently, there has been no comprehensive discussion on the applicability of the RCD to civil reviewable matters or what the legal basis for such applicability would be.<sup>67</sup> Nevertheless, the two cases are supportive of the view that the RCD can at least in theory apply to civil reviewable matters.

### [3.4] The RCD and Federal Legislation

Since the RCD emerged as a product of conflicts between federal and provincial law there is some uncertainty over how it might apply with respect to a federal regulatory regime and competition law. The modern jurisprudence on the doctrine sheds some light on this problem, and it appears that courts are willing to take the statutory interpretation route when deciding whether Parliament intended to displace the Act with another comprehensive federal regulatory scheme.<sup>68</sup> Absent any guidance in the legislation, the case of *British Columbia Telephone Co. v. Shaw Cable System (B.C.) Ltd.* provides some judicial direction on the test for resolving concurrencies of jurisdiction.<sup>69</sup> *Shaw Cable* dealt with contradictory orders by the CRTC and a federal Labour Arbitrator in regards to a collective bargaining unit. The Supreme Court in that case developed a test for deciding which legislation prevails when there is an "operational conflict."<sup>70</sup> The Court set out a three step test for resolving such conflict: (1) First, an inquiry must be made into the legislative purposes behind the two administrative regimes; (2) Second, the decisions of the tribunals should be assessed to see if they are central to the purpose(s) behind their respective acts; (3) Third, the degree to which each tribunal fulfills a policy making role is an important factor determining which legislation should take precedence.

### [3.5] Federal Paramountcy and the RCD

The modern case law on the RCD continues to exhibit the same problems of constitutional uncertainty that plagued the doctrine in its early days. In particular, the RCD is inconsistent with the doctrine of federal paramountcy articulated by the Supreme Court in *Multiple Access v. McCutcheon*.<sup>71</sup> Paramountcy dictates that where a provincial law conflicts with a federal law to the extent that there is an impossibility of dual

compliance the federal law will displace the provincial law to the extent of that conflict.<sup>72</sup> This principle has recently been extended to situations where provincial law, by its effects, displaces or frustrates the purpose of federal legislation, in which case paramountcy also operates.<sup>73</sup> The trend in the last 30 years at the Supreme Court, from *Multiple Access* to *Rothmans, Benson & Hedges v. Saskatchewan*, appears to be in the direction of federal primacy over provincial legislation in situations of conflict.<sup>74</sup> This is particularly the case where there appears to be an exclusive domain of federal competence such as the *Competition Act*.<sup>75</sup> The RCD works opposite to the paramountcy doctrine by giving precedence to the provincial legislation (or more technically dispelling conflict through statutory interpretation). It can thus be seen that the RCD still suffers from uncertain legal foundations due to its incompatibility with the well established doctrine of federal paramountcy.

### [3.6] Public Detriment and the Criminal Law

The RCD's incompatibility with paramountcy raises questions as to why courts continue applying an interpretive approach that is at odds with the constitutional jurisprudence. One possibility is that statutory interpretation offers a more expedient resolution to the problem of conflicting legislation. By using an interpretation of the statute that avoids conflict the courts are able to reach a seemingly harmonious solution that provides appropriate deference to provincial protectionist interests. The question from a competition policy perspective is whether this harmony is real or illusory in terms of its effects on the operations of competition law, particularly in regards to its purposes. It has frequently been stated that the purpose of competition legislation is to protect the public interest in competition and that prevention of competition is *prima facie* unlawful since it operates *ipso facto* to the detriment of the public.<sup>76</sup> The court in *Chung Chuck*, however, concluded that provincial regulatory activity did not represent a restraint on trade notwithstanding that it had the effect of limiting competition. The exact words used by MacDonald J.A. in *Chung Chuck* are confusing when viewed in light of the purposes of competition policy:<sup>77</sup>

There is no intent to restrict or injure trade in relation to farm produce. The purpose of the Act is to better conditions in an important industry. *The object of traders in every line of industry is to secure as large a share of that trade as possible at remunerative rates. That is not unlawful* [emphasis added].

These comments illustrate that as early as 1929 courts were willing to form an interpretive sphere of protection around regulated sectors such as agriculture. It is no doubt true that the object of traders in every industry is to secure as large a share of trade as possible. This however, is exactly the reason why combines formed in the first place and a legislative backlash was exacted against them. Why should such conduct be shielded simply because it falls under the umbrella of provincial legislation? A deep operational conflict in an area of economic policy that is of national importance demands greater constitutional clarity and legislative certainty than a solution grounded in a vague interpretation of a word like "unduly". Moreover, there is a large body of case law which suggests that considering public detriment as the courts have done since *Canadian Breweries* is inappropriate given the plenary scope of the criminal law jurisdiction.<sup>78</sup> Wilson and Wydrzynsky discussed the jurisprudence on this point, referring to the key Supreme Court decisions on criminal law powers:<sup>79</sup>

If *Morgentaler* and the *Margarine Reference* are considered together, the rule which evolves is as follows: if the challenged section meets the test of the *Margarine Reference* in that there is an evil or undesirable effect upon the public, then, applying *Morgentaler*, the Courts must take the proscription of Parliament as given. There is no room for the Courts to alter the content of otherwise valid criminal law, nor is there jurisdiction to add elements to specific offences. This, however, is precisely what the Supreme Court has done in *Jabour*, adding an element of public detriment to the conspiracy provision.

Wilson and Wydrzynsky point towards a central problem with the RCD. The courts have used it as a device for importing extra-legal considerations into the definition of an offence that Parliament has deemed to be criminal. In this way they have encroached upon the federal government's exclusive right to proscribe criminal conduct. If Parliament had decided in the early 1920s that provincial regulatory bodies were to be exempt

from the application of the *CIA* they would have stated so explicitly in the wording of the conspiracy provisions. Absent such specific direction, the development of the RCD conflicts with the longstanding approach to interpreting criminal legislation. Wilson and Wydrzynsky provide an informative analogy in this respect:

The Court [in *Jabour*] reasoned that *since* Part V of the Combines Investigation Act was criminal *then* there was an implied element of public detriment. On this basis, an argument is open in respect of any criminal offence in which public benefit can be demonstrated, that an acquittal must be entered. This argument, valid as it may seem, given the decision in *Jabour*, leads to absurdity. For example, if an accused charged with trafficking in cocaine were able to demonstrate that the drug actually benefited the public's health, would he then be entitled to an acquittal? This question need not be answered in detail. If the elements of the offence as written in the statute are met, then the Courts must convict. [emphasis in original].<sup>80</sup>

In short, Canadian jurisprudence has clearly established that “public detriment” is not an element of a criminal offence. If such considerations are to find their way into judicial decision making there needs to be express statutory direction to that effect. Alternatively the offence should be redefined as civil which would indicate Parliament's intention to grant judge's greater latitude for interpretation with respect to conduct that has not been criminalized.

### [3.7] “Undue” Distinctions in Statutory Interpretation

If courts continue raising the specter of public detriment a separate but related issue emerges in terms of the inconsistent application of such a doctrine. This involves the problem of distinguishing between anti-competitive conduct that is legislated and purportedly “benefits” the public and conduct that does not fall under a legislative regime but might nevertheless be shown to be beneficial. If the courts are willing to accept that regulators or regulatees are acting in the public interest why should they preclude similar arguments from private citizens who can present evidence that their actions were taken in the public interest?<sup>81</sup> From a legal standpoint it is clear that when prosecuting criminal offences we do not inquire into the accused's perceived morality of their actions. Only affirmative defences are available in law. But if this is the case how can courts rely on a standard as ambiguous as the “public interest” and “public detriment” for defining a substantive defence to a conspiracy charge? Such a question should, where possible, be excluded from judicial discretion because it is an inherently political issue that involves balancing a multiplicity of interests.<sup>82</sup> This is especially true in the context of competition law where convictions carry substantial terms of imprisonment, hefty fines and associated stigma. Turning “public interest” into a question of statutory interpretation allows courts to determine by fiat conduct that is in the public interest without first addressing the constitutional question of jurisdiction in order to clarify or at least delimit the definition of “public interest”. In other words, the interpretive solution to conflicting legislation leaves serious gaps in our understanding of the scope of criminal legislation. If particular conduct is defined as criminal yet state actors and those sanctioned by the state are able to evade prosecution the law does not apply equally to its subjects and the rule of law is thrown into question.

The possibility of an inequitable application of the statutory interpretation approach was illustrated in *R. v. Howard Smith Paper Mills et al.* (“*Howard Smith*”) which involved an agreement by several manufacturers and wholesalers to fix the price of “fine papers”.<sup>83</sup> The defendants argued that their agreement did not unduly lessen competition because it helped to stabilize the paper mill industry during the Great Depression by allowing each firm to maintain some market share and continue operating at least part time. The court neglected to hear the defence that the price fixing agreement was in the public interest and ruled that any such evidence would be irrelevant. *Taschereau J.* upheld this ruling by appealing to principles developed in *Weidman v. Shrage* discussed in section 2.2:<sup>84</sup>

The public is entitled to the benefit of free competition, and the prohibitions of the Act cannot be evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine which the law forbids, and the wish to ac-

comply with desirable purposes constitutes no defense and will not condone the undue restraint, which is the elimination of free domestic markets.

There is a marked contrast between the court's interpretation and application of "unduly" in *Howard Smith* and *Canadian Breweries*. In the latter, there were several private brewers merging that had portions of their business regulated by the Liquor Control Board. In *Howard Smith* there was no such regulatory framework. From the perspective of "public interest" the discrepancy between the two decisions is questionable. Why allow for one set of companies to benefit from the RCD simply because a portion of their activities were regulated by a provincial Board while denying the same benefit to companies that had combined out of necessity in difficult economic times?

### [3.8] Policy & Legal Perspectives

From a policy standpoint, resorting to leeway language as a way of providing exclusive protection for certain industries represents a departure from the spirit of competition legislation as a framework law and raises legal concerns about the inequitable application of a criminal law. Leaving aside the equity concerns there are compelling economic reasons why such an interpretation is unwarranted. As described in the Peltzman model in section 1.2, politicians appear to have the incentive to regulate both monopolistic industries and highly competitive ones. This theoretical prediction is supported by casual observation which reveals that many potentially competitive industries frequently benefit from regulation (including trades as diverse as taxiing, peanut farming and advertising).<sup>85</sup> Agriculture in Canada has been the target of criticism due its archaic and inflexible quota system supported constitutionally by the decisions of the Supreme Court on marketing schemes in the 1970s.<sup>86</sup> This layer of provincial and federal regulation obviously conflicts with the aims of competition law and recent reviews have found that it may be damaging not only to the public in general but to the long term prospects of the industry.<sup>87</sup> William Robson and Colin Busby of the C.D. Howe Institute have documented the effects of the cartelization of Canada's agricultural sector:<sup>88</sup>

Government control of entry has blunted competition, hampered innovation, and slowed entrepreneurship. Premium prices for production quotas make entry costs punishingly high for new farmers. Supply management may be doing more harm than good to a new generation of farmers, casting doubt on the system's sustainability....From a fairness point of view, supply management privileges a few insiders by imposing costs on a larger number of consumers who are deprived of a wider selection of products and price competition.

The economic concerns with regulatory agencies such as marketing boards are aggravated by the legal difficulties of maintaining such complex administrative regimes. In this respect the interpretive approach of the RCD results in a poorly defined scope of powers for regulators and uncertain limits on the activities of regulatees. This is evident in *Jabour* where the Supreme Court gave wide licence to the B.C. Law Society to determine conduct that it considered to be contrary to the "public interest".

The expansion of the RCD to broadly styled regulatory legislation raises questions about the limits of the interpretive approach as well as its future application in light of the new amendments to the Act that came into force in March, 2010.<sup>89</sup> What limitations are there to conduct that restrains trade but has some connection, however tenuous, to a regulatory regime? The case of *Waterloo Law Association* ("*Waterloo Law*") points to the uncertainty hovering over this question.<sup>90</sup> In *Waterloo Law* a group of lawyers formed a county law association that established a fixed fee schedule for its members. Search warrants were issued pursuant to the Act as part of an investigation into unfair trade practices. The lawyers relied on the RCD and argued that s. 32(1) of the *Competition Act* was inapplicable to them because they were a "regulated industry" operating under the Law Society. Mr. Justice Eberle held that the Law Association was not immune from prosecution simply by virtue of the fact that lawyers are regulated professionals:<sup>91</sup>

The fact that governance of the legal profession and of its members is within the provincial legislative domain, under property and civil rights, does not remove lawyers from the reach of a valid criminal law. For example, a lawyer is subject to criminal prosecution if he commits murder or theft, or any other crime. This remains the case even where, as here,

the province has delegated governing powers over the legal profession to a provincial law society.

These comments suggest a stricter interpretation of the RCD, and support the view that the doctrine does not apply simply because members of a professional organization have their activities regulated in other respects. The prosecution in *Waterloo Law* was abandoned however, and so no proposition came out of the case on exactly how the interpretive approach delineates between regulatee conduct that unduly restrains trade and that which does not.

### [3.9] Summary of the Modern Jurisprudence

To summarize, the modern approach to the RCD has been characterized by three main developments. First, the landmark decision in *Jabour* expanded the doctrine to include generally authorized conduct. Second, the courts seem to have accepted the application of the RCD to civil reviewable conduct albeit without providing much direction on the legal basis for the application. Third, there are a number of cases which support the application of the RCD to federal in addition to provincial regulatory regimes. Finally the jurisprudence on the paramountcy doctrine as well as the recent decision in *Garland* seem to support the primacy of federal legislation and the view that Parliament “is not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness.”<sup>92</sup> Many of these developments have interfered with the economic objectives of competition policy and have judicialized highly political issues embedded in the public choice tradeoffs described by the Peltzman model. These problems, along with other important jurisprudential questions will be discussed in the next section.

## [4] Essential Questions

### [4.1] RCD: The Essential Features

The application of the RCD both in terms of the law and competition policy leaves many unanswered questions. Although the Bureau itself views the case law on the RCD as underdeveloped<sup>93</sup> there is some degree of consensus on its essential features. First, it is clear from a constitutional perspective that the provincial (or federal) regulatory statute must be *intra vires* as a standalone piece of legislation. As discussed, the RCD rests on indeterminate constitutional foundations, being directly opposed to recognized doctrines of federalism such as paramountcy. There is however, at least in theory, a prerequisite to its application, namely that the legislation has a semblance of being *intra vires* and does not encroach overtly upon the federal government’s exclusive jurisdiction over inter-provincial trade.<sup>94</sup> Second, the party relying on the RCD must be engaging in conduct that is within the scope of the regulatory legislation, although its activities need not be specifically authorized. This requirement exists in order to prevent individuals or organizations whose conduct falls under a regulatory regime in certain respects to rely on this fact alone as immunity from prosecution.<sup>95</sup> Third, the regulatory power must not only be authorized but actually exercised.<sup>96</sup> This is an important and often overlooked point in the RCD jurisprudence. The requirement that regulatory power is “exercised” simply means that where a regulatory agency has forborne from exercising its powers over regulatees there is some authority to suggest that the RCD cannot be relied upon.<sup>97</sup> Finally, the conduct must not serve to frustrate the purposes of the regulatory legislation which is corollary to the principle that the trade restraints must be authorized.<sup>98</sup>

### [4.2] The Key Questions

Based on the aforementioned features, the following questions are geared towards some of the more interesting and contentious areas of the RCD jurisprudence:

- (1) How do we reconcile the aims of competition policy, particularly the maintenance of free competition and economic efficiency, with provincial regulation that tends to oppose these objectives?
- (2) What extent of regulation is required to trigger the application of the RCD? Does the principle of general authorization found in *Jabour* apply only to the criminal prohibitions

in the Act or does it also extend to the civil provisions? Is there a link between the level of statutory authorization and the application of the RCD as a defence to conduct prohibited by the Act?

(3) Given the requirement in *Canadian Breweries* that the regulatory power must be exercised, what is the status of the RCD in relation to conduct which a regulator has forborne from regulating? In other words, does the Bureau have the jurisdiction to investigate and prosecute activity that a regulator has the power to regulate but has omitted from regulation?

(4) Are courts being more deferential to the regulatory decisions of professional organizations, particularly self-regulated professions such as law societies?

(5) What is the status of the new *per se* offences in the *Competition Act* in relation to the RCD? Is it possible to reconcile the decision in *Garland* which reaffirmed the interpretive approach to the RCD with the absence of leeway language in the new s. 45(1) of the Act? Does s. 45(7), which supports a continuation of the doctrine, provide enough direction for judges to continue applying the RCD as before?

(6) Finally, and perhaps most importantly, is there a resolution to the constitutional uncertainties in the RCD by statutorily integrating the defence?

A discussion of these problems and proposed solutions is contained in the following sections.

#### [4.3] Reconciling Divergent Policies

Competition policy is said to be “concerned with making the best use of competition as a means of allocating resources efficiently in the economy.”<sup>99</sup> As a doctrine that supports certain monopolistic practices, the RCD frustrates this goal of allocative efficiency and contributes towards a more protectionist vision of federalism. Although laws of general application such as the *Competition Act* are necessary for achieving national economic objectives it is important to keep in mind that competition policy does not operate in a vacuum. The demands of a mixed market system necessitate some government intervention for the protection of industries from harsh or highly inequitable conditions. Former Bureau Commissioner Sheridan Scott discussed this in a speech to the C.D. Howe Institute:<sup>100</sup>

Effective competition itself can only take place in a healthy society, and healthy societies are not anarchies, but are built on social laws and regulations that develop and support our all too human aspirations. And even our markets depend on certain economic regulations – think of the importance of contract and intellectual property laws.

Ms. Scott’s comments speak to the realities of the Canadian economic landscape. Aside from the common law which “regulates” activities like contract formation and tort liability, an abundance of industries including public utilities and telecommunications have long operated as government supported natural monopolies. Economies of scale typically dominate in these industries and consequently regulated monopolies are usually a more favourable (and arguably a more efficient) solution than price competition. This indicates that the substantive aims of competition policy can never realistically be segregated from the political and economic landscape in which they operate. Regulation will frequently encumber if not outright oppose the basic economic philosophy of price competition. The question is whether it is possible for regulation to act as a *complement* rather than a *contradiction* to competition policy in order for a desirable equilibrium to be struck between free markets and regulatory controls.

The courts in Canada have been of little assistance in helping to achieve this balance. As Gorecki and Stanbury argue, the Supreme Court has lost sight of the key objective of maintaining free competition:<sup>101</sup>

As the *Aetna Insurance* (1977), *Atlantic Sugar* (1980), and *Jabour* (1982) decisions of the Supreme Court of Canada indicate, the majority of Canada’s court of last resort appears to have lost sight of the substantive meaning of the public’s interest in curbing restraints of

trade. The majority has totally ignored the rhetoric of free competition, although the few dissenters have maintained the tradition. The majority might well re-read the analysis of Mr. Justice Idington in *Weidman v. Shragge*, written some seventy years ago.

The case of *Weidman*, as one of the earliest statements of competition policy, suggested that courts should accept the promotion of free competition as an important purpose underlying combines legislation. Instead however, many judges have adopted a much more regulation friendly approach, refusing as Mr. Justice O'Sullivan did, to interpret the legislation through a free market lens:<sup>102</sup>

With respect to those who hold the contrary view, I think that the *Combines Investigation Act*, even considered as a whole, is not designed to protect a system of free competition, but rather to restrict "undue" interference with competition.

In regards to the interpretation of "undue" and whether the common law would protect free competition, Justice O'Sullivan had the following to say:<sup>103</sup>

Capitalism and the free market have, however, never been enshrined in the common law. From the earliest times down to the present day of wage, price, and rent controls, the law has shown a determination to prevent capitalism and free competition from injuring the public good as conceived by Parliaments and Legislatures.

These comments illustrate how political inclinations have shaped the interpretation of the Act and have done little to address the related problems of competition law and federalism. Whether the common law protects free competition or not is a political question and one that cannot be answered with much clarity by judges. Accordingly, statutory reform could greatly assist courts, regulators, and market participants by providing a more precise benchmark on the purposes of the Act and its relationship to provincial regulation. The current purpose clause provides a mixed message that has been criticized for advocating irreconcilable objectives and little direction on the political nature of the problems being addressed:<sup>104</sup> A solution would be to draft a narrower purpose clause that can better articulate the three most basic objectives of competition policy as defined in the literature.<sup>105</sup>

#### [4.4] The Extent of Regulation

A purpose clause that grapples with the problems of federalism would represent an important step forward in clarifying the application of the RCD. A much narrower problem, however, is the specific versus general authorization debate that emerged in the wake of the *Jabour* decision.<sup>106</sup> If we take the basic principle from that case—that general authorization in the form of discretion to regulate is sufficient to trigger the RCD—the main issue for competition policy is whether this is limited to a potential conflict between the criminal provisions of the Act and provincial legislation or if the doctrine can also apply to a prosecution made pursuant to any section of the Act including civil reviewable conduct. In this paper's submission the case law supports the latter view. The Bureau's position is that there has been no definitive ruling on the issue and therefore it refuses to recognize the general application of the RCD to civil matters.<sup>107</sup> Based on the decision in *Jabour* and its interpretation in cases such as *LSUC*, however, there appears to be sufficient authority for the view that the doctrine could indeed apply more generally to other sections of the Act. In *Jabour*, s. 1 of the *Legal Professions Act* allowed the Benchers to determine what constitutes "conduct unbecoming a member of the society."<sup>108</sup> The Supreme Court held that because the legislature had styled the power of the Benchers in such broad terms it was within their power to limit the advertising of members in the public interest. This is a very broad proposition and one that can easily be extended to reviewable matters. Part VIII of the Act reveals little substantive differences between the civil reviewable conduct and the criminal provisions aside from penalties.<sup>109</sup> The Competition Bureau's position is that the RCD has traditionally been applied to shield provincial legislation from being labeled as criminal. To cite this as a reason for not applying the doctrine to civil provisions, however, represents a much narrower view of the doctrine than that supported by the jurisprudence. Historically, competition legislation was grounded in the federal government's criminal law power. Gradually, as economic liberalization expanded the scope of competition law, many of the criminal provisions became quasi-criminal and or were replaced with civil provisions. Consequently, in

*GM v. City National Leasing* Dickson C.J. upheld the civil cause of action in the *CIA* under the federal trade and commerce power.<sup>110</sup> In deciding that the RCD does not apply to the civil provisions, the Bureau appears to have concluded that when the criminal “stigma” is not present federal paramountcy should apply and the civil provisions of the Act take precedence over any provincial regulations that contravene them or frustrate their purpose.<sup>111</sup> The question since *Labour* is: why make the distinction? If courts are willing to permit law societies to restrict market activity in the public interest it appears unlikely that they will take a more restrictive approach simply on the grounds that some provisions do not attract a criminal stigma. Indeed, a key principle emerging out of the 1957 Farm Products reference is the principle that *any* scheme otherwise within the authority of the legislature is not against the public interest when the legislature is seized of the power and obligation to take care of that interest.<sup>112</sup> This implies that the criminal/civil distinctions are not really that consequential to the application of the RCD unless it can be shown that there is a critical nexus between the “public interest” and criminality. The discussion in section 3.6 emphasized that outside of the RCD jurisprudence the Supreme Court has firmly opposed any such nexus and has frequently held that the only element of public interest in a defence is that specifically articulated by the legislature.<sup>113</sup> Accordingly, it should make no difference whether the conduct is civil or criminal because the “public interest” has not been firmly entrenched in criminal law generally nor is it necessarily linked to criminal conduct under the Act outside of the RCD jurisprudence.

#### [4.5] Forbearance

An issue that is related to the scope of a regulator’s statutory authorization is whether the Bureau has jurisdiction to investigate in situations where conduct falls under a regulatory regime but the regulator has forbore from exercising its powers. Some studies have dealt with this issue, particularly in regards to the CRTC and its forbearance from regulation in the telecommunications industry.<sup>114</sup> Various provincial regulatory bodies have statutorily mandated forbearance provisions. For example, s. 29(1) of the *Ontario Energy Board Act, 1998* allows the Board to refrain from regulation if it finds that substantial competition already exists:<sup>115</sup>

On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

Provisions of this kind may allow regulatees to claim immunity through the RCD on the grounds that the Bureau has no jurisdiction to embark on an investigation or prosecution (overlapping jurisdiction argument) or simply because their conduct is tacitly consented to by the regulators on the basis that it chose not to intervene (implicit consent argument). The rule applicable to forbearance was stated as obiter dicta by Mr. Justice Davies in the case of *R. v. British Columbia Fruit Growers Association*.<sup>116</sup> That case dealt with the trial of an accused charged with unduly limiting the facilities for storing tree fruit. The tree fruit industry in B.C. was regulated and sold its produce centrally; however, independent growers were permitted to operate outside the scheme. In 1976 the accused entered into an agreement that had the effect of preventing independents from using storage facilities for their fruit. They were charged with contravening s. 32(1)(a) of the *CIA*. One of the defences relied upon was that there was authorization for this agreement under the regulations of the *Natural Products Marketing Act* which allowed the Board to control the operation of packing houses.<sup>117</sup> Mr. Justice Davies rejected this argument on the grounds that the act authorized the Board to control these operations but it did not do so.<sup>118</sup> This decision followed *Canadian Breweries* in that it required the regulator to exercise their power in order for the RCD to apply. *B.C. Fruit Growers* turned on an interpretation of “unduly” and so no further guidance was given on the Bureau’s jurisdiction to commence an inquiry. Mr. Justice Davies’ rejection of the defendant’s claim that they were regulated, however, represents an implicit acceptance of the Crown’s ability to commence a prosecution where regulatory power exists but has not been exercised. In conjunction with *Canadian Breweries* this provides some authority for rejecting the implicit consent argument.

The overlapping jurisdiction argument presents a different problem. It amounts to a claim that the Bureau should be precluded from making incursions upon the jurisdiction of provincial or federal regulatory bodies. Any such incursion would be *ultra vires* the powers of the Bureau. One possible solution to this problem is the application of *Shaw Cable* discussed in section 3.4. Although that case dealt with conflicting decisions made by a Labour Arbitrator and the CRTC, the test developed by the Court is instructive on which administrative regime takes precedence in situations of jurisdictional overlap. The three factors discussed by L'Heureux Dubé J. point to some of the main issues that courts are likely to consider when deciding on the issue of forbearance and overlapping jurisdiction. In determining whether forbearance by a regulatory agency allows the Bureau to conduct an investigation the courts should consider (i) the jurisdiction issue (separation of powers); (ii) the purposes behind the Act and the regulatory legislation; (iii) the degree to which the Bureau is fulfilling its policy mandate when embarking on an investigation or prosecution of a regulatee and whether the regulatory agency has established, through its forbearance, objectives compatible with competition policy. In short, the test in *Shaw Cable* provides guidance for the problem of forbearance and the Bureau's jurisdiction. If the Bureau can establish that the powers of a regulator are not being exercised and that its incursion into the regulator's jurisdiction is in support of one of its policy objectives it may legitimately investigate and prosecute in areas that would otherwise be protected by the RCD.

#### [4.6] The RCD and the Professions

In 1976, the *CIA* was amended to include application of its provisions to professional organizations.<sup>119</sup> Professions in Canada make up approximately 20% of the service economy and 7% of total hours worked in the business sector.<sup>120</sup> The main professions both regulated and self-regulated include doctors, lawyers, dentists, architects, engineers, paralegals, real estate agents, and property appraisers.<sup>121</sup>

The Bureau's approach to the professions is highlighted by four main areas of concern, two of which are of particular importance to the RCD: (i) suggested fee schedules and (ii) advertising prohibitions.<sup>122</sup> With respect to fee schedules, the *Waterloo Law* case dealt with mandatory fees set up by an executive representing regional lawyers.<sup>123</sup> In this case the RCD was shown to be inapplicable on the basis that lawyers, although regulated by the Law Society, were not authorized by the statute to impose any mandatory fee schedules.<sup>124</sup> The decision in *Waterloo Law* seemed to support a stricter approach to authorization but this has largely been eroded by the prevailing judgment in *Jabour* with respect to advertising. Advertising is especially important for fulfilling many of the objectives of competition policy because it increases awareness of prevailing prices, leads to more informed purchases for consumers, and ultimately encourages greater competition and downward pressure on prices. Indeed, in *Jabour* it was argued that restrictions on advertising impeded the operation of high volume, low cost legal clinics whose success was based on their ability to reach out to laypeople through extensive advertising.<sup>125</sup> Given that advertising is closely linked to the promotion of free competition and economic efficiency, the ruling in *Jabour* is especially difficult to reconcile with the aims of competition policy. Discretion under statutory authority is limited by principles such as the rule of law as well as the purposes laid out in the statute. It is difficult to see how a provision in the *Legal Professions Act* that allows benchers the right to restrict conduct contrary to the public interest could be given such a broad liberal construction. Other cases, notably *Mortimer v. Corp. of Land Surveyors of the Province of British Columbia*, developed the principle that statutes are to be strictly construed when there is ambiguity as to whether they give rise to the RCD defence.<sup>126</sup> *Mortimer* is of particular interest as a comparison to *Jabour* because it also dealt with a self-governing profession, namely land surveyors. It raised questions not only about the Supreme Court's liberal approach to interpretation in *Jabour* but the general deference seen in all cases involving law societies except for *Waterloo Law*. Dohm J. had the following to say about professional organizations and the interpretation of monopolistic statutes:<sup>127</sup>

The interpretation of section 4(g) of the Act and whether it allows the Corporation to pass a bylaw prescribing a minimum tariff of fees is affected by the monopolistic nature of the legislation and also the general (as opposed to specific) description of the tariff. There is no quarrel that the legislation as a whole creates a professional monopoly comprising 300 members in an overall population of 3 million people.

He went on to discuss the principle of strict construction:<sup>128</sup>

Not to be overlooked too, is the realization that Parliament through the Competition Act makes it plain that the nation should be protected from those who would join together to control the market by fixing prices. As was indicated earlier, there is much to be gained in giving professional bodies the power to regulate themselves. I do wonder though, if the common good is served by providing to a professional body (monopolistic in nature) through legislative authority and without limitations, the power to engage in activities which would be illegal if carried out by anyone else. Surely in these circumstances, a strict construction of the legislation is a reasonable approach.

The approach taken by Mr. Justice Dohm was supported by case law predating *Jabour* which dealt with professional architects. In *Pauze v. Gauvin*, Taschereau J. had the following to say about the interpretation of monopolistic statutes governing the professions:<sup>129</sup>

The statutes creating these professional monopolies, sanctioned by law, access to which is controlled and which protect their members in good standing who meet the required conditions against any competition, must however be strictly applied. Anything which is not clearly prohibited may be done with impunity by anyone not a member of these close associations.

The marked contrast between Taschereau J.'s approach to statutory interpretation and that adopted by the Court in *Jabour* is salient. Recall that the provision at issue in *Jabour* was styled very broadly. What can explain the very generous approach taken by the Court in construing the *Legal Professions Act*? Could Parliament have intended the Benchers to have such broad reaching discretion that they could prohibit activity shown to be essential to Mr. Jabour's type of practice? The cases on strict construction suggest that some conformance to competition principles is desirable when interpreting broadly styled regulatory powers. Nevertheless, the Court in *Jabour* was willing to take a more generous interpretation, hinting at some pattern of deference to law societies that was later echoed in the *LSUC* case when the RCD was ostensibly expanded to civil reviewable conduct.

#### [4.7] Statutory Amendments and the RCD

The new amendment to s. 45(1) of the Act and its impact on the RCD was briefly discussed in section 3.8. The most recent case on the RCD is undoubtedly *Garland*. In that case, it was held that the RCD will apply only where Parliament expressly or by necessary implication provides leeway in a criminal provision for those acting pursuant to valid provincial legislation.<sup>130</sup> The new section 45(1) now contains the following wording:<sup>131</sup>

Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product

The absence of "unduly" makes the offence *per se* for the first time in its history. The lack of leeway language has not eliminated the RCD, however, as *Garland* might predict. Instead the drafters have declared the continuation of the doctrine through section 45(7) of the Act which provides that:<sup>132</sup>

The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Section 45(7) raises an interesting problem for the RCD because it allows for the jurisprudence of “unduly” to continue in force despite the absence of the critical language that hitherto supported the interpretive approach. This “ghost” section is thus problematic because it is premised on the assumption that the common law has produced determinable and consistent rules on the RCD, a view that has hopefully been dispelled by the analysis in this paper. The section states that the “rules and principles of the common law” continue in force. Given the discussion in this paper we may legitimately wonder what those rules are. From the RCD’s history it is clear that they are no more than selective judicial interpretations on the statutory wording: “undue”, “agreement”, “public interest”, etc. From this perspective, the most plausible view of s. 45(7) is that it directs judges to consider the previous legislation as described through the common law. The problem with this approach is that it provides such an unclear standard. Not only will judges be interpreting the sections of past legislation that is now amended, they will also be interpreting the interpretations of previous judges on that very same legislation. Such layers of interpretation create the risk of inconsistent judgments resulting from judges’ different views of the RCD case law.

#### [4.8] The Legislative Solution

The final question addressed in this paper is the issue of statutory integration as a proposed solution to the constitutional problems raised by the RCD. Any statutory solution will of necessity have to wrestle with the underlying constitutional issues that the courts have evaded for nearly a century. In this paper’s submission, the RCD’s essential problem lies in jurisdiction. One approach recommended in 1977 as Bill C-13 proposed the general rule that all regulated industries be subject to competition legislation unless:<sup>133</sup>

- (a) The restrictive conduct is specifically imposed by legislation
- (b) The restrictive conduct is actively supervised by independent officials
- (c) The restraint is necessary for the effective accomplishment of the regulatory legislation’s goals and is the least restrictive means of achieving those goals.

Such “narrow tailoring” of provincial legislation is commendable because it would constrict the application of the RCD to those cases where it is specifically warranted. Further, proposal (c) would help shape regulated conduct so that it interferes as little as possible with competition policy objectives. The general rule that regulated industries are subject to competition law is also important because it gives primacy to the federal law, affirming paramountcy and the status of the Act as a framework law. Unfortunately the proposed amendments were never adopted and the most definitive statement that Parliament has been able to make to date remains section 45(7). This section, representing a perpetuation of the common law approach based on statutory interpretation has done nothing to clarify the jurisdictional issue. Legislation that could identify the specific areas of regulation where the defence applies and the degree of provincial authorization required would establish much clearer spheres of jurisdiction that would make the judicial task of interpreting the doctrine simpler.

#### [5] Conclusion

The federal system in Canada has produced a unique and challenging landscape for competition law and policy. Regulation in its many guises fosters monopolistic activity that has been shown to cause the same negative economic outcomes as secret collusion. Although certain protections are warranted in a mixed market society the central rationales of competition policy, including the promotion of free markets and economic efficiency, clearly stand opposed to marketing schemes, monopolistic professional organizations, and other regulated industries that have the effect of restricting trade, inflating prices, and limiting consumer choice in the marketplace. The RCD has served to protect the influence of these (mostly) provincial regulators and regulatees. What can be done to limit the effect of this legal doctrine that confounds the Bureau’s mandate? Edmund Burke’s inspiring adage “laws like houses lean on one another” comes to mind as an apt metaphor for a juristic solution. If we want regulation to be “competition friendly” and competition policy to respect the economic autonomy of provinces it is time to develop a more exacting statutory integration of the RCD. The approach taken by the courts has been wrought with uncertainties, constitutional quandaries, and political influence marked by judicial deference to provincial authority. Furthermore, the doctrine has

seen an uneven application and development across industries, particularly with respect to professional organizations such as law societies. If the purposes of competition policy are to be seen as being more than mere pretenses a statutory solution to the RCD would represent the best method for clarifying the doctrine, shielding competition policy from excessive political influence, and strengthening its inter-provincial application.

## Endnotes

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<sup>1</sup> Thomas W. Ross, "Viewpoint: Canadian Competition Policy: Progress and Prospects" (2004) 37 *The Canadian Journal of Economics* 243 at 247. [Competition Policy: Progress and Prospects].

<sup>2</sup> William L. Letwin, "The English Common Law Concerning Monopolies" (1954) 21 *The University of Chicago Law Review* 355.

<sup>3</sup> Competition Policy: Progress and Prospects, *supra* note 1 at 244.

<sup>4</sup> Janet Bolton & Lorne Salzman, "The Regulated Conduct Doctrine and the Competition Bureau's 2006 Technical Bulletin: Retrospective and Prospective", online: McCarthy Tétrault <<http://www.mccarthy.ca/pubs/salzmanbolton.pdf>> [Bolton & Salzman].

<sup>5</sup> Paul K. Gorecki & William T. Stanbury, *The Objectives of Canadian Competition Policy 1888-1983* (Montreal: The Institute for Research on Public Policy, 1984) [Objectives of Canadian Competition Policy].

<sup>6</sup> John D. Wilson & Christopher J. Wydrzynski, "Competition in the Market for Legal Services after Jabour" (1984) 22 *U.W.O. L. Rev.* 95 [Wilson & Wydrzynski].

<sup>7</sup> Bill C-10 Amendments to *Competition Act*, R.S.C. 1985, c. C-34 [Bill C-10].

<sup>8</sup> *Jabour v. Law Society of British Columbia*, [1982] S.C.J. No. 70 [Jabour].

<sup>9</sup> George J. Stigler, "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics and Management Science* 3 [Stigler].

<sup>10</sup> *Ibid.*

<sup>11</sup> See: Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1971).

<sup>12</sup> Sam Peltzman, "Toward a More General Theory of Regulation" (1976) 19 *Journal of Law and Economics* 211 [Peltzman].

<sup>13</sup> Stigler, *supra* note 9 at 5-6.

<sup>14</sup> Ontario's agricultural sector reveals that most (if not all) marketing boards restrict output in these ways. Facilitating legislation includes: *Milk Act* R.S.O. 1990, c. M.12; *Farm Products Marketing Act*, R.S.O. 1990, c. F.9 and accompanying regulations.

<sup>15</sup> Peltzman, *supra* note 12 at 222-224.

<sup>16</sup> This diagram is borrowed directly from Peltzman's paper with some modifications: see Peltzman, *supra* note 12 at 224.

<sup>17</sup> Kip Viscusi, John M. Vernon, & Joseph E. Harrington Jr., *Economics of Regulation and Anti-Trust* 3rd ed. (Cambridge: MIT Press, 2000) [Economics of Regulation] at 323.

<sup>18</sup> *Ibid.* at 323.

<sup>19</sup> *An Act for the Prevention and Suppression of Combines Formed in Restraint of Trade* S.C. 1889, c. 41.; *Combines and Fair Prices Act* S.C. 1919, c. 45; and the *Combines Investigation Act* S.C. 1923, c. 9.

<sup>20</sup> *Re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191 Per Viscount Haldane [*Re Board of Commerce Act*].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Competition Act*, R.S.C. 1985, c. C-34 [Competition Act].

<sup>23</sup> *Reference Re Combines Investigation Act*, [1929] S.C.R. 409.

<sup>24</sup> Bruce C. McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969) 47 *Can. Bar Rev.* 161 at 175 [Constitutional Aspects of Anti-Combines Law].

<sup>25</sup> *Citizen Insurance Co. v. Parsons*, (1881), 7 *App. Cas.* 96.

<sup>26</sup> *R. v. Chung Chuck*, [1929] 1 D.L.R. 756 at para. 9 [Chung Chuck].

<sup>27</sup> *Ibid.* at para. 9.

<sup>28</sup> Bolton & Salzman, *supra* note 4 at 2.

<sup>29</sup> Constitutional Aspects of Anti-Combines Law, *supra* note 22 at 189.

<sup>30</sup> *Board of Commerce Act*, *supra* note 18.

<sup>31</sup> *P.A.T.A. v. Attorney General of Canada*, [1931] A.C. 310, at 325-326 [P.A.T.A.].

<sup>32</sup> *Weidman v. Shragge*, (1912) 46 S.C.R. 1 at 36-37 [Weidman].

<sup>33</sup> *Re Board of Commerce Act*, *supra* note 18.

<sup>34</sup> See generally: *Objectives of Canadian Competition Policy* *supra* note 5.

<sup>35</sup> Michael Bliss "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910" (1973) 47 *The Business History Review* 177 at 184.

<sup>36</sup> *Objectives of Canadian Competition Policy*, *supra* note 5 at 15-16.

<sup>37</sup> Mr. Davies, from P.E.I., saw the legislation as being aimed at "punish[ing] combinations which had for their object the intent of withdrawing enormous and improper sums from people's pockets, of forming corners and making people pay double the price." *Objectives of Canadian Competition Policy*, *supra* note 5 at 18.

<sup>38</sup> Ruth Sullivan, *Driedger on the Construction of Statutes*, (3d) (Toronto: Butterworths Canada, 2008).

<sup>39</sup> *P.A.T.A.*, *supra* note 29 at 317.

<sup>40</sup> *R. v. Simoneau*, (1936), 1 D.L.R. 143 (Que. Ct. Sess.) [Simoneau].

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* at 152.

<sup>44</sup> *Reference Re: Farm Products Marketing Act*, [1957] S.C.R. 198 [Farm Products Marketing Act].

<sup>45</sup> *Ibid.*

<sup>46</sup> *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 [Canadian Breweries].

<sup>47</sup> Wilson & Wydrzynski, *supra* note 6.

<sup>48</sup> *Canadian Breweries*, *supra* note 44 at 629-630.

<sup>49</sup> Bolton & Salzman, *supra* note 4 at 4.

<sup>50</sup> *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 [Rothmans].

<sup>51</sup> Wilson & Wydrzynski, *supra* note 6.

- <sup>52</sup> *Howard Smith Paper Mills Ltd. et al v. The Queen*, [1957] S.C.R. 403 [Howard Smith].
- <sup>53</sup> *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641 [City National].
- <sup>54</sup> *Competition Act*, *supra* note 20, s. 45(1).
- <sup>55</sup> 32 O.A.C. 278 at para. 8.
- <sup>56</sup> *Jabour*, *supra* note 8.
- <sup>57</sup> *Ibid.*
- <sup>58</sup> *Legal Professions Act*, R.S.B.C. 1960, c. 214, s. 1.
- <sup>59</sup> [2004] 1 S.C.R. 629 [Garland].
- <sup>60</sup> *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at 614 [Goodyear Tire].
- <sup>61</sup> Competition Bureau Canada, "Technical Bulletin on 'Regulated' Conduct" (June 29, 2006), online: <<http://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/02141.html>> [Technical Bulletin 2006].
- <sup>62</sup> Constitutional Aspects of Anti-Combines Law, *supra* note 22 at 246.
- <sup>63</sup> (1988), 47 D.L.R. (4th) 710 [Industrial Milk].
- <sup>64</sup> [1996] O.J. No. 995 [LSUC].
- <sup>65</sup> *Competition Act*, *supra* note 20, ss.77, 78, and 79.
- <sup>66</sup> LSUC, *supra* note 65 at para. 27.
- <sup>67</sup> Technical Bulletin 2006, *supra* note 60.
- <sup>68</sup> See: *Society of Composers, Authors, and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.*, [1992] F.C.J. No. 1034; *R. v. Charles*, [1999] S.J. No. 763.
- <sup>69</sup> 125 D.L.R. (4th) 443. [Shaw Cable].
- <sup>70</sup> *Ibid.* at paras. 56-58.
- <sup>71</sup> [1982] 2 S.C.R. 161 [Multiple Access].
- <sup>72</sup> *British Columbia (Attorney General) v. LaFarge Canada Inc.*, [2007] S.C.J. No. 23.
- <sup>73</sup> *Rothmans*, *supra* note 48.
- <sup>74</sup> *Multiple Access*, *supra* note 69; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *City National*, *supra* note 52.
- <sup>75</sup> Technical Bulletin 2006, *supra* note 60.
- <sup>76</sup> *Weidman*, *supra* note 30.
- <sup>77</sup> *Chung Chuck*, *supra* note 24 at para. 9.
- <sup>78</sup> See: *Ref Re Dairy Industry Act (Canada) s. 5(a)*, [1949] S.C.R. 1.
- <sup>79</sup> *Wilson & Wydrzynsky*, *supra* note 6 at 107.
- <sup>80</sup> *Ibid* at 108.
- <sup>81</sup> See: *Howard Smith*, *supra* note 50.
- <sup>82</sup> For a discussion on polycentrism in the context of judicial review see: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982 at para 36.
- <sup>83</sup> *Howard Smith*, *supra* note 50.
- <sup>84</sup> *Ibid.* per Taschereau J.
- <sup>85</sup> *Economics of Regulation*, *supra* note 18 at 318-324.
- <sup>86</sup> The so called "chicken and egg war" was an important chapter in the consolidation of provincial as well as federal control over agricultural marketing. See: *Attorney General of Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 680; *Reference re: Agricultural Products Marketing Act, 1970*, [1978] S.C.J. No. 58.
- <sup>87</sup> C.D. Howe Institute, *Freeing up Food: The Ongoing Cost, and Potential Reform, of Supply Management* by William B.P. Robson and Colin Busby (Toronto, Ontario: Canadian Publication Mail Sales 2010).
- <sup>88</sup> *Ibid.* at 1.
- <sup>89</sup> Bill C-10, *supra* note 7.
- <sup>90</sup> *Waterloo Law Association et al. v. Attorney General of Canada* 58 O.R. (2d) 275 [Waterloo Law].
- <sup>91</sup> *Ibid* at para. 20.
- <sup>92</sup> *Goodyear Tire*, *supra* note 59.
- <sup>93</sup> Technical Bulletin 2006, *supra* note 60.
- <sup>94</sup> See generally: *Manitoba (Attorney General) v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689.
- <sup>95</sup> *Waterloo Law*, *supra* note 87.
- <sup>96</sup> *Canadian Breweries*, *supra* note 44 at para. 120.
- <sup>97</sup> See *R. v. Canadian Breweries*, *supra* note 44 at para. 120 where McRuer C.J.H.C. ruled that "When a provincial legislature has conferred on a commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the court must assume that the power has been exercised in the public interest (italics added).
- <sup>98</sup> *R. v. Charterways Transportation Ltd. et al.*, [1981] 32 O.R. (2d) 719.
- <sup>99</sup> William T. Stanbury "Competition Policy in Canada: Evolution, Effectiveness, and the Changing Context of Competition" (October 1997) Policy Options.
- <sup>100</sup> S. Scott Commissioner of Competition "Regulation and Competition: Moving to a More Productive Future" (C.D. Howe Institute Policy Conference Competition Policy in Regulated Industries: Principles and Exceptions.) (November 6, 2006) [Regulation and Competition].
- <sup>101</sup> *Objectives of Canadian Competition Policy*, *supra* note 5 at 72.
- <sup>102</sup> (1976) 25 C.P.R. cited in *Objectives in Canadian Competition Policy* *supra* note 5 at 68.
- <sup>103</sup> *Ibid.* at 69.
- <sup>104</sup> Section 1.1 of the Act contains the following purpose clause: "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 choice" *Competition Act*, *supra* note 20, s. 1.1.
- <sup>105</sup> *Objectives in Canadian Competition Policy*, *supra* note 5.
- <sup>106</sup> See generally: Mark Katz & Charles Tingley "The Regulated Conduct Defence in Canada" (2006) 11 Competition Law 730.
- <sup>107</sup> Technical Bulletin 2006, *supra* note 60 at 5.
- <sup>108</sup> *Jabour*, *supra* note 8 at 316.
- <sup>109</sup> *Competition Act*, *supra* note 20.
- <sup>110</sup> *City National*, *supra* note 52.
- <sup>111</sup> Technical Bulletin 2006, *supra* note 60.
- <sup>112</sup> *Farm Products Marketing Act*, *supra* note 42.
- <sup>113</sup> See *R. v. Morgentaler*, [1988] 1 S.C.R. 30 especially paras 48, 61, and 62.
- <sup>114</sup> Don Mercer "The Regulated Conduct Defence and the Telecommunications Industry" (1995), online: <<http://www.bureaudelaconurrence>>.

gc.ca/eic/site/cb-bc.nsf/eng/00986.html>.

<sup>115</sup> *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B., s. 29(1).

<sup>116</sup> 11 C.P.R. (3d) 183.

<sup>117</sup> *Ibid.* at para. 9.

<sup>118</sup> *Ibid.* at para. 41.

<sup>119</sup> Peter W. Hogg and Warren Grover, "The Constitutionality of the Competition Bill" (1976) 1 Can. Bus. L.J. 197.

<sup>120</sup> Competition Bureau of Canada *Self Regulated Professions: Balancing Competition and Regulation* (Gatineau: The Competition Bureau, 2007) at v.

<sup>121</sup> Calvin S. Goldman "The Competition Act and the Professions" (Notes for an Address to the Canadian Bar Association Ontario, Program on the Professions, April 25, 1989, pp. 8-9). (Unpublished). [Competition Act and the Professions].

<sup>122</sup> *Ibid.*

<sup>123</sup> *Waterloo Law*, *supra* note 87.

<sup>124</sup> *Ibid.*

<sup>125</sup> Competition Act and the Professions, *supra* note 120.

<sup>126</sup> *Mortimer v. Corp. of Land Surveyors of the Province of British Columbia*, 37 Admin. L.R. 87, 58 D.L.R. (4th) 172.

<sup>127</sup> *Ibid.* at para. 18.

<sup>128</sup> *Ibid.* at para. 20.

<sup>129</sup> [1954] S.C.R. 15.

<sup>130</sup> *Garland*, *supra* note 58 at para 77.

<sup>131</sup> *Competition Act*, *supra* note 20, s. 45(1).

<sup>132</sup> *Ibid.* s. 45(7).

<sup>133</sup> Calvin S. Goldman and John D. Bodrug ed. *Competition Law of Canada* (New York: Juris Publishing, 2008) at 11.02.

## From the University of Toronto Roundtable on Competition Policy Institutions, April 2011

### CRITICAL REFLECTIONS ON THE INSTITUTIONAL DESIGN OF CANADIAN COMPETITION POLICY

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2011 marque le 25<sup>e</sup> anniversaire de l'entrée en vigueur de la *Loi sur la concurrence* de 1986 et constitue un moment propice pour évaluer si les nouveaux arrangements institutionnels mis en place par la Loi ont bien fonctionné ou sont déficients à certains égards. Afin de lancer cette évaluation, nous avons mené des entrevues avec chaque ancien commissaire de la concurrence (ou directeur des enquêtes et recherches) depuis 1986, la présidente du Tribunal de la concurrence depuis les huit dernières années, et un économiste ayant occupé des fonctions au sein du Tribunal de la concurrence et du Bureau de la concurrence. Les entrevues ont porté sur la performance du Bureau de la concurrence et du Tribunal de la concurrence, ainsi que sur de possibles options de réforme. Il existe un consensus que le statu quo institutionnel est insatisfaisant, mais moins de positions partagées quant à des options de réforme.

#### I. Introduction

2011 marks the 25<sup>th</sup> anniversary of the enactment of the *Competition Act*<sup>1</sup> of 1986, which inaugurated the modern era of competition policy in Canada. It is an opportune juncture to stand back from the day-to-day details of the administration of competition policy in Canada and evaluate whether the new institutional arrangements introduced by the *Competition Act* of 1986 have worked well or have been found wanting in some respects.

The earlier history of Canadian competition policy in Canada will not be re-traced in detail here.<sup>2</sup> In broad strokes, it is sufficient to recall that with the enactment of the first competition statute in Canada in 1889,<sup>3</sup> cartels and shortly thereafter mergers and monopolization were addressed through criminal prohibitions, enforced in the ordinary criminal courts of the provinces. While this criminal law framework yielded a steady trickle of convictions for price fixing conspiracies, it proved almost completely ineffective in addressing potentially anti-competitive mergers or monopolization, in part due to the criminal burden of proof, the nebulous public interest test that had to be satisfied, and restrictive interpretations of the statutory provisions by the courts.<sup>4</sup> Attempts in the 1920s and 1930s to move beyond the criminal law framework to incorporate forms of civil or administrative review of anticompetitive practices were struck down by the Privy Council and the Supreme Court of Canada as *ultra vires* the federal parliament.<sup>5</sup>

By the mid-1960s, a tentative political consensus had emerged that Canadian competition laws needed to be strengthened, particularly in the area of mergers and monopolization, and the federal government commissioned the Economic Council of Canada to undertake a study of the area and recommend policy changes. The Economic Council, in its 1969 report,<sup>6</sup> recommended that a wide range of potentially anti-competitive practices, including mergers and monopolization, should be subject to civil review by an expert tribunal and not dealt with through criminal prohibitions enforced in all-purpose criminal courts (a view subsequently endorsed by the Skeoch-McDonald Report in 1976).<sup>7</sup> Despite many fits and starts, the Stage 1 amendments to the *Combines Investigation Act*<sup>8</sup> in 1976 and the Stage 2 amendments in 1986 (which saw the *Combines Investigation Act* replaced by the *Competition Act*, more or less in its current form) largely gave effect to the Economic Council's recommendations in this respect. In particular, a wide range of reviewable practices, including mergers and abuse of dominance, were made reviewable in contested cases by the newly consti-

tuted Competition Tribunal, comprising a mix of Federal Court Trial Division judges and expert lay members, on application of the Commissioner of Competition on behalf of the Competition Bureau, while certain practices remained subject to criminal prohibitions enforceable in the criminal courts – *e.g.*, price fixing, predatory pricing, price discrimination, and resale price maintenance. Subsequent amendments to the *Competition Act* permitted private complainants limited access to the Competition Tribunal for injunctive relief (but not damages) with respect to a subset of reviewable practices (but not mergers or abuse of dominance), created a second civil review track for potentially anti-competitive horizontal arrangements while adopting something close to a *per se* criminal prohibition of hardcore price fixing or market allocation agreements amongst competitors, and de-criminalized predatory pricing, price discrimination, and resale price maintenance. The Tribunal was also given power to impose administrative monetary penalties (AMPs) for abuse of dominance.<sup>9</sup> Early doubts about federal constitutional jurisdiction over features of the new regime were largely put to rest by the decision of the Supreme Court of Canada in *General Motors vs. City National Leasing*,<sup>10</sup> upholding civil features of the legislation pursuant to the federal parliament's general trade and commerce power. That said, while there has yet to be a decided case in the competition context, we expect there to be constitutional challenges to the AMPs regime, in particular whether it is compatible with a civil rather than a criminal regime, just as there have been in other settings.<sup>11</sup>

In this paper, we critically analyze the central institutions in Canadian competition policy, drawing on interviews with past Commissioners of Competition and others with experience in the field. We asked our interviewees to evaluate the performance of the courts, the Tribunal and the Bureau, according to normative criteria or values for evaluating competition law institutions which we think are likely to be relatively uncontroversial. However, each value implies an obverse value, and interactions with other values, thus rendering the weighting of, or trade-offs among, values a quintessential polycentric and highly contestable exercise. The key dyadic values are listed below, following which we report our interviewees' assessments, and posit that integrating the Bureau and the Tribunal in some manner may better serve the purposes of Canadian civil competition law enforcement than does the present model.<sup>12</sup>

#### **a. Independence – Accountability**

On the one hand, competition law institutions should be free from day-to-day political interference. Independence helps to depoliticize enforcement decisions, reduces the risk of perceived bias, and provides consistency from one political administration to the next. On the other hand, at least in a representative democracy, it is difficult to defend institutional independence without some form of accountability, *e.g.*, with respect to appointments, budgetary allocations, financial expenditures, periodic mandate and performance review.

#### **b. Expertise – Detachment**

Competition law matters typically require high levels of expertise in their resolution – expertise with respect to particular industries, expertise in marshalling and interpreting empirical data, and expertise in industrial organization theory. However, too close an involvement in the industry in question or excessively doctrinaire commitments to particular theoretical paradigms may compromise detachment in evaluating or adjudicating novel arrangements or evolving economic or theoretical environments.<sup>13</sup>

#### **c. Transparency – Confidentiality**

In order to enhance the performance and public credibility of competition laws, high levels of transparency in performing investigative, enforcement, and adjudicative functions are desirable. Conversely, much of the information that a competition law agency is required to evaluate from the immediate parties involved as well as from competitors, suppliers, and customers is highly commercially sensitive; and public disclosure may be seriously damaging to legitimate business interests.<sup>14</sup>

#### **d. Administrative Efficiency – Due Process**

Competing concerns also exist between administrative efficiency and due process protections. Many matters with which a competition law agency may be seized are time-sensitive (*e.g.*, merger review). However,

timeliness in disposition is in tension with the value of due process in providing all affected or interested parties a right to be heard, to adduce evidence, and to contest the position of parties adverse in interest.

### e. Predictability – Flexibility

In a legal system based on the rule of law, significant value is placed on the predictability and consistency with which laws are applied. In such a legal system, affected parties can order their affairs with a fairly high level of confidence in the nature of the rules that govern those affairs. But the value of predictability is in tension with the obverse value of flexibility where the evolution of economic theory and the idiosyncrasies of particular industries, transactions, or practices may require re-evaluation and refinement of pre-existing rules, policy positions, or adjudicative decisions. This often leaves a large domain of uncertainty in the application of competition laws.<sup>15</sup>

In balancing these various values, a complex, subjective, and inevitably highly contentious optimizing calculus is involved. Moreover, the complexity of this calculus is, in fact, greater than the primary dyadic value tensions identified above in that many of the values interact with one another in polycentric, mutually reinforcing or antithetical ways. These values and the trade-offs they entail need to be kept in mind when analysing the institutional performance of Canada's competition bodies.

## II. Views from the Front Lines

### A. Drawing on Experience

Over the period of August to October 2010, we interviewed, either in person or by conference calls lasting from 45 minutes to an hour, all former Commissioners of Competition over the almost 25-year period since the current institutional arrangements were implemented in the round of reforms reflected in the *Competition Act* of 1986: in sequence, Lawson Hunter, Calvin Goldman, Howard Wetston, George Addy, Konrad von Finckenstein, and Sheridan Scott.<sup>16</sup> Some former Commissioners have gone on to chair major sector-specific regulatory bodies, while others have become leading members of the Canadian competition bar. In addition, we interviewed Madam Justice Sandra Simpson, Federal Court Judge and Chair of the Competition Tribunal since 2003, and Lilla Csorgo, economist lay member of the Competition Tribunal from 2005 - 2007 and Senior Economic Advisor to the Commissioner of Competition and T. D. MacDonald Chair holder at the Competition Bureau from 2007 - 2009, to provide the perspective of an economist on current institutional arrangements. We posed the following four sets of questions to each interviewee:

- Does the current bifurcated agency (Competition Bureau–Competition Tribunal) structure work well? Can it be improved? Is more radical reform called for, such as integrating all investigative and adjudicative functions within a single agency (the integrated agency model), or replacing the Competition Tribunal with, *e.g.*, the Federal Court in contested civilly reviewable matters?
- Does the mandate of the Competition Bureau require re-evaluation with respect to explicit or implicit exemptions or exceptions, such as the regulated conduct defence, and overlapping jurisdiction between the Bureau and sector-specific regulators (such as the Canadian Radio-television and Telecommunications Commission (CRTC) or the Canadian Transportation Agency)?
- With respect to case-by-case decision-making by either the Bureau or the Tribunal, are appropriate protections in place to ensure: full and timely notice of allegations, notice of evidence relied on, appropriately constrained investigative powers, an effective right to challenge Bureau determinations before either the Tribunal or a court, and proportionality of remedies to violations?
- With respect to institutional performance norms, in the case of both the Bureau and the Tribunal, are appropriate standards adhered to in terms of the following values: timeliness; expertise; predictability; transparency about decisions; public consultation; public accountability; and independence?

We review the responses of our interviewees below, indicating where, on the one hand, substantial consensus exists or where, on the other hand, substantial dissensus prevails.

## B. Structure

Most interviewees agreed that the current bifurcated agency structure has not worked well over its history. The Competition Tribunal, at least in contested cases, has often engaged in highly protracted, adversarial proceedings, sometimes with an elapsed time of two years or more between the Notice of Application by the Commissioner to the Tribunal to the issuance of its final decision.

The Tribunal's record in this respect has significantly improved recently. The adoption of a "chess clock" rule for allocating time envelopes to each party in contested matters seems to hold out some promise of disciplining contested hearings, as do rule changes requiring all witness statements to be pre-filed in full (avoiding examination in chief).<sup>17</sup> For example, the timing from application to disposition in a recent refusal to deal case was thirteen months, with the timing from the hearing to the decision being six months.<sup>18</sup> In addition, on urgent matters such as an application for an interim order in merger proceedings, the Tribunal has issued decisions within eight days of notice of the matter.<sup>19</sup>

The consensus among interviewees, however, is that timeliness of disposition is still a major concern with Tribunal proceedings in contested cases. It is possible, for example, that parties are especially reluctant to take more complex cases to the Tribunal because of doubts about timeliness, which may explain the continued consensus concern about timeliness despite the clearly observed improvement in the timeliness of Tribunal decision-making recently. In order to encourage a greater rate of litigation before the Tribunal, a number of interviewees argued that there was a strong case for legislating timelines for decision-making by the Competition Tribunal, from the date of application by the Commissioner or a private party to final disposition, as is already the case with decision-making by the Canadian International Trade Tribunal in trade remedy cases and is also already the case in merger review by the European Commission.

Beyond issues of timeliness, most interviewees were highly skeptical that the Tribunal has been able to bring substantial expertise to bear on its deliberations, noting the mixed to weak quality of many lay member appointments, as well as the lack of pre-existing, specialized expertise on the part of most judicial members. One interviewee noted that the idea that lay expertise is sought with current appointments is undermined by the selection of lawyers (and not competition lawyers) for positions with the Tribunal. Not only does this lack of expertise affect the quality of ultimate determinations but it was suggested that it may affect the ability of the Tribunal to engage in rigorous case management by judicial members who lack the expertise and confidence to discipline the advocacy strategies of the parties to contested proceedings.<sup>20</sup>

Interviewees noted that there is a feedback effect from the lack of expertise: the very light caseload of the Tribunal since its creation has inhibited the development of a specialized body of expertise, which in turn has inhibited hearings before the Tribunal. Most interviewees were skeptical that the case load is likely to increase in the future. In the case of mergers, which are typically extremely time sensitive, it is difficult to conceive of many contested merger cases ever coming before the Tribunal. Mergers are more likely to be resolved in the Commissioner's office (albeit with much attenuated due process and transparency relative to the Tribunal).<sup>21</sup>

In light of these perceived shortcomings, different reforms were suggested by the interviewees. One suggestion was to reform the Competition Tribunal, with panels of perhaps two Federal Court judges and one economist. The economist would be a full decision-maker, unlike under the *status quo* in which the lay members (who may not be economists) cannot make decisions of law; the consensus among interviewees was that this restriction lacks a justification. One possibility is that this reconstituted Tribunal would review matters of law or matters of mixed law and fact based on the Commissioner's own evidentiary record, rather than hearing all evidence *de novo*, with a remand power in the event of evidentiary inadequacies. This option has some appealing qualities, but interviewees noted that given the Tribunal's light case load it may be difficult to justify the full-time appointment of an economist. This may argue for the appointment by Order-in-council of a roster of economists from whom one would be chosen on a case-by-case basis by the Chair of the Tribunal to serve as a member of an adjudicative panel. Interviewees noted that this seemed a more desirable arrangement than the current practice at the Tribunal of appointing *ad hoc* staff economists

to advise Tribunal members informally on particular cases where their role and inputs are not transparent.

For many interviewees, the Competition Tribunal, at least in anything resembling its present form, is “unsalvageable.” Interviewees taking this view tended, by substantial consensus, to favour reconstituting the Competition Bureau as a commission with a body of three to five commissioners, including a Chair of the Commission, recognizing that as a practical matter most competition policy decisions will be made in the Bureau in settlement discussions with the parties and that these decisions should not be dependent entirely on the views and mind-set of a single commissioner. With such a structure, the general view was that at least one of the commissioners should be a senior industrial organization economist with full co-decision making responsibilities.

One concern with a multi-member commission is that political considerations may militate in favour of ensuring representation of major regions, language, ethnic, and gender groups, leading to an excessively large commission with highly variable expertise. Most concern from interviewees, however, focused on the authority that would be vested in this commission. Many believed that the commission should not have responsibility for both investigating and adjudicating because of a concern about bias, or perceived bias, from such dual roles. Others were less concerned about such matters, citing provincial securities commissions and the Federal Trade Commission as examples. The primary perceived strength of overlapping adjudication and investigation functions is the increased expertise that the commissioners, as both adjudicators and investigators, would develop. The alternative is that the commissioners would only investigate, and engage in settlement discussions with parties, but would not ultimately adjudicate. Rather, any matter in dispute would be referred either to a reconstituted Tribunal or possibly the Federal Court. But even those that supported the idea of an integrated body responsible for both investigation and adjudication agreed that there would still need to be some external form of check and balance on decisions taken by such a multi-member commission, but in this respect there was much less consensus on what form this external check or balance should take.

The relationship between investigation and adjudication is clearly an important issue where reasonable people can disagree. One option is to abolish the Competition Tribunal and simply replace it with the Federal Court Trial Division, where a single judge, perhaps drawn from a sub-set of Trial Division judges that are prepared to commit to developing expertise in competition matters, would perform the adjudicative functions presently performed by the Competition Tribunal, subject to further appeals to the Federal Court of Appeal (as at present, in the case of decisions of the Competition Tribunal). However, other interviewees were of the view that Federal Court Trial Division judges would exacerbate the concerns over lack of expertise in external adjudicative bodies. Moreover, this option would not address timeliness issues if proceedings before the Federal Court were to involve *de novo* hearing of the evidence. Another concern about vesting supervisory authority in the Federal Court was that it would be difficult for that body to accommodate competition policy-specific procedures within an otherwise general adjudicative framework.

In order to address the timeliness question before the Federal Court, one suggestion would be that the commission would develop an evidentiary record, and appeals to the Federal Court Trial Division would be limited to matters of law or mixed law and fact, with the possibility of remand to the commission in the event of factual or evidentiary inadequacies in its record. These concerns in turn raise questions as to how a multi-member commission would develop an evidentiary record which could be reviewable on appeal. One possibility is to contemplate a highly inquisitorial process before the commission in contested cases. For example, the investigative staff of the commission and the private parties involved could submit competitive impact assessments to the commission, along with supporting written expert opinions, perhaps subject to written interrogatories by parties adverse in interest, with a highly truncated oral hearing before the commission, followed by a written reasoned decision. If the commission's decision-making processes, at least in contested cases, were structured in this fashion, a yet further option would be to provide for appeals not to the Federal Court Trial Division but to the Federal Court of Appeal, although this option again would raise questions of relevant expertise in members of the Federal Court of Appeal in competition matters.

### C. Mandate

There are several issues relating to the scope of Canadian competition policy. Most interviewees were of the view that the current scope and boundaries of the regulated conduct defence are highly unclear, and a majority of interviewees favoured a legislative amendment to the *Competition Act* to clarify this scope and increase predictability for all affected parties.

With respect to overlapping jurisdiction of the Competition Bureau and sector-specific regulators, especially with respect to merger review, the consensus of interviewees was that no special merger review regime is required in the case of airline and rail mergers, and political oversight of mergers in these two sectors, as at present, is unwarranted. Most interviewees also were of the view that there is no case for a special merger review regime in the telecommunications sector, while recognizing that in the banking and broadcasting sector financial stability and cultural concerns may warrant special review procedures that recognize considerations specific to these two sectors. However, even in these two cases, the consensus amongst interviewees was that the Competition Bureau should undertake the initial assessment of the competitive implications of a proposed merger and make public its findings and recommendations, while leaving sector-specific regulators free to reach other findings and recommendations. Other regulators would be disciplined, however, by the requirement of providing a public document setting out their reasons for diverging from the views of the Competition Bureau, thus ensuring adequate levels of transparency in decision-making between the two affected agencies.

Similarly, while some expressed concern about the Bureau's lack of expertise in certain dynamic regulated sectors like telecom, the consensus was that where a sector-specific regulator purports to apply competition principles, *e.g.*, with respect to predatory pricing, it should defer to the Bureau in making an initial assessment of the issues at hand and follow a procedure similar to that proposed for merger reviews in such a sector in the event of diverging from the Bureau's views of the relevant competition policy concerns.

### D. Due Process Protections

Most interviewees were of the view that with respect to criminal prosecutions for violations of the *Competition Act*, there are adequate general procedural protections for defendants, given that these matters are tried in the ordinary criminal courts and are subject to the application of the Charter of Rights and Freedoms.<sup>22</sup> In civil matters, there have been concerns in the recent past over the Bureau's utilization of section 11 orders, available by *ex parte* application to the Federal Court, demanding production of classes of documents named in these orders. Specifically, concerns have arisen as to the breadth of these demands, not only with respect to immediate parties to transactions, but competitors, suppliers, and customers. Some interviewees also favoured providing notice to affected parties in *ex parte* applications for section 11 order in civil matters (but not, for obvious reasons, in criminal matters); others were concerned that publicity about competition investigations may create unwarranted reputational costs for firms who may not ultimately have done anything anticompetitive. Some interviewees were of the view that supplementary information requests (SIRs) introduced in recent amendments to the *Competition Act* (similar to so-called "second requests" under the *Hart-Scott-Rodino Act*<sup>23</sup> in the United States) will substitute for section 11 applications in merger cases (at least with respect to the parties to the transactions), and similar concerns about the potential for excessive frequency and scope of SIRs will arise.

Further concern expressed to us by some interviewees relates to the inability or unwillingness of case officers responsible for particular files or more senior officials to whom they report to isolate and communicate to the parties in a timely fashion the critical issues of concern to them in an investigation. Such early communication would permit the parties, again in a timely fashion, to address these concerns either by way of demonstrating that they are unwarranted or that remedial options may be available that effectively address them. Some interviewees were of the view that this delay reflects, at least in some cases, lack of experience by case officers along with a hesitancy on their part to communicate to the parties views that their superiors might disagree with, or alternatively a litigation mentality that one should hold one's cards close to one's vest in the event an investigation should lead to litigation.

### E. Systemic Performance Qualities of the Competition Bureau

Most interviewees focused on three issues pertaining to the institutional performance of the Bureau: independence, accountability, and expertise, with some mention being made of a fourth factor, timeliness of decision-making.

With respect to independence, former Commissioners unanimously reported that their decisions as Commissioners in particular cases had never been influenced by the Minister or his or her political staff, and indeed that no such efforts had been attempted. However, the majority of interviewees were of the view that the Bureau, which is currently constituted as a statutory agency within Industry Canada, would be better assured of institutional independence, in a systemic sense, if the Bureau received its own parliamentary budget allocation separate from Industry Canada, thus avoiding the need for the Commissioner to negotiate or curry favour with the Deputy Minister of Industry (and indirectly the Minister) in securing budgetary allocations. A minority of interviewees were of the view that the Bureau's systemic independence would be better assured if it were removed from Industry Canada and constituted as a separate statutory agency (similar to the CRTC). This would have the virtue of completely detaching the Bureau from current policy concerns of Industry Canada, which may not always be entirely consistent with the objectives of competition policy, while at the same time entailing the vice of removing the Bureau from at least the potential of providing inputs into general areas of government economic policy-making – a vice that some interviewees felt to be of little consequence, because the Bureau is rarely consulted on such matters now.

With respect to accountability, a number of interviewees expressed concern that amendments to the *Competition Act* that provide for the registration of consent agreements in merger cases with the Competition Tribunal, and automatic enforcement thereof as orders of the Tribunal, without review by the Tribunal, has been an undesirable development in that little public scrutiny of the agreement is possible given the skeletal nature of the agreements. This is exacerbated by the fact that the Bureau provides no or inadequate technical backgrounders or competitive impact assessments by which the broader public can evaluate the appropriateness of such orders, or other settlement arrangements. By extension, some interviewees also expressed concerns that the Bureau inadequately utilizes technical backgrounders to explain its decisions in major cases to discontinue or settle a matter, thus rendering its decision-making processes less than adequately transparent. Some interviewees also expressed concern that there is very little retrospective evaluation of the ultimate market results following orders in particular cases. With respect to expertise, most of the interviewees were of the view that while the Bureau has had some success in recruiting case officers with Masters degrees in economics, it has been less successful in recruiting and retaining suitably qualified Ph.D. economists. In addition, concerns were expressed that often Ph.D. economists are either unwilling or not encouraged to involve themselves heavily in particular investigative or enforcement files, but rather operate in corners of the Bureau focusing on theoretical/technical issues. To address the perceived lack of economic input into actual cases, some interviewees favour the appointment of a Senior Economic Advisor to the Commissioner to advise on broader policy matters, while with respect to particular cases under investigation, there could be a requirement that the economists on such a team prepare a written assessment of the economic issues at stake in the case and submit this report not only to the case officer but to the head of the division to whom the case officer reports. While many interviewees noted the lack of consistent input from senior experienced economists in the Bureau's activities (as with the Competition Tribunal), they also noted that the Canadian academy currently produces very few economists with the industrial organization and applied skill sets required in regulatory environments such as the Competition Bureau (but also in other areas of economic policy making, such as energy policy).

With respect to timeliness of decision-making within the Bureau, some interviewees were critical of the protracted nature of Bureau decision-making in many cases, and argued for legislated deadlines, as opposed to merely internal service deadlines, in order to focus and discipline the Bureau's efforts.<sup>24</sup>

### III. Conclusion

We have reviewed the central institutions in Canadian competition policy, drawing on reflections on the performance of these institutions from observers who are uniquely positioned to provide insight: every past Competition Commissioner, the Chair of the Competition Tribunal, and an economist who has served both on the Tribunal and with the Bureau. In our view what emerges from this canvass is that the core institutional question confronting Canadian competition policy, particularly with respect to civil matters, is how best to structure the institutional relationship between investigation and adjudication.

As we have argued in the past,<sup>25</sup> perceived shortcomings of the performance of the current institutional framework stem in large part from the existing structure. Concerns have been expressed about timeliness, expertise and public accountability of both the Bureau and the Tribunal. Some causes of this concern are exogenous to institutional structure; for example, if relatively few industrial organization economists are being trained in Canada, this has nothing to do with the Bureau and the Tribunal. But others we believe relate intimately to the institutional set-up. For example, timeliness at the Tribunal may relate to the lack of expertise at the Tribunal, which in turn relates to the small caseload that it hears. Relatively inexperienced adjudicators on the Tribunal cannot develop such expertise on the job because of the rarity of cases, which in turn contributes to the rarity of cases. Timeliness at the Bureau may also depend ultimately on the challenges that parties face in considering litigation before the Tribunal. The Tribunal has, for all practical purposes, ceased to provide an external check on the Bureau's decision-making. Parties, especially in mergers, thus effectively require the Bureau's approval because they are not in a position to threaten credibly to take disagreements to the Tribunal. Moreover, third parties have limited rights to bring complaints before the Tribunal. This allows the Bureau considerable leverage both in conducting its inquiries and in reaching settlements with the parties. While there is no reason to suppose that officers at the Bureau would act unprofessionally, there is little discipline on their discretion, which may contribute to delay as risk-averse case officers probe every possible competition angle in a case. Accountability also relates obviously to the institutional framework. With public adjudication at the Tribunal occurring only rarely, the Bureau can enforce the law with relatively little public oversight. Settlement discussions behind closed doors are the norm and publicity the exception.

Given the connection between the central criticisms of current institutional performance and the current institutional structure, we believe that this structure deserves thorough review and reform. The difficulty for reform is that while there is a consensus on the shortcomings of the *status quo*, there is no such agreement over fundamental aspects of reform. In particular, while our interviews suggest that there is general support for the idea of a multi-person commission, there is division over its particular role, as well as the institutional framework for review of its decisions.

As we have argued in the past,<sup>26</sup> we are drawn to greater *de jure* integration of the investigative and adjudicative functions within a Competition Commission. We understand the concerns about bias that arise from such integration, but believe that the benefits from increasing expertise, timeliness and accountability in the adjudication process justify the risk of bias. At present, adjudication, when it arises (which is very rarely), involves adjudicators who for the most part lack considerable expertise in the competition policy sphere. By bringing greater adjudicative responsibilities within the commission, the decision-makers will be fully immersed in the field and the expertise, timeliness and accountability problems will be mitigated considerably. While there are interaction effects of a number of kinds, the core reason to integrate investigation and adjudication is that expert adjudicators are better able to provide timely decisions, which will increase formal adjudication, which will increase accountability.

We have identified four responses to concerns about bias, which clearly do not individually or collectively eliminate these concerns, but do diminish the role such concerns should play in shaping institutional reform. First, under the *status quo*, there is already *de facto* integration of investigation and adjudication within the Bureau. Parties are very wary of litigation before the Tribunal, which grants considerable power to the Bureau to extract settlements. Investigators are *de facto*, and with consent agreements to some extent *de jure*, already adjudicators under the *status quo*, yet there is very little publicity about the inputs into and bases for their decisions. Formalizing adjudication within the Bureau would have the advantage of poten-

tially rendering certain features of the process more transparent. The Bureau could be required to produce reasons for its decisions, for example. In short, concerns about bias cannot be invoked to reject proposed reforms in favour of the *status quo*.

Second, concerns about bias can be addressed within the reform. Reform could take advantage of a multi-person commission, for example, by ensuring that commissioners vested with decision-making authority in any given case are not involved in the investigation associated with that particular case.

Third, in our view it is essential in contemplating reform not to treat concerns about bias as a kind of trump card. In civil matters, the typical remedy is a cease-and-desist order. The mildness of the remedy, which could even be institutionalized by eliminating AMPs if the commission adjudicates a matter, undermines concerns about bias. Moreover, while concerns about bias are relatively weak under the status quo, concerns about expertise, accountability and timeliness are widespread and strong. Allowing residual concerns about bias to exist within an institutional framework may well be appropriate in light of the potential gains to be had on these other dimensions.

Fourth, we are open to persuasion that appeals should lie to the Federal Court of Appeal on matters of law, mixed law and fact, and fact (with leave) from commission decisions (as is the case currently with decisions of the Tribunal), although this option comes at a cost – lack of timeliness and expertise in decision-making. The latter concern would be mitigated if the Federal Court of Appeal were to show more deference to decisions of an expert commission than it has to decisions of the Tribunal.

## Endnotes

<sup>1</sup>Thanks to participants at the April 2011 Competition Policy Roundtable at the Faculty of Law, University of Toronto, generously supported by the Canadian Bar Association and the James Tory Fund for Studies in Business Law, for helpful comments. Thanks also to a number of interviewees (Lawson Hunter, Calvin Goldman, Howard Wetston, George Addy, Konrad Von Finckenstein, Sheridan Scott, Lilla Csorgo and Justice Sandra Simpson) for sharing their time and expertise with us.

<sup>2</sup>*Competition Act*, RSC 1985, c C-34 [hereinafter *Competition Act*].

<sup>3</sup>See Michael Trebilcock, Ralph Winter, Paul Collins and Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (University of Toronto Press, 2003), ch. 1. [Canadian Competition Policy].

<sup>4</sup>*An Act for the Prevention and Suppression of Combines Formed in Restraint of Trade*, SC 1889, c 41.

<sup>5</sup>See Paul Gorecki and W.T. Stanbury, "The Administration and Enforcement of Competition Policy in Canada, 1889 to 1952" in R.S. Khemani and W.T. Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: The Institute for Research on Public Policy, 1991); See also *Canadian Competition Policy*, *supra*.

<sup>6</sup>See *Re Board of Commerce Act and Combines Fair Prices Act of 1919*, (1920) 60 SCR 456. [1922] AC 1919 (P.C.). and *Reference re Dominion Trade and Industry Commission Act, 1935*, [1936] S.C.R. 379. See generally *Canadian Competition Policy*, *supra*.

<sup>7</sup>Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

<sup>8</sup>L.A. Skeoch and B.C. McDonald, *Dynamic change and Accountability in a Canadian Market Economy* (Ottawa: Minister of Supply and Services, 1976).

<sup>9</sup>*Combines Investigation Act*, RSC 1970, c C-23.

<sup>10</sup>See ss. 78 and 79 of the *Competition Act*, *supra* note 1.

<sup>11</sup>*General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641 (1989), 255.

<sup>12</sup>There have been a number of cases considering, and to date upholding, the constitutionality of various financial penalties in different administrative contexts. See, e.g., *Martineau v. M.N.R.* 2004 SCC 81 (considering constitutionality of financial penalties in customs context); *U.S. Steel 2010 FC 642* (considering constitutionality of AMPs in context of possible breaches of undertakings pursuant to Investment Canada Act); *Re Rowan*, 2009 LNONOSC 941, affirmed 2010 ONSC 7029 (considering constitutionality of AMPs in securities regulation context).

<sup>13</sup>The identification and explanation of these values is largely drawn from a previous paper, Michael Trebilcock and Edward Iacobucci "Designing Competition Law Institutions" (2002) 25 *World Competition* 361.

<sup>14</sup>This balance between expertise and detachment was one of the goals of the newly created Competition Tribunal. The appointment of both judicial and non-judicial members to the Tribunal was, Goldman explains, "designed to provide both procedural fairness and additional expertise in the assessment of complex competition cases". See Calvin S. Goldman, "The Merger Resolution Process Under the Competition Act: A Critical Time in its Development" (1990) 22:1 *Ottawa Law Review* 1 at 10.

<sup>15</sup>In 1986, when the current merger provisions of the Competition Act came into force, the Tribunal had jurisdiction to order any action to eliminate an alleged substantial lessening or prevention of competition. As a result of early Tribunal decisions regarding consent order applications in cases such as *Canada (Director of Investigation and Research) v. Palm Dairies Ltd.* (1986) 12 CPR (3d) 540 (Comp. Trib.) and *Canada (Director of Investigation and Research) v. Imperial Oil Ltd.* (1990) 31 CPR (3d) 277 (Comp. Trib.), the Competition Bureau and the business community developed a preference for "fix it first" solutions and post-closing undertakings to remedy competition issues arising from a merger, bypassing the consent order provisions. See Goldman, *supra*. However, this response to the perception of intrusive consent orders was clearly not transparent, with most contestable mergers negotiated in the Commissioner's office with little oversight from the public.

<sup>16</sup>Uncertainty is especially problematic for companies attempting a merger. As former Commissioner Goldman noted in 1990, "parties to a proposed merger are very anxious to avoid that one word which can prove to be a real impediment to the transaction proceeding – 'uncertainty'", see Goldman, *supra* at 11.

<sup>17</sup>The current Commissioner of Competition, Melanie Aitken, declined our invitation to comment on any of these matters.

<sup>18</sup>See Competition Bureau, *Merger Review Process Guidelines* (Gatineau, QC: Competition Bureau, 18 September 2009).

<sup>19</sup>*Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. et al.*, (2009) Comp. Trib. 6.

<sup>20</sup>*The Commissioner of Competition v. Labatt Brewing Company Ltd. et al.*, (2007) Comp. Trib. 3.

<sup>21</sup>That this is the perception does not imply that it is true – there is clear evidence that in recent cases like *Nadeau* that the Tribunal has been very aggressive in case management.

<sup>21</sup> See Calvin Goldman and Navin Joneja, "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner," (2010) *Loyola University Chicago Law Journal* 535 at 546-548. This has been a feature of the Competition Bureau for quite some time, see Goldman, *supra*.

<sup>22</sup> While AMPs did not arise in our conversations with the interviewees, there clearly exist concerns about the due process rights associated with a civil penalty that some have analogized to a criminal fine. As noted above, we expect litigation on this question in the near future.

<sup>23</sup> Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub L No 94-435, 90 Stat 1383.

<sup>24</sup> Merger cases for which the parties file statutory notification materials under Part IX of the Competition Act are subject to statutory waiting periods, but these waiting periods are not binding upon the Bureau. The Commissioner may challenge a merger, despite expiry of the waiting period, up until one year after closing. No statutory time limits of any kind exist for the review of mergers which are the subject of requests for advance ruling certificates or "no-action" letters but not notifications (the vast majority of mergers), nor for criminal matters (there is no limitation period for criminal prosecutions in Canada), and there is a three-year limitation period for bringing abuse of dominance cases under the Competition Act (after the practice has ceased) but no limitation period for other civilly reviewable matters. Given the need for business certainty, the current limitation periods impose no practical constraints on the duration of Bureau investigations.

<sup>25</sup> See Trebilcock and Iacobucci, (2002), *supra*; Trebilcock and Iacobucci, "Designing Competition Law Institutions: Values, Structure and Mandate," (2010) 41 *Loyola University Chicago Law Journal* 455.

<sup>26</sup> Trebilcock and Iacobucci, (2010), *ibid*.

## THE COMPETITION TRIBUNAL 2003-2011 AND BEYOND

**Justice Sandra J. Simpson**

*Federal Court, Ottawa*

**I**t is my belief that no one should run a country, a court, a corporation or a tribunal for more than eight years. For this reason, when my second term as the Tribunal's chairperson expires in June 2012, I will not seek a further renewal.

Given this decision, I have been commenting on developments at the Tribunal in the last eight years and on possible reforms. The following points summarize the remarks I have made in speeches over the last year.<sup>1</sup>

Regarding developments to date, I have said:

- i. The Tribunal imposes tight case and hearing management. Its pre-hearing scheduling orders and its use of the "chess clock" procedure in hearings ensure that cases are heard in an efficient and predictable manner. This means that the problems which were experienced years ago in *Southam* (delays) and *Superior Propane* (eighty witnesses for the Commissioner) are ancient history and no longer relevant.
- ii. The Tribunal's Rules, which were entirely rewritten in 2008, provide the flexibility the Tribunal needs to respond to the requirements of individual cases and parties. Formality has been reduced and evidence-in-chief in hearings have been abolished. This latter change has significantly reduced the length of hearings.
- iii. The Tribunal has also reduced the length of its hearings by developing the capability to hold fully electronic hearings both in Ottawa and across the country. At the end of this year, it will move to e-hearings as the norm in all cases.
- iv. In urgent cases, the Tribunal has established a record of rapid response. For example, in *Labatt*, it held a two-day hearing four days after the application was filed and the decision was released one day later.
- v. In fully contested cases, Tribunal hearings are held, on average, thirteen months from the date the application is filed and decisions are issued, on average, three months after the conclusion of the hearing.
- vi. Criticisms of the Tribunal members' lack of expertise are unjustified. The members have exactly the expertise which was expected of them when the Tribunal was established. In 1986, its creators decided that the lay members would be experienced business people who would bring the necessary expertise and judges would ensure that hearings were conducted fairly.
- vii. However, since competition law has become increasingly influenced by economic theory and since parties frequently use industry experts to explain their businesses, the original view of the roles to be played by the Tribunal's members needs to be reassessed. In my opinion, the composition of the Tribunal should be altered as new appointments are made so that its members will be economists and judges with commercial backgrounds.
- viii. The Tribunal has not had enough work to keep its members and staff engaged. In my view, its jurisdiction should be expanded to include the following:
  - a. Single damages for parties in private actions;
  - b. Private actions for abuse of dominance with leave (it should be noted that the Tribunal has exercised its power to grant leave to private parties responsibly);
  - c. A reference power for parties in negotiations with the Commissioner;
  - d. The approval of consent agreements by a judge alone - with written comments from but no interventions by affected parties. This will ensure that the Commissioner has a defensible theory of harm to support his or her settlements.

Regarding future developments, I have said:

- i. In response to the suggestion that other models for the adjudication of civil competition law cases be considered, it is my view that the present model – with the revised membership described above – is the preferable model. The separation of adjudication from enforcement that we now enjoy avoids the perception of bias which has been the FTC experience.
- ii. The priority of assignments between the Federal Court and the Competition Tribunal needs to be established. The Tribunal's six judges are appointed on a full-time basis to both the Tribunal and the Federal Court. However when a judge is needed for Tribunal work, he or she usually has previously assigned Federal Court matters. There have been times when the Court has refused to relieve the judges of their Federal Court work and they have either had to perform double duty or decline their Tribunal assignments. This state of affairs is unacceptable and the *Competition Tribunal Act* and perhaps the *Federal Courts Act* need to be amended to show that, when the Chair deems it necessary, Tribunal work takes priority over Federal Court assignments.

## U.S. ANTITRUST POLICY INTEGRATION: THE 2010 U.S. HORIZONTAL MERGER GUIDELINES

**William E. Kovacic\***

*Commissioner, U.S. Federal Trade Commission*

En août 2010, le Département de la justice des États-Unis et la Federal Trade Commission ont publié des nouvelles lignes directrices qui décrivent comment les deux organismes fédéraux antitrust doivent analyser les fusions horizontales. L'efficacité du nouveau document, qui a apporté les premières révisions majeures aux *Lignes directrices sur les fusions horizontales* des États-Unis depuis 1992, dépendra beaucoup du succès des agences à adopter une approche analytique cohérente dans la mise en oeuvre et dans les activités de sensibilisation externes. Cet article propose des mesures que les agences américaines peuvent prendre afin de mieux réaliser une intégration des politiques dans l'application des lignes directrices de 2010.

In August 2010, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued new guidelines to describe how the two agencies would analyze horizontal mergers.<sup>1</sup> The issuance of the new Horizontal Merger Guidelines (HMG) followed a custom begun in 1968 when the DOJ announced how it would exercise the prosecutorial discretion inherent in the Supreme Court's expansive interpretations of the Clayton Act's merger control provision.<sup>2</sup>

The 2010 guidelines are important for at least three reasons. First, merger policy is an essential foundation of U.S. competition policy. Merger control impedes collusive conduct and forestalls the creation of market power that can reduce competition with respect to price, output, quality, or other dimensions of rivalry.<sup>3</sup> Sensible merger policy also dictates that antitrust agencies recognize the value of a strong market for the buying and selling of firms and stand aside when transactions seem likely to be benign or precompetitive.<sup>4</sup>

A second reason is the contribution the 2010 HMG can make to influence merger analysis in a world of roughly 120 competition agencies. A growing number of nations (notable examples include China and India) have the capacity to determine whether mergers proceed or founder through the application of their own competition laws. The United States and other countries have a strong stake in the broad acceptance of sensible competition policy standards. A country's influence upon international standards depends heavily on its ability to devise analytical approaches that elicit emulation due to their superior intellectual vision and demonstrated quality in implementation. Owing to new developments in economic theory and learning gained from enforcement experience, merger guidelines share a vital characteristic with computer software: they require periodic upgrades. The U.S. federal antitrust agencies last had issued a major upgrade of their merger guidelines in 1992, and it was time to put a new edition into circulation.

A third reason for which the 2010 Guidelines are important is that they provide an opportunity to revisit the institutional arrangements through which the United States implements its competition laws. The federal government's application of the antitrust laws takes place principally through a joint venture between the DOJ and the FTC, with sectoral regulators such as the Federal Communications Commission and the Federal Energy Regulatory Commission sharing power to review mergers in certain sectors. Since 1914, when the Congress gave both the DOJ and the FTC authority to enforce the Clayton Act and its ban on anticompetitive mergers and various other forms of conduct, the relationship between the two federal antitrust agencies has displayed the sustained tension that usually arises when two public bodies are assigned the same or similar duties. The DOJ/FTC relationship features many of the same frictions that arise in commercial joint ventures when rivals seek to function as partners.

The performance of the federal government's antitrust joint venture in applying and explaining the 2010 HMG will be a major determinant of the success of the new guidelines. The first anniversary of the 2010 HMG approaches quickly, and it is worth considering what the two agencies have done to make their collaboration in applying the guidelines effective.

The focus here is squarely on implementation. The article does not address debates about the soundness of the underlying analytical framework, or whether the 2010 HMG make the right tradeoffs between the timeless polarities of clarity and flexibility, simplicity and completeness. The emphasis on implementation seeks to correct an imbalance in discussions about competition law. The scrutiny of analytical concepts ordinarily comes at the expense of seemingly mundane considerations of implementation – the procedures and methods of organization that must be effective if concepts are to be useful in practice. The physics of competition law (concepts) usually eclipses engineering (implementation). Superb physics applied through weak engineering is a losing combination.

The 2010 HMG concepts will thrive only if policy engineering receives its due. The issuance of the new document was only a first step. Everything depends on what comes next. The DOJ and the FTC devoted considerable effort to preparing the new guidelines. This was a major achievement in its own right. The two agencies have shown little urgency, however, to take measures that will determine whether the document will improve the quality of merger policy. The FTC today has a better working relationship with the Competition Directorate of the European Union than it has with the Department of Justice. The new guidelines present an ideal opportunity to place the process of merger review within the federal antitrust agencies on a better footing and to strengthen the relationship between the DOJ and the FTC – to move beyond cooperation that takes place begrudgingly on an as-needed basis and embrace a fuller, willing collaboration that takes full advantage of accumulated knowledge and policy complementarities.

### **Policy Integration**

The 2010 HMG have important elements of commonality with previous federal merger guidelines, and they add new features. To achieve policy coherence, it is important for the DOJ and the FTC to achieve and sustain a consistent interpretation of the document. Like their predecessors, the 2010 HMG unmistakably, and inevitably, give the federal agencies extensive discretion to determine the decision to prosecute. Even if the agencies had issued more fully specified methodologies that purported to cabin the government's analysis, the exercise of discretion would seep through in the definition and application of key operative terms. Elaborate, comprehensive drafting cannot suppress the hard issues that frequently emerge in a diagnosis of likely competitive effects.

Nonetheless, there are a number of steps the agencies can take to increase the likelihood that the public authorities will do two things that are essential elements of a well-functioning competition policy system: (1) apply the 2010 HMG in a manner that promotes the development of coherent policy throughout the U.S. antitrust system and (2) facilitate future discussion about the appropriate design of merger policy. Some measures are readily within the agencies' grasp and require only a sustained commitment to their implementation over time. Other tasks are more difficult. These include a basic re-examination of the enforcement framework and operation of merger policy. All of the suggested steps involve what amounts to a long-term investment in the infrastructure of merger control – not a strong suit of public policy making in the United States.

### **Easier Measures**

Merger guidelines are a policy product whose successful application demands intensive post-sale services. There is little point in creating the complex antitrust software of new merger guidelines without careful attention to customer service and to their compatibility with the operating system on which the software runs.

In the case of federal merger guidelines, the provider of the product and the post-sale services is a joint venture of two government bodies: the DOJ and the FTC. The overall quality of the post-sale services delivered to users of the guidelines is a function of the effort of the two agencies, especially their effort to achieve coherence in the application of the guidelines.

Two sets of users require special attention: the agency staffs, on the one hand, and the potential participants in mergers and their advisors, on the other hand. A useful starting place for the agencies is the education of their own professionals. The two federal agencies have yet to set in place a systematic program to

ensure that the DOJ and the FTC establish and share a coherent vision of the 2010 HMG. One useful way to achieve this common vision would be to establish common and continuing instructional programs for attorneys and economists now employed by the agencies and for new hires. Joint DOJ and FTC training exercises would help ensure that the interpretation of key 2010 HMG provisions takes place in a consistent manner.

No less important is the sharing of know-how about actual applications of the 2010 HMG. The DOJ and the FTC presently have no programs to engage their merger case handlers and managers (attorneys and economists) in regular discussions to share know-how about what they have learned through the application of the new guidelines. Among other topics, regular common discussions of experience under the new guidelines could consider whether the typical information requests made in the second request process are well linked to the new HMG framework. A further means to improve the exchange of know-how would be a continuing program of secondments by which the merger groups of both agencies exchanged attorneys and economists.

The issuance of new merger guidelines also provided an opportunity, as yet untaken, to build a common framework to assess the consequences of past enforcement decisions and identify areas for improvement in the merger review process. One could envision joint, regular consultations about assessment techniques and the development of a research agenda to evaluate process and substantive outcomes. This could be linked to collaboration with external groups to devise evaluation methodologies and discuss outcomes.

The indifference of the DOJ and the FTC to measures that would yield deeper integration between the agencies forfeits a potentially valuable source of policy improvements. Imagine that there were two commonly owned hospitals with cardiology units in the same community. The cardiology teams of these hospitals would be engaged in a continuous process of consultation about matters such as diagnostic techniques, surgical methods, and post-operative care. Such cooperation would reflect the awareness that the two teams can accelerate performance improvements by pooling knowledge rather than working in isolation. The DOJ and FTC have common ownership but no culture or habit of routine consultation that links the work and knowledge of their merger teams.

Along with greater efforts to build a common base of knowledge between the two agencies, the attainment of coherent merger policy under the 2010 HMG requires greater efforts to integrate efforts to engage external audiences. The rollout of the guidelines will be more effective if there is true congruence between the themes and specific ideas conveyed by officials at the DOJ and the FTC. A basic starting point is to consult on the formulation of an outreach program – including agreement on messages communicated in public appearances, the advance sharing of the texts of speeches, and the identification of speaking opportunities for agency officials.

The outreach program has several dimensions that go beyond appearances at conferences, seminars, and workshops to give the agencies' interpretation of guidelines and recounting of experience with the new document. One focus of attention is fuller disclosure of DOJ and FTC activity related to merger review. A more complete program of disclosure would entail a commitment to issue closing statements in each instance in which an agency has undertaken a significant inquiry and has decided not to intervene. Closing statements would be appropriate in each investigation in which the agencies issue Second Requests. Such statements would describe, in informative detail, the reasons why an agency permitted specific transactions to proceed without intervention. A further valuable form of disclosure would be to continue the agencies' practice over the past decade of publishing data sets on enforcement tendencies, including data that illuminates actual experience under the new HMG.

The external education program also would engage other government institutions that participate in merger reviews. These include the state governments and federal sectoral regulators such as the FCC and the FERC. The United States would do well to create its own equivalent of the European Competition Network, the mechanism by which DG Comp and the national competition authorities of the European Union coordinate their activities.

### More Difficult Forms of Policy Integration

The measures described above could promote coherence through means that are largely within the control of DOJ and the FTC. Their implementation only demands institutional will and perseverance. If undertaken, these steps would increase the likelihood that the two agencies will implement the 2010 HMG in a coherent manner and, as a side benefit, improve routine cooperation and team spirit across the agencies.

There are additional steps that would improve national policy coherence but require more complex and difficult reforms. Among the most important is to improve the interagency clearance process – the mechanism the DOJ and the FTC use to determine which institution will review a particular matter. The existing system relies mainly on recent agency experience in a sector to determine the assignment of files. In most cases, this allocation rule results in the smooth distribution of matters between the agencies. Yet there are instances in which the agencies reach an impasse during the initial thirty-day waiting period in the Hart-Scott-Rodino merger review process and achieve agreement only as the initial period is about to expire. When these conflicts occur, the parties find themselves in the annoying position of being asked to withdraw and refile their notification to avoid the certainty that they will receive a second request simply in order to enable the agencies to do the job they ought to have performed in the first thirty days. Disputes over the entitlement to review specific matters can be a source of persistent bitterness between the agencies, and disagreements that result in forced re-filings arouse needless antipathy in the private sector.

An allocation mechanism that emphasizes recent experience also can create perverse incentives for each agency. An agency might be tempted to issue second requests in borderline matters simply for the purpose of expanding its experience base and bolstering its claim for future matters. Where second requests are appropriate, the agency might draft specifications more broadly than necessary (for example, covering a broader rather than a narrower array of products) as a way to assert a broader base of experience.

The resolution of disagreements over clearance issues often involves elaborate forms of bargaining between the agencies. This is especially true for merger or nonmerger matters will involve firms with a high public profile. One agency will surrender a high profile matter to the other agency upon a promise to receive other high profile matters in the future. In some instances, DOJ and FTC agree to trade cases involving significant firms or sectors, so that experience with respect to a given company or sector is subdivided between the agencies rather than concentrated in a single case handling team. Such trades can reduce agency effectiveness by denying to any single team the full body of knowledge that would come from greater exposure to a firm or a sector. When an agency trades items of considerable value to obtain clearance for a specific matter, it may feel a stronger need than usual to realize the greatest possible return for its investment. This can impart momentum in the direction of intervening in a transaction, a step that is more likely to attract favorable attention, rather than standing down after an investigation.

Reforms to the clearance process are certain to require a three-way negotiation among the DOJ, the FTC, and the Congress. In early 2002, the DOJ and the FTC sought to change the existing allocation of sectoral oversight and alter the calculus for clearance decisions and did not consult Congress in advance before doing so. Key legislators objected and made credible threats to reduce the DOJ and FTC budgets unless the agencies withdrew the reforms. DOJ capitulated, and the reforms collapsed. The agencies had underestimated the value the legislative oversight committees derive from the number and type of companies subject to the jurisdiction of the agencies within their purview. Companies subject to the jurisdiction of a regulatory agency often give campaign contributions and other forms of homage to members of Congress who sit on the legislative committee that oversees the agency. When an agency ceases to exercise jurisdiction over a company (for example, by allocating oversight to another federal agency), the firms have weaker incentives to provide contributions to the agency's congressional oversight. For the affected oversight committee, this is the equivalent of losing an income stream. Thus, reforms to the DOJ and FTC clearance process are likely to require congressional approval if they are to endure.

There is a deeper and still more difficult issue confronting the U.S. antitrust system: should it reduce the number of existing public enforcement agents or reallocate tasks among them? Given the political dynam-

ics described above, it is difficult to imagine what form of exogenous shock would be necessary to induce Congress to revisit the dual federal enforcement agency structure and either consolidate federal government responsibility in one agency or redistribute authority between the DOJ and the FTC. Simplification by merger of the existing agencies may be unattainable, but greater policy integration by agreement between the two agencies is not. The menu of possibilities, presented earlier, that require no congressional approval can be adopted by the agencies alone. To do so would improve the prospects for success of the 2010 HMG and establish ties that strengthen coherence throughout the U.S. antitrust system.

## Endnotes

<sup>1</sup> Commissioner, U.S. Federal Trade Commission; Professor, George Washington University Law School (on leave). This article is based on a presentation made to the Competition Law Roundtable hosted by the Canadian Bar Association and the University of Toronto in Toronto on April 8, 2011. The views are the author's alone.

<sup>1</sup> Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

<sup>2</sup> Department of Justice, Merger Guidelines (1968), reprinted in 2 Trade Reg. Rep. (CCH) ¶ 4510. The liability standards established by Supreme Court decisions that led up to the 1968 guidelines are discussed in Andrew I. Gavil et al., *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 439-48 (2d edition, Thomson West, 2008). Before the DOJ 1968 guidelines, the FTC had issued guidance concerning the analysis of mergers in specific sectors, including cement and food distribution. See Hillary Greene, "Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective," 72 *Antitrust L.J.* 1039, 1042-44 (2005) (discussing FTC sector-specific guidelines of 1960s and 1970s).

<sup>3</sup> Gavil et al., *supra* note 3, at 432-36.

<sup>4</sup> William Blumenthal, "The ICN Recommended Practices for Merger Process: Why They Matter" (Brno, Czech Republic, Mar. 18, 2008) (presentation at the ICN Merger Notification & Procedures Workshop: Implementing the Recommended Practices), available at <http://www.ftc.gov/speeches/blumenthal/20080318ICNBrnoSpeechMergerRPs.Final.pdf>.

## Articles

### WHAT THE CANADIAN CRIMINAL CONSPIRACY AMENDMENTS MEAN FOR BUYING-SIDE AGREEMENTS (INCLUDING MERGERS WITH BUYING-SIDE EFFECTS)

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Suite à l'amendement de l'article 45 de la *Loi sur la concurrence*, les dispositions criminelles relatives aux complots ne s'appliquent plus aux ententes d'achats groupés. Ceci a eu deux conséquences : (1) les cartels aux effets monopolistiques et les cartels aux effets monopsonistiques sont traités asymétriquement même si l'effet économique de ces cartels est symétrique; et (2) on en connaît davantage sur l'approche du Bureau de la concurrence concernant les ententes entre acheteurs, dont les fusions affectant les marchés d'approvisionnement. La justification pour le traitement asymétrique des ententes d'approvisionnement en matière de complots est empirique : la plupart du temps, les ententes d'approvisionnement ne sont pas économiquement nuisibles, c'est-à-dire qu'elles n'impliquent que des exercices de pouvoir compensateur. Cependant, l'asymétrie sous-jacente de traitement pourrait néanmoins se révéler problématique, soulevant des questions quant à la caractérisation d'une entente comme étant une entente d'achat ou de vente, avec un impact considérable sur l'effet juridique potentiel d'une telle détermination.

#### 1. Introduction

With the implementation of revised section 45 of the Canadian *Competition Act* (the "Act") on March 12, 2010, the criminal conspiracy provision appears to no longer apply to joint purchasing agreements, even those between firms that compete in respect of the purchase of products. The provision only refers to the "supply" or "production" of a product and, if this were not sufficiently clear, the Competition Bureau's (the "Bureau") *Competitor Collaboration Guidelines* resolve any remaining ambiguity (at least as to the Bureau's understanding): "... joint purchasing agreements ... are not prohibited by section 45, but may be subject to a remedy under the civil agreements provision in section 90.1..."<sup>1</sup> As a result of this amendment, cartels with monopoly effects and cartels with monopsonistic effects are treated asymmetrically even though the economic effect of such cartels is symmetric in that both result in a reduction in economic surplus. The only possible justification for this is expediency in the face of empirical outcomes: that is, more often than not buyer side agreements are not economically harmful in that they only entail exercises of countervailing power as opposed to monopsony power.

That buyer agreements often entail an exercise of only countervailing power is widely accepted. If an upstream supplier of an input has market power, an agreement among buyers to reduce the price of the input can effectively counter that market power with the net effect that more of the input is purchased and surplus is increased.<sup>2,3</sup> In contrast, on the selling side, it would be very rare that an agreement that effectively raises output prices would increase surplus,<sup>4</sup> because this could only occur if the pre-merger price were below the competitive price. Consequently, absent a requirement for agreements to result in an undue lessening of competition as was required under the previous version of section 45, as a matter of expediency, it is not unreasonable that buyer agreements would fall outside the criminal provisions. However, the underlying asymmetry in treatment could still prove problematic. It can raise questions as to the proper characterization of an agreement as a buying or selling one, and so whether justice is served when one characterization can result in a \$25 million fine and a prison term of up to 14 years, and the other in only the dissolution of the arrangement.

A surprising consequence of the exclusion of buying agreements from the cartel provision is that, in ex-

plaining within the *Competitor Collaboration Guidelines* (“Collaboration Guidelines”) how buying agreements will be treated under new civil provision 90.1, the Competition Bureau (the “Bureau”) makes its clearest statement yet as to how it approaches issues of monopsony and buying power. This statement presumably applies equally to mergers that potentially have an impact on input markets; if not, the Bureau risks asymmetric treatment of non-criminal horizontal arrangements among competitors and (equally non-criminal) mergers. The discussion of monopsony in the context of section 90.1 is particularly notable because the Bureau has been historically criticized for a “lack of meaningful guidance” on this issue.<sup>6</sup>

In this paper I examine the economics of the symmetry across monopoly and monopsony effects, the bases for its asymmetric treatment, and the questions this asymmetry raises in regard to the characterization of transactions. I also examine the treatment of buyer agreements as discussed within the Collaboration Guidelines and its implications on buying side mergers.

For purposes of clarity, before proceeding further, it is worthwhile defining some terminology. This is particularly the case since this is an area where there are numerous similar terms, and the same terms can sometimes take on different meanings. The definitions used herein follow that outlined by Chen.<sup>7</sup> In particular, monopsony power is defined as the ability of a firm to profitably reduce the price of an input below competitive levels by reducing its purchases of the input (in the case of a group of firms, this can be referred to as “oligopsony power” as well as monopsony power; herein, monopsony power is used to include oligopsony power). The potential for the exercise of monopsony power arises when a large buyer or group of buyers of an input is supplied by competitive firms whose costs increase with each additional unit of quantity produced.<sup>8</sup> In contrast, a buyer only has countervailing power (also referred to as “bargaining power”) when it is able to offset, at least in part, the market power of *sellers*. Countervailing power is exercised only when in its absence a buyer would pay prices in excess of competitive levels. Countervailing power counters the market power of suppliers. Buyer power is an umbrella term that includes monopsony, oligopsony and countervailing power.

Section 2 discusses the asymmetry in approach to buying and selling cartels under the criminal conspiracy provisions. Section 3 examines the discussion within the Collaboration Guidelines on monopsony power-creating horizontal arrangements and its implications for merger review. Section 4 briefly compares the Bureau’s approach within the Collaboration Guidelines to that contained in the US Merger Guidelines and the approach generally taken by the European Commission (“EC”). Section 5 concludes.

## 2. Asymmetric Approach to Buying and Selling Cartels

### 2.1 The Status of Buying Cartels Under the Act and According to the Bureau

Subsection 45(1) of the Act reads as follows:

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
- (a) to fix, maintain, increase or control the price of the *supply* of the product;
  - (b) to allocate sales, territories, customers or markets for the *production or supply* of the product; or
  - (c) to fix, maintain, control, prevent, lessen or eliminate the *production or supply* of the product. [emphasis added]

If this is not considered sufficiently clear to indicate that conspiracies to buy a product are not included in the criminal provision, the Bureau’s Collaboration Guidelines resolve any remaining ambiguity as to the Bureau’s own understanding:

The prohibition in paragraph 45(1)(a) applies to the price for the **supply** of a product, and not to the price of the **purchase** of a product. Accordingly, joint purchasing agreements – even those between firms that compete in respect of the purchase of products – are not prohibited by section 45, but may be subject to a remedy under the civil agreements provision in section 90.1 where they are likely to substantially lessen or prevent competition [emphasis in original].<sup>9 10</sup>

As such, agreements on the selling side to fix prices are illegal but agreements on the buying side are not. This is the case despite the fact that buying side agreements that result in the exercise of monopsony power will have a negative affect on welfare in the same way as those on the selling side.

## 2.2 The Economics of Monopoly and Monopsony

The symmetry of monopoly and monopsony was recognized by the Canadian Competition Tribunal<sup>11</sup> in the context of a merger between two meat rendering companies (“*Hillsdown*”). In that decision, the Competition Tribunal noted that it could analyse the competitive effects of the merger from the perspective of a monopsonist or a monopolist, and that no significant difference resulted from the two characterizations.<sup>12</sup> In particular, the Competition Tribunal suggested that any transaction can be characterized as a sale of a service or the purchase of inputs.

This is a reasonable finding if the firm in question is neither the initial producer nor the end-user; in other words, that it is in the middle of two markets buying from one and selling in the other.<sup>13</sup> (As such, while a group of final consumers might collectively have monopsony power, their monopsony power could not be re-characterized as monopoly power since they consume the good in question.)

To illustrate, suppose there are two pipelines that transport oil from northern Alberta to oil refineries further south.<sup>14</sup> The two pipelines collude in selling their oil transportation services, setting a monopoly price for such services. They are caught and are so subject to criminal prosecution under section 45. Alternatively, suppose the two pipelines do not sell transportation services but rather buy crude oil in northern Alberta and then resell it at points further south. The two pipelines form a buying group for the purchase of crude, pushing the price of crude down such that crude producers reduce the amount of crude they make available to the pipeline. There are complaints and the buying arrangement is subject to civil review under section 90.1. While the legal outcome of the two matters are quite different, the economic effects are the same.

Suppose in the case where oil pipeline transportation services are being sold that the price of oil at the end of the pipelines is competitive – there are multiple sources of oil in this particular area – and that the competitive price for oil is \$100/m<sup>3</sup>. Further suppose that the marginal cost of transporting oil via the pipeline is  $C_p$  and absent collusion, price of transportation ( $P_p$ ) is set equal to marginal cost. When the two pipelines collude, however, they set the price of transportation services at the monopoly price. Since demand for pipeline services are derived from downstream demand for oil, pipeline producers know the quantity of oil transportation services they will be able to sell oil producers will be given by the equality of oil producers’ marginal cost (the marginal cost of oil ( $C'(Q)$ ) plus the cost of transportation, i.e.,  $C'(Q) + P_p$ ) and their marginal revenue. Marginal revenue in this case will be \$100 given the competitive downstream market for oil. This provides the demand curve faced by the pipeline producers ( $P_p = \$100 - C'(Q)$ ). As such, the pipeline producers’ profits ( $\Pi_p$ ) can be written as

$$\Pi_p = (\$100 - C'(Q) - C_p)Q$$

Assume the resulting profit maximizing price is \$75/m<sup>3</sup>. At this price, assuming that oil producers’ demand for pipeline transportation services is not perfectly inelastic, the oil producers purchase fewer transportation services than they otherwise would were transportation sold competitively. Given the downstream price of \$100/m<sup>3</sup> for oil and a monopoly transportation cost of \$75/m<sup>3</sup>, the oil producers’ profits are  $(\$100 - \$75 - AC(Q^M))Q^M$  (where  $AC(Q)$  is the average cost of oil production) and pipeline cartellists’ profits are  $(\$75 - C_p)Q^M$ .

Now instead, suppose that the pipeline owners buy crude oil at the northern end of the pipeline and then re-sell it at the southern end. The pipeline owners now come together to jointly purchase crude oil at the northern end of the pipeline. They reduce the purchase price. If the upstream market for oil is competitive, oil suppliers will supply out to their marginal costs so that the profit function faced by pipeline suppliers will be as before; that is,  $\Pi_p = (\$100 - C'(Q) - C_p)Q$ .

As such, the quantity that maximizes pipeline operators’ profits will be the same as before, resulting in a price paid for upstream oil of \$25/m<sup>3</sup>. The oil producers will have profits of  $(\$25 - AC(Q^M))Q^M$  and the pipe-

line owners will make profits of  $(\$100 - \$25 - C_p)Q^M$ . Both oil producers and pipeline owners have the same profits in the monopsony case as in the case of monopoly.<sup>15</sup>

The net result in both situations is a loss in surplus in the intermediate pipeline market: with monopoly, too few pipeline transportation services are purchased in the market to be socially optimal such that too little crude is transported, while with monopsony, too little crude is supplied for transportation.

This loss in surplus arises even though in both the monopoly and monopsony examples the market for the sale of crude oil at the end of the pipelines remains competitive. There is no change in the total amount of crude oil produced (only the particular pipelines at issue will have lost market share), and there is no change in the price of crude oil in the downstream market at the end of the pipelines. This is not to say that there might not be an additional source of inefficiency stemming from the competitiveness of the downstream market for crude oil. The reduction in oil transported through the pipelines will be made up by other crude oil producers (who perhaps use trucks, ships or other pipelines for their transportation) increasing their output. If those oil producers increase their output by bringing on-line an oil source that is less productive than the oil source that would have otherwise produced the crude oil but for the monopsony/monopoly, there will be a misallocation of resources from the more efficient oil source to the less. Alternatively, if the crude oil market is not in fact competitive, the reduction in oil transported through the pipelines as result of either the buyer or seller cartel will result in a reduction in output in the crude oil market at the end of the pipelines and so a higher price and reduced surplus in that market as well.

As a theoretical matter, monopsony is no less harmful than monopoly. As in the case of monopoly in selling services, monopsony transfers surplus from the upstream market (the supply of crude oil in northern Alberta) to the intermediate market (the oil pipeline transportation market) and in so doing creates a deadweight loss and an inefficient allocation of society's resources. If the question of economic surplus in the market at issue were the only consideration, there would be no reason to proscribe one type of agreement and not the other. Nonetheless, the Parliament of Canada chose to treat these situations asymmetrically.<sup>16</sup>

### 2.3 A Matter of Expedience

The decision to treat monopoly and monopsony differently was presumably made based on the likelihood of harm. Not all agreements to fix prices, allocate markets or eliminate the production or supply of a product on the selling side will necessarily be surplus-reducing.<sup>17</sup> Similarly, not all buying side agreements will have such an effect. However, more often than not, such agreements are harmful on the selling side and are not on the buying side. Buying side agreements often have the effect of reducing upstream prices without causing a reduction in output. In other words, such agreements often have the effect of countervailing pre-existing upstream market power, rather than resulting in output-reducing market power. As such, to preclude the capture of such efficiency-enhancing agreements where defendants can no longer rely on the requirement that agreement unduly lessens competition, buying agreements have been excluded from section 45 altogether.

This question of expedience is at least partially suggested by the Collaboration Guidelines but only in the context of small- and medium-sized firms: "The Bureau recognizes that small- and medium-sized firms often enter into joint purchasing agreements to achieve discounts similar to those obtained by larger companies. Given that such arrangements can be pro-competitive, they are not deserving of condemnation without a detailed inquiry into their actual competitive effects; as such, they should only be subject to review under the civil agreements provision in section 90.1."<sup>18 19</sup>

### 2.4 Characterization of Transactions

While it may be desirable to exclude certain type of behaviour from a *per se* law, in the case of buying and selling cartels, this exclusion raises the question of the proper characterization of a transaction as either involving a sale or a purchase. It is not completely clear that direction of payment would dictate the outcome given the Tribunal's decision in *Hillsdown* that a transaction can be characterized as a sale of a service or the purchase of an input. In keeping with that decision, the US Merger Guidelines note in an example in regard to "implicit prices" that "[i]f pipelines buy the oil at one end and sell it at the other, the price charged for trans-

porting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as ‘pipeline transportation of oil from point A to point B’ than as ‘oil at point B’.<sup>20</sup> If this type of reasoning were to prevail in the case of buying agreements taking place in Canada, not only could a buying agreement that has monopsony effects be captured, so could one that merely countervails upstream market power. Moreover, given the significant difference in penalties for the two types of cartels – a fine up to \$25 million and a prison term up to 14 year in the case up selling cartels versus dissolution of the agreement in the case of buying cartels – defendants have strong incentive to re-characterize an agreement as one involving purchase.

### 3. The Competitor Collaboration Guidelines, Mergers and Monopsony Power

The asymmetric approach to monopoly and monopsony has the surprising benefit of the Bureau clearly stating that not all input price reducing agreements will result in a lessening of competition. While this statement is made in the context of joint purchase agreements, it would be wholly unreasonable for the Bureau to fail to extend this logic to agreements that are in fact mergers. Historically, the Bureau has failed to make this position clear in the merger context. This has led to uncertainty as to whether the Bureau would proscribe buyer-side mergers that are unlikely to reduce surplus. However, even with this uncertainty now resolved, questions remain as how to assess cases of monopsony and to successfully distinguish such cases from those involving bargaining power.

#### 3.1 Is a Reduction in Output Necessary for an Agreement Between Buyers to Raise Issues?

The Canadian *Merger Enforcement Guidelines* (the “MEGs”) are 46 pages long. Within that, a mere single paragraph and one footnote address the question of monopsony power:

2.4 The analytical framework is equally applicable when assessing market power by buyers of a product. Market power of buyers means the ability of a single firm or group of firms to profitably depress prices paid to sellers ( for example, by reducing the purchase of inputs) to a level of that is below the competitive price for a significant period of time.<sup>21</sup>

Given this brevity, it is not surprising that a lack of clarity follows. The most important issue is whether “reducing the purchase of inputs” or reducing some other dimension of competition (such as quality) is necessarily part of an exercise of market power by buyers, or whether wealth transfers from sellers to buyers as a result of countervailing power is sufficient. In other words, do the merger provisions apply to cases of merger that improve the ability of the merged entity to countervail upstream market power, or is it limited to cases of monopsony power?

#### *Applicability of Guidance in the Collaboration Guidelines to Buyer Mergers*

Prior to the amendment to section 45, when section 45 applied to the purchase of a product and potentially applied regardless of whether the input price reduction was accompanied by an output decrease (depending on how an undue lessening of competition was interpreted and assessed),<sup>22</sup> it was arguable from a policy point of view that the merger provisions too should apply in this way. That is, that the merger provisions should consider cases of buying power that do not also constitute monopsony power. Otherwise, the merger provisions risked rendering *per se* legal behaviour that was might otherwise be subject to the criminal price-fixing provisions. Given the amendments to section 45, however, such an interpretation of buyer market power in the case of merger no longer makes sense. Exercises of buyer market power through joint purchasing agreements are no longer proscribed criminally but are examined under section 90.1 to determine whether they likely constitute monopsony power. Only if they do, will agreements be considered likely to substantially lessen or prevent competition in the relevant upstream market.<sup>23</sup>

It would be wholly unreasonable if the approach to civil buying agreements under 90.1 did not also apply to the merger provisions. Mergers, after all, are simply a particular type of agreement. This reasoning remains despite the fact the Bureau is careful to limit its discussion of joint purchasing agreements and monopsony power “[f]or the purpose of section 90.1.”<sup>24</sup>

*Collaboration Guidelines on Output Reduction*

In regard to output reductions in the context of joint purchasing agreements, the Bureau notes as follows:

... the Bureau considers a single buyer to have “monopsony power” where the buyer holds market power in the relevant purchasing market such that it has the ability to decrease the price of a relevant product below competitive levels with a *corresponding reduction in the overall quantity of the input produced or supplied* in a relevant market, or a *corresponding diminishment in any other dimension of competition* [emphasis added].<sup>25</sup>

This, it would appear, should resolve the question of whether mere transfers in wealth are subject to remedy in regard to buying agreements (or mergers between buyers) but for a footnote accompanying this statement:

Cases where the supply curve is perfectly inelastic such that a price decrease below competitive levels does not result in a decrease in output but only a wealth transfer may also give rise to concerns. This scenario should be understood to be generally included in the category of upstream market power.<sup>26</sup>

In other words, if the input in question is one where supply cannot be easily altered, the Bureau may still pursue a merger between buyers that lowers the price to such input providers even though there will be no decrease in output. The Collaboration Guidelines do not elaborate any further on this point, but presumably the types of products that this would entail are the types that are often considered in buyer power cases: agricultural products<sup>27</sup> and products that are by-products of other production processes. For agricultural and other similar products, the amount of output can be altered from one growing season to the next but often cannot be easily or profitably altered within a growing season. By-product production meanwhile is typically contingent on demand for the associated main product. Examples might include scrap metal, rendered meat by-product (as in the *Hillsdown* case), and steam from heat-intensive production facilities.

Logs are potentially the type of ‘agricultural’ product of concern. In 2004, they were the focus of two separate Bureau consent agreements, involving two separate mergers within the forestry industry.<sup>28</sup> In both cases, the settlement involved the divestiture of saw mills. In neither case, however, did the Bureau’s publicly available information note whether the merger would result in a decline in log purchases. Rather, in regard to one of the mergers, it noted only that “[t]his transaction would have resulted in less choice for log sellers, wood re-manufacturers and wood-chip sellers.”<sup>29</sup>

The exception to the need for output reductions (or a corresponding diminishment in any other dimension of competition) in cases of perfectly inelastic supply is unlikely to much increase the scope of section 90.1 in cases of joint purchasing agreements or the merger provisions in the case of buyer mergers. Perfectly inelastic supply curves are likely to be relatively rare or a question of (mis)measurement.

In cases of agricultural products, growing seasons are typically no more than a year such that a producer can adjust her output the following year should low prices compel her to do so. As such, an observation of perfectly inelastic supply may only be a question of the period over which it is observed. In such situations, output should be measured over a period which is sufficiently long for adjustment and should at least match the duration of the expected price increase.

Even in cases where the growing period is considerably longer, such as in the log example, the log is typically not the only input to production. Other inputs can include cutting, management, transportation and others. A decrease in log prices could compel a producer to rationalize output on the basis of inadequate return on the sum of these inputs, not just the cost of the log itself. This is similarly true for by-products. One need not look further than recyclable materials to know that producers will forgo the cost of selling such materials in favour of storing or destroying them if the price of recyclables is sufficiently low.<sup>30</sup> In such situations, production of a by-product, or the product itself in cases such as logs, should not be confused with the sale of such products.

### *Wealth Transfers when Considering Efficiencies*

Despite the Collaboration Guidelines stating otherwise (with the exception of cases of perfectly inelastic supply), consideration of cases where there is only an upstream wealth transfer as a result of a merger between buyers is arguably not out of keeping with the Canadian Federal Court of Appeal's decision that wealth transfers be considered when assessing whether efficiency gains likely to be brought about by a merger will offset the anti-competitive effects arising from that merger.<sup>31</sup> Given that section 90.1 parrots the merger provisions wording in regard to efficiencies, the same standards of review presumably apply to joint purchasing agreements. In carrying out such trade-off analysis, the balancing weights standard is typically applied. Under that standard, any increase in surplus arising from the efficiency gain from the merger is balanced against the deadweight loss resulting from the likely anti-competitive effects of the merger, and where appropriate, some portion (including possibly all or none) of the associated transfer of surplus from consumers to producers.<sup>32</sup>

It arguably remains unclear, however, whether a finding of a substantial lessening of competition must necessarily also include a deadweight loss such that wealth transfers are only considered in the trade-off analysis given a finding of a deadweight loss. That said, considering the expressed concern with wealth transfers by the Federal Court of Appeal, it is welcome that the Bureau has not suggested that *any* decrease in input prices are subject to anti-trust scrutiny, and it has rather restricted itself to only those situations where the price decrease is accompanied by a deadweight loss (i.e., an unambiguous exercises of monopsony power) and/or those situations where the wealth transfer arises from a perfectly inelastic supply curve, which are likely to be relatively rare. Here, as elsewhere, most price decreases should be welcome.

### **3.2 The Analytical Framework for Cases of Monopsony**

As noted above, the MEGs indicate that the analytical framework for assessing market power on the selling side is equally applicable on the buying side (a similar statement is also made in the US Merger Guidelines<sup>33</sup>). This, however, is not as straightforward as it may first seem. Topics for consideration include: the base price against which a lessening of competition is determined, market definition, barriers to entry, and the role of the downstream market. Again, the Collaboration Guidelines are illuminating, but it is not clear that the order of steps suggested by the Collaboration Guidelines are really the ones anyone, including the Bureau, would or should follow when determining the likelihood of monopsony. Rather, the first step should be determining whether input sellers have market power. It is this that will determine whether any buyer power is likely to be one of monopsony, and so whether output is likely to increase or decrease.

#### *Competitive Price*

In the case of mergers between suppliers, whether the merger is likely to result in a substantial lessening of competition is based on an assessment of whether the merged entity is likely "able to sustain higher prices than would exist in the absence of the merger by diminishing existing competition."<sup>34</sup> That is, changes in market power are measured relative to the prevailing price (at least in most instances).<sup>35</sup> In the case of a merger between buyers, however, the use of the prevailing price would be at risk of including prices that are above competitive levels and so at risk of including situations of bargaining power rather than monopsony power.<sup>36</sup> The Collaboration Guidelines, in specifying only a concern with exercises of monopsony power, indicate that a decrease in price below "competitive levels" is of interest. (This echoes the MEGs in the description of buyer market power as prices paid to sellers that are below the competitive price.) This raises the first question as to what a competitive price actually entails.

The usual candidate for the competitive price is marginal cost. Short-run marginal cost, however, ignores contributions to fixed cost, and it is not clear from a simple reference to it, whether marginal cost is limited to those instances where the market is in long-run equilibrium (characterized by zero economic profits) or it is any time price is equal to marginal cost (which may be characterized by profits). Moreover, measuring marginal cost is notoriously difficult, with average variable cost – a wholly different concept better suited for determining shutdown points – often acting as a substitute. Using the average cost curve instead, while

computationally somewhat easier, does not resolve the issue of short-run versus long-run. Also, some would argue that its use is not theoretically sound. Regardless of the cost used, in all cases, cost measurement issues are compounded when the market in question is characterized by multi-product firms. So, even if the measure of competitive price through a cost proxy can be agreed upon, this does not mean that it can be easily and un-controversially estimated.

Here again the Collaboration Guidelines are instructive. While they do not define “competitive price levels,” they do note that a price below competitive levels has “a *corresponding* reduction” in the overall quantity produced or supplied or a “*corresponding* diminishment” in any other dimension of competition. This provides an elegant solution to the question of not so much what constitutes a competitive price (which remains unresolved), but whether the observed price is in fact competitive: if input suppliers will reduce their output (or some other dimension of competition) when price is below the prevailing price, the prevailing price is considered competitive.<sup>37</sup>

#### *Market Definition*

The MEGs indicate that a key consideration in merger review is market definition. This again poses challenges in the context of monopsony. Markets in buying cases are defined around the *sellers* to the merging parties. In particular, the Collaboration Guidelines indicate that the Bureau “applies a hypothetical monopsonist test under which a relevant market is defined as the smallest group of products and the smallest geographic areas in which a sole, profit-maximizing buyer (the “hypothetical monopsonist”) would impose and sustain a significant and non-transitory price decrease below levels that would exist in the absence of the joint purchasing agreement.”<sup>38</sup> As consequence, one obtains a list of differing markets in which one or more seller to the merging parties participates, depending on whether a seller is likely to experience a price decrease below prevailing prices. As such, while the test is called the hypothetical monopsonist test, because it uses prevailing prices (which may or may not be competitive), it defines markets on the basis of buying power, not on the basis of monopsony power.

The issue is further complicated by the fact that market definition in monopsony cases – being centered around sellers – can be unintuitive, can involve an assessment of the costs of switching by buyers not just sellers, and the resulting market can be different for each supplier potentially affected by the downstream transaction.

In the case of downstream sellers of products, market definition is determined on the basis of consumers’ willingness to switch to other products or geographic areas in face of a price increase. As such, market definition depends on their actions, rather than the actions of sellers. In the case of the hypothetical monopsonist test, market definition depends on *suppliers* having profitable, alternative outlets for their products, which in turn depends on buyers and their willingness to switch. That, in turn, may vary depending on who the seller is.

To illustrate, take the example of corn farmers who sell corn to corn processors.<sup>39</sup> Suppose that the buyers, who are either merging or entering into a joint purchasing agreement, are purchasing corn from farmer A and farmer B. Farmer A is located to the south of the processor and farmer B is located to the north. Suppose that in face of a price decrease by the processors, farmer A has numerous other potential buyers located further south to which it can profitably turn. Farmer B, however, has no other proximate processors. Consequently, it appears that the processors would be able to profitably lower prices paid to farmer B but not to farmer A, and so both would be in different relevant geographic markets.<sup>40</sup> Now suppose, however, that farmer A typically produces corn of a particular variety which the main southern processor cannot process without incurring additional costs. These costs are not insignificant and not ones that farmer A could profitably incur on behalf of the buyer, and so these costs preclude profitable sale to that processor. So, despite the fact that processor A is in a broader geographic market than processor B, it too might face a decrease in the price of its corn. Further suppose, however, that farmer A (unlike farmer B) has the type of land that is also good for producing canola. Farmer A is in a position to profitably increase its canola production in response to a corn price decrease in sufficient quantity to render the corn price decrease unprofitable for the

processors. Consequently, we have two sellers of corn with two different geographic markets and two different products markets, one of them including canola.

#### *Barriers to Entry*

The consideration under market definition of costs buyers face in switching sources of supply or the costs to sellers of switching to the production of other products starts to blur the line between market definition and barriers to entry. In downstream seller cases, markets are defined from the perspective of buyers and so potential supply-side substitutes are not considered until barriers are assessed, or, they are considered in market definition only to the extent that firms can profitably divert sales from existing buyers to those in the relevant market and/or profitably bring idle capacity online without incurring significant sunk costs.<sup>41</sup> In the case of buyer mergers, market definition hinges on supply-side substitution.

The Collaboration Guidelines do little to elucidate this blurring, noting only that “where parties to the joint purchasing agreement account for a significant portion of the input purchases, the Bureau will consider whether barriers to entry into buying the relevant input are high.”<sup>42</sup> As such, the Collaboration Guidelines do not address such issues as the timeframe over which buyer “entry” is to be assessed. Nor does it address the possible interaction between barriers on the buyer side and those on the input supply side. While in the short-run, a supplier of a product subject to monopsony power may have no or few alternatives for the sale of its product, in the longer-run, in response to depressed monopsony prices, it may seek out and/or develop alternative outlets. A monopsonist, in such a situation, may be less willing to exercise its monopsony power if it believes that such an exercise would jeopardize its long-run source of supply as result of high barriers to entry into supply.

#### *Monopsony Power (and the Order of Steps Taken to Assess its Likelihood)*

At this point in the analysis, having defined markets, determined levels of share accounted for either the merged entity or the joint purchasing group, and assessed barriers to entry, one could still be in a situation of a highly concentrated buying market with high barriers to entry into buying, but only bargaining power rather than monopsony power. This is not a situation that is likely to arise in downstream mergers. The above types of conditions – high market share/concentration in a well-defined market with high barriers to entry – are often deemed sufficient to conclude market power in the assessment of a merger among sellers. The reason is that it is highly unlikely that the prevailing price in such a merger would be below the ‘competitive’ price (which is analogous to a prevailing price which is above the competitive price in a merger of buyers). The insufficiency of these factors to find monopsony power is acknowledged in the Collaboration Guidelines.<sup>43</sup> It notes additional factors the Bureau will consider in distinguishing between bargaining power and a likely exercise of monopsony power:<sup>44</sup>

1. Whether the supply curve is highly elastic;
2. Whether the upstream supply of the input is characterized by a large number of sellers and low barriers to entry such that the normal selling price of a supplier is likely competitive; and
3. Whether it seems likely that certain suppliers will exit the market in response to the anticipated price decrease or will scale back production.

It is these factors that go the heart of the matter. In regard to factor 1, as noted above, an upward-sloping supply is a necessary condition for the exercise of market power. However, simply-stating so by noting that the elasticity of the supply curve is a factor for consideration does little to clarify how elasticity is likely to be assessed. In some ways, this is similarly the case in regard to factor 3; that factor is essentially a restatement of the definition of monopsony power. That said, factors 1 and 3 are welcome in that they again emphasize that bargaining power is insufficient, and clarify what is required for monopsony power.

Factor 2 does provide new information as to how bargaining and monopsony power may be distinguished. In fact, it is so key that in practice it is the likely starting point for all monopsony cases, and if it is not, it should be. Bargaining power arises when a firm (or firms) is able to offset, at least in part, the market power of *sellers* (and so one would expect, that in its absence, a buyer would pay prices in excess of competitive

levels). An observation of seller market power suggests that an exercise of monopsony power is unlikely. In such situations, there is no need to define markets, assess barriers and so forth. As such, an assessment of the market power of sellers is equally important to the analysis as that of buyers, suggesting that, unlike in selling-side mergers where only selling-side market power is thoroughly assessed,<sup>45</sup> both market power by sellers and buyers should be carried out. Moreover, an assessment of the likelihood of market power by sellers to potentially monopsonistic buyers should be the first step. Fortunately, competition agencies have a long history of assessing whether sellers have market power, and those tools tend to be well-known and transparent.

#### *Downstream Market*

Nowhere in the analytical framework contained in the Collaboration Guidelines for assessing monopsony power does the downstream market play a role. This is reasonable to the extent that the surplus loss of concern in cases of monopsony power occurs in the upstream market. As such, there need not be any change in output or price in the downstream market. That said, whether buyers are incented to exercise monopsony power, even when they are in a position to do so, is not independent of the downstream market. The downstream market structure can impact the profitability of an exercise of monopsony power. As noted in the above oil pipeline example, in competitive downstream markets, the only downstream effect of decreased input purchases and the corresponding decrease in downstream output will be lost downstream market share. This will reduce, although not necessarily eliminate, the incentive to exercise monopsony power. Reduced input purchases may nonetheless be profitable for the firm if the benefit of the cost savings upstream outweighs the costs associated with decreased market share downstream. If alternatively the buyers in question also have downstream market power so that they have an incentive to reduce downstream output, this will reinforce any incentive to reduce upstream purchases.

### **4. Comparison of Canadian, US and EC Approaches**

The most striking difference in the approach to monopsony in Canada versus that in the EC and, until the recent clarification in the US Merger Guidelines, in the US was that Canada was more hawkish. The EC, given its focus on consumer welfare in competition policy, puts it in the unusual position that it has a more conservative approach than Canada to mergers that result in monopsony power. The EC will not pursue cases of merger resulting in monopsony power unless it is also accompanied by downstream market power.<sup>46</sup> Whether this was also the case in the US – given its similar focus on consumer welfare – was not historically completely clear.<sup>47</sup> The US Merger Guidelines resolve any ambiguity. Therein, the US agencies note, “[n]or do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.”<sup>48</sup>

While the above is a welcome clarification to the US approach to buyer mergers, the US Guidelines remain frustratingly cryptic in regard to the role of output reductions in monopsony power. The US Guidelines use the term monopsony power but do not define it, leaving it unclear whether they simply mean situations where there is one (or a dominant) buyer or they wish to limit monopsony power to those situations where its exercise has an output effect (or a similar effect on another dimension of competition).

The uncertainty in regard to the need for an output effect is further confused by the Agencies noting that they “do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power.”<sup>49</sup> While a short-run reduction in output may not be the *only* indicator of enhanced buyer market power, it is not clear whether the US agencies nonetheless view it as a necessary (but not necessarily sufficient) indicator. If it is not a necessary indicator, it should be made clear whether this is because the Agencies are possibly concerned with (a) incidents of bargaining power, (b) wish to only indicate that they are also concerned with non-price elements of competition that may not have an obvious impact on quantity or, rather, because (c) they wish to also capture situations of (perfect) price discrimination where the monopsonist can extract the maximum surplus from suppliers without reducing output. If the latter, this may be noteworthy but likely exceptional.

## 5. Conclusion

With the implementation of revised section 45 of the Canadian *Competition Act* on March 12, 2010, the criminal conspiracy provisions appear to no longer apply to the purchase of a product. As a result, buyer and seller cartels are treated asymmetrically under the law, even though their effects can be uniform. Such asymmetry is justifiable on the basis of likelihood of harm and the need for expedience. Whether buyer cartels are less likely to be harmful to the economy than seller cartels is an empirical matter but it is generally understood to be so. As recognized by the Competition Tribunal and the US agencies, however, transactions can be characterized as either the purchase of an input or the sale of a service, raising the specter of dispute over transaction characterization particularly given the significant difference in punishment available under sections 45 and 90.1.

That buyer cartels are now exempt from the criminal conspiracy provisions has the surprising benefit of shedding light on the Bureau's approach to mergers between buyers. The Bureau's Collaboration Guidelines makes clear that it will only consider those joint purchasing agreements that constitute a likely exercise of monopsony power as having lessened or prevented competition substantially. It would be wholly unreasonable on the part of the Bureau if this position were not extended to mergers between buyers, given that mergers differ from joint purchasing agreements only in that they constitute a particular type of agreement.

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## Endnotes

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<sup>1</sup> *The Competitor Collaboration Guidelines* ("Collaboration Guidelines"), Competition Bureau, Canada, December 2009, at 11.

<sup>2</sup> This is not to suggest that two monopolies are better than one. Even in such countervailing situations, it is preferable that upstream market power not be the result of unnecessary or poorly enforced or managed regulation, a merger that should be subject to competition review, or abuse of dominance. Moreover, as noted by Ungem-Stemberg (2003) and Dobson and Waterson (1997), lower wholesale prices need not translate to lower downstream prices if increased countervailing power is accompanied by increased concentration in the downstream market. This is not considered herein since, in practice, increased downstream market power as result of an agreement would be separately considered and investigated under applicable provisions of the Act (mergers, civil arrangements, or the conspiracy provisions).

<sup>3</sup> Chen (2003) and Eruktu (2005) contemplate situations where increased countervailing power has a net negative welfare effect. In both papers, an increase in countervailing power by an asymmetrically large buyer may make its rivals worse off and so potentially result in a decrease in effective downstream competition. These theories are akin to "waterbed" theories of anticompetitive harm whereby "a discounted price to a buyer with market power results in an increase in the wholesale price to other buyers – a so-called waterbed effect – that results in an increase in prices to downstream consumers" (Roundtable on Monopsony and Buyer Power, Note by the Secretariat, OECD, October 10, 2008, at paragraph 18). The Bureau has indicated that it will investigate waterbed theories of harm under its abuse provisions but "in order for a change in downstream market structure, which may result from secondary line price discrimination implied but the cycle hypotheses, to be considered harmful it must be the case that the intended purpose of the discrimination was the exclusion or disciplining of competitors (as opposed to some pro-competitive rationale), and that such exclusion/disciplining results in enhanced downstream market power. A simple observation of price discrimination in the input market would not normally be sufficient to conclude an anti-competitive effect." The Bureau further noted that it has no experience with waterbed effect cases (Roundtable on Monopsony and Buyer Power, Note by Canada, OECD, October 16, 2008, at paragraphs 28-29 (<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02995.html>)). Since the focus of discussion in this paper is agreement and not abuse of dominance, negative welfare effects from countervailing power of the type considered by Chen and Eruktu are not considered herein.

<sup>4</sup> Here, and throughout this paper, it is assumed that all other potential sources of changes in efficiency – productive or dynamic – are constant with any agreement.

<sup>5</sup> *Competitor Collaboration Guidelines*, Competition Bureau, Canada, December 23, 2009.

<sup>6</sup> Clifford and O'Carroll note, "The lack of meaningful guidance from the [Commissioner and the Competition Tribunal] makes it more difficult for advisers to apply analytical frameworks with confidence that the Bureau will adopt similar frameworks for its investigation and assessment of a merger that raises monopsony issues ... the transparency and predictability of the Competition Bureau's analysis of monopsony issues would benefit from the Commissioner supplementing the *Merger Enforcement Guidelines* with a more detailed discussion of these issues." (John Clifford and Sorcha O'Carroll, "Monopsony and Predatory Buying: The Landscape is Wide Open", Canadian Bar Association Conference – Competition Law Section, October 2007, at 11).

<sup>7</sup> Zhiqi Chen, "Buyer Power: Economic Theory and Antitrust Policy", *Research in Law & Economics*, vol. 22, 2007, at 19-20. See also "Re: Roundtable on Monopsony and Buyer Power (22-23 October 2008)", letter to all competition delegates and observers, July 24, 2008, Frederic Jenny, Chair of Competition Committee, OECD.

<sup>8</sup> That is, the marginal cost of a supplier is increasing.

<sup>9</sup> *Collaboration Guidelines* at 11.

<sup>10</sup> Whether the courts will agree with this interpretation of amended section 45 remains to be seen.

<sup>11</sup> This recognition is noted in the Bureau's *Merger Enforcement Guidelines* (see *Merger Enforcement Guidelines*, September 2004, Competition Bureau, Canada, at footnote 10).

<sup>12</sup> *The Director of Investigation and Research v. Hillsdown (Holdings) Canada Ltd.*, et al., Reasons and Order, Competition Tribunal, March 9, 1992, at 18.

<sup>13</sup> Care must be taken that in re-characterizing a monopsony purchase into a monopoly sale, the same buyers and sellers are at issue. *Hillsdown* is illustrative. The transaction entailed the merger of two renderers of meat by-products. In some cases, the renderers purchased renderable material (mainly from slaughterhouses); in other instances, slaughterhouses and the like purchased rendering services from renderers (*Hillsdown* at 9). When renderers purchased renderable material, they purchased this material from a set of slaughterhouses who were distinct from the slaughterhouses to whom rendering services were sold. These two different sets of slaughterhouses had different substitutes available to them, and so paid different prices (*Hillsdown* at 8). As such, two different markets were at issue, each of which could have been characterized as a sale of services or a purchase of inputs.

<sup>14</sup> For purposes of this example, assume that pipelines are not regulated in any way.

<sup>15</sup> Alternatively, if the upstream market for the supply of oil is not competitive, the pipeline operators will not have monopsony power and will not be able to purchase the same quantity of oil as transported in the monopoly pipeline services case, resulting in different equilibrium outcomes under the pipeline monopoly and oil buying agreement scenarios.

<sup>16</sup> The asymmetric approach was not chosen in the case of bid-rigging. Buyers secretly agreeing to fix the purchase price of a product sold through auction continue to be circumscribed on a *per se* basis. The mechanism by which buying agreements in auctions are sanctioned are by way of pre-announcement. If the person requesting bids or tenders is informed of the agreement beforehand, section 47 does not apply. The *Collaboration Guidelines* indicate, however, that such agreements may be examined under section 90.1 (*Collaboration Guidelines*, at 2).

<sup>17</sup> For example, firms forming such agreements may not collectively have market power.

<sup>18</sup> Collaboration Guidelines, at 11.

<sup>19</sup> Such agreements can typically be pro-competitive in two ways: one, through countervailing power that increases output as described above; and two, through bulk purchases allowing for more cost-effective sale (e.g., by reducing transaction or transportation costs).

<sup>20</sup> US Merger Guidelines, August 2010, at 10.

<sup>21</sup> MEGs, 2004, at paragraph 2.4. As noted above, the footnote that addresses buyer market power notes the Competition Tribunal finding in *Hillsdown*.

<sup>22</sup> For example, charges were brought under section 45 against six taxi companies and seven individuals in St. John's for conspiring to unduly prevent or lessen competition in the purchase of contracted rights to operate taxi cab services from or on the premises of contracting businesses and public institutions in the City of St. John's and elsewhere in the Province of Newfoundland and Labrador (see "Competition Bureau charges St. John's taxi companies with conspiracy", Media Release, Ottawa, July 9, 2004, and "Newfoundland Court Confirms Dismissal of Conspiracy Charges in St. John's Taxi Case for Failure to Establish a Relevant Market", *Perspective*, Davies Ward Phillips & Vineberg LLP, October 22, 2007.) Publicly available information on the case does not discuss whether the alleged agreement had an impact on output.

<sup>23</sup> Collaboration Guidelines, at 33.

<sup>24</sup> Collaboration Guidelines, at 33.

<sup>25</sup> Collaboration Guidelines, at 33.

<sup>26</sup> Collaboration Guidelines, at footnote 23.

<sup>27</sup> Relatively few mergers have been challenged in the US on the basis of buying side considerations. Of the more recent cases, one was in the grain industry (*United States v. Cargill, Inc. and Continental Grain Co.* (filed July 8, 1999), <http://www.usdoj.gov/atr/cases/12500/2552.htm> (complaint), 64 FEDERAL REGISTER 44,046 (1999) (competitive impact statement), 2000-2 Trade Cases (CCH) ¶ 72,967 (final judgment), as noted in "Roundtable on Monopsony and Buyer Power: Note by the United States", Directorate for Financial and Enterprise Affairs, Competition Committee, Organisation for Economic Co-operation and Development, October 13, 2008, at 6).

<sup>28</sup> One involved the merger between Canfor Corporation and Slocan Forest Products Ltd. ("Bureau resolves competition issues in forestry merger", Media Release, Competition Bureau, Canada, April 1, 2004), and the other a merger between West Fraser Timber Co. Ltd and Weldwood of Canada Ltd. (see "Competition Bureau reaches agreement to preserve competition in two B.C. forestry markets", News Release, Competition Bureau, Canada, December 7, 2004).

<sup>29</sup> "Bureau resolves competition issues in forestry merger", Media Release, Competition Bureau, Canada, April 1, 2004.

<sup>30</sup> Matt Richtel and Kate Galbraith, "Back at Junk Value, Recyclables Are Piling Up", *The New York Times*, December 7, 2008 (<http://www.nytimes.com/2008/12/08/business/08recycle.html>).

<sup>31</sup> In particular, the Federal Court of Appeal found that "In referring to "the effects of any prevention or lessening of competition", subsection 96(1) does not stipulate what effects must or may be considered. When used in non-statutory contexts, the word, "effects", is broad enough to encompass anything caused by an event. Indeed, even though it does not consider the redistribution of wealth itself to be an "effect" for the purpose of section 96, the Tribunal recognizes, as all commentators do, that one of the *de facto* effects of the merger is a redistribution of wealth ... the Tribunal erred in law when it interpreted section 96 as mandating that, in all cases, the only effects of an anti-competitive merger that may be balanced against the efficiencies created by the merger are those identified by the total surplus standard ..." *Commissioner of Competition v. Superior Propane Inc.*, Reasons for Judgment, 2001 FCA 104, at paragraphs 77 and 139.

<sup>32</sup> *Bulletin on Efficiencies in Merger Review*, Competition Bureau, Canada, March 2, 2009, at 4.

<sup>33</sup> "To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market." (US Merger Guidelines, 2010, at 32).

<sup>34</sup> MEGs, 2004, paragraph 2.9.

<sup>35</sup> In prevent cases, the price that would have prevailed absent the merger is the base price of concern (MEGs, 2004, at paragraph 2.10).

<sup>36</sup> As noted herein at footnote 4, it is possible that countervailing power may result in negative welfare effects in the downstream market. The Bureau has, however, indicated that it would consider such cases under the abuse provisions and that price discrimination in an upstream market generally does not raise concerns.

<sup>37</sup> This implicitly assumes that the prevailing price is not already subject to a weak exercise of monopsony power (i.e., an exercise of monopsony power that does not fully maximize profits) such that at the prevailing price, suppliers are already supplying less than the competitive output and should the price be further depressed, suppliers would supply even less output. If there is reason to believe that the prevailing price is less than the competitive price prior to the implementation of the buying agreement or the buying side merger, the above noted methodology for ascertaining whether the prevailing price is likely to be the competition price is inappropriate.

<sup>38</sup> Collaboration Guidelines, at 34.

<sup>39</sup> This is an elaboration of an example that is contained in the Collaboration Guidelines at 34.

<sup>40</sup> This is no different from downstream mergers being characterized by multiple geographic markets conditional on the ability to price discriminate across those geographic areas.

<sup>41</sup> MEGs, at paragraph 4.2.

<sup>42</sup> Collaboration Guidelines, at 35.

<sup>43</sup> Collaboration Guidelines, at 35.

<sup>44</sup> Collaboration Guidelines, at 35.

<sup>45</sup> The Bureau will consider countervailing power on the part of buyers in selling-side mergers (MEGs, at paragraphs 7.1-7.3). However, it is unlikely that such power will exist absent the availability of alternatives sellers, which would have been assessed when assessing seller market power and barriers to entry.

<sup>46</sup> "Roundtable on Monopsony and Buyer Power: Note by the European Commission", Directorate for Financial and Enterprise Affairs, Competition Committee, Organization for Economic Co-operation and Development, October 13, 2008, at paragraph 12.

<sup>47</sup> Werden, Gregory, "Monopsony and the Sherman Act: Consumer Welfare in a New Light", *Antitrust Law Journal*, 74, 3 (2007): 707-737, at 707.

<sup>48</sup> US Merger Guidelines, at 33.

<sup>49</sup> US Merger Guidelines, at 33.

## Comments

### INJUNCTIONS IN MISLEADING ADVERTISING CASES

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Les entreprises désirant faire cesser la publicité de leurs concurrents par voie d'injonction interlocutoire en vertu de l'article 52 de la *Loi sur la concurrence* doivent affronter plusieurs difficultés. En particulier, il est difficile de déterminer quelle importance le tribunal accordera à la « valeur probante de la preuve » et au « préjudice irréparable ». Les auteurs ne recommandent de recourir aux demandes d'injonctions pour faire cesser la publicité trompeuse que dans des cas exceptionnels.

#### Introduction

There are only a few realistic options available for businesses to deal with the (perceived) unfair and misleading advertising of competitors. Prosecutions under the *Competition Act* (“the Act”) take time and put the matter out of the immediate control of the offended party. Although many companies belong to Advertising Standards Canada (“ASC”), which offers a dispute resolution procedure, others do not, and ASC’s decisions are not binding. Finally, the court system is generally so slow that advertising campaigns will almost certainly have run their course by the time a claim can be brought to trial or otherwise dealt with.

Offended parties often feel that they are left with little choice but to bring a motion for an interlocutory injunction, usually under sections 36 and 52 of the Act. Such proceedings are expensive and public, but at least they can be relatively expeditious.

Although on occasion such motions have been successfully used to restrain advertising, there are a number of significant hurdles that must be cleared before an injunction will be issued by a Canadian court. In some cases, the bar is set very high, making it difficult to see how a large, successful commercial entity could obtain an injunction restraining the advertising of one of its competitors.

Ultimately, in our view, businesses should be encouraged to attempt to develop mutually acceptable protocols to deal with advertising disputes, and move for interlocutory relief as a last (and not a first) resort.

#### Section 52 of the Competition Act

Section 52 of the Act states “[n]o 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.”<sup>1</sup>

This section is contained in Part VI of the Act, “Offences in Relation to Competition.” It is a criminal provision, contravention of which is punishable by imprisonment for up to 14 years.<sup>2</sup>

Under section 36 of the Act, any person who has suffered “loss or damage” as a result of “conduct that is contrary to any provision of Part VI” may sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered, as well as costs.<sup>3</sup>

Therefore, to ultimately succeed in a claim pursuant to sections 36 and 52 of the Act, a claimant must establish:

1. that the impugned advertising is for the purpose of promoting, directly or indirectly, any business interest;
2. that the impugned advertising is false or misleading;
3. that the false and misleading representation is being made knowingly or recklessly;
4. that the impugned advertising is false or misleading in a material respect; and
5. that the impugned advertising has caused, is causing or will cause loss or damage to the claimant.

The burden of proof is on the claimant to establish all of these requirements. There is some authority for the proposition that while the burden of proof is still on the balance of probabilities, it is a heavier burden that requires “substantial proof” of an activity which is a “very serious public crime.”<sup>4</sup> It is difficult to determine what such an apparently higher standard actually requires, in particular following the Supreme Court of Canada’s 2008 decision in *F.H. v. McDougall*.<sup>5</sup>

It is clear, however, that the standard for liability under section 52 is reasonably high. Aggressive advertising is not circumscribed by the Act unless it is an “untruthful disparagement” of the goods or services of a competitor. Even advertisements which “push the bounds of what is fair” are acceptable; before the courts will interfere in the competitive marketplace, it must be established that the advertisements are “clearly unfair.”<sup>6</sup>

Section 52 is distinct from the various civil “deceptive marketing practices” described in Part VII.1 of the Act, including section 74.01(1)(b), which states that it is “reviewable conduct” to make a representation to the public regarding the performance of a product that is not based on “an adequate and proper test.”<sup>7</sup> Section 36 does not grant the public a right to pursue a claim for damages for any section of the Act other than Part VI. Therefore, in order to establish liability under sections 36 and 52 of the Act, a claimant must do more than simply claim that its competitor’s testing is not “adequate and proper,” but must instead establish all of the elements of liability for criminal misleading advertising described above.

The Act does not specifically provide for injunctive relief; however, courts have generally found that they have inherent jurisdiction to issue an interlocutory injunction where it appears “just and convenient” to do so.<sup>8</sup>

In a motion for an interlocutory injunction to restrain false advertising, it is very common for the moving party to make additional claims pursuant to the *Trade-marks Act* and the torts of injurious falsehood and interference with economic interests. These causes of action often entail a very similar analysis to section 52 of the Act and will not be discussed in detail in this paper.<sup>9</sup>

## Injunction

The well-known test for an injunction in Ontario (and most of the rest of Canada) is:

1. there must be a serious issue to be tried;
2. it must be determined that the applicant would suffer irreparable harm if the application is refused; and
3. the balance of convenience must favour the applicant.<sup>10</sup>

In British Columbia, the test is worded in a slightly different way. The first stage of the test is whether the applicant’s claim raises a fair issue to be tried. The second is whether the balance of convenience favours the granting of the injunction. Whether either of the parties will suffer irreparable harm is but one factor to be considered at the second stage.<sup>11</sup>

The relationship between the different stages of the test is somewhat murky. The consensus seems to be that they should not be seen as “separate, water-tight categories” or “a series of independent hurdles.” Rather, since the factors relate to one another, strength in one area ought to be permitted to compensate weakness in another.<sup>12</sup>

While this undeniably provides courts with much-needed flexibility in order to do justice between the parties in an individual case, the lack of clearly delineated requirements has, as we shall see, led to inconsistent decisions and unpredictable results.

### Strength of the Case

The Supreme Court of Canada has held that there are no specific requirements which must be met in order to satisfy the criteria of whether there is “a serious issue to be tried.” Instead:

“Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.”<sup>13</sup>

However, the Supreme Court of Canada also held that an exception to this rule arises when the result of the interlocutory motion will in effect amount to a final determination of the action.<sup>14</sup> In one Ontario case, the court concluded that a motion for an interlocutory injunction in a false and misleading advertising case often amounts to a final determination of the action, and noted that courts have routinely inquired into the merits of the complaint to ensure that the reason for restraining the impugned representation is compelling.<sup>15</sup>

There appears to be some uncertainty as to whether, at the interlocutory stage, a court should consider all of the elements of a claim under section 52. This was the approach adopted by Justice Nordheimer in *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.* Even though the plaintiff had established that the defendants may have made false statements, Justice Nordheimer ruled that it had not established there was a serious issue to be tried because the plaintiff had not brought forward sufficient evidence that the statements were made dishonestly or recklessly or that the plaintiff had, or would, suffer economic harm.<sup>16</sup>

However, the courts have also held that where it is clear that a false statement would cause harm, there is no need for proof of actual economic loss<sup>17</sup> and that the state of mind of the defendant may be inferred from the evidence including but not limited to its statements of belief in the validity of its claims.<sup>18</sup> In other cases the courts have granted injunctions without explicitly considering whether the impugned representations were made knowingly or recklessly or whether the plaintiff had or would suffer economic harm.<sup>19</sup>

In general, courts are reluctant to make factual determinations regarding expert evidence or testing at the interlocutory stage.<sup>20</sup> Many are content to simply assume that there is a serious issue to be tried and move on to the other stages of the test.

As discussed above and below, notwithstanding the apparent ease with which this first requirement can be met, the strength of the case (beyond whether there is a serious question to be tried) is an important factor which can affect the other elements of the test.<sup>21</sup> In practice, a strong case that an advertising claim is false and misleading often goes a long way towards securing an interlocutory injunction. Likewise, courts seem reluctant to issue injunctions in cases where they are not convinced of the strength of the case.

### Irreparable Harm

The Supreme Court of Canada defined “irreparable” harm in *RJR-Macdonald Inc.* as harm that cannot be quantified or cured, usually because one party cannot collect damages from the other. Examples include where one party will be put out of business or will suffer permanent market loss or irrevocable damage to its business reputation.<sup>22</sup>

There are a number of problems in establishing irreparable harm in a claim under section 52. First, the harm caused by false and misleading advertisements is generally of an economic nature and takes the form of lost profits and revenues. Companies may also claim that false and misleading representations damage their reputation or brand, but this loss of reputation should also manifest itself in a loss of customers.<sup>25</sup>

Second, in most motions for interlocutory relief pursuant to section 52 the defendant has more than enough resources to compensate the plaintiff for any damages, and the plaintiff is rarely in danger of being put out of business by the impugned representation.

Accordingly, plaintiffs generally take the position that although the claim is for economic harm, the damages suffered are irreparable because they cannot be quantified. Plaintiffs usually argue that there are too

many variables to determine the effect of a specific advertisement and there is no reliable method to calculate the economic value of a company's brand. Usually the evidence for this position consists of affidavits from officers of the plaintiff.<sup>24</sup> Evidence of this nature has been criticized by the court on some occasions,<sup>25</sup> and has been accepted in other cases.<sup>26</sup>

The Nova Scotia Supreme Court has in fact quantified damages in a misleading advertising case with the aid of an expert witness who was an accountant and a professional business valuator.<sup>27</sup>

Unfortunately, the definition of what constitutes "irreparable harm" in cases under section 52 of the Act is inconsistent.

Courts in Ontario have previously held that damages from false and misleading advertising cannot be calculated and therefore that damages are an inadequate remedy.<sup>28</sup> However, they have just as frequently held that proof of irreparable harm must be clear and not speculative, and that there should be evidence to support a claim that harm is taking place.<sup>29</sup> In particular, one court stated that large sophisticated companies should be able to show some evidence of harm.<sup>30</sup>

In Ontario, Justice Code recently attempted to reconcile the Ontario decisions by ruling that in a strong case irreparable harm could be inferred, but in a weaker one it had to be independently proven.<sup>31</sup> It is difficult to predict, at this stage, to what extent the courts will be willing to examine the underlying merits of the plaintiff's claim and exactly how strong a case needs to be for a court to "infer" irreparable harm.

In two subsequent decisions between the same parties, the Ontario courts appeared to take a somewhat stricter approach towards irreparable harm. In both of those cases, the court found there to be a serious issue to be tried (although not necessarily a strong case) but was unimpressed with the moving party's affidavit evidence that it was suffering irreparable harm.<sup>32</sup>

The answer may be that Ontario courts are generally reluctant to grant an injunction unless a strong case is established, whether or not this is explicitly stated so in the reasons. Very few, if any, injunctions have been granted to restrain false advertising in cases where the court did not find that the moving party had established a strong case.

Ontario courts have also not taken a consistent approach towards the issue of whether the harm must be permanent and irrevocable. In some cases, the courts have required strict proof that any damage is not only difficult to quantify, but irrevocable;<sup>33</sup> in others, they have not considered the issue.<sup>34</sup>

In British Columbia, the courts generally tend to take a more relaxed approach to the issue of irreparable harm, either by simply stating that the harm to the plaintiff cannot be quantified<sup>35</sup> or by stating that the harm to both the plaintiff and the defendant cannot be quantified.<sup>36</sup> In one recent case, Justice Grauer ruled that the moving party did not have to prove that it was unable to counter the effects of the misleading advertising with its own advertising.<sup>37</sup>

In a recent New Brunswick case, Justice Clendening followed the decision of Justice Grauer, above, apparently adopting a more relaxed approach towards irreparable harm.<sup>38</sup>

The Federal Court appears to take a stricter approach and has consistently ruled that proof of irreparable harm must be clear and not speculative.<sup>39</sup>

Delay in bringing the motion for an injunction can be seen as compelling evidence that the matter is not urgent and that the plaintiff is not suffering irreparable harm.<sup>40</sup> Further, the longer the representation has been made, the more likely the courts are to insist upon evidence of actual harm.<sup>41</sup>

Additionally, if the representation is not being made at the time of the hearing and the defendant has undertaken not to make it in the future, any claim for irreparable harm is speculative.<sup>42</sup> We have not found a Canadian case where an interlocutory injunction was granted under section 52 of the Act in such circumstances.

## Balance of Convenience

The third factor the courts will consider when deciding whether to grant an interlocutory injunction is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits. The factors considered in this phase are numerous and vary in each individual case.<sup>43</sup>

The balance of convenience is rarely determinative in motions for interlocutory injunctive relief pursuant to section 52. Usually, the judge's finding at this stage will mirror his or her findings on the strength of the case and irreparable harm.

Courts have often considered the importance of protecting commercial free speech, and they have repeatedly stated that “[e]ven commercial speech is worthy of protection.”<sup>44</sup> Courts may be wary of becoming part of a marketing strategy, and have expressed reluctance to interfere in a competitive marketplace, or to “micromanage” advertising disputes between weighty competitors.<sup>45</sup> On the other hand, courts have also ruled that protecting the public from being misled is an important objective.<sup>46</sup>

It can also be relevant if the plaintiff is or has been engaging in similar conduct to that it seeks to enjoin,<sup>47</sup> although this is not always a persuasive factor.<sup>48</sup>

As described above, in British Columbia, the courts consider a variety of factors at the stage of considering the balance of convenience, including:

- the risk of irreparable harm to either party;
- the strength of the moving party's case
- which of the parties has acted to alter the balance of the relationship and so affected the status quo;
- factors affecting the public interest; and
- any other factor.<sup>49</sup>

The practical effect of the British Columbia test is to put more emphasis on the strength of the case and less on the requirement of irreparable harm. For example, in *TELUS Communications Co. v. Rogers Communications Inc.*, Justice Grauer considered Telus's motion for an order enjoining Rogers from representing that it had the “most reliable” wireless network. Telus had recently constructed an entirely new end-to-end wireless network and Rogers' advertising was based on a comparison between Rogers' network and Telus' old network. Justice Grauer granted the injunction despite finding that there was an equal risk of irreparable harm to both parties. His decision was upheld on appeal.<sup>50</sup>

During the same period, Bell Canada (which shares its wireless network with Telus) was also representing that its network was the most reliable (as well as the largest, fastest, best and most powerful). Bell Canada's claims were based on testing it had conducted between Rogers' network, and its “new network” before that network had been made available to the public. Once again, the court found that there was an equal risk of irreparable harm to both parties. Justice Cullen granted the injunction regarding the “most reliable” representation but declined to enjoin Bell from making any of the other representations, ruling that since Bell had at least some testing to support its claims, the case concerning these other representations was “not as stark” as it had been before Justice Grauer.<sup>51</sup>

The courts in both British Columbia and Ontario have found that the terms of the injunction should be as narrow as possible to remedy the problem.<sup>52</sup>

## Conclusion

The test for an interlocutory injunction is flexible and discretionary, and the courts have not always applied it consistently in advertising cases. That being said, it certainly appears that the strength of a moving parties' case has assumed greater importance in the more recent jurisprudence. This is a change in how lawyers (and most judges) have viewed the test for an interlocutory injunction in this country.

Where a court determines that the moving party has a strong case, it is much more likely to be forgiving on

the other requirements of the test, and more likely to grant the injunction. Where it does not so find, a court is more likely to require convincing evidence that the moving party is suffering harm and that such harm is irreparable before granting an injunction. In such cases, as we have seen, courts will also review more carefully a range of issues under the balance of convenience aspect of the test, such as freedom of speech, the nature of the parties and the marketplace, prior related conduct and the harm that may be suffered by the responding party if an injunction is awarded. When a court heads down this path, it is clear that the chances of success are much lower.

In any event, the injunction remains one of a number of potential remedies available to deal with misleading advertising claims. Each of the options (including the injunction option) has its limitations and complications. However, in the absence of a negotiated alternative dispute mechanism, an injunction may be the best alternative, in particular where a party can present a strong case to the court that the disputed advertising is clearly false and misleading.

## Endnotes

<sup>1</sup> Lawyers at Babin Barristers LLP ([www.babinbarristers.com](http://www.babinbarristers.com)).

<sup>1</sup> *Competition Act*, R.S.C., 1985, c. C-34, s. 52.

<sup>2</sup> *Competition Act*, R.S.C., 1985, c. C-34, s. 52(5).

<sup>3</sup> *Competition Act*, R.S.C., 1985, c. C-34, s. 36.

<sup>4</sup> *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 at para.39 (CanLII), aff'd 2009 NSCA 42 (CanLII).

<sup>5</sup> *F.H. v. McDougall*, 2008 SCC 53 (CanLII).

<sup>6</sup> See *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 at para.39 (CanLII) and the cases cited therein.

<sup>7</sup> *Competition Act*, R.S.C., 1985, c. C-34, s. 74.01(1)(b). Note that section 52(1)(b) of the Act previously contained a provision regarding "adequate and proper" testing, but it has been moved to Part VII.1.

<sup>8</sup> *Mead Johnson Canada v. Ross Pediatrics*, 1996 CanLII 8235 at paras. 29-30 (Ont. S.C.J.), leave to appeal denied 1996 CanLII 8194 (Ont. S.C.J.); *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 581 at para. 44 (CanLII), aff'd 2009 BCSC 1610 (CanLII), *Bell Aliant v. Rogers Communications*, 2010 NBQB 166 (CanLII).

<sup>9</sup> *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 65 (Ont. S.C.J.); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 3 (Ont. S.C.J.).

<sup>10</sup> *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.), *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 26 (Ont. S.C.J.).

<sup>11</sup> *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 581 at para. 27 (CanLII), aff'd 2009 BCSC 1610 (CanLII).

<sup>12</sup> Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, On.: Canada Law Book, 2009) at 2.600, *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 69 (Ont. S.C.J.); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at paras. 38-39 (Ont. S.C.J.).

<sup>13</sup> *RJR - MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

<sup>14</sup> *RJR - MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

<sup>15</sup> *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at paras. 39-40 (Ont. S.C.J.).

<sup>16</sup> *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at paras. 66-67 (Ont. S.C.J.). See also: *Telus Communications Company v. Rogers Wireless Inc.*, 2006 CanLII 15757 at para. 8 (Ont. S.C.J.).

<sup>17</sup> *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 (Ont. Ct. J. (Gen. Div.)).

<sup>18</sup> *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 72 (B.C.S.C.).

<sup>19</sup> See, for example, *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 (CanLII) where Justice Grace wrote at paragraph 23: "I recognize that there are other elements which must be proved at trial for Bell to succeed. I go no further than to say I am satisfied analysis of stages two and three of the *RJR-MacDonald* test is required."

<sup>20</sup> *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at para. 18 (CanLII); *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 76 (B.C.S.C.); *Bell Aliant v. Rogers Communications*, 2010 NBQB 166 at para. 18 (CanLII).

<sup>21</sup> See, for example, *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 48 (Ont. S.C.J.) and *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 47 (CanLII), aff'd 2009 BCCA 581 (CanLII).

<sup>22</sup> *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

<sup>23</sup> *Telus Communications Company v. Rogers Wireless Inc.*, 2006 CanLII 15757 at para. 9 (Ont. S.C.J.).

<sup>24</sup> It is worth noting that these affidavits can come back to haunt a party that finds itself on the other side of a motion for an interlocutory injunction.

<sup>25</sup> See *Effem Foods Ltd. v. H.J. Heinz Co. of Canada* (1997), 75 C.P.R. (3d) 331, 1997 CarswellNat 1353 at paras. 2-3, (F.C.T.D.) (W.L.); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at paras. 19-20 and 28 (CanLII); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 at para. 69 (Ont. S.C.J.).

<sup>26</sup> *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 53 (B.C.S.C.).

<sup>27</sup> *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 at para. 110 (CanLII), aff'd 2009 NSCA 42 (CanLII).

<sup>28</sup> *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, 1994 CanLII 7429 at para. 14 (Ont. Ct. J. (Gen. Div.)); *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 at paras. 22-23 (Ont. Ct. J. (Gen. Div.)); *Eveready Canada v. Duracell Canada Inc.*, 1995 CanLII 7328 at para. 21 (Ont. Ct. J. (Gen. Div.)).

<sup>29</sup> *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at paras. 73-74 (Ont. S.C.J.) (CanLII); *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.*, 1995 CanLII 7321 at para. 27 (Ont. Ct. J. (Gen. Div.)), *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at paras. 54 (Ont. S.C.J.), *Telus Communications Company v. Rogers Wireless Inc.*, 2006 CanLII 15757 at para. 9 (Ont. S.C.J.); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 at paras. 71-73 (Ont. S.C.J.).

<sup>30</sup> *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at para. 71 (Ont. S.C.J.).

<sup>31</sup> *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 40 (Ont. S.C.J.).

<sup>32</sup> *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications*

*Inc.*, 2010 ONSC 3010 at paras. 19-20 (CanLII).

<sup>33</sup> *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 74 (Ont. S.C.J.); *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at para. 53 (Ont. S.C.J.); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 at para. 73 (Ont. S.C.J.).

<sup>34</sup> For example, see *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, 1994 CanLII 7429 (Ont. Ct. J. (Gen. Div.)); *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 (Ont. Ct. J. (Gen. Div.)).

<sup>35</sup> *Tele-Mobile Co., A Partnership v. Bell Mobility Inc.*, 2006 BCSC 161 at para. 70 (CanLII).

<sup>36</sup> *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 82 (B.C.S.C.). But c.f. *Telus Communications Co. v. Bell Mobility Inc.*, 2007 BCSC 518 at para. 17 (CanLII), where Justice Silverman found that the damage to both parties was roughly equal and could be compensated for in a financial sense.

<sup>37</sup> *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 56 (CanLII), aff'd 2009 BCCA 581 (CanLII).

<sup>38</sup> *Bell Aliant v. Rogers Communications*, 2010 NBQB 166 (CanLII).

<sup>39</sup> *Effem Foods Ltd. v. H.J. Heinz Co. of Canada* (1997), 75 C.P.R. (3d) 331, 1997 CarswellNat 1353 at paras. 2-3, (F.C.T.D.) (W.L.).

<sup>40</sup> *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.*, 1995 CanLII 7321 at para. 27 (Ont. Ct. J. (Gen. Div.)).

<sup>41</sup> *Effem Foods Ltd. v. H.J. Heinz Co. of Canada* (1997), 75 C.P.R. (3d) 331, 1997 CarswellNat 1353 at para. 4, (F.C.T.D.) (W.L.), *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at para. 28 (CanLII).

<sup>42</sup> *Tele-Mobile Co., A Partnership v. Bell Mobility Inc.*, 2006 BCSC 161 at para. 25 (CanLII); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 45 (Ont. S.C.J.).

<sup>43</sup> *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

<sup>44</sup> *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 82 (Ont. S.C.J.); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 33 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at para. 32 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at paras. 49-51 (Ont. S.C.J.).

<sup>45</sup> *Telus Communications Co. v. Bell Mobility Inc.*, 2007 BCSC 518 at para. 26 (CanLII); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 33 (CanLII).

<sup>46</sup> *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 49 (CanLII), aff'd 2009 BCCA 581 (CanLII).

<sup>47</sup> *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.*, 1995 CanLII 7321 at para. 34 (Ont. Ct. J. (Gen. Div.)); *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at paras. 59 (Ont. Ct. J. (Gen. Div.)).

<sup>48</sup> *Mead Johnson Canada v. Ross Pediatrics*, 1996 CanLII 8235 at paras. 44-46 (Ont. Ct. (Gen. Div.)), aff'd 1996 CanLII 8194 (Ont. S.C.).

<sup>49</sup> *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 4 (B.C.S.C.).

<sup>50</sup> *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 (CanLII), aff'd 2009 BCCA 581 (CanLII).

<sup>51</sup> *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 (B.C.S.C.).

<sup>52</sup> *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 60 (CanLII), aff'd 2009 BCCA 581 (CanLII); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 39 (CanLII).

<sup>53</sup> *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 (Ont. S.C.J.); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 (Ont. S.C.J.).

<sup>54</sup> *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, 1994 CanLII 7429 (Ont. Ct. J. (Gen. Div.)); *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 (Ont. Ct. J. (Gen. Div.)).

## JOINT VENTURE DECISION CRIMINAL, ALBERTA COURT SAYS

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**A**n Alberta court has held that a decision by joint operators of an oil field to sole source a contract constituted a conspiracy contrary to section 45 of the *Competition Act*, a criminal offence, and awarded damages to the company that lost out on the business.<sup>1</sup>

### The Rainbow Lake Oilfield

Husky Oil Operations Ltd. and Mobil Oil Canada (now ExxonMobil Canada Ltd.) each owned 50% of the Rainbow Lake oilfield and operated it jointly. They embarked on a joint synergy initiative called “Mosky”, whose object was to reduce costs on jointly-owned properties in the Rainbow Lake area. In 1996, as part of this initiative, they decided to sole source fluid hauling for the Rainbow Lake oilfield. Fluid hauling was the second biggest cost of the oilfield. Before 1996, they had contracted with two fluid haulers. Husky and Mobil interviewed both incumbent fluid haulers, and decided on one of them. The loser, Kolt Oilfield, ultimately went out of business and sued.

Kolt claimed that the decision by the joint operators to sole source fluid hauling eliminated competition to supply fluid hauling to the oilfield and therefore offended section 45 of the *Competition Act*. At the time, this provision made it a criminal offence to enter into an agreement to lessen competition unduly.<sup>2</sup>

### Not a “single entity”

Mobil objected at trial that Mobil and Husky should be considered to be a single entity for competition law purposes, and thus incapable of conspiring with one another. The trial judge rejected this assertion based on a boilerplate clause in the agreement under which they operated the oilfield that said that the parties were not partners or joint venturers, but were tenants in common of the oilfield.

### Breach of section 45

The trial judge then conducted the two stage analysis mandated by the Supreme Court in *PANS* for determining if there had been an “undue lessening” of competition:<sup>3</sup> the structure of the market and the behaviour of the parties to the agreement.

Beginning with market structure, Belzil J. concluded that fluid hauling constituted the product market, and that the geographic market was limited to Rainbow Lake. Husky was the dominant oil and gas producer in the Rainbow Lake area.<sup>4</sup> Husky also operated a large processing plant, which enhanced its market power. Husky and Mobil were high volume customers generating over \$1 million annually in revenue for Kolt. The judge noted that Kolt lost a major customer in 1997, when Canadian National Resources Ltd. linked its well to a pipeline, thus doing away with the need for fluid hauling.

Belzil J. also considered barriers to entry. He accepted that start-up costs would not be prohibitive, but that they would be significant and operate as a barrier to entry. He refused to accept the defendants’ contention that other more efficient fluid haulers could enter the market, noting that there was no evidence of any potential competitor poised to enter the market at the relevant time.

Turning to the behaviour of the parties, Belzil J. noted that Husky and Mobil admitted to entering into an agreement to sole source fluid hauling. He rejected as irrelevant their contention that the purpose of the agreement was to enhance efficiency, noting that in *PANS* the Supreme Court had rejected the availability of an efficiency defence. Belzil J. seems to have been particularly struck by the admission on cross-examination by a Mobil representative that Husky and Mobil considered that competition between the two haulers had got the prices to where they were, and the competition had to be taken out of the process in order to get the prices to where they wanted them.

Finally, Belzil J. held that Husky and Mobil breached section 45 by entering into an agreement that prevented Kolt from competing for their business:

173 The Plaintiff had no contractual entitlement to revenue from the Defendants for fluid hauling, but did have the legal protection, afforded to it by s. 45, to have the opportunity to compete in the marketplace for this revenue. The decision by the Defendants to use Car-dusty exclusively for their fluid hauling requirements prevented the Plaintiff from compet-ing for this business.

This led Belzil J. to conclude that Husky and Mobil were also liable for the torts of civil conspiracy and unlawful interference with economic relations.

### **Damages awarded “at large”**

Turning to the assessment of damages, Belzil J. determined that because of the various contingencies, both positive and negative, he would assess damages from November 13, 1996 (the date that Kolt was advised it had lost the fluid hauling business) until the date of trial, which was over 14 years. He applied no contingency adjustment during this period. Since the business failed entirely in May 1997, Belzil J. held that he should assess damages based on the entire revenue of Kolt, not just the revenue from Husky and Mobil. He also held that he should assess damages based on Kolt maintaining the same fleet size as it had before the breach.

Despite having made these findings, Belzil J. did not draw any conclusions as to the amount of damages that a calculation based on his findings would yield. Instead, he noted that damages can be awarded “at large” for the torts of civil conspiracy and unlawful interference with economic relations.<sup>5</sup> He awarded \$5 million. He then stated that “This award, which is exclusive of pre-judgment interest, is compensatory only”. However, there is nothing in Belzil J.’s reasons indicating how he derived this figure.

Belzil J. also awarded \$500,000 in punitive damages.

### **Why this decision is wrong**

Belzil J.’s decision is clearly wrong, in the sense that Husky and Mobil’s conduct was not the sort of conduct that section 45 was intended to address. A competition lawyer would have advised Husky and Mobil that the chances of an investigation and referral for prosecution by the Competition Bureau were remote.

To be sure, on its face, Husky and Mobil’s conduct appears to fit within the parameters of section 45. It might be argued that Belzil J. was correct in his conclusion that Husky and Mobil breached section 45, and that to the extent that this is a perverse result, it is indicative of the overreach of the old section 45. Indeed, one of the reasons for amending section 45 in 2010 was the potential of the old provision to criminalize economically innocuous conduct by joint venturers. Belzil J.’s decision would appear to validate that argument.

In my view, however, Belzil J. was wrong to conclude that Husky and Mobil had violated section 45.

First, Belzil J. should not have dismissed the single entity doctrine so quickly.<sup>6</sup> Belzil J. dismissed the argu-ment because the contract originally entered into in 1964 between predecessors to both Husky and Mobil expressly precluded virtually every kind of relationship between them, including partnership and joint venture.

The single entity doctrine was developed in the United States. It exempts from scrutiny under *Sherman Act* §1 (the US’ conspiracy provision) arrangements where two or more legally distinct enterprises in fact form one economic actor. The doctrine looks at the substance of the relationship, not its formalities. Thus whether the companies involved are legally distinct is not determinative; the question is whether they constitute independent centres of decision-making. If they do not, then the arrangement is exempt. The US Supreme Court summarized this doctrine in the recent *American Needle* case:

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged §1 violation are legally distinct entities. Nor, however, is it determinative that two le-gally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together “independent centers of decision making.” *Id.*, at 769. If it does, the entities are capable of conspiring under §1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

The Husky-Mobil arrangement would likely satisfy the test under the US single entity doctrine. The Husky-Mobil arrangement in substance created one economic actor, the Rainbow Lake oilfield business, and one centre of decision-making. In my view, Belzil J. was wrong to ignore current operational realities in favour of a 56-year-old contract when assessing the arrangement for competition law purposes.

The question remains whether the single entity doctrine could be asserted as a defence under the old section 45. Section 45 exempted agreements between companies that are subsidiaries or parents of one another, or subsidiaries of the same parent. Because this exemption was based on corporate structure rather than economic substance, it did not insulate joint ventures from scrutiny. But section 45 applied to agreements “with another person”. Arguably, where there is one centre of decision-making, there is one “person” from the standpoint of a competition lawyer, even though there may be two or more legal persons. This would be consistent with the mischief that section 45 addresses, which is agreements between entities that constitute (or should constitute) separate centres of decision-making, and not actions of two entities that form one centre of decision-making (unless the combination is itself criminal).

Second, Belzil J. erred in finding that Husky and Mobil had excluded Kolt from the opportunity to compete. The evidence related by Belzil J. shows very clearly the opposite: the Husky and Mobil team charged with lowering fluid hauling costs held a bid process with both Kolt and its competitor Cardusty as bidders. Kolt competed, and lost.

Belzil J.’s decision really amounts to imposing a requirement on Husky and Mobil to send sufficient volumes of work to both Kolt and Cardusty to keep them alive as viable fluid hauling providers, so that they could compete on what amounted to a spot hauling market. Belzil J. expressed this in the negative:

The decision by the Defendants to use Cardusty exclusively for their fluid hauling requirements prevented the Plaintiff from competing for this business.

Belzil J.’s assertion that his “conclusion is entirely consistent with interpreting the *Competition Act* in a manner which protects competition, not the individual competitor” could not be more wrong: he interpreted the *Competition Act* as requiring the preservation of a particular, static, market structure. Indeed, on Belzil J.’s reasoning, it would have been unlawful for Husky and Mobil to replace fluid hauling entirely with a pipeline.

The Husky-Mobil case is a nearly perfect illustration of the potential that the old section 45 had to criminalize efficiency-enhancing behaviour by joint venturers. Happily, it is not only the first case to realize these fears, but almost certainly also the last. The reform of section 45 in 2010 made it inapplicable to buying-side (monopsony) agreements. It also introduced an ancillary restraints defence designed to protect legitimate joint ventures. As a result, joint venturers seeking to improve purchasing efficiencies are no longer subject to potential criminal sanctions and damages should a judge disagree with their goals.

## Endnotes

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<sup>1</sup> 321665 *Alberta Ltd. v. ExxonMobil Canada Ltd.*, 2011 ABQB 292.

<sup>2</sup> Effective March 12, 2010, section 45 was amended to prohibit agreements between competitors to fix selling prices, to allocate customers, sales or markets, or to fix or limit production or supply. There is no longer a requirement to prove an anti-competitive effect – such agreements are simply illegal unless the defence can prove that they are “ancillary and necessary” to another or larger agreement that does not itself violate the section. Significantly, the amendments rendered section 45 inapplicable to buying-side agreements such as that in issue in this case. Buying-side (monopsony) agreements are now civilly reviewable by the Competition Tribunal, but can no longer be the subject of fines or civil suits for damages in provincial court.

<sup>3</sup> *R. v. Nova Scotia Pharmaceutical Society (No. 2)*, [1992] 2 S.C.R. 606.

<sup>4</sup> This conclusion would appear to be inconsistent with the evidence, summarized by Belzil J., that Mobil had some 100% properties in the Rainbow Lake area in addition to properties 50% owned with Husky. The bulk of Husky’s interests were in the properties 50% owned with Mobil. Presumably Belzil J. meant to conclude that Husky and Mobil together were dominant.

<sup>5</sup> Damages at large are damages awarded to compensate a plaintiff for a loss, but without requiring the plaintiff to prove the loss with particularity.

<sup>6</sup> To be fair, it is not clear how much of an argument was made. The judge noted that no authority was cited for this proposition. In fact, the single entity doctrine is well established in the United States. The leading case in the US is *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The doctrine was most recently discussed by the Supreme Court in *American Needle Inc. v. National Football League*, 560 U.S. \_\_\_, 130 S. Ct. 2201 (2010).

## Developments

### CANADIAN COMPETITION LAW: THE YEAR IN REVIEW (2010-2011)

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En raison de la grande variété d'amendements apportés à la *Loi sur la concurrence* au cours des dernières années, de la vigueur renouvelée du Bureau de la concurrence dans l'application de la Loi, et d'un grand nombre de dossiers devant les tribunaux, 2010-2011 a été marquée par d'importants développements en droit de la concurrence au Canada.

2010-2011 was a busy year in Canadian competition law. The Commissioner of Competition ("Commissioner") launched several test cases under the recently-amended civil sections of the *Competition Act* ("Act"), and the Competition Bureau ("Bureau") issued a steady stream of merger guidance, apparently stepping-up the level of enforcement activity in merger review. Criminal courts kept pace with a continued stream of deceptive marketing, cartel and bid-rigging convictions; while divergent civil court decisions regarding indirect purchaser claims for damages in cartel cases paved the way for a possible appeal to the Supreme Court of Canada. For a short period of time in the fall of 2010, however, the *Investment Canada Act*<sup>2</sup> stole the lime-light, as BHP Billiton eventually withdrew its unsolicited bid for Potash Corporation of Saskatchewan Inc. ("PotashCorp") in the face of the Minister of Industry's preliminary rejection of the bid under that statute.

Highlights of 2010-2011 included the following:

- Legislative changes were proposed that sought to modernize the provisions of the *Competition Act*; particularly in regards to e-mail, social networking and advanced technology;
- The above-noted decision by the Minister of Industry under the *Investment Canada Act* that the acquisition of PotashCorp by BHP Billiton was not likely to be of "net benefit" to Canada marked only the second such decision by that Minister in the history of that statute;
- The Commissioner's challenge of the acquisition of an unlicensed landfill site by CCS Corporation from Complete Environmental Inc. was noteworthy in that the transaction had not been subject to advance notification under the Act, had already closed, and was based solely on an alleged "prevention" of competition;
- A steady stream of merger guidance was issued by the Bureau, ranging from the Bureau's disclosure obligations in the context of a hostile takeover bid; draft revisions to the *Merger Enforcement Guidelines* ("MEG"s), an updated *Fee and Services Standards Handbook for Mergers and Merger-Related Matters* and an updated *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*;
- Criminal enforcement was at centre-stage, as the Bureau obtained penalties in respect of cartels involving the chemicals, retail gasoline, refrigeration compressors and air cargo industries, as well as bid-rigging cases involving traffic lights and residential ventilation contracts, and issued new guidance in respect of its immunity and leniency programs;
- Deceptive marketing and misleading advertising remained a top priority for Bureau resources, resulting in both criminal and civil lawsuits, fines, and the extradition to the United States of Canadians alleged to be involved in fraudulent telemarketing schemes aimed at the U.S.;
- The Commissioner's strong focus on unilateral conduct was evidenced by two actions against the real estate industry alleging abuse of a dominant position in respect of the rules surrounding use of multiple listing services for residential real estate, and the launch of a price maintenance case that is ongoing against the VISA and MasterCard credit card networks (the first under the new civil resale

price maintenance provision). The Commissioner's challenge against Air Canada's alliance agreements with United Continental airlines also marked the first contested case under the new civil provision for anti-competitive agreements among competitors (s.90.1); and

- As noted above, divergent civil court decisions regarding indirect purchaser claims for damages in cartel cases paved the way for a possible appeal to the Supreme Court of Canada.

### 1. Legislative Amendments

There were two legislative endeavours in 2010-2011: the enactment of Bill C-28<sup>3</sup> and the proposed adoption of Bill C-51.<sup>4</sup> As compared with the overhaul of merger review and cartel enforcement in 2009-2010, the legislative changes proposed in 2010-2011 were relatively sparse but nonetheless important in terms of expanding the Bureau's enforcement powers.

#### (a) Bill C-28

Bill C-28, widely known as the anti-SPAM and anti-spyware law, received Royal Assent on December 15, 2010. The bill has a broad application, but in regards to the Act the amendments provide clarification on specific electronic issues. First, the Act now prohibits false or misleading commercial representations that are made electronically.<sup>5</sup> Second, the Act now clarifies that an act will be committed when a person sends a message and also when a person permits a message to be sent.<sup>6</sup> The definition of "telemarketing" has been expanded to include "any means of telecommunications" as opposed to "interactive telephone communications."<sup>7</sup> As a result, any means of telecommunications sent by way of a text, sound, voice or image message will fall within the purview of the Act. Fittingly, given Canadians' apparent love-affair with new media, messages sent *via* social networking sites such as Twitter and Facebook, along with text messages and instant messages are also now subject to the legislation.

#### (b) Bill C-51

Bill C-51, known by its short title *Investigative Powers for the 21st Century Act*, was re-introduced into the House of Commons on November 1st, 2010. The Bill had previously died upon prorogation in December 2009. The new Bill also died, however, with the call of the May, 2011 federal election. As of the time of writing, it had not yet been reintroduced. As implied by its title, the Bill had aimed to extend the current investigative powers of national law enforcement and security agencies for computer-related crimes to reflect the growing use of new communications technologies. Bill C-51 would have primarily affected provisions in the *Criminal Code* (the "Code"),<sup>8</sup> but there were important ramifications for the interpretation of the *Competition Act* and in particular for the investigative powers of the Commissioner. In the event that the Bill is reintroduced and passed (more likely with the new Parliamentary majority government), the Commissioner will be able to issue specific orders for the production of transmission data associated with telecommunications.<sup>9</sup> Although transmission data does not provide the content of the telecommunication, it indicates the origin, destination, date, time, duration, type and volume, thereby providing a much greater breadth of information for the Commissioner.

If enacted, the amendments will allow the Bureau to better address significant technology-related challenges that affect its ability to obtain evidence, particularly in regards to violations of the deceptive marketing and false or misleading representation provisions. Specifically, the Bill would replace the reference to "telephone" in the *Competition Act* as the means of committing the aforementioned offences with the term "any means of telecommunication" used for communicating orally,<sup>10</sup> which would significantly broaden the scope of its application. Other aspects of the Bill, however, have sparked debate.

#### (c) Merger Review Threshold Increased

The threshold for the minimum "size of target" for mandatory merger review in Canada under the Act increased on February 1, 2011. As a result, the threshold for the size of the assets or revenue of the "target" of acquisitions involving businesses in Canada is \$73 million.<sup>11</sup> The threshold will be reviewed again in early 2012 and may be adjusted at that time in keeping with the rate of inflation.

## 2. Mergers

Several cases and consent orders in 2010-2011 reflected the newly-enhanced investigative powers of the Bureau with respect to mergers.<sup>12</sup> The Commissioner, Melanie Aitken, noted that merger review is now a more coherent process.<sup>13</sup> As can be seen from the pace of cases and consent agreements during the year, including in respect of non-notifiable transactions, 2010-2011 appears to forecast a movement toward more active merger enforcement in Canada, even as the *Investment Canada Act* bared some (very) rare teeth.

### (a) BHP Billiton/ PotashCorp

On November 3, 2010, the Honourable Tony Clement, Minister of Industry, announced that he had sent a notice to BHP Billiton indicating that he was not satisfied that its proposed acquisition of control of Potash-Corp was likely to be of net benefit to Canada.<sup>14</sup> The *Investment Canada Act* requires the Minister of Industry to approve certain foreign acquisitions of control of Canadian businesses as being of “net benefit to Canada”, prior to closing. In this instance, despite the offer by BHP Billiton of unprecedented undertakings, but in the face of vocal opposition from several provincial premiers, both federal opposition parties, as well as some Canadian business leaders, the Minister made a preliminary decision to decline approval. Although the Act requires the Minister to extend the review period by 30 days to allow investors to make additional representations, BHP Billiton walked away from its bid on November 14, 2010, thereby terminating the review process. No reasons were ultimately provided, but the Minister noted that the Government’s policy continues to be favourable toward foreign investment.<sup>15</sup>

### (b) Merger Policy Guidance

The Bureau released a statement on its disclosure policy in the context of hostile takeover bids on June 2, 2010. In a hostile bid, the Bureau can be put in an awkward position if disclosure to one party of information concerning its review is interpreted as giving that party an advantage in the bid process. According to the *Hostile Transactions* guideline, subject to the confidentiality restrictions in section 29 of the Act, when the Bureau provides pertinent information to one party in a hostile transaction, it will strive to disclose the information equitably to the other party. The policy indicates that the Bureau will disclose the complexity designation of the proposed transaction, the anticipated timing of the Bureau’s review, the date upon which the other party has certified compliance of a response to a SIR, the Bureau’s preliminary and final views on market definition and analytical factors involved in finalizing its views, and the Bureau’s preliminary and final views on whether the proposed transaction is likely to prevent or lessen competition substantially.<sup>16</sup>

An updated *Fee and Services Standards Handbook for Mergers and Merger-Related Matters* was released on November 1, 2010. A key purpose of the new *Handbook* is to better align the Bureau’s non-binding internal timelines for processing merger files with the statutory waiting periods. The classification of incoming merger files has been simplified to either “complex” (maximum 45-day timeline for review) or “non-complex” (maximum 14-day timeline for review), with the caveat that the normal 45-day timeline for a preliminary conclusion in a complex case is extended to the statutory waiting period if a SIR is issued.<sup>17</sup> The former system admitted of a third category of “very complex,” which was seen to be inconsistent with the impact of SIRs on deal timing and the review period.

Also on November 1<sup>st</sup>, 2010, the Bureau released an updated *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*. The Guide provides logistical and administrative information about the filing of merger notifications and requests for advance ruling certificates (“ARCs”) (including requested information and when customer contacts should be supplied in an ARC request), as well as advice about the timing of filings and supplementary / voluntary information requests. The *Procedures Guide* also provides a step-by-step flow chart that can be used to determine if a proposed transaction is notifiable under the Act.<sup>18</sup>

On June 27, 2011, the Bureau issued draft revisions to the *Merger Enforcement Guidelines* (“MEGs”). The MEGs were last revised in 2004, and the changes reflect current views on Canada’s unique efficiencies defense as well as an expansion of the horizontal and vertical merger analysis. The proposed revisions reflect

some of the 2010 revisions to the U.S. *Horizontal Merger Guidelines* but fall short of espousing any particular mode of economic analysis. The proposed revisions to the MEGs do not indicate radical changes in approach to merger review; however, they do adapt to the more nuanced thinking and broader range of analytical tools that have become available to the Bureau since the MEGs were last revised. In keeping with the Bureau's recent enforcement tactics, they may reflect a more activist approach to merger review. The final revised MEGs are expected to be issued in the fall of 2011.

Some of the more significant proposed changes to the MEGs include:

- The Bureau may consider market definition and competitive effects concurrently, in a dynamic analytical process. Market definition, although often still performed, is no longer a necessary step in analyzing a merger's competitive effects (though it will still be used where feasible and useful). The new U.S. *Horizontal Merger Guidelines* contain a similar approach, likely motivated by an alternative "upward pricing pressure" ("UPP") test developed by Joseph Farrell and Carl Shapiro. UPP has become fairly widely used by the agencies in the United States, where appropriate, and is beginning to be used in appropriate cases in Canada.
- The draft revised MEGs contain an enhanced treatment of monopsony power; specifically, in reviewing buyer power the Bureau will consider factors such as whether the merged firm has an incentive to reduce its own output (and therefore its purchases), whether long-run supply is likely to be reduced if prices are pressed lower, and whether upstream supply is already competitive (*i.e.*, countervailing selling power). In short, the anti-competitive concern should not be present when a purchaser can negotiate lower prices that do not diminish the overall supply of the inputs in question.
- The revised MEGs contain additional detail concerning the Bureau's approach to minority interests and interlocking directorates, both of which may be reviewed if they are ancillary to a merger transaction or if they provide the party in question with an ability to materially influence the economic behaviour of the business of a competitor.
- A significant development is a change in the approach to assessing whether entry is likely to be "timely," by removing the 2-year time frame and referring back to whether such entry will likely occur soon enough to deter the exercise of market power.
- The revised MEGs will contain an expanded analysis of anti-competitive effects in non-horizontal mergers. Specifically, if the acquisition of a supplier or customer (a "vertical" merger) allows the merged firm to limit or eliminate rival firms' access to inputs or markets, thereby reducing or eliminating rival firms' ability or incentive to compete, the merger may be anti-competitive.
- The draft revisions contain a more nuanced approach to the analysis of "coordinated effects" in merger review, as well as an expanded treatment of the efficiencies defence that incorporates the *Efficiencies Bulletin* from 2009.<sup>19</sup>

### (c) Specific Cases:

As noted above, on January 24, 2011 the Bureau applied to the Tribunal to dissolve the merger between CCS Corporation and Complete Environmental Inc., alleging that – absent the acquisition – Complete Environmental would have opened a new hazardous waste landfill. The Bureau alleges a substantial prevention of competition, in the first "pure" prevent case in Canada.<sup>20</sup> The merging parties argue in reply, *inter alia*, that Complete Environmental would not have been a vigorous and effective competitor, that its entry could not have been expected to reduce prices, that the Commissioner's market definition is flawed, that barriers to entry in the relevant market are not high, and that buyers are able to constrain any exercise of market power.<sup>21</sup> The case is currently pending before the Tribunal.

On June 27, 2011, the Bureau filed an application pursuant to the merger provisions of the Act seeking to prohibit a proposed joint venture between Air Canada and United Continental Holdings Inc. In the same application, the Bureau brought the first challenge to a competitor collaboration agreement under the civil section 90.1, in respect of three existing coordination agreements between the two airlines. The Bureau believes that the joint venture would allow the parties to set prices, capacity and schedules, thus resulting in a monopoly on several transborder routes, substantially reducing competition on additional routes and enabling them to impose significantly higher prices.<sup>22</sup> Air Canada and United Continental deny these allegations, and say that their cooperative relationship has provided more efficient and convenient service to customers.<sup>23</sup> The case is currently pending before the Tribunal.

The Bureau examined closely, but ultimately chose not to challenge, several media mergers in 2010-2011, including Shaw Communication's acquisition of Canwest Global Communications Corp., Canadian Satellite Radio Holdings Inc.'s acquisition of Sirius Canada and BCE's acquisition of CTV.<sup>24</sup> Notably, broadcasting mergers are also subject to concurrent review by the Canadian Radio-television and Telecommunications Commission (the "CRTC") on broad public interest grounds which include consideration of the competitive impact of the proposed transaction.

The renewed vigour of merger enforcement in Canada was also witnessed by the numerous consent agreements registered with the Tribunal in 2010-2011. For example:

- On June 29, 2010 the Bureau, IESI-BFC Ltd. and Waste Services Inc. ("WSI") entered into a consent agreement whereby WSI agreed to divest its commercial waste business in five cities.<sup>25</sup>
- On July 28, 2010, the Bureau reached an agreement with Nufarm Limited concerning its proposed acquisition of AH Marks Holding Limited.<sup>26</sup> The agreement addressed the Bureau's concern that there would be a substantial lessening or prevention of competition in the supply of certain herbicides in Canada. The Bureau and the United States Federal Trade Commission ("FTC") coordinated remedies in the case.
- A resolution was announced in a pharmaceutical merger on July 30, 2010 between the Bureau, Teva Pharmaceutical Industries Ltd. and the Merckle Group.<sup>27</sup> The Bureau required divestitures of assets and licenses relating to the sale and supply of certain dosages of oxycodone tablets and morphine sulphate tablets in Canada.
- Another divestiture was sought in the proposed merger of Novartis AG and Alcon, Inc. in August, 2010, related to several eye-related medical products. The agreement includes divestiture of assets and associated licenses. The Bureau worked closely with the FTC and the Competition Directorate of the European Commission.<sup>28</sup>

Divestitures are not the only remedies at the Bureau's disposal. The Bureau also agreed to some behavioral remedies, as demonstrated in The Coca-Cola Company's consent agreement in relation to its acquisition of the North American business of its primary bottler, Coca-Cola Enterprises Inc. The Bureau feared that it would have lessened and/or prevented competition substantially in the supply of soft drinks in Canada. The Coca-Cola Company agreed to certain restrictions on the use of, and access to, Dr. Pepper Snapple Group's commercially sensitive information, including restrictions on access to relevant personnel.<sup>29</sup>

In August, 2011, the Bureau made public in summary form the results of a study of the efficacy of merger remedies between 1995 and 2005.<sup>30</sup> The study examined factors that were viewed to contribute to the success or failure of structural (divestiture) versus behavioural remedies in a variety of merger cases. The Bureau will now use the results of the study in order to update the *Information Bulletin on Merger Remedies in Canada*, as well as the consent agreement outline template contained in the appendix thereto.

### 3. Conspiracies and Bid-Rigging

Criminal enforcement was at centre-stage in 2010-2011, as the Bureau obtained penalties in respect of cartels involving the chemicals, retail gasoline, refrigeration compressors and air cargo industries, as well as bid-rigging cases involving traffic lights and residential ventilation contracts, and issued new guidance in respect of its immunity and leniency programs;

With the amendment of the cartel provisions and the finalization of the leniency program, the cartel enforcement regime has undergone a period of modernization in recent years. As a result, 2010-2011 highlighted the Bureau's focus on detecting and prosecuting cartels. In a speech, the Commissioner reinforced the fact that the conspiracy provisions are shifting towards a more aggressive recognition of criminal activities that includes jail time for individual conspirators.<sup>31</sup> This is evidenced by the imprisonment of an individual in the Quebec gasoline cartel case. In addition, the Bureau is increasingly using wiretaps in investigations.<sup>32</sup> As of September 30, 2010, the Criminal Matters Branch had 42 ongoing investigations, many of which involved a high degree of cooperation with other jurisdictions, including coordinated searches.

### (a) Guidelines

In 2010, the Bureau released guidelines relating to both the immunity and the leniency programs. According to the Bulletin on the Bureau's *Immunity Program*, the Bureau will recommend immunity where the Bureau was unaware of or did not have enough evidence to recommend prosecution of an offence, and the party is the first to come forward to confess its role. The party must fully cooperate with the Bureau, must terminate its illegal activity and must not have played a role in coercing other parties to participate in the illegal activity.<sup>33</sup>

If immunity is not available, the *Leniency Program Bulletin*,<sup>34</sup> issued September 29, 2010, outlines factors the Bureau will consider when making sentencing recommendations to the Public Prosecution Service of Canada (PPSC) and the process for seeking a recommendation for a lenient sentence in criminal cartel cases.

The Bureau also released an updated Handbook to reflect amendments to the *Competition Act* and the Bureau's approach to applications for written opinions pursuant to section 124.1 of the Act. The changes cover the conspiracy provisions, competitor collaborations that prevent or lessen competition, and certain pricing practices.<sup>35</sup>

### (b) Specific Cases

On May 12, 2010, Solvay Chemicals Inc. was fined \$2.5 million by the Federal Court as a result of the company's price fixing conspiracy in relation to hydrogen peroxide sold in Canada.<sup>36</sup> Solvay is the second party to plead guilty to the conspiracy, as Akzo Nobel Chemicals International BV pleaded guilty in November 2008 and was fined \$3.15 million for its involvement. The Bureau's investigation of other companies alleged to be participants in the price-fixing conspiracy remains ongoing.

On the domestic front, the Bureau continued its examination of the gasoline industry. New criminal charges were laid against 25 individuals and three companies involved in an alleged gasoline price-fixing case in Victoriaville, Thetford Mines, Magog and Sherbrooke, P.Q.<sup>37</sup> The charges marked the end of the largest criminal investigation in the history of the Competition Bureau, involving the search of over 90 locations, the interception of thousands of phone calls and the seizure of over 100,000 records. The first wave of charges had been laid in 2008 against an additional 13 individuals and 11 companies. Further, on May 30, 2011, the owner of a Petro-Canada service station in Quebec pleaded guilty to criminal charges for conspiring to fix the price of gasoline at the pump. The owner was sentenced to pay a fine of \$20,000.<sup>38</sup>

On October 27, 2010, the Federal Court imposed a penalty of \$1.5 million on Embraco for fixing the price of hermetic refrigeration compressors sold to the household refrigerator and freezer manufacturer in Canada.<sup>39</sup> Embraco and its competitor exchanged information on the industry and market intelligence, and reached an agreement to increase prices. On November 3, 2010, Panasonic Corporation also admitted guilt for its involvement in the conspiracy case and was fined \$1.5 million.<sup>40</sup>

On October 28, 2010, Cargolux Airlines International pleaded guilty and was fined \$2.5 million for its role in an international air cargo cartel affecting Canada. The Bureau determined that air cargo fuel surcharges for international air cargo transportation services from Canada had been fixed between 2002 and 2006.<sup>41</sup> In 2009, other airlines pleaded guilty to fixing air cargo surcharges for shipments on specific routes from Canada. To date, the Bureau has collected more than \$17 million in fines from airlines involved in this conspiracy.

Finally, Kason Industries pleaded guilty to conspiring with Component Hardware Incorporated to lessen competition in Toronto and elsewhere in Canada in the sale of refrigeration and food service equipment components. Kason agreed to pay a fine of \$250,000.<sup>42</sup>

### (c) Bid-Rigging Cases

In *R. v. Électromega Limitée*,<sup>43</sup> a judgment released on May 5, 2010, Electromega was acquitted of bid-rigging in an alleged conspiracy to fix the prices of traffic lights in Quebec City. The court found, among other things, that the testimony of Crown witnesses was unreliable, as they could not accurately recall events that had occurred seven years prior to trial.<sup>44</sup>

On December 21, 2010, criminal charges were laid against 8 companies and 5 individuals for rigging bids in Montreal. The Bureau provided evidence to suggest that the companies coordinated their bids, pre-determining the winners of the contracts.<sup>45</sup> On July 19, 2011, Les Entreprises Promécanic, Ltée pleaded guilty to three charges of bid-rigging and was fined \$425,000 for its role in the scheme.<sup>46</sup>

#### 1) Deceptive Marketing Practices and Mass Marketing Fraud

Deceptive marketing practices continued to eat up a large portion of Bureau resources. A number of significant penalties were imposed on large corporations, while major consent agreements registered with various businesses effectively enforced the policies.

The Bureau brought claims against two major telecommunications conglomerates in Canada: Bell Canada and Rogers Communications. On November 19, 2010, the Bureau claimed that Rogers engaged in misleading advertising of its discount cell phone and text service. The legal proceedings are ongoing, and the Bureau is seeking a \$10 million dollar administrative monetary penalty (“AMP”), the maximum amount allowed under the Act.<sup>47</sup> The Bureau brought a similar action against Bell Canada on June 28, 2011 and negotiated a consent agreement whereby Bell agreed to pay a \$10 million AMP in respect of allegedly charging higher-than-advertised prices for some services.<sup>48</sup>

Other major national retailers, including Reitmans (Canada) Limited and Zellers Inc., also entered into consent agreements concerning false advertising. Smart Set, a division of Reitmans, advertised a \$25 “Savings Pass” with a \$50 purchase, but it did not publish the expiry date or additional purchase requirements anywhere except on the pass itself. Smart Set agreed to correct the problem by extending the expiry period, eliminating the additional purchase requirement, and notifying customers of the change through their website, store signage and email lists.<sup>49</sup> Similarly, Zellers advertised a \$10 savings card for customers when a certain movie was purchased, but the Bureau complained that the advertisement did not clearly disclose the fact that a minimum \$50 purchase was required. Zellers agreed to waive the minimum purchase requirement and to extend the redemption period.<sup>50</sup> After almost 400 customers of Whirlpool Canada had their mail-in rebates rejected, the Bureau required Whirlpool to reimburse each customer for up to \$2000, depending on their purchases.<sup>51</sup>

The Bureau’s ongoing examination of environmental claims by sellers of spas and hot-tubs continued to bear fruit. Adding to the nine consent agreements entered into in 2009, the EcoSmart Spas and Dynasty Spas agreed to cease claiming that the companies’ hot tubs or insulation satisfied the criteria of the ENERGY STAR Program, and to pay an AMP of \$130,000.<sup>52</sup>

In *R. v. Cheung*, the defendants were charged with deceptive telemarketing practices under ss. 52 and 52.1 of the Act and s. 380 of the *Criminal Code*. Employees allegedly called companies regarding a (false) registration in a business listing in order to sell the listing.<sup>53</sup>

On the class-action front, 2010-2011 saw two major developments. On January 7, 2011, the Ontario Superior Court of Justice approved a settlement in a class action alleging (among other things) breach of the criminal misleading advertising provisions in section 52(1) of the Act. The action related to various software problems with SureStep blood glucose self-monitoring devices. The settlement had a cash value of \$2.75 million and a product value of \$1.25 million. On March 7, 2011 the British Columbia Court of Appeal overturned a lower court decision which had denied class certification to purchasers of Toyota vehicles, finding that the appellants had shown proof of loss on a class-wide basis. The action relates to an allegedly misleading “Access Program” implemented by Toyota Canada Inc. which governed the sales process and pricing for the sale and lease of Toyota vehicles.

### 4. Deceptive Telemarketing Crack-down

The Bureau continued to work in cooperation with its international counterparts to combat deceptive telemarketing fraud. The Bureau participated in Fraud Prevention Month (a Canadian educational campaign focused on online fraud in 2011), as well as in an international sweep led by the International Consumer Protection and Enforcement Network (“ICPEN”) to expose fraudulent and deceptive advertising on social

networking sites,<sup>54</sup> and a major investigation into cross-border deceptive business directory scams. Canadians extradited to the United States have faced significant jail time in relation to deceptive telemarketing prosecutions, and the Bureau has signalled its intention to apply Canadian law to combat fraudulent marketing practices regardless of whether the victims are located inside or outside of Canada.

## **5. Reviewable Distribution Practices: Refusal to Deal; Price Maintenance; Exclusive Dealing, Tied Selling and Market Restriction; Abuse of Dominance**

### **(a) Refusal to Deal**

On June 2, 2011, the Federal Court of Appeal released its decision in *Nadeau Poultry Farm Limited v. Groupe Westco Inc et al.*,<sup>55</sup> confirming the 2009 Tribunal decision to reject the appellant's complaint under s. 75, the Act's provision related to refusals to supply. As a result, the benchmark decision of the Tribunal, and its clarification of the concepts of "ample supply," "insufficient competition," "usual trade terms," and "adverse effect on competition," remain in place in the context of a supply-managed industry.

The Tribunal released a decision on March 4, 2011,<sup>56</sup> refusing to grant leave to Brandon Gray Internet Services Inc., an internet domain name registrar to bring a refusal to deal case against the Canadian Internet Registration Authority ("CIRA"). Only registrars certified by CIRA are permitted to register ".ca" domain names, so when it was refused re-certification, Brandon Gray was unable to register such domain names for its clients. The Tribunal found that Brandon Gray had not met the test to obtain leave because it had not provided any evidence showing how CIRA's alleged refusal to certify had led to an adverse effect on competition in a market. Brandon Gray had merely submitted an affidavit of a Senior Systems Administrator, wherein the administrator stated that he "verily believed" that the termination of Brandon Gray's relationship with CIRA would result in reduced competition in the ".ca" industry. This evidence was found to be insufficient.

On June 29, 2011, the Used Car Dealers Association of Ontario ("UCDA") sought leave from the Tribunal to bring an application against the Insurance Bureau of Canada ("IBC") alleging refusal to deal and retail price maintenance.<sup>57</sup> UCDA claims that IBC stopped supplying it with data on vehicle accident history and claims, which IBC compiles from its member insurers, and which UCDA relies on being able to purchase in order to supply vehicle accident history reports to its members. UCDA alleges that one of its competitors in the accident history report market, CarProof, has a significant business relationship with IBC, and that IBC is refusing to supply the insurance data because of UCDA's low pricing policy. On September 9, 2011, the Tribunal granted leave to UCDA to file an application pursuant to section 75.

### **(b) Price Maintenance**

The Bureau filed its first application with the Tribunal under the new price maintenance provision in December, 2010, against the Visa and MasterCard card networks. The application claims that the two credit card companies enforce or continue agreements that influence upward, or discourage the reduction, of credit card merchant acceptance fees. When a customer pays by credit card, the merchant pays a fee that, by agreement with the accepting banks as a condition of their participation in the card network, the merchants are not permitted to pass on to the customers. Merchants are also not permitted to refuse certain cards. Since "premium" cards that provide cardholders with rewards such as travel miles charge higher merchant fees, this rule means merchants pay more when customers use such cards, but cannot pass on those fees. The Commissioner alleges that these credit card rules amount to price maintenance and have an adverse impact on competition, resulting in increased costs to both consumers and merchants.

Both credit card companies vehemently defend themselves. In separate responses, the credit card networks reply that the rules are pro-competitive, in that they prevent cardholders from unexpected surcharges by merchants, as well as protecting the card networks' brands. They also deny that the rules prevent merchants from charging different prices depending on the method of payment. The case is pending before the Tribunal.<sup>58</sup>

### (c) Abuse of Dominance

With the power to impose administrative monetary penalties in respect of abuse of dominance came a renewed attempt to characterize an abuse of dominance as being capable of founding a civil claim for damages. In *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*,<sup>59</sup> the court found that the addition of AMPs to the remedies available for abuse of dominance did not change previous authorities holding that conduct alleged to constitute an abuse of dominance under the Act is not an unlawful act for the purposes of a tort claim in a private action, unless and until the Tribunal makes a prior determination of abuse of dominance.<sup>60</sup> Only when prohibited by Tribunal order does such conduct become unlawful for purposes of a tort claim. This decision is currently under appeal.

In 2010-2011, the Bureau took its first abuse of dominance case before the Tribunal since filing the application against *Canada Pipe* in 2002. In February 2010, the Commissioner commenced an application against the Canadian Real Estate Association (“CREA”) alleging that CREA’s rules regarding the use of its multiple listing service amounted to an abuse of a dominant position. CREA contested the case and pleadings were filed, but the Bureau and CREA entered into a consent agreement in October, 2010.<sup>61</sup>

The Bureau then filed a similar application in May, 2011 alleging an abuse of dominance by the Toronto Real Estate Board (“TREB”) in light of the TREB’s rules regarding the use of information available on its own multiple listing service.<sup>62</sup> TREB argues, among other things, that it is merely exercising its copyright in the proprietary database, therefore falling within the exception from the abuse of dominance provisions contained in subsection 79(5) of the Act. This litigation remains ongoing.

### (d) Civil Proceedings against Competitor Collaborations

As noted above, on June 27, 2011, the Commissioner filed an application challenging a proposed joint venture between Air Canada and United Continental airlines under the merger provisions of the Act, and also challenging three “coordination agreements” between Air Canada and United Continental Holdings Inc. as anti-competitive agreements among competitors or potential competitors (s.90.1 of the Act). The Bureau alleges that the agreements allow the parties to implement joint pricing and scheduling of flights and to share revenue,<sup>63</sup> while the parties maintain that the arrangements are efficiency-enhancing and benefit customers.<sup>64</sup> This is the first case brought under the Act’s new civil provision for agreements among competitors. As such, the Commissioner will be required to show a substantial lessening or prevention of competition, and the parties will be able to avail themselves of an efficiencies defence. The case is currently pending before the Tribunal.

## 6. Divergent Rulings in Indirect Purchaser Class Actions

A price-fixing class action was launched in 2010 across Ontario, BC and Quebec. A group comprised of Cadbury Adams Canada Inc., The Hershey Company, Hershey Canada Inc., Nestle Canada Inc., Mars Incorporated, Mars Canada Inc. and ITWAL Limited (collectively, “ITWAL”), was alleged to have fixed chocolate prices. Cadbury Adams Inc. paid \$5.7 million to the plaintiffs in order to have itself removed from the action.<sup>65</sup> The other wholesalers remain in litigation.

On April 15, 2011, the British Columbia Court of Appeal released its reasons for judgment in two important class actions: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,<sup>66</sup> and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*.<sup>67</sup> In the *Sun-Rype* case, the plaintiffs alleged that the defendants had fixed the price of corn syrup. Claims were asserted by both direct and indirect purchasers, but the Court of Appeal said there is no sound basis upon which a claim can be made for an illegal overcharge that is passed on to an indirect purchaser. Citing the Supreme Court of Canada’s 2007 decision in a restitution case, *Kingswood Investments Ltd. v. New Brunswick (Finance)*,<sup>68</sup> the B.C. Court of Appeal held that since defendants cannot avail themselves of a “passing on” defence, it follows that indirect purchasers cannot sue to recover losses passed on to them by direct purchasers (permitting such claims could otherwise result in “double jeopardy” for the defendants). The majority used similar reasoning to reject certification against Microsoft. The action against Microsoft had previously been certified as a class proceeding. The plaintiffs alleged that Microsoft engaged

in anti-competitive behaviour that allowed it to overcharge for its products; specifically, they claimed that Microsoft conspired with computer manufacturers in schemes to exclude competition and keep prices high. The overcharges at the direct-purchaser level were allegedly passed through to the indirect purchasers. The B.C. Court of Appeal set aside the certification order, for reasons expounded in the *Sun-Rype* judgment. There were vigorous dissents in both cases, and they follow a 2009 decision by the same court that had granted certification of a class including both direct and indirect purchasers (see *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*).<sup>69</sup> Leave has been sought to appeal both the latest *Pro-Sys* and the *Sun-Rype* cases to the Supreme Court of Canada.

Finally, in Ontario, the Superior Court of Justice approved a partial settlement against some (but not all) defendants in *Osmun v. Cadbury Adams Canada Inc.*<sup>70</sup> Consonant with the Bureau's immunity and leniency policies, the Court noted that a partial settlement is particularly beneficial in conspiracy actions where the defendants allegedly share a "dark secret", and obtaining the cooperation of some defendants can be of great tactical value in pursuing the others.

## 7. Conclusion

2010-2011 was an important year for the development of competition law in Canada, as the Bureau and the business community adjusted to new merger review procedures, more rigorous cartel enforcement, invigorated civil cases, as well as actions in respect of deceptive marketing and false or misleading representations. Many of the important cases are ongoing, however, and 2011-2012 will be a year to watch.

## Endnotes

<sup>1</sup>The research assistance of Marisa Berswick, law student, is gratefully acknowledged. Susan Hutton is a partner of Stikeman Elliott LLP, and a member of its Competition and Foreign Investment Group.

<sup>1</sup>R.S.C. 1985, c. C-34, as amended (the "Act").

<sup>2</sup>R.S.C. 1985, c. 28 (1<sup>st</sup> supp.)

<sup>3</sup>Bill C-28, *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (in force December 15, 2010).

<sup>4</sup>Bill C-51, *An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act* (1<sup>st</sup> reading).

<sup>5</sup>*Supra* note 2 at s. 74.011(1).

<sup>6</sup>*Ibid.* at s. 52.01(1).

<sup>7</sup>*Ibid.* at s. 76(1).

<sup>8</sup>R.S.C. 1985, c. C-46 (the "Code")

<sup>9</sup>*Supra*, note 3 at Form 5.007

<sup>10</sup>*Ibid.* at s. 24(d).

<sup>11</sup>Competition Bureau, "2011 Pre-Merger Notification Transaction-Size Threshold" (February 1, 2011) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03344.html>>.

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<sup>13</sup>Competition Bureau, Speeches, "Remarks by Melanie L. Aitken, Commissioner of Competition" (September 30, 2010 at CBA Fall Competition Law Conference) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03306.html>>.

<sup>14</sup>Industry Canada, "Minister of Industry Confirms Notice Sent to BHP Billiton Regarding Proposed Acquisition of Potash Corporation" (November 3, 2010), available at: <<http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06031.html>>.

<sup>15</sup>Industry Canada, "Industry Minister Clement Confirms BHP Billiton's Withdrawal of its Application for Review under the Investment Canada Act" (November 14, 2010), available at: <<http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06068.html>>.

<sup>16</sup>Competition Bureau, "Hostile Transactions: Bureau Policy on Disclosure of Information" <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03243.html>>.

<sup>17</sup>Competition Bureau, Bulletins, "Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters" (November 1, 2010) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03295.html>>.

<sup>18</sup>Competition Bureau, "Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the *Competition Act*" (November 1, 2010) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html>>.

<sup>19</sup>Hutton, Susan M and Marisa Berswick, "Draft Revisions to Canadian MEGs Released for Comment" (July 4, 2011) <<http://www.thecompetitor.ca/2011/07/articles/competition/merger-review/draft-revisions-to-canadian-megs-released-for-comment/#more>>.

<sup>20</sup>*The Commissioner of Competition v. CCS Corporation et al.*, 2011 Comp. Trib. 5.

<sup>21</sup>See "Response of CCS Corporation, Complete Environmental Inc. and Babbirk Land Services Inc." (March 10, 2011), available at: <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=336>>.

<sup>22</sup>Competition Bureau, News Release, "Competition Bureau Seeks to Block Joint Venture between Air Canada and United Continental" (June 27, 2011) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03386.html>>.

<sup>23</sup>Air Canada, "Air Canada Responses to Commissioner of Competition's Opposition to Canada-US Transborder Joint Venture" (Press Release) (June 27, 2011).

<sup>24</sup>See Competition Bureau, "Competition Bureau Clears Shaw's Acquisition of Canwest" (August 13, 2010) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03279.html>>; Competition Bureau, "Competition Bureau Statement Regarding BCE's Acquisition of CTV" (February 1, 2011) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03346.html>>; Competition Bureau, "Competition Bureau Statement Regarding Merger of XM Canada and Sirius Canada" (February 23, 2011) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03351>>.

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- <sup>65</sup> *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (SCJ).
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## CALL FOR PAPERS / APPEL À COMMUNICATIONS

Submissions for the Winter 2011-2012 issue should be received by the Editorial Board no later than **December 1st, 2011**.

Les soumissions pour le numéro d'hiver 2011 doivent être reçues par le Comité de rédaction au plus tard le **1<sup>er</sup> décembre 2011**.

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