# COMMENT AND ANALYSIS

## WHEN MERGER GUIDELINES FAIL TO GUIDE

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Professor D.G. McFetridge recently reviewed, in this journal, Paul S. Crampton's book *Mergers and the Competition Act*. This book appears to have inspired many of the Bureau's "Merger Enforcement Guidelines." Professor McFetridge refers to Mr. Crampton's belief "that the *Competition Act* is regarded as the most economically literate competition statute in the world," then adds:

> His book provides ample evidence that this economic literacy has come at a high price in terms of complexity and uncertainty of interpretation. He assumes that the merger evaluation and adjudication process provided for in the Act would itself pass a benefit/cost test. Time will tell if that assumption is warranted.[1]

It will be argued here that with the publication of the Guidelines, the verdict is now in. An already problematic merger provision in the *Act* has been rendered still more unpredictable and still more costly by the enforcement policy adopted.

The discussion below proceeds in four parts. The first examines the difficulty created by making price projections such a central feature of merger analysis in the Guidelines. The second part questions the workability of the method adopted by the Guidelines of trading off a substantial lessening of competition against gains in efficiency. The third part considers the application of the Guidelines in two significant cases. The fourth part draws some conclusions and makes some observations.

### Part 1

A fundamental problem with the Guidelines is that they reflect the Director's confidence that the Bureau can fine-tune the assessment of mergers by calling on economic analysis for more precision than it can deliver. Though clearly written and honourably intended, the Guidelines suffer from the fallacy of spurious precision. This is first evident in the definition of the relevant market:

> In general, a relevant market is defined as the smallest group of products and the smallest geographic area in relation to which sellers could impose and maintain a significant and non-transitory price increase above levels that would likely exist in the absence of the merger. In most contexts, the Bureau considers a 5 percent price increase to be significant, and a one year period to be non-transitory. However, a different price increase or time period may be employed where the Director is satisfied that the application of the 5 percent or one year thresholds would not reflect market realities.[2]

How then will the Bureau determine whether the targeted price increase or time period are likely to be achieved by the merger? One method, and one suspects that this is the chief method, is described in the Guidelines as follows:

> The views, strategies and behaviour of buyers are often among the most important sources of information considered in the assessment of whether buyers will likely switch to another product in the event of the postulated significant and non-transitory price increase. What buyers state they are likely to do, what they have done in the past, and their strategic business plans, often provide a reliable indication of whether the postulated price increase is likely to be imposed and sustained.[3]

There is no indication of how the claimed "reliability" of the price projection is tested.

Canadian buyers, unlike their Japanese and American counterparts, do not have a reputation for toughness. In his recent study *Canada at the Crossroads*, Michael Porter says that Canadian buyers are generally not sophisticated buyers and put little pressure on suppliers to upgrade. Moreover, there is an essential difference between the market knowledge of buyers who spend all their time in frequent

transactions on a limited range of products, such as livestock buyers for meat-packers, and the market knowledge of buyers who have responsibility for a variety of products, each of which may be purchased only periodically.

Comparable price projections are explicitly required by the Guidelines in the evaluation of the geographical dimension of the relevant market and in the evaluation of several of the factors listed in section 93, namely foreign competition,[4] the availability of acceptable substitutes[5] and barriers to entry.[6] However, the most important forecast about prices is required in determining whether there is likely to be a substantial lessening of competition as a result of the merger.[7]

If economists could consistently forecast the magnitude and duration of price increases, they could make fortunes on the commodities and stock markets. Needless to say, they can't do this, even where they are aided by price series that cover several business cycles. But for the vast majority of goods and services, no long-run price series exist. Price forecasting is a difficult exercise in the best of circumstances, but if analysts can't track past prices, they are even less likely to be able to predict future prices with much precision.

Even current prices are often difficult enough to determine, because price lists or posted prices or advertised prices won't do. What matter to customers or suppliers are transaction prices. The Guidelines do in fact pay lip-service to this problem. In their discussion of the relevant product market, the Guidelines say:

> The persuasiveness of information with respect to price movements and levels is often reduced by the difficulty associated with ascertaining the net price at which sales are actually transacted.[8]

Similarly, in their discussion of the relevant geographic market, the Guidelines note:

> The value of information on price movements and price levels is often undermined by difficulty in ascertaining the price at which sales are actually transacted.[9]

This, though, is the last one hears of the problem, and the Guidelines proceed as if transaction prices are readily available and pose no serious problem for price forecasting. Unfortunately, it is precisely in highly concentrated industries, where mergers matter most, that the greatest effort will be made by suppliers to keep secret price-cutting from being disclosed. This does not mean, however, that discounting may not be widespread but difficult to track elsewhere. Past studies have shown that in the meat-packing industry, for example, the big companies generate many thousands of invoices per month, and their buyers of livestock and salesmen of fresh meat are often given considerable discretion in pricing. Similarly, real estate dealers and stock brokers regularly give away part of their commissions. In the airline industry in the United States, discounts off the regular economy fare have affected as much as ninety percent of the available seats. Typically less data is available here, but to report the state of play in Canada would still require the tabulation of transaction prices between hundreds of city pairs, together with the various restrictions affecting use of the bargain rates.

Another complication is that there are many markets where non-standard products or customized production are the rule. Defence industries, real estate, most of the professions, some personal services, much of the construction industry and part of the clothing industry come to mind. There are other industries—the automobile industry is an important example—where the availability of options (plus varying trade-in allowances, financing terms, product warranties and after-sale service) complicate the recording, never mind the forecasting of transaction prices.

However, the most fundamental objection of all is not to the assumption that the amount and duration of price increases can generally be forecast without substantial difficulty, but rather to the assumption that such increases are necessarily a good proxy for a substantial reduction in competition. As Professor L.A. Skeoch pointed out long ago:

> On the monopoly side, particularly, one wonders if it is worthwhile at this date to continue to assume that private monopolists have as their main motivation the maximization of short-run profits rather than the maximization of the present value of the firm, with short-run prices and profits often being "too low", thereby discouraging entry and maintaining their monopoly position. The monopoly problem may turn out to be that the monopolist seeks a long life and a quiet one, rather than that he "strains after the last gnat of profit." Stability and order may degenerate into stagnation and rigidity. The misallocation of resources involved is

probably of a complex, dynamic kind, which is more difficult to identify and to remedy than that in which output is too low and prices and profits too high.[10]

The importance of this distinction in the Canadian context can scarcely be exaggerated. We receive almost daily reminders of how little the soft competition that has characterized much of the Canadian economy in the past has prepared us for the rigours of international competition. The worry isn't only or even mainly that our prices are too high, but that our costs are too high. The work of Michael Porter is only the latest warning. He emphasizes the importance of vigorous competition in the domestic market because this provides an essential incentive for firms to engage in innovation, which he says is the most important source of productivity gains and competitiveness.

In a discussion of the price ceiling imposed in Canada by the landed cost of imports plus the tariff, the Guidelines say that "where domestic firms are pricing just below the tariff ceiling prior to a merger, it is usually the case that further price increases would likely be prevented by foreign competition."[11] Then a footnote says "In these circumstances, the merger would not likely lead to a substantial lessening of competition." In other words, where an oligopoly in Canada sets a price just under the landed cost of imports plus tariff (a not uncommon situation) and all firms merge, the Bureau would likely take no action.

Presumably the same policy is applicable where any tight oligopoly charges a monopoly price. A merger of all firms would not increase the price, therefore the merger would not likely lead to a substantial lessening of competition, therefore the Bureau would likely take no action. This seems to be an effective formula for ensuring that merger policy doesn't contribute much towards improving the performance of the Canadian economy.

The fundamental problem is that the Guidelines fail to give sufficient recognition to the fact that competition is a process. No snapshot of the price effects at the time of the merger (even if these could be predicted accurately) will do justice to the results that may be expected in the long run from serious impairment of the competitive process.

**Part 2**

A second serious manifestation of the fallacy of spurious precision in the Guidelines involves section 96(1) of the *Competition Act*. This reads:

> 96.(1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

The section is flawed, because gains in efficiency can't be measured on the same scale as effects of lessening competition. Any trade-off between the two must therefore be more or less arbitrary.

The Guidelines say this about the measurement of a reduction in competition:

> The calculation of the likely anticompetitive effects of mergers is generally very difficult to make.... In view of the difficulties associated with arriving at precise estimates of both the elasticity of market demand and the magnitude of the prevention or lessening of competition that is likely to be brought about by the merger, several trade-off assessments are generally performed over a range of price increases and market demand elasticities.[12]

Perhaps one may be forgiven for doubting how "generally" several such assessments are in fact performed, and how significant they are when this happens.

About the measurement of gains in efficiency, the Guidelines note:

> Production efficiencies ... are generally the focus of the evaluation, because they can be quantifiably measured, objectively ascertained, and supported by engineering, accounting or other data... However, claims that a merger will lead to dynamic efficiencies are ordinarily extremely difficult to measure. Accordingly, the weight given to claims regarding such efficiencies will generally be qualitative in nature.[13]

Not everyone will agree that such certainty surrounds the measurement even of production efficiencies. There can be diseconomies of scale (and of scope) as well as economies, and the former

may come to dominate where the spur of competition disappears. One assumes that in the Soviet Union the state monopolies were positioned long ago to take advantage of all possible economies of scale, but the results are plain.

Undaunted, the Guidelines proceed to "explain" how the Director proposes to measure the unmeasurable:

> The expressions "greater than" and "offset" are considered to each have qualitative and quantitative connotations. That is to say, the efficiency gains must be greater than the anticompetitive effects that are likely to result from the merger in both a qualitative and quantitative sense; and the efficiency gains must offset these anticompetitive effects, in both a qualitative and quantitative sense. To be assessed in terms of "greater than," efficiency gains must be capable of being weighed in similar terms as all or some of the anticompetitive effects that will likely result from the merger. Efficiency gains and anticompetitive effects that cannot be weighed in similar terms will be evaluated in terms of whether the gains offset the anticompetitive effects. This evaluation can be subjective in nature and will ordinarily require the exercise of the Director's discretion.[14]

In this context, "ordinarily" has to mean one hundred percent of the time.

This, however, is not the end of the matter. The Guidelines point out that there is an additional problem. The assessment required by section 96(1) generally involves an evaluation of whether any of the gains that are identified as being likely to be realized post-merger would also be likely to be attained through less anticompetitive means such as internal growth, a merger with a third party, a joint venture, a specialization agreement, or a licensing, lease or other contractual arrangement, if the order in question were made.[15]

The effort to track down all the largely non-existent data implied by this measurement process, if it is in fact seriously attempted, diverts attention from the real job to be done.

Given properly defined markets, any conflict between efficiency objectives and competition policy objectives ought to be rare. This is because growth by merger of small firms is highly unlikely to raise competition policy concerns, and growth by merger of large firms won't raise competition issues either, unless such firms are protected in Canada in some way from foreign rivals.

Where the Canadian market is protected from foreign competition, it is not obvious why the growth of large firms should not have to rely upon their winning rather than buying a larger market share from domestic rivals. Where there are efficiencies of still larger scale or scope, they are generally available through internal growth, at least in the long run.

However, since some weight must be given to section 96, and since the trade-off will be arbitrary anyhow, the above analysis suggests the need for some arbitrary guideline that is economically rational and has minimal potential for damage to competition. Thus, until it is overruled by the Tribunal or the courts, the Bureau should take the position that claimed efficiency gains will override a substantial lessening of competition *only* where the firms are able to predict a minimum increase of X percent within a three-year period in the real value of exports, or a minimum increase of Y percent in the substitution of domestic products for imported products, in harmony with section 96(2). Unlike most predictions of efficiency gains, these would at least be testable. An essential part of such a guideline would be a condition that failure of the firms to deliver the promised efficiency gains would result in an immediate application by the Director, before the three-year limit imposed by section 97 expires, to dissolve or modify the merger.

**Part 3**

The introduction to the Guidelines states that they do not represent a significant change in enforcement policy. Earlier mergers might therefore be expected to throw light on how the Guidelines are applied as a practical matter. Unfortunately, in terms of published information, nearly all mergers are a closed book.

It happens, however, that in the case of Imperial Oil's acquisition of Texaco in 1989, a great deal of background information was already available in the report of the Restrictive Trade Practices Commission on "Competition in the Canadian Petroleum Industry" published in 1986. For instance,

the report indicates that by 1984, five companies—Imperial, Gulf, Petro-Canada, Shell and Texaco—accounted for 77 percent of the volume of all refined petroleum products sold in Canada. Changes in the industry from 1960 to 1984 had involved a reduction by half in the number of refiners (from 24 to 11) and by about one-third in the number of refineries (from 44 to 25). Just since 1979 there had been a reduction in refinery capacity of about 16 percent. Concentration in the industry increased further in 1985 when Petro-Canada purchased Gulf's downstream assets west of Québec, and Ultramar Canada, which was a big regional refiner in Québec and Atlantic Canada, purchased Gulf's eastern Canadian marketing assets.

The Canadian petroleum industry is characterized not only by high concentration, but also by a vast web of supply arrangements. According to the Commission, Imperial Oil had an average of 142 supply agreements in force in each of the years from 1979 to 1981. Indeed, Imperial had supply agreements of one form or another with each of the other Canadian refiners.

The Commission described in some detail the most far-reaching product supply arrangement of all. This was entered into in 1983 by Texaco and Gulf and was to run for many years. The arrangement consisted of seven agreements:

1) Gulf would process for Texaco at Edmonton;
2) Gulf would supply product to Texaco out of Edmonton in exchange for product supplied by Texaco to Gulf out of Nanticoke in Ontario;
3) Texaco would process for Gulf at Nanticoke;
4) Gulf would process for Texaco at Montréal;
5) Texaco would sell to Gulf out of Dartmouth and Gulf would sell to Texaco out of Montréal;
6) Gulf would terminal for Texaco at Clarkson, Ontario; and
7) Texaco would terminal for Gulf at Calgary.

In conjunction with entering into this new arrangement, Texaco closed its Edmonton refinery and Gulf discontinued gasoline production at its Clarkson refinery near Toronto. When Petro-Canada purchased Gulf's downstream assets west of Québec in 1985, it took over Gulf's supply arrangements with Texaco west of Québec. Petro-Canada also took assignment of Gulf's obligation to process for Texaco in Montréal.

Quite correctly, the Guidelines are at pains to point out that where market power arises out of an important merger, the power may be exercised unilaterally or it may be exercised interdependently with other competitors. What the latter means is that a merger can facilitate the ability of two or more competitors to exercise market power through an explicit agreement or arrangement, or through other forms of behaviour that permit firms implicity to co-ordinate their conduct.[16] Given the background provided by the report of the Restrictive Trade Practices Commission, if the 1989 merger between Imperial Oil and Texaco does not facilitate the ability of the leading firms to exercise market power interdependently, it is difficult to think of a case that would.

It is certainly possible that the Tribunal thought so too, but there was no application before it to dissolve the merger. The Tribunal was asked only to approve a consent order worked out between the Director and the companies. The Tribunal finally gave its approval on February 6, 1990, but this was the end of a long road. Ten days earlier the Tribunal had issued Reasons indicating that the Tribunal was prepared to approve parts of the proposed consent order but would require significant changes in other parts. The necessary changes were made and the order was approved. But all this followed a Partial Decision by the Tribunal in 1989 which also led to significant changes in the proposed order. Still earlier, a number of changes had been made to the proposed order to take account of objections raised by intervenors. For example, the Attorney-General of Québec withdrew Québec's opposition to the proposed consent order only when the Director and Imperial Oil agreed to the divestiture of an additional 68 service stations in that province.[17]

Before accepting the revised order, the Tribunal rejected the Director's evidence on the viability of the import option for independent distributors, and the Director's submission that the supply assurance provisions of the proposed order were adequate.[18] This whole case raises serious questions

about the wisdom of attempts to fine-tune structural remedies for anticompetitive mergers.

Not surprisingly, the issue of the effectiveness of competition in the Canadian petroleum industry won't go away. In the latest issue of this journal, Paul K. Lepsoe reports as follows:

> The investigation by the Bureau of Competition Policy into retail gasoline pricing, which has been underway for several months, is continuing. It arose initially because of complaints of significantly higher prices for gasoline in the Ottawa area than in other markets in Ontario, including the North. Complaints about the retail pricing practices of the industry were subsequently received from many other cities across Canada...
>
> Canadian consumers are clearly very sensitive to any fluctuation, or lack of fluctuation, in the price of gasoline: the Bureau receives more complaints about gasoline pricing than any other economic activity.[19]

There is a second instructive merger that throws light on the implications of the Guidelines, again because considerable information about it has become public—this time through the efforts of a union, the Canadian Association of Industrial, Mechanical and Allied Workers. In this case, however, no proceedings were undertaken before the Competition Tribunal. In 1988 Wolverine Tube, which operated seven plants in the United States and one in London, Ontario, bought two plants located in Montreal and New Westminster from Noranda Metal Industries, thereby acquiring a monopoly in Canada of the production of copper tubing and copper alloy tubing. These products are widely used in plumbing, construction and industrial applications.

It appears that Wolverine and Noranda first sought the Bureau's blessing in 1987, but were turned down because of the Bureau's concerns about the competitive consequences of the merger. However, in November 1988 the Director announced that he would not apply to the Tribunal for an order if the merger were to proceed. The Director's Annual Report for the year ended March 31, 1989 reads:

> In arriving at this decision, the Director extensively examined the information provided by Wolverine, N.M.I and other market participants. The views of a significant cross-section of purchasers of these products was also obtained.
>
> The Director had been advised by N.M.I that it had concluded that its tube mill operations in Montreal, Quebec and New Westminster, B.C., and related activities, were not a sustainable stand-alone business. N.M.I. confirmed that there were no other interested purchasers. Therefore, Noranda Inc., N.M.I's parent company, indicated that its only alternative to the merger was to liquidate the business, which would involve the cessation of operations at these two mills...
>
> Accordingly, the Director concluded that he would not, at that time, bring an application to the Tribunal for an order in respect of the merger. In taking this position, he recognized that the merger should not only ensure that the assets in question will continue in production, but will also enable Wolverine to realize significant efficiency gains, thereby becoming a more effective international competitor. The Director will however be monitoring market developments, including the extent to which imports of seamless copper tubing into Canada provide effective and vigorous competition to Wolverine.[20]

It turns out that most of this was wrong. Recent evidence shows that the operations at least at New Westminster were a sustainable stand-alone business, that there was at least one other interested purchaser, that the New Westminster assets did not continue in production for very long after the merger (Wolverine closed the plant in April 1991), and that Wolverine Canada did not become a more effective international competitor (the New Westminster plant exported over forty percent of its production—a higher percentage than was achieved by either the Montréal or London plants).

Within a month of the closure, the Canadian Association of Industrial, Mechanical and Allied Workers had located business interests in B.C. with the necessary financial backing, who were prepared to enter a joint venture with the union to purchase the plant. The Vancouver office of Deloitte and Touche was hired to evaluate the plant's worth and the feasibility of reopening. On May 14, 1991, in response to a request for information from Deloitte and Touche, Mr. J.B. Clarke, Vice-President Western Operations, of Wolverine Tube (Canada) Inc. wrote:

> If the New Westminster plant were sold, and was then operated by a competitor, this would seriously harm our other Canadian plants. Therefore, we would want an enormous premium on the sale of the New Westminster plant to cover the resulting loss of orders for our other Canadian plants. Realistically, this means that no sale is possible. That is why we have not sought out buyers and have tried in every way we could, short of saying the plant is not for sale, to discourage the Union's efforts to find a buyer.

This, and other similar statements by Wolverine officers including Mr. John M. Quarles, President

of the U.S. parent, testify to the viability of a stand-alone plant in New Westminster, to the substantiality of competition that would be offered by such a plant and, by extension, to the substantial lessening of competition that took place when Wolverine acquired Noranda's plants.

It is noteworthy that the Guidelines are silent about evidence of intent to monopolize. One assumes that the parties to a merger are more knowledgeable about their business than anyone else is, yet their expectations, as reflected in their intent, appear to be completely discounted by the Guidelines. Perhaps the explanation for the silence is simply that intent is too difficult to quantify, and is therefore assumed to fail the economic literacy test.

The Director has recently emphasized that the reduction in import tariffs and the rise in the Canadian dollar since the Wolverine/Noranda merger have had the effect of making imports a significantly greater competitive threat. If true, this would validate, with different reasons, the opinion the Bureau gave at the time of the merger. There are however several problems with this proposition.

Imports have never accounted for as much as thirty percent of the total Canadian market, and although no import figures are available for Western Canada, it is virtually certain that the percentage is very much smaller there. This judgment is based on the high proportion of New Westminster's production that was exported (forty percent), on the fact that copper tubing is a heavy product and freight costs are high, so it is generally sold f.o.b. shipping point, and on the configuration of U.S. production. Of the 17 U.S. plants, 13 are located east of the Mississippi River, and the remaining four (in Missouri and Oklahoma) are all more than 3,500 kilometres from New Westminster.

The Bureau seems to be hung up on some mechanical determination of the relevant geographical market. While the New Westminster plant was in operation, Western Canada represented a significant sub-market that was distinguishable for some purposes from the country as a whole. No increase in imports in Atlantic Canada, for example, would affect the price in New Westminster, except in the unlikely event that such imports forced a reduction in the f.o.b. plant price in London and Montréal. In this event, it would still be open to the New Westminster plant to maintain its f.o.b. plant price, while yielding up to London or Montréal some of the territory it previously served in Manitoba.

With the disappearance of New Westminster as a basing point, distant producers will no longer have to absorb freight in order to match prices in that market. Prices west of Winnipeg will eventually rise substantially to reflect the f.o.b. plant prices in London and Montréal (or Missouri and Oklahoma) plus full freight to destination.

Nevertheless, the Director concluded that there was no reason to change the Bureau's original position. Thus, there was no reason to apply to the Tribunal, before the limitation period imposed by section 97 expired at the end of October 1991, to dissolve the original merger between Wolverine and Noranda, or to require the sale, instead of permitting the dismantling of the New Westminster plant.

**Part 4**

If the analysis in this paper is correct, it implies a number of shortcomings of the Guidelines and of the enforcement policy they reflect.

1) Business leaders can't make timely decisions if they are required to understand 59 pages of the Guidelines plus 35 pages of appendices. Even if they do understand them, they are still likely to find it necessary to come to Ottawa to consult the Bureau about the intricacies of the merger law. Businessmen should be able to get a good general idea of what the law requires, without consultation. Yet according to the Guidelines:

   the most complex of these cases can require up to six months after all requested information has been obtained from the merging parties before the Director's position is finalized.[21]

2) The spurious precision of the Guidelines masks a high level of discretion in the office of the Director. The Bureau attempts to moderate the resulting uncertainty for business by providing for extensive consultation. All this consultation promotes negotiated settlements, because companies have no way of knowing whether they will get as good a deal through the Tribunal and the courts. Indeed,

on the few occasions when the Tribunal has had an opportunity to review what the Bureau and the parties have negotiated, the Tribunal has shown that it is likely to be tougher.

3) Negotiated settlements and advance ruling certificates preclude any real accountability to the public. While negotiated settlements are eventually disclosed in summary form, there is little hard information on which outsiders can judge the appropriateness of the arrangements. There is some irony in a recent comment about Japan made in this journal by Robert D. Anderson, a senior economist in the Bureau:

> In 1977, additional amendments were adopted to strengthen some aspects of the Antimonopoly Act. At least to outward appearances, however, the application of competition policy in Japan remained weak...The vast majority of cases were resolved through informal consent proceedings or recommendations by the JFTC that were voluntarily accepted by the parties.[22]

In order to promote accountability to the public, the present bias of the business community and the Bureau in favour of negotiated settlements should be modified, by requiring complete disclosure of all the facts on which the settlement is based well before the expiry of the three-year limitation period for a challenge to the merger. In order to overcome the confidentiality provisions of section 29 for this purpose, it might be necessary to include in the settlement a provision requiring the Director to publish a report covering all the non-confidential elements, and the private parties to produce a report covering all the confidential elements.

4) Negotiated settlements do not establish precedents. The law can't rely on self-policing. Even the most law-abiding citizen and the most learned counsel are faced by doubt about what the law requires. The Guidelines do little to narrow the wide discretion conferred on the Director and to make intervention by the Bureau more predictable. Negotiated settlements postpone the day when the Tribunal and the courts will have to determine what key provisions of the law really mean. This maximizes uncertainty, imposes a cost, and arguably constitutes a drag on the economy. The Director should be persuaded to take as many cases as possible, instead of as few as possible, to the Tribunal. This would clarify ambiguities in the law far more rapidly than current enforcement policies will ever do. In the long run this would save resources for the Bureau and for business, as well as endowing the country with more effective competition.

5) The absence of authoritative interpretation of the merger provisions by the Tribunal or the courts leaves the Bureau, too, afflicted by uncertainty. This, combined with the spurious precision of the Guidelines, promotes the spreading of resources over far too many cases. The latest Annual Report of the Director (for the year ending March 31, 1990) indicates that over the past four years, merger examinations have been rising steadily (40, 160, 216 and 251 respectively), as have the issuance of advance ruling certificates (3, 26, 59 and 72 respectively). Examinations that have resulted in restructuring or abandonment of the proposed merger have not shown similar progression, (4, 6, 6 and 3). Neither have ongoing applications before the Tribunal (0, 2, 2 and 1). The Bureau should focus on significant features of the real world so far as they can be discerned. It should not dissipate its resources in an effort to fine-tune structural changes in a market economy.

6) For the reasons given in Part 2, the Guidelines should state that until the Director is overruled by the Tribunal or the courts, he will deem that efficiency gains override a substantial lessening of competition *only* where the firms predict a minimum increase of X percent within a three-year period in the real value of exports, or a minimum increase of Y percent in the substitution of domestic products for imported products. Failure of the firms to deliver on their forecast efficiency gains thus defined would bring about an immediate application by the Director to the Tribunal, before the three-year limit imposed by section 97 expires, to dissolve or modify the merger.

7) If the application of the law cannot be transformed by such measures as those described above, then a limited amendment of the law should be sought. Such an amendment would allow private actions in merger cases to be brought before the Tribunal. This would develop the jurisprudence rapidly and offset the currently unpredictable nature of Bureau interventions.

**Notes**

[1] (1990),11:4 C.C.P.R. at p. 54.

[2] Consumer and Corporate Affairs Canada, Bureau of Competition Policy, "Merger Enforcement Guidelines" (1990), p. ii.

[3] *Ibid*, p. 11.

[4] *Ibid*, p. 17.

[5] *Ibid*, p. 32.

[6] *Ibid*, p. 33.

[7] *Ibid*, p. 5.

[8] *Ibid*, p. 13.

[9] *Ibid*, p. 16.

[10] *Canadian Journal of Economics & Political Science* (November 1967).

[11] *Supra*, note 2, p. 24.

[12] *Ibid*, pp. 49, 50.

[13] *Ibid*, Appendix 2.

[14] *Ibid*, p. 49.

[15] *Ibid*, p. 46.

[16] *Ibid*, p. i.

[17] Annual Report of Director of Investigation & Research, Bureau of Competition Policy, Consumer & Corporate Affairs, March 31, 1990.

[18] Schultz, N.J., "The Sheets Are Finally Hung Out in the Imperial/Texaco Merger" (1990), 11:1 *C.C.P.R.* at p. 3.

[19] Lepsoe, Paul K., "Gasoline Pricing Investigation Continues" (1991), 12:3 *C.C.P.R.* at p. 9.

[20] Annual Report of Director of Investigation and Research, Bureau of Competition Policy, Consumer & Corporate Affairs, (March 31, 1989).

[21] *Supra*, note 2, p. 58.

[22] Anderson, Robert D., "Competition Policy Aspects of the U.S.-Japan Structural Impediments Initiative: Implications for Canada" (1991), 12:2 *C.C.P.R.* at p. 42.

## NATIONAL SUPPLY MANAGEMENT OF AGRICULTURE PRODUCTS: OPTIONS FOR REFORM

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### Introduction

Current intense negotiations among *GATT* participants aimed at bringing to a conclusion the so-called Uruguay Round have helped to direct lobbyist, media and political attention to the economics and operation of Canadians national supply management programs for industrial milk, eggs, chickens and turkeys.

Reduction of trade-distorting agricultural subsidies and income support mechanisms such as government floor price and surplus buy-up programs was an initial key agenda item of many *GATT*

members, particularly the CAIRNS group of which Canada is a member. Among the OECD industrialized nations such programs are common, and much public discussion has taken on the appearance of the pot calling the kettle black.

A second and generally less volatile agenda item has been the consideration of substituting tariffs, escalating quota and/or a narrower definition of products eligible for import quota for the fixed quota that have been used to insulate a number of agricultural and further processing sectors in many countries, including Canada, from significant import competition. Such border controls are permanent and are distinguishable from the temporary controls often established to help maintain farm gate prices at peak production periods within a given year as part of an income support program.

Their current justification in international trade law is based upon Article XI of the *GATT*. It allows contracting parties to establish such import restrictions on agricultural and fisheries products as are necessary to support domestic governmental measures to restrict the quantities of a product permitted to be marketed or produced, where the restriction is applied to the product covered by the domestic scheme or to a perishable and competing product processed from it.

Canadian *GATT* representatives and Ministers have, of course, vigorously defended the use of permanent import restrictions as a necessary condition for effective national supply management programs. And, of course, these programs have been defended as having appropriately balanced the competing economic interests of producers on the one hand, by income support, preservation of the family farm, and increasing bargaining power relative to large or vertically integrated processors and distributors, and of consumers on the other hand, by efficient production and maintenance of quality and consistency of supply.

This commentary takes as a given that the capacity of Canada to maintain existing quantitative import restrictions to complement its supply management programs will be reduced. It is also assumed that Canada will not be obligated to dismantle these domestic programs as a result of *GATT* changes—after all, the focus of the *GATT* is on barriers to international rather than domestic trade.

We will examine options available for maintaining national supply management structures while reorienting their role over time toward the promotion of efficiency, increasing domestic industry restructuring in the face of increased import competition. The focus will be on the possible suitability for achieving this goal of recommendations made by the most recent federal government evaluation of national supply management programs—the reports of the National Dairy and Poultry Task Forces published March 15, 1991. These advisory Task Forces were established by the Minister of Agriculture in December 1989.

The Task Forces, being composed of a representative balance of producer, processor, distributor and consumer interests, can reasonably be viewed as having defined the most politically acceptable near-term measures for these programs. However, neither Task Force was required to assume a substantial increase in import competition. (Even the current CITT hearings into the allocation of poultry and dairy product import quota has been expressly directed not to address the level and principles for establishing the total import quota in a given period. The CITT is therefore limited to assessing who should get quota in order to generate maximum consumer benefits.)

But first, an overview of the principal elements of Canadian national supply management programs.

### National Supply Management

Although the enabling legislation and resulting institutional structure for Canada's industrial milk and poultry product supply management programs are outwardly quite different, each program has essentially the same building blocks. These are:

- A federal/provincial agreement establishing rules for setting a national production level and its allocation to provinces based on historical pre-agreement production and interprovincial trade

characteristics, adjusting the national production level, and establishing a national marketing agency to monitor domestic quota compliance, to hold or clear surplus production, and to set fees (or levies) either within quota or over quota production of individual producers to cover its market clearing and administration costs.

- Federal legislation establishing the producer-controlled marketing agency. For poultry products only, a statutory body (the National Farm Products Marketing Council) to advise Ministers on the desirability of proposed national supply management programs and marketing plan terms, and to supervise and report publicly on marketing agency operations.
- Import restrictions.
- Determination of producer (farm gate) prices through a formula which, based on producer survey results on their booked or historical costs, simulates the average costs of production of a producer of reasonable efficiency.

This target producer price can become a floor price guaranteed through agency support payments or standing agency purchase offers. The agency can also administer the price directly using the calculated target price as a uniform maximum farm gate price, as is the case for eggs.

**Task Force Recommendations**

Both Task Force reports accept the continuing appropriateness of the established elements of national supply management and focus their attention on measures to: increase decision-making transparency, openness and accountability within the supply management system itself, legitimize calculated target prices as being efficient prices, and increase intergovernmental regulatory cooperation and decision-making speed.

The Task Force on National Dairy Policy has made the following principal recommendations in these areas:

1. *A more transparent, participatory, objective system*, placing identifiable stakeholder representatives on the Canadian Dairy Commission and its underlying advisory committee structure.
2. *An accurate price-setting mechanism at arm's length from government*, establishing an independent non-representative tribunal to make binding decisions on target prices, processor margins and offer-to-purchase programs, but with continued reliance on a cost-of-production survey to base prices on efficient producer costs.
3. *Greater efficiency*: further study of specific issues, such as economies of scale and demand shifts to lower-fat dairy products, leading to an action plan to improve industry competitiveness.
4. *A more integrated national marketing system*: development of common regulatory standards and techniques for provincial boards which more readily shift supplies towards new market demands.
5. *Meeting competitive pressures*: to maintain border controls but have milk producers and processors fund up to sixty percent of the difference between U.S. and Canadian dairy product prices through a rebate payment to further processors.

For its part, the Task Force on National Poultry Policy has provided a similar set of recommendations:

1. *Promoting A New Partnership* (i.e. improving the legitimacy of existing institutions):

- by increasing non-producer representation on the supervisory agency (the National Farm Products Marketing Council, or NFPMC);
- by placing an onus on the marketing agency to rebut market requirement findings of representative consultative committees;
- by giving the NFPMC power to make binding settlements in marketing agency/industry/provincial board disputes; and
- by mandatory periodic reviews of the federal/provincial agreement underlying each marketing plan.

2. *Operational Adjustments*, including:
- increased capacity to monitor compliance with global quota levels;
- encouraging interprovincial trade in quota and production, and periodic reallocation of new quota to low-cost/high-demand areas;
- establishing long-term agency/producers processor product design/specification agreements to identify primary product improvements to meet changing demand conditions;
- use of a model efficient form approach for producer cost-of-production formulae with greater stakeholder input in design and data collection;
- exclusion of express quota acquisition costs from producer prices (although quota value capitalized in other inputs such as land and building costs would still be rolled in);
- development of North American producer performance standards to help define an "efficient" Canadian producer for administered pricing purposes; and
- review of the methods of allocating total import quota (but not its size or the range of products requiring an import permit).

**Comments**

The principal thrust of the institutional recommendations of the two Task Forces is to establish, in effect, a statutory tribunal to make decisions on the principal producer income determinants of the supply management scheme (total domestic production quota determination and its provincial allocation) and then, directly or indirectly, administer farm gate price for the regulated product. Moreover, it appears to have been assumed that the operations of this tribunal would be similar to the adjudicative and multi-party rulemaking hearing process of conventional "quasi-judicial" regulatory boards.

This "judicialized" decision-making process would be substituted for the current process of federal/provincial marketing plan amendment in the case of poultry products, and internal decision-making (in consultation with governments) by the Canadian Dairy Commission in the case of industrial milk products.

The idea of establishing a more clear-cut regulatory structure for supply management programs has been advanced by a wide range of interested parties for a considerable period of time, perhaps ever since the existing structures came into being. For example, similar proposals were made by the Economic Council of Canada in its Regulation Reference reports of 1980 and 1981, and by the 1985 federal government Task Force on Program Review (the Nielson Task Force). Over the last decade several unsuccessful attempts had been made within the federal bureaucracy at preparing proposed amendments to the *Farm Products Marketing Agencies Act* to move the NFPMC in this direction.

On the other hand, the operational recommendations of the Task Force reports on how domestic production quota and administered price determination should actually be revised may, in reality, be more consistent with greater decision-making freedom within particular marketing agencies, subject to more explicit legislated economic performance standards where agency adherence to these standards is accountable to legislators, as opposed to an independent tribunal.

The principal reason for this potential inconsistency is the inherently time-consuming, costly and even adversarial decision-making process required of quasi-judicial tribunals. This process may be a mismatch for markets which are subject to increasing competitive pressure and within which business success is often achieved only by adaptation through a large number of short-term adjustments which, although not perfect, muddle through in the right direction (that is, markets where greater managerial freedom is needed).

An external shock to these supply management schemes from increased import competition would have the result that domestic producer viability could only be maintained by more rapid industry productivity gains than traditionally experienced. This requires greater managerial freedom on the part

of producers and the marketing agency itself. The transformation of the supply management scheme into more of an instrument for industry adjustment, as opposed to a domestic income distribution tool, in response to this external shock may therefore be achieved best if the operational, but not the institutional recommendations of the two Task Force reports were implemented.

On the other hand, with increased import competition, protection of the consumer interest in the face of producer-dominated supply management schemes would not necessarily have to be achieved through an open case-by-case regulatory process following stringent fairness and transparency criteria. Rather, the focus for protection of the consumer interest would shift to a single issue: the rate of increase over time of import competition. If there is a perceived requirement for decision-making fairness and transparency on this point, a quasi-judicial hearing structure is already available through the Canadian International Trade Tribunal under either its power to inquire into and to report to the Governor-in-Council on any matter in relation to the economic, trade, or commercial interests of Canada on goods made the subject of a reference by the Governor-in-Council (section 18, *CITT Act*), or its obligation, under the new safeguard inquiry provisions of its *Act*, to inquire into properly documented domestic producer complaints alleging that imported goods are being imported in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive goods" (sections 22 to 30, *CITT Act*). A new regulatory tier within the supply management structure itself would not have to be established to achieve this objective and, accordingly, the risk-reducing opportunities for increased management initiatives as a result of the creation of a new regulatory structure need not be taken.

**Conclusion**

The recommendations of the National Dairy and Poultry Policy Task Forces directed at efficiency-inducing operational improvements to Canada's complex national supply management programs for dairy and poultry products have the potential to reorient these programs away from consumer/producer income redistribution and towards more conscious producer-sector adjustments for increased efficiency and competitiveness. They have the benefit of some inherent political legitimacy, having been developed with representation from all stakeholders and having drawn on longstanding reform recommendations from other bodies with a role in promoting increased economic efficiency. Given that the elimination of these programs is not a realistic political option, and that there is no compelling case that Canadian producers have derived windfall profits from these programs, marginal adjustments to the existing schemes are the only practical option.

The operational improvements proposed by the two Task Forces have the potential to generate further Canadian producer efficiency gains to meet the increased import competition that may arise from revisions to the *GATT*.

However, the institutional recommendations of the two Task Forces, which would introduce a form of regulatory agency within the supply management schemes themselves, may be counterproductive from this perspective. Instead, if greater procedural fairness is required, this can be achieved through available CITT inquiry powers, which are exercised through a public hearing process and which would focus on the issue of the appropriate rate of change over time in the intensity of import competition—whether it is achieved through relaxing quantitative restrictions or through tariffs.

# COMPETITION POLICY, THE CANADIAN ECONOMIC UNION AND RENEWAL OF THE FEDERATION

By: Robert D. Anderson and S. Dev Khosla*

## I. Introduction

Renewing and improving the operation of the federation is the foremost challenge facing Canadians today. A central aspect of the challenge lies in improving the functioning of the Canadian economic union. Competition in domestic markets and the international competitiveness of many Canadian industries have been impaired by barriers to interprovincial trade, investment and labour mobility.[1] In this regard, it is encouraging that the constitutional proposals released by the Government of Canada in the fall of 1991 incorporate specific measures to strengthen the Canadian economic union.[2]

The government's proposals would expand the existing section 121 of the *Constitution Act, 1867* to protect the free mobility of persons, goods, services and capital throughout Canada, and to broaden the range of restrictions on interprovincial trade and commerce that may be addressed under the section.[3] In addition, the proposals call for the adoption of a new constitutional head of power enabling the Parliament of Canada to make laws for "the efficient functioning of the economic union" (proposed section 91A of the *Constitution Act*). The proposals also contain measures to limit federal-provincial regulatory overlap in financial markets and to coordinate the macroeconomic policies of the federal and provincial governments.[4]

Competition policy is an important consideration in strengthening the economic union. Competition policy can assist in removing barriers to internal trade, protecting consumers from anti-competitive abuses and facilitating access to markets throughout the federation. In addition, as discussed in this paper, competition policy-related concepts are relevant to improving the efficiency of the federal system itself. The provision of government services in a federal system has elements in common with the operation of competitive markets.[5] Finally, it may be noted that the current constitutional proposals contain a specific suggestion regarding a provincial role in the regulation of unfair trade practices that merits consideration.[6]

This paper explores the links between competition policy, the Canadian economic union and renewal of the federation. It reflects on the implications of the economic union proposals for competition policy, and suggests ways in which competition policy can contribute to the objectives of the union. In addition to conceptual aspects of these issues, the paper examines select constitutional and competition policy elements of various foreign economic unions and/or free trade areas. These arrangements provide a comparative perspective on the Canadian situation.

The paper is organized as follows. Part II provides a conceptual discussion of the importance of the economic union and the federal system of government from a competition policy point of view. Part III focuses on the role of competition policy in relation to the economic union. It identifies ways in which competition policy can contribute to the objectives of the union, as part of its role in facilitating the efficient functioning of markets. Part IV discusses some pertinent aspects of competition policy as it is presently applied in Canada.

Part V examines some aspects of the current constitutional proposals in light of the discussion in preceding sections of the paper. The discussion focuses on the issue of mobility rights and the proposal for a new federal power to manage the economic union. It also reflects on the suggestion put forward in the current proposals regarding a provincial role in the regulation of unfair trade practices.

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* Bureau of Competition Policy, Ottawa. The views expressed are the authors' and not necessarily those of the Bureau. Helpful comments provided by Derek Ireland and Val Traversy on an earlier version of the paper are gratefully acknowledged.

For comparative purposes, Part VI looks at the role and structure of competition policy and related constitutional provisions in various foreign federations (including supranational associations) and market integration initiatives. These disparate arrangements comprise the United States of America, the European Community, the Australia-New Zealand Free Trade Area, the *Canada-United States Free Trade Agreement* and the U.S.-Japan *Structural Impediments Initiative*. The discussion highlights the complementarity of competition policy and constitutional provisions/doctrines concerning mobility rights in the United States and the European Community. It also illustrates the growing role of competition policy in facilitating the efficient integration of markets in a wide variety of institutional settings. Part VII of the paper presents conclusions.

## II. The Economic Union and the Federal System: A Competition Policy Perspective

A strong economic union in the context of a federal system of government can make an important contribution to the well-being of its citizens.[7] First, by increasing competition and facilitating the rationalization of production patterns, a union helps to improve the performance of domestic industries. Second, through similar mechanisms, a federal system of government and union can enhance efficiency in the provision of government services. As the Macdonald Commission noted, "One of the fundamental reasons for setting up an economic union is to enhance economic competition among member states."[8] Each of these aspects is of interest from the competition policy point of view and is examined below.

The free mobility of goods and services as well as factors of production (i.e., labour and capital) is critical to the efficient functioning and international competitiveness of Canadian industries. Such mobility facilitates the realization of gains from inter-regional trade, investment and the re-deployment of labour according to the principles of comparative advantage. Moreover, increased mobility strengthens competitive rivalry in domestic markets. In addition to promoting consumer choices, this enhances Canadian industries' ability to compete in international markets. Porter's work on the competitive advantage of nations indicates that strong rivalry in domestic markets provides a necessary incentive for innovation, entrepreneurial efforts and the continual upgrading of products and productive capacities which is critical to competing effectively abroad.[9] The free mobility of products and production factors across the economic union can also facilitate the achievement of economies of scale and specialization of production facilities. In this way, enhanced mobility can help to address long-standing concerns about inefficient scale and production patterns in Canadian manufacturing and other industries.

The importance of enhanced mobility through a strengthened economic union for the future prosperity of Canada is highlighted by recent empirical analyses of barriers to interprovincial trade and investment flows. Examples of such barriers include preferential government procurement policies, industrial development grant and subsidy programs, agricultural supply management programs, beer and liquor marketing schemes, trucking regulations and regulatory requirements relating to the professions.[10] Recently, the Canadian Manufacturers' Association has estimated that such barriers entail annual costs to the Canadian economy of over $6 billion.[11] In addition, while affirming the importance of such barriers, the Economic Council of Canada has highlighted the more subtle costs that can arise from divergence in macroeconomic and other government framework policies across the federation.[12] By addressing such barriers, measures to strengthen the economic union can contribute significantly to the future prosperity of Canadians.

A strengthened union and federation can also contribute to improved efficiency in the provision of government services. This aspect of the union, while not as well known, may be equally important for the welfare of Canadians. The theory of competitive federalism, as developed by Breton, Easterbrook and others suggests that the availability of governmental services from multiple governments in a federation can lead to increased efficiency, by providing competition in the "market for government

services."[13] According to this theory, the necessity to compete arises from the ability of citizens to compare the performance of the various governments in the federation, the possibility of inter-jurisdictional movement of citizens (and capital) and the additional opportunities that federalism creates for public input into policy development processes.[14] As a result, advocates of competitive federalism argue, in the long run a federal system is more likely than a unitary state to generate policies that are efficient in the sense of responding effectively to the needs of the citizenry.

Thus, the theory of competitive federalism affirms the importance of measures to guarantee mobility across the federation, as a means of enhancing inter-jurisdictional competition.[15] It also provides basic insights into the advantages of a federal system of government. The theory recognizes that, by permitting a degree of decentralized decision-making, federalism facilitates the tailoring of programs to match the needs of individual sub-units of the federation. In addition, federalism facilitates useful innovations in policy design by political sub-units. It limits the scope of potential adverse consequences arising out of such innovations, while enabling other sub-units to opt in if the innovation is successful.[16] The theory of competitive federalism also emphasizes the diffusion of power throughout a federation as a check and balance against possible abuse by any individual government. The latter consideration overlaps with the classical case for federalism based on the dispersal of government authority as a safeguard of the socio-political health of the federation.[17]

An important implication of the theory of competitive federalism is that concerns about the erosion of national standards through a destructive "race for the bottom" among sub-units of a federation are often exaggerated. In fact, competitive pressures will tend to reject extreme or ill-advised sub-unit policies. Empirical support for the view that competition among sub-units can generate efficient policy outcomes is provided by the U.S. market for corporate charters. The granting of corporate charters (i.e., terms of incorporation) is under the jurisdiction of the individual state legislatures, rather than the U.S. Congress. The states compete aggressively for the revenues available from being the legal domicile of corporations, by offering differing terms of incorporation. The state of Delaware, where more than fifty percent of the Fortune 500 companies are domiciled, dominates the market. Recent studies indicate that Delaware has achieved this dominance by organizing its corporate legal institutions to enable it to reduce agency costs by continually improving its laws respecting corporate governance.[18] Interstate competition provides a necessary incentive for the state's ongoing investment in this area.[19] This finding illustrates the relevance of competitive federalism to real-world policy issues.

Another important implication of the theory of competitive federalism concerns the practice of executive federalism (i.e., the exercise of decision-making powers by unelected bodies representing the federal and provincial levels of government). Of course, mutual consultation and, with respect to many functions, cooperation between the federal and provincial governments is essential to efficient governance in the complex Canadian society of the 1990s. Coordination is particularly important in the delivery of overlapping government programs and in the application of laws and regulatory requirements in individual cases. In addition, certain matters (e.g., constitutional affairs) by their nature require joint deliberations and decision-making. The theory of competitive federalism implies, however, that executive federalism can sometimes degenerate into a form of collusion among arms of government that would otherwise be in competition with each other. Such collusion runs the danger of enabling governments to substitute the agendas of particular interests in place of those of the public at large.[20]

Moreover, the need to obtain the acquiescence of diverse sub-unit governments can have the effect of inhibiting effective action by individual actors within the federation. Thus, a key complaint of advocates of competitive federalism in Canada is that the practice of executive federalism has constrained the federal government's ability to act decisively in the national interest.[21] Federal action has increasingly been affected by a perceived requirement to obtain broad agreement among the provinces before initiating new courses of action even within traditional areas of federal responsibility. An example would be international trade policy, a traditional area of federal responsibility in which the provinces have played an increasingly important role in recent years.[22]

The theory of competitive federalism also provides insights into the role of regional economic development policies, which are an important area of activity for both the federal and provincial governments. Such policies are a key matter for consideration in relation to the economic union, as they sometimes give rise to barriers to the mobility of capital and labour. In general, the theory affirms the role of regional development policies as a legitimate means by which governments compete for the support of citizens. This implies a need for limited exceptions relating to such policies in constitutional provisions regarding mobility rights. At the same time, the theory of competitive federalism emphasizes that the efficiency benefits of such policies depend on institutions and laws that ensure vigorous competition within the federal system.[23]

A further intriguing implication of the theory of competitive federalism is that, in the long run, competition in the political marketplace helps to ensure an efficient allocation of activities and responsibilities between the federal and provincial governments. This approach looks beyond the traditional "legal-constitutional" perspective on federalism, which emphasizes the *de jure* assignment of powers in the Constitution. In particular, it recognizes that the assignment of powers is determined through a continuing bargaining process which involves both levels of government and that, notwithstanding the formal assignment of powers, broad scope for competition exists as a result of overlapping spheres of activity.[24] Each level of government has a comparative advantage in performing particular functions. To the extent that competitive market forces are allowed to operate, efficiency in the allocation of activities among governments should prevail.

Competition among sub-units in a federation is not always workable in light of the special characteristics of certain government functions. In particular, problems can arise when the effects of an individual sub-unit's laws or enforcement policies are felt outside its boundaries (e.g., in the case of air pollution).[25] Certain governmental functions may even have natural monopoly characteristics (overwhelming economies of scale or coordination) that cause them to be best executed exclusively at the federal level of government. Examples of such functions probably include monetary policy, the patent system and national defence. It should be noted, however, that the mere possibility of spill-over effects on other sub-units does not, in itself, imply that competition within a federation will generate inefficient policy outcomes. In many circumstances, sub-units still have clear incentives to avoid measures that impact adversely on neighbouring sub-units, since such measures are likely to generate retaliatory or other defensive measures that harm the original sub-unit.[26]

Thus, the theory of competitive federalism highlights the importance of institutions that preserve incentives for efficient behaviour and maintain a healthy equilibrium among the federal and sub-unit governments. Advocates support the existing federal policy of equalization payments to individual provinces, as a means of ensuring that the poorer sub-units are able to compete with the richer ones.[27] The importance of an elected Senate is affirmed as a means of ensuring that provincial interests are appropriately represented at the federal level.[28] The theory underscores the importance of constitutional provisions that protect the mobility of persons, capital, goods and services across the union, as these directly facilitate intergovernmental competition. The theory of competitive federalism also strongly supports the role of the *Charter of Rights and Freedoms*. As Breton notes,

> The Charter, by bringing citizens more directly into the political process, increases the degree of competition in the system and, by making 'elite accommodation' more difficult, will force the system to be more attentive to the preferences of all citizens.[29]

This observation further illustrates the correspondence between competitive federalism and competition policy solutions.

## III. The Role of Competition Policy in Relation to the Economic Union

There are important differences in the focus and objectives of competition policy and an economic union. While constitutional arrangements regarding a union relate principally to government activities

that may restrict trade or investment, competition policy and particularly competition law focus to a large degree on commercial arrangements. Furthermore, the objectives of competition policy and of an economic union are not identical. While an economic union supports the mobility of persons and resources as a value in its own right, competition policy is principally concerned with the efficient functioning of markets.[30] These two objectives are not always co-extensive. In some cases, commercial arrangements such as intrabrand exclusive territories that (in a limited way) affect mobility may be accepted by competition policy on efficiency grounds.[31]

Notwithstanding these differences in orientation, competition policy has an important role to play in facilitating the free flow of resources and eliminating barriers to trade within the economic union. Agreements that restrict competition among firms and practices that make it difficult for other firms to enter a market can affect directly the flow of resources and investment among provinces. Corporate restructuring through mergers can also affect interprovincial trade or impede the entry of new firms by entrenching a dominant position in particular markets. By providing remedies for such agreements, practices and structural realignments, competition policy enhances mobility and helps to maximize output, income and employment across the federation. In this way, it complements the role of constitutional provisions that promote the mobility of resources and contributes directly to the goals of the economic union.[32]

Competition policy can contribute to a unified internal market in other ways. An important aspect of competition policy in the 1990s is the provision of input to the development and implementation of other government policies that affect the competitive market system. Through such input, competition policy can help to ensure that federal and provincial legislation, regulations and policies do not inadvertently restrict interprovincial trade or otherwise impede the operation of competitive market forces.

These functions of competition policy are aspects of its traditional role in promoting consumer choices and facilitating the efficient functioning of markets. Competitive markets have the capability to deliver the maximum possible output, productivity and choices for consumers, together with a high degree of innovation and successful adaptation of new technologies. In addition, as noted in Part II, strong competitive rivalry in domestic markets can contribute significantly to a nation's success in international markets. Realization of these goals requires a policy framework that preserves the natural rivalry of firms in markets. Indeed, Porter's research strongly affirms the importance of competition policy as a means of promoting the international competitiveness of domestic firms.[33]

An important related function of competition policy in the 1990s is to facilitate international economic integration. The globalization of markets has generated pressures for adoption of common approaches to national rules governing international trade, innovation and competition. As a result, competition law and policy are figuring importantly in multilateral discussions regarding trade and investment rules in the international economy.[34] In addition, as discussed below in Part VI, recent bilateral initiatives such as the U.S.-Japan *Structural Impediments Initiative*, the *Canada-United States Free Trade Agreement* and the Australia-New Zealand Free Trade Area entail increased reliance on competition policy. Through this function, competition policy contributes to broader objectives of the economic union such as enhanced international trade and investment flows.

## IV. Pertinent Aspects of Competition Policy in Canada

Competition policy in Canada is multifaceted. It encompasses four discrete functions: (i) the administration and enforcement of the *Competition Act*, including both criminal and non-criminal provisions; (ii) interventions before federal and provincial regulatory agencies making decisions that affect competition in particular markets; (iii) the provision of input to the design and implementation of other government policies that affect the competitive market system; and (iv) representing Canada's interests in international competition policy fora.[35]

# CANADIAN COMPETITION POLICY RECORD

The application of competition policy in Canada is guided by the "purpose clause" of the *Competition Act*. The clause indicates that the purpose of the *Act* is to maintain and encourage competition in Canada, in support of four specific objectives: (i) to promote the efficiency and adaptability of the Canadian economy; (ii) to expand opportunities for Canadian participation in world markets (while at the same time recognizing the role of foreign competition in Canada); (iii) to ensure that small and medium-sized businesses have an equitable opportunity to participate in the Canadian economy; and (iv) to provide consumers with competitive prices and product choices. Thus, in Canada, competition is not viewed as an end in itself. Rather, it is viewed as a means of promoting a diverse set of objectives relating to firms and consumers through the operation of a dynamic, competitive market system. Promoting efficiency gains and international competitiveness figure prominently in these objectives.

These objectives are reflected in the substantive provisions of Canadian competition legislation, which was extensively overhauled and modernized in 1986. For example, the merger review provisions, which are intended to prevent corporate restructuring that substantially lessens competition, contain an exception for transactions that yield offsetting efficiency gains. The various provisions concerning reviewable business practices incorporate tests that limit their impact to situations that have demonstrable anti-competitive effects. In addition, "the abuse of dominant position" provision of the *Act* specifically recognizes the role of superior competitive performance by firms. The *Act* also contains a special provision to permit inter-firm specialization agreements that are likely to result in significant productivity improvements.[36]

Since the 1986 amendments, the merger provisions in particular have been extensively applied in diverse sectors of the Canadian economy. A major effort has been made to apply the provisions in a way that fosters efficient international integration as well as competition in domestic markets. For example, in at least two cases, a decision by the Director and Investigation and Research not to challenge a merger or to seek a consent order from the Competition Tribunal has been made (wholly or partly) on the basis of a commitment by the parties to apply for accelerated reduction of tariffs under the *Canada-United States Free Trade Agreement (FTA)*.[37] Cases initiated under other reviewable matters sections of the *Act* have also focused on opening up competition and international linkages.[38]

During this period, the role of competition policy as an aspect of the policy framework for the national economy has been enhanced by a variety of environmental factors. With the globalization of markets, there is greater emphasis on fostering the international competitiveness of Canadian firms and industries. In addition, there is widespread recognition of the limitations of government intervention in the marketplace in the form of subsidies or detailed regulations. These trends have been reinforced by international developments such as extensive privatization and deregulation as well as the liberalization of trade within regional blocs such as the Canada-United States Free Trade Area and the European Community. These developments entail increased reliance on the application of the *Competition Act* as an alternative to intrusive regulatory intervention in diverse sectors of the Canadian economy.[39]

In response to these trends, the maintenance of competitive rivalry through enforcement of the *Competition Act* has been complemented by enhanced involvement of the Bureau of Competition Policy in the development and implementation of other government policies that affect the competitive market system. These policies include general economic framework policies such as international trade policy, intellectual property rights and privatization, as well as industry-specific policies such as transportation, telecommunications, energy and agriculture.[40] Through the provision of such input, competition policy can help to ensure that federal and provincial legislation, regulations and policies do not inadvertently restrict interprovincial trade or otherwise impede the operation of competitive market forces.

It is recognized that, as the business environment evolves, there may be a need for further changes in Canadian competition legislation, particularly in areas not covered or substantially affected by the 1986 amendments. These include the key provisions of the *Act* concerning conspiracies in restraint of trade, as well as provisions relating to price maintenance, deceptive marketing practices and price

discrimination.[41] Changes in some of these provisions may be necessitated by constitutional as well as economic policy considerations.[42] Subject to such considerations, however, competition policy in Canada is well adapted to its functions in maintaining rivalry, promoting consumer choices and protecting the integrity of the economic union.

The enhanced role of competition law and policy as an aspect of economic framework policy in Canada parallels developments in numerous other jurisdictions. In the past decade, new competition laws have been enacted and/or existing laws strengthened in other traditional market economies such as the United Kingdom, France, Italy, Spain, Denmark and Sweden. In the European Community, competition policy has played a pivotal role in the Europe 1992 market integration exercise. In Japan, a major effort is under way to strengthen the application of competition policy in the domestic economy, as a result of commitments made in the U.S.-Japan *Structural Impediments Initiative.*[43]

In the United States, the application of existing antitrust policies has been extensively refined and clarified during the past decade through the issuance of revised guidelines on matters such as mergers and international business operations. These guidelines recognize the interrelationship between competition and efficiency issues as well as technology transfer.[44] In addition, the enactment of new competition laws has figured importantly in economic reforms in the emerging market economies of Eastern Europe as well as in newly industrialized economies such as Brazil. Some aspects of foreign competition policy of particular relevance to the Canadian economic union are discussed further in Part VI of this paper.

## V. Competition-Related Aspects of the Present Constitutional Proposals

The constitutional proposals released by the Government of Canada in the fall of 1991 contain important elements to strengthen the economic union and the federation. The proposals are consistent with the model of competitive federalism in some important respects. To begin with, the proposal to expand section 121 of the *Constitution Act, 1867* (formerly the *British North America Act*) will enhance the mobility of citizens and resources across the federation. The existing Canadian Constitution provides only limited protection for the mobility of individuals and resources. The *Charter of Rights and Freedoms* (section 6) provides qualified protection for the right of citizens to move, take up residence and pursue the gaining of a livelihood in any province. In addition, the present section 121 of the *Constitution Act, 1867* provides for the free admission of articles produced in any province (but not, at present, persons, capital or services) into each of the other provinces. Section 121 has not been given wide play by the courts in the resolution of disputes concerning the present economic union. Its principal impact has been to preclude the application of custom duties to interprovincial trade. Indeed, the section has never been applied to strike down non-tax-related impediments to interprovincial trade. Its potential applicability to blatant non-tax measures has, however, been noted in cases involving agricultural marketing schemes.[45]

The current constitutional proposals would strengthen section 121 in two important ways. First, the section would be broadened to protect the mobility of persons, capital and services (in addition to goods). Second, the range of restrictions that could be addressed under the section would be expanded to encompass non-tariff barriers, including barriers arising from federal or provincial legislation, regulations and administrative practices.[46] Such measures could be challenged by private parties as well as governments. The overall intent is to ensure that "government practices do not create barriers or restrictions to the mobility of people, goods, services and capital on the basis of where in Canada they reside or originate."[47]

The expanded protection for mobility rights in the revised section 121 would be subject to some important limitations. In particular, the proposals specify that the revised section would not render invalid laws falling within three classes of exceptions: (i) federal laws relating to the principles of equalization or regional development; (ii) certain laws enacted by provincial legislatures for the

reduction of intra-provincial economic disparities; or (iii) laws enacted by the Parliament of Canada or a provincial legislature which have been declared by Parliament to be in the national interest. The latter exception is further qualified by a stipulation that no such declaration shall have effect unless it is approved by the governments of at least two-thirds of the provinces, representing at least fifty per cent of the population of all the provinces.[48]

The above-noted exceptions represent significant departures from the principle of free movement to be enshrined in the revised section 121. In considering these exceptions, however, it should be noted that not all exceptions of this nature are necessarily inconsistent with the concept of competition in a federal system of government. As discussed in Part II, the ability of individual sub-unit governments to compete with each other by implementing differing economic and social policies is intrinsic to a federal system of government. Indeed, it is a principal source of the strength and efficiency of such systems.

The rights provided in the expanded section 121 would be complemented by another important element of the current constitutional proposals, namely the proposed new head of power for the Parliament of Canada to make laws in relation to matters that it declares to be for "the efficient functioning of the economic union" (the proposed section 91A of the *Constitution Act*). This section is designed to complement the revised section 121 in two respects. First, section 91A would provide a means of addressing impediments to mobility that may not be characterized as barriers under section 121. These might include, for example, barriers resulting from conflicting provincial regulatory requirements.[49] Second, section 91A would provide a means for governments to take direct action respecting barriers to mobility, without waiting for adjudication of the issues by the courts under section 121. As the proposals point out, "governments may wish to avoid the uncertainty, costs and time associated with addressing certain kinds of barriers through the courts by having recourse to an alternative forum for the resolution of these problems."[50]

The proposed section 91A clearly has the potential to impact on some traditional areas of provincial activity which may give rise to impediments to mobility. In considering this aspect of the proposal, however, it should be noted that the application of section 91A is qualified in two significant ways that preserve provincial rights and implicitly involve the provinces in any actions to be taken under the provision. First, the section stipulates that no law enacted by the Parliament of Canada under the section will take effect unless approved by the governments of at least two-thirds of the provinces accounting for at least fifty percent of the population of the provinces. Second, the application of any such law within an individual province can be voided (for a period of up to three years) by a resolution supported by at least sixty percent of the members of the province's legislative assembly.[51]

Apart from these measures to strengthen the economic union, the constitutional proposals are consistent with the model of competitive federalism in certain other respects. In particular, the proposals would strengthen the Canadian *Charter of Rights and Freedoms* by entrenching in the *Charter* the protection of private property rights and by restricting the availability of the "notwithstanding clause" which provides a means for governments to avoid the application of the *Charter*.[52] These measures would facilitate competition by expanding the protection of individual rights. In addition, the present proposals would establish a directly elected Senate with effective legislative powers and "more equitable" representation of individual provinces and territories. Reforms would also be introduced to allow more free votes (not governed by party discipline) in the House of Commons. These measures will help significantly to provide more effective representation of citizens' preferences.

The federal proposals also contain significant measures to adjust the existing federal-provincial allocation of legislative powers in ways that could potentially enhance competition. They would recognize exclusive provincial jurisdiction in several new fields of economic activity. These include forestry, mining, housing and municipal/urban affairs. The proposals would also provide for a "streamlining" of responsibility for various government regulatory activities through legislative and administrative inter-delegation between the federal and provincial governments. The purpose of such streamlining would be "the elimination of unnecessary costs to individuals, to the private sector and

to governments."[53] While recognizing the possibility of these cost savings, it should be noted that measures which constrain the respective roles of the federal and provincial governments may also increase costs if they entail a reduction in intergovernmental competition. As discussed in Part II, the theory of competitive federalism implies that competitive pressures resulting from the concurrent exercise of powers in many areas is an impotant source of efficiency gains.

One of the areas of responsibility that is noted as a possible candidate for streamlining in the federal proposals is that of "aspects of unfair trade practices."[54] In considering this proposal, it should be noted that in an increasing number of industries, the operations of firms and their natural geographic markets transcend individual provincial (and, in many cases, national) boundaries. The harmful effects of anti-competitive practices and structural re-alignments also transcend provincial boundaries. In many cases, these matters could not be effectively addressed by provincial authorities alone. Reflecting these considerations, recent constitutional decisions of the Supreme Court of Canada have emphasized the importance of a country-wide competition law and policy at the federal level to support the unity of the Canadian market.[55]

The importance of a strong federal role in the area of competition policy is supported by other considerations as well. As discussed in Part III, competition policy is an increasing focus of interest in international economic policy discussions at both the bilateral and multilateral levels. With the globalization of markets, and the increasing importance of transnational corporations, there are growing pressures for international harmonization of rules governing business behaviour. If Canada is to provide effective input to the harmonization process, and is to participate effectively in international arrangements respecting antitrust notification and consultation, it is important that competition policy be coordinated at the federal level. For all these reasons, Canada will undoubtedly continue to require a comprehensive competition law and policy at the federal level.

The need for federal leadership does not, however, imply that there is no scope for provincial involvement in the area of competition policy in Canada. Subject to appropriate rules providing for paramountcy of federal legislation, the enactment of competition legislation at the provincial level could help to strengthen the competitive environment for business in Canada. Such legislation might address, for example, misleading advertising and matters such as refusal to deal affecting only local markets. The potential benefits of provincial activity in the field of competition law were emphasized by the Economic Council of Canada in its influential 1969 *Interim Report on Competition Policy*.[56] The possibility of concurrent provincial involvement in this area was recognized by the Supreme Court of Canada in its 1989 judgment in *General Motors of Canada Ltd* v. *City National Leasing*.[57] In essence, the judgment implies that competition is a subject to which the "double aspect" doctrine applies.[58]

Thus, as suggested in the current federal proposals, there may be scope for the provinces to assume a useful role in the regulation of unfair trade practices. This would not, however, remove the need for a comprehensive country-wide competition law and policy at the federal level. Rather, provincial policies in this area would supplement federal policy by providing an additional layer of protection for consumer interests. It should be noted that provincial involvement in this area would raise complex issues of a procedural nature that would have to be addressed if the current proposal is implemented.

With regard to other aspects of the current proposals, in certain respects they clearly go beyond measures that would be consistent with a model of competitive federalism. For example, the proposals would establish a new Council of the Federation, composed of representatives of the federal, provincial and territorial governments, that would deliberate on issues of inter-governmental coordination and collaboration. The Council would have a wide-ranging mandate to foster harmonization and coordination of fiscal policies. Its decisions would require the approval of the federal government and at least seven provinces representing at least fifty percent of the population. This proposal would extend and formalize the existing institutions of executive federalism in Canada.

In addition, the proposals would entrench in the Constitution measures to constrain the exercise of authority under the so-called spending power of the federal Parliament. The spending power permits

the federal government to appropriate and transfer to the provinces, often with conditions attached, funds to be spent in areas that are outside the scope of federal legislative jurisdiction.[59] As such, the spending power is an important vehicle for federal initiatives in diverse fields of economic and social policy. The current proposals would preclude the government from introducing new Canada-wide shared-cost programs and conditional transfers in areas of provincial jurisdiction without the approval of at least seven provinces representing at least fifty percent of the population. The federal government's existing authority to take jurisdiction over public works by declaring them to be for the general advantage of Canada would also be eliminated.[60] These proposals appear to be aimed at achieving a more coordinated and collaborative approach to governance within the Canadian federation.

## VI. Constitutional Doctrines and Competition Policy in Foreign Economic Unions and/or Transnational Arrangements

This part of the paper examines select aspects of constitutional provisions and doctrines relating to mobility and the role of competition policy in various international examples of economic unions and/or transnational economic arrangements. These arrangements provide a useful comparative perspective on the Canadian situation. The arrangements considered are:

(i) the United States of America;
(ii) the European Community;
(iii) the Australia-New Zealand Free Trade Area;
(iv) the *Canada-United States Free Trade Agreement*; and
(v) the U.S.-Japan *Structural Impediments Initiative*.

The degree of integration represented by these arrangements varies considerably. Thus, the following discussion illustrates the market-integrating role that competition policy can play in diverse political and institutional settings, as well as the complementary role of competition policy and constitutional provisions in the more closely-knit associations. The United States and the European Community also provide insight into the feasibility of shared responsibility for the administration of competition policy by multiple arms of government.

### The United States of America

The United States provides a leading example of a successful economic union. It functions effectively as an integrated internal market, notwithstanding its regional diversity and the extensive powers exercised by the fifty states of the union. Indeed, the degree of rivalry prevailing in the U.S. internal market was a key factor in the post-World War II success of U.S. industries.[61]

The U.S. economic union is based on a complex set of constitutional provisions, Supreme Court jurisprudence and related federal and state statutes.[62] The most important of these is the so-called "commerce clause" of the U.S. Constitution.[63] This clause is the primary source of constitutional authority for the U.S. Congress to regulate international and interstate commerce. Under the relevant U.S. Supreme Court jurisprudence, the clause has been used extensively to strike down state fiscal arrangements that impact adversely on interstate commerce.[64] Other important instruments in establishing the U.S. economic union include the federal treaty clause, the import and export of goods clause and Supreme Court jurisprudence establishing the right of free movement of individuals among the states.

These constitutional provisions are effectively complemented by the application of the U.S. antitrust laws to anti-competitive business behaviour. Indeed, in the United States, antitrust law enforcement has traditionally been a vigorous and visible aspect of the economic policy framework. It has guided marketplace behaviour and promoted rivalry in a diverse array of industries in both the

goods and the services sectors. Such effective enforcement of the U.S. antitrust laws is credited by Porter as an important source of U.S. economic growth and prosperity.[65]

The administration of the U.S. antitrust laws provides important insights into the feasibility of shared responsibility for antitrust enforcement in a federal state. Responsibility for the development and, particularly, the enforcement of the antitrust laws is split among various levels and institutions of government. To begin with, at the federal level, the U.S. Department of Justice and the Federal Trade Commission share responsibility for enforcement of the U.S. antitrust laws. Although administrative arrangements exist to prevent duplication of enforcement efforts, particular transactions or corporate practices can, in principle, be investigated by either agency. The two federal agencies also participate in ongoing study of competition policy issues, provision of input to related government policies and representation of U.S. interests in international deliberations relating to competition policy.

The individual states of the union also play an important role in antitrust enforcement. This role has two aspects. First, in many circumstances involving matters affecting individual states, the state Attorneys-General have jurisdiction under federal law to initiate cases that the federal agencies choose not to pursue, perhaps for reasons of insufficient resources. In this regard, the state Attorneys-General represent a third arm for enforcement of antitrust laws enacted at the federal level.[66]

Second, most of the individual states of the United States have enacted their own "baby" antitrust statutes. These states include New York, California, Florida, Texas, Massachusetts and Michigan. The state statutes have similar objectives but differ in some of their specific provisions and interpretation from the federal antitrust laws.[67]

State antitrust enforcement activities were deliberately encouraged by U.S. federal legislation enacted by Congress in 1976. This legislation required the U.S. Attorney-General to notify his state counterparts of possible violations and to share information with them, and provided seed money for state enforcement programs.[68] As a result, in the past decade, the relative importance of state as opposed to federal antitrust enforcement activity has increased substantially. Indeed, it has been suggested that by 1996, state antitrust enforcement activities will surpass those at the federal level.[69]

The impact of shared responsibility for antitrust enforcement on the effectiveness of U.S. antitrust policy has been extensively commented upon. In 1988, the role of state antitrust laws and the implications of antitrust federalism were the subject of an extensive study by a committee of the American Bar Association. The committee noted some apparent tensions between federal and state enforcement policies and suggested that state governments may be more oriented toward "populist" pressures than the federal government. In general, however, the study found that the promulgation of antitrust laws by the states has not generated significant disharmony in policy applications.[70]

Shared responsibility for antitrust enforcement has also raised complex procedural issues concerning the application of overlapping federal and state laws. Concerns have arisen regarding attendant uncertainties for individuals and firms.[71] To an important degree, however, such uncertainties are being addressed by voluntary cooperation among federal and state enforcement authorities. The National Association of Attorneys-General (NAAG) has played an important role in this regard. The current priorities of NAAG emphasize enhanced cooperation with the federal Department of Justice and Fair Trade Commission through, *inter alia*, joint prosecutions, harmonization of merger guidelines and enhanced sharing of information in merger cases.

Antitrust enforcement in the United States is not limited to the activities of federal and state law enforcement agencies. Private antitrust suits initiated by individual citizens or corporations provide a major additional vehicle for antitrust law enforcement. Indeed, such suits typically account for a substantially greater proportion of the total number of antitrust cases than federal and state efforts combined. Such private enforcement activities are encouraged by aspects of U.S. civil procedure such as contingency fees for attorneys and the availability of triple damages for successful plaintiffs.

It has often been suggested that the scope for private actions in the U.S. may be excessive and carries with it the potential for harassment of competitors.[72] Consequently, it may not be in other

jurisdictions' interests to adopt rules that encourage private actions to the same degree as in the United States. The U.S. experience suggests nonetheless that, subject to appropriate limitations, expanded scope for private actions may carry important benefits. In recent years, privately-initiated cases have generated a clear majority of the pathbreaking judicial opinions that have re-shaped U.S. antitrust policies along lines suggested by economic efficiency considerations.[73]

### The European Community

The European Community (EC) provides another important model of an economic union. Recently, the EC has emerged as a leading player in the shaping of international economic policy. It provides a striking example of the application of freedom of movement provisions and also illustrates effectively the role that competition policy can play in supporting economic integration. In considering the EC experience, however, it should be noted that in some important respects, the EC is only now moving towards a degree of *de facto* economic integration that has prevailed for many years in Canada.[74] Furthermore, the principles of competition policy in the EC differ in significant ways from the approach taken in Canada (and the United States).[75] Consequently, while of interest, the EC model is not necessarily the appropriate one for Canada.

The European Community was established in 1957, under the provisions of the *Treaty of Rome*. A central purpose of the Community was to establish a common market and promote harmonization of the economic policies of the member states. The objectives underlying the creation of the common market, as set forth in the *Treaty*, were to promote the harmonious development of economic activities, increased stability, a rising standard of living and closer relations between member states.

The freedom of movement provisions of the *Treaty* are a cornerstone of the EC economic union.[76] The provisions specifically prohibit quantitative restrictions on imports and exports and all measures having equivalent effects on trade between EC member states. In addition to direct restraints on international trade, such measures may include indirect barriers such as standards and domestic input requirements and aspects of government procurement. The freedom of movement provisions have also been important in facilitating intra-EC trade in goods embodying intellectual property rights.[77] Other provisions of the *Treaty* establish the right of individuals to take up residence and employment in any of the Community's member countries.[78]

The role of the freedom of movement provisions of the*Treaty* in integrating the European market has been complemented by the application of competition policy to private restraints of trade. From the inception of the Community, it was recognized that the removal of customs duties, quotas and other traditional barriers to trade would not be sufficient to ensure the integration of member countries' markets. Effective controls on anti-competitive restraints of trade were necessary to ensure that businesses would not be able to employ such restraints as a substitute for traditional barriers to trade. The central importance of competition policy to the Community's objectives is reflected in specific provisions of the *Treaty of Rome*.[79]

The current initiative to complete the integration of the EC internal market by 1992 has increased the importance attached to an effective community-wide competition policy. The Community has initiated a number of measures to strengthen the application of competition rules in sectors that are being opened by the Europe 1992 initiative, and to close the remaining gaps in the Community's competition policy framework. These include the development of an important new regulation to govern mergers and acquisitions and measures to apply competition policy in previously highly regulated sectors of the EC economy such as air travel and telecommunications.[80]

The development of EC competition policy as an instrument of market unification has entailed costs as well as benefits. It has led to the development of substantive rules that appear to be inconsistent with the market efficiency approach followed in Canada and the United States. For example, in contrast to Canada and the United States, the EC has established a more-or-less *per se* approach to intrabrand territorial market restraints.[81] This approach has been criticized by knowledgeable observers as being

inconsistent with economic efficiency objectives.[82] The EC also differs considerably from Canada and the United States in procedural aspects of competition policy, with greater administrative powers and fewer protections for private parties' rights.[83]

Nevertheless, in certain respects, EC competition policy has important lessons to offer for Canada. A particular aspect of interest concerns the role that competition policy can play in the resolution of policy-related disputes concerning trade and investment flows within the internal market. As the Community has progressed towards 1992, the need for stricter control of "state aids" to industry (i.e., subsidies) has increasingly been recognized. This is an important focus of activity for the EC competition authority.[84] It may be appropriate to explore the potential contribution of competition policy in similarly addressing the issue of state aids in a renewed Canadian federation.

In its own way, the EC experience also provides insights into the viability of shared responsibility for competition policy in a federal system of government. In addition to the Community-wide competition policy under the *Treaty of Rome*, the majority of EC member states have enacted their own national competition legislation. These national laws, rather than the Community policy, provide the operative framework for intra-national trade and commerce. Indeed, it is noteworthy that, in recent years, concurrently with the movement toward market unification in 1992, there has been a major expansion of antitrust enforcement at the national level. Moreover, there is considerable diversity in national laws and enforcement policies toward business practices.[85]

Finally, the EC also provides more general insights into economic factors underlying the allocation of powers between central and sub-unit governments in a federal system of government. Aspects of the efficiency trade-offs and incentives discussed in Part II regarding the assignment of functions to the federal and sub-unit governments are recognized in the principle of "subsidiarity" which ostensibly underlies the allocation of responsibilities in the EC.[86] The principle recognizes that the assignment of powers to the Community as a whole should be justified by the existence of either significant spill-over effects ("externalities") or indivisibilities and/or economies of scale in the management of a policy function. In regard to both of these criteria, however, subsidiarity also requires that two additional conditions be met, if a particular function is to be assigned to the Community government. First, it must be shown that assignment to the Community level will yield net benefits after administrative costs and the balance of market and government failures are taken into account. Second, it must be clear that *ad hoc* coordination among national governments cannot, by itself, correct for the problems identified.[87] These conditions recognize that sub-unit governments themselves have incentives to correct for spill-over effects, and that centralized administration inevitably entails its own costs.

### The Australia-New Zealand Free Trade Area

The Australia-New Zealand Free Trade Area is a looser arrangement than a true economic union. It provides for only a limited degree of cooperation between the sovereign governments of Australia and New Zealand. However, the Free Trade Area provides another important example of the use of competition policy as a market integrating instrument. Under pertinent treaty provisions, all tariffs and quantitative restrictions on goods flowing between these two countries have now been eliminated. In 1988, a Protocol to the *Australia-New Zealand Closer Economic Relations Trade Agreement* (ANZERTA) provided for the non-application of anti-dumping measures in the two countries' bilateral trade. In its place, Australia and New-Zealand agreed to apply their respective national competition laws, suitably amended.[88]

This agreement was given effect in new Australian and New Zealand legislation which came into force on July 1, 1990. This legislation explicitly extends the jurisdictional reach of the two countries' competition laws to apply to their bilateral trade. It implements specific provisions defining acts which constitute misuse of trans-Tasman market power. They provide increased powers for the Australian Trade Practices Commission and the New Zealand Commerce Commission to administer the new provisions.[89]

These developments in Australia-New Zealand trade illustrate clearly the potential usefulness of competition policy as a market integrating tool. At the same time, they underscore the scope for implementation of competition policy solutions in different institutional contexts. Rather than a joint agency, the Australian and New Zealand laws continue to be administered by the respective national authorities. It is expected, however, that the developments to date may lead to further harmonization of the two countries' policies in future.[90]

### The Canada-United States Free Trade Agreement

The 1988 *Canada-United States Free Trade Agreement (FTA)* is another arrangement that stops short of the degree of integration contemplated in an economic union but nevertheless provides insights into the role of competition policy in facilitating such integration. The agreement entails increased reliance on competition policy in various ways. In particular, there is increased reliance on the *Competition Act* as the means of safeguarding the market system in respect of international takeovers, in view of the increase in the basic threshold for review of U.S. acquisitions in Canada under the *Investment Canada Act* from $5 million to $150 million over several years.[91] Under the *Competition Act* there are no thresholds for review purposes *per se*. In addition, the incidence of transnational mergers and specialization agreements is expected to grow.

The *FTA* has also raised interest in the possible use of competition policy as an alternative to aspects of existing contingency trade policies. The *Agreement* (Article 1907) provides for the development, over a five to seven year period, of a new set of rules to govern practices which are currently dealt with under the two countries' anti-dumping and countervail laws. As in the Australia-New Zealand arrangement, competition law provisions relating to predatory pricing and/or related conduct would provide a market-oriented alternative to existing anti-dumping policies.[92] The role that competition policy can play in facilitating international economic integration could also be explored in the context of the ongoing wider negotiations toward a North American Free Trade Agreement involving Canada, the United States and Mexico.

### The U.S.-Japan Structural Impediments Initiative

The recent U.S.-Japan *Structural Impediments Initiative* (*SII*) is another major international development in international economic relations in the 1990s. Like the *Canada-United States Free Trade Agreement* and the Australia-New Zealand arrangement, the *SII* is a looser arrangement than an economic union. Nonetheless, it provides perhaps the starkest evidence of the growing importance of competition policy as an instrument of international economic policy. The talks also exemplify other important characteristics of contemporary trade policy such as the obsolescence of traditional distinctions between domestic and international policies.[93]

Competition policy was a central consideration in the *SII* negotiations. The role of the Japanese "keiretsu" (industrial groups), the extent of restrictive business practices in the Japanese distribution sector and the perceived laxity of Japanese competition law enforcement were key concerns pursued by the United States in the negotiations. As a result, the agreements reached by the two countries pursuant to the negotiations in June 1990 incorporated detailed measures to strengthen the Japanese *Antimonopoly Act* and the role of the country's antitrust authority, the Fair Trade Commission, in the Japanese economy. In particular, the agreements committed the government of Japan to strengthened antitrust enforcement in the distribution sector, "much stronger" enforcement of criminal provisions of the *Antimonopoly Act* relating to price-fixing and market allocation, and measures to facilitate private legal actions for damages under the *Act*.[94]

While the ultimate impact of the *SII* agreements remains to be seen, U.S. antitrust officials who participated in the negotiations view it as an important contribution that will facilitate efficient trade

and investment links between the two countries.[95] The extensive use of competition law and policy as a market-opening device should help to ensure that the effects of the agreement on third parties are also positive. Competition policy generally is non-discriminatory with respect to country of origin. It may be noted that, notwithstanding these positive features of the agreements, the wide-ranging, adversarial nature of the *SII* negotiations has generated concerns regarding their implications for the international trading system.[96]

## VII. Conclusions

A strengthened economic union in a renewed federation can contribute significantly to the well-being of Canadians. By increasing competition and facilitating the rationalization of industries, the union can help to improve the performance of domestic industries. Through similar mechanisms, a renewed federation can enhance efficiency in the provision of government services. The latter is an important implication of the theory of competitive federalism, which provides insights into the operation of the union and the federal system. The theory emphasizes the importance of constitutional provisions and institutions that enhance choices for citizens and maintain a competitive balance among the various governments in a federation.

Competition policy can contribute significantly to the effectiveness of the economic union. This is despite important differences in the focus and objectives of competition policy and the union as discussed in Part III of this paper. In particular, by providing remedies for anti-competitive agreements, practices and corporate mergers, competition policy facilitates the free flow of resources across the country. In addition, competition policy can facilitate the efficient operation of the union by providing input to related economic and social policies that affect the competitive market system.

The constitutional proposals put forward by the Government in the fall of 1991 are consistent with the model of competitive federalism in some important respects. The proposed amendments to section 121 of the *Constitution Act* would significantly expand the scope and reach of the section. This proposal has the potential to significantly enhance factor mobility and competition in markets for goods and services in Canada. The new federal power to enact laws for the efficient functioning of the union would provide a useful alternative to litigation under section 121. The proposals to strengthen the *Charter of Rights and Freedoms* and establish an elected Senate would help to assure effective representation of citizens' interests.

The specific proposal regarding the regulation of unfair trade practices as a possible candidate for "streamlining" of authority between the federal and provincial governments merits careful consideration. There is a compelling case for country-wide application of a comprehensive federal competition law and policy in Canada. In an increasing number of cases, anti-competitive practices transcend provincial (and, in many instances, international) boundaries and could not be effectively addressed by provincial authorities. Within this framework, however, there may be scope for assumption by the provinces of limited responsibilities in regard to the application of competition policy in local markets.

In certain other respects, the current constitutional proposals go beyond measures that would be consistent with the model of competitive federalism. These include the proposals to establish a new Council of the Federation to foster coordination of economic policies and to implement constraints on the exercise of the federal spending power. These proposals would lead to a more collaborative approach to governance in Canada.

The survey of foreign economic unions and transnational arrangements in Part VI of this paper provides important insights into the role of competition policy in supporting economic integration. Both of the advanced unions considered in this section—the United States and the European Community — illustrate the role of competition law as a cornerstone of a successful economic union. In addition, both jurisdictions exemplify the complementarity of competition policy and constitutional provisions that constrain the ability of sub-unit governments to restrict the flow of trade and

investment across the union. In their own ways, both the U.S. and the EC also illustrate the feasibility of shared responsibility for antitrust enforcement involving both federal and sub-unit levels of government—while highlighting the importance of voluntary cooperation to reduce the uncertainties that may arise in such circumstances. The relevance of competition policy to economic integration is further illustrated by the reliance that has been placed on it in the Australia-New Zealand Free Trade Area and the *U.S.-Japan Structural Impediments Initiative,* as well as the *Canada-United States Free Trade Agreement.*

The analysis of foreign jurisdictions also highlights the wider role that competition policy can play in the resolution of policy-related disputes concerning trade and investment flows within an economic union. As noted in Part VI, competition authorities in the European Community are playing an increasingly important role in addressing state aids to industry. It may be appropriate to explore the potential contribution that competition policy in Canada could make in this area, in the context of a renewed Canadian federation and economic union.

**Notes**

[1] Michael E. Porter and Monitor Company, *Canada at the Crossroads: The Reality of a New Competitive Environment* (study prepared for the Business Council on National Issues and the Government of Canada, October 1991), p. 74. The need for measures to reduce or eliminate existing barriers to interprovincial trade and investment was also a central theme of the Royal Commission on the Economic Union and Development Prospects for Canada ("Macdonald Commission"), *Report* (1985), vol. III, pp. 99-274. More recently, the importance of a strengthened economic union has been emphasized by the Economic Council of Canada, the C.D. Howe Institute, the Canadian Manufacturers' Association and other organizations and individuals (see Part II of this article and references cited therein).

[2] *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, 1991), pp. 28-31. See also *Canadian Federalism and Economic Union: Partnership for Prosperity* (Ottawa: Supply and Services Canada, 1991).

[3] *Canadian Federalism and Economic Union: Partnership for Prosperity, id.*, pp. 22-23, and *Shaping Canada's Future Together: Proposals, id.*, pp. 29-30. Presently, section 121 protects only the movement of goods, and its application has been limited primarily to tax-related measures. For further discussion, see Part V, *infra.*

[4] *Canadian Federalism and Economic Union: Partnership For Prosperity, id.*, pp. 25-41.

[5] See "Supplementary Statement of Albert Breton," in Macdonald Commission, *Report, supra.* note 1, vol. III, pp. 486-526. A revised version of this statement is presented in Albert Breton, "Towards A Theory of Competitive Federalism" (1987), 3 *European Journal of Political Economy* 263-327. A similar argument was put forward earlier in Frank H. Easterbrook, "Antitrust and the Economics of Federalism" (1983), XXVI *Journal of Law and Economics* 23-50.

[6] *Shaping Canada's Future Together: Proposals, supra,* note 2, pp. 37-39. For discussion, see Part V, *infra.*

[7] The economic union comprises the various laws, institutions and commercial arrangements that impact on interprovincial trade and investment flows.

[8] Macdonald Commission, *supra,* note 1, vol. III, p.130.

[9] "Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry.... Domestic rivalry not only creates pressures to innovate but to innovate in ways that *upgrade* the competitive advantages of a nation's firms." Michael E. Porter, *The Competitive Advantage of Nations* (New York: Free Press, 1990), p. 117. Porter's theory of the competitive advantage of nations provides a new paradigm for understanding international trade and investment patterns. It encompasses aspects of the classical theory of comparative advantage but emphasizes additional factors such as competitive rivalry, firm strategy, demand conditions and the existence of related/supporting industries. See Porter, *id.*, chapters II and III.

[10] For discussion, see *Canadian Federalism and Economic Union: Partnership For Prosperity, supra,* note 2. See also Frank R. Flatters and Richard G. Lipsey, *Common Ground for the Canadian Common Market* (Montreal: Institute for Research on Public Policy, 1983).

[11] Canadian Manufacturers' Association, *Canada 1993: A Plan for the Creation of a Single Market in Canada* (April 1991).

[12] See Judith Maxwell (Chairman, Economic Council of Canada), "Canada's Economic Union: Why It Matters" (Vancouver, B.C.: address to the Vancouver Board of Trade, September 26, 1991).

[13] See Breton, *supra*, note 5, and Easterbrook, *supra*, note 5. Breton's views are further developed in Albert Breton, "The Growth of Competitive Governments (Presidential Address to the Canadian Economics Association)" (1989), XXII *Canadian Journal of Economics* 717-750 and Albert Breton, *Centralization, Decentralization and Intergovernmental Competition* (Queen's University, Institute of Intergovernmental Relations, Reflections Paper No. 4, 1990). Some of the core insights from which the theory of competitive federalism developed were originated in C.M. Tiebout, "A Pure Theory of Local Expenditures" (1956), 64 *Journal of Political Economy* 416-424.

[14] See Breton, *supra*, note 5, pp. 498-501 and Pierre Salmon, "Decentralization as an Incentive Scheme" (1987), 3:2 *Oxford Review of Economic Policy* 265-288. It should be noted that the type of competition contemplated by the theory of competitive federalism is broader than the textbook concept of price competition. It emphasizes competition through innovation in the design and delivery of government programs. This type of competition is sometimes referred to as "Schumpeterian" or "entrepreneurial" competition.

[15] Breton, *supra*, note 5, pp. 513-515.

[16] An example of such an innovation is that of universal health insurance, which was pioneered by the province of Saskatchewan in the early 1960s and subsequently adopted by all the provinces, with the cooperation of the federal government.

[17] In discussing the advantages of a federal system in 1787, *The Federalist Papers* noted:

> The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States: a religious sect, may degenerate into a political faction in a part of the confederacy; but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source: a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union...

Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New York: Bantam, 1982), no. 10, pp. 48-49.

[18] See, e.g., Curtis Alva, "Delaware and the Market for Corporate Charters: History and Agency" (1990), 15 *Delaware Journal of Corporate Law* 885-920.

[19] Recently, the U.S. experience in this area has led to a re-examination of the institutions and principles governing the development of corporate law in Canada. This analysis suggests that Canadian policy in this area has focused excessively on the perceived benefits of centralization and uniformity, while being insufficiently sensitive to the potential benefits of competition. The impact of the *Canada Business Corporations Act* on Canadian corporate law illustrates the potential benefits of intergovernmental competition. At the same time, it underscores the importance of federal leadership in "championing institutional modifications to engender competitive activity." See Ronald J. Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991), 36:1 *McGill Law Journal* 130-190, at p. 190.

[20] Breton observes that "cooperative [i.e., executive ] federalism is aimed at removing the competition which is a natural by-product of federal organization." Breton, *supra*, note 5, p. 492. To a large extent, this view accords with traditional perceptions of executive federalism in Canada as an exercise in "élite accommodation."

[21] See Martin Painter, "Intergovernmental Relations in Canada: An Institutional Analysis" (1991), 24 *Canadian Journal of Political Science* 269-288.

[22] For discussion, see Douglas M. Brown and Murray G. Smith (eds.), *Canadian Federalism: Meeting Global Economic Challenges?* (Kingston: Institute of Intergovernmental Relations and Halifax: Institute for Research on Public Policy, 1991).

[23] Breton, *supra*, note 5, pp. 506-509 and 513-515.

[24] In fact, Breton argues that, in a *de facto* sense, all powers in a federation are exercised concurrently. See Breton, *supra*, note 5, pp. 501-503. While this may represent an extreme view, it is supported to some extent by the concept of "double aspect" which has been expressed in Canadian constitutional cases such as *Multiple Access Ltd.* v. *McCutcheon et al.* (1982), 138 D.L.R. (3d) 1 (S.C.C.). This concept permits broad scope for concurrent exercise of powers by the federal and provincial governments in many areas. For useful discussion, see Douglas Rutherford, Q.C. and J.S. Tyhurst, "Competition Law and the Constitution: 1889-1989 and into the Twenty-First Century," in R.S. Khemani and W.T. Stanbury (eds.), *Historical Perspectives on Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991), 253- 283, at pp. 271-272 and 277. See also Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), at pp. 316-318.

[25] See Easterbrook, *supra* , note 5, at pp. 29-33.

[26] For related analysis, see Edmund W. Kitch, "Regulation and the American Common Market," in A. Dan Tarlock, ed., *Regulation, Federalism and Interstate Commerce* (Cambridge, Mass.: Oelgeschlager, Gunn & Hain, Inc., 1981), at pp. 9-55.

[27] Breton, *supra*, note 5, pp. 515-518. For related discussion of efficiency rationales for intergovernmental grants, see David Wildasin, "Income Redistribution in a Common Labour Market" (1991) 81:4 *American Economic Review* 757-774. See also Robin Boadway and Frank R. Flatters, "Efficiency and Equalization Payments in a Federal System of Government: A Synthesis and Extension of Recent Results" (1982,) 15 *Canadian Journal of Economics* at 613-633.

[28] It is of critical importance that members of the Senate are directly elected by citizens of the respective provinces, rather than being nominated by the provincial governments, as this provides an added dimension of competition in the representation of their interests.

[29] Breton, *supra*, note 5, p. 520.

[30] For background, see Bureau of Competition Policy, *Canadian Competition Policy: Its Interface With Other Economic and Social Policies* (Hull, Québec: Consumer and Corporate Affairs Canada, September 1989), pp. 4-6 and references cited therein. The so-called "purpose clause" of the *Competition Act* refers to some additional objectives which are discussed in Part V below.

[31] This important principle was recognized in the famous U.S. case of *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 443 U.S. 36 (1977) (U.S. Supreme Court), which established a "rule of reason" standard for territorial market restraints. See also the *Competition Act*, section 77. For discussion of related issues concerning competition policy and international trade, see R.D. Anderson, P.J. Hughes, S.D. Khosla and M.F. Ronayne, *Intellectual Property Rights and International Market Segmentation: Implications of the Exhaustion Principle* (Bureau of Competition Policy, Working Paper, October 1990).

[32] "The introduction of an effective competition policy can be seen as one method to ensure that... differing regional advantages will accrue to the nation as a whole in terms of lower prices, better quality and variety and increased opportunities for Canadians." Peter Hogg and Warren Grover, "The Constitutionality of the Competition Bill" (1976), 1 *Canadian Business Law Journal* 197. In a similar vein, Safarian has emphasized "the need for a strong competition policy...if the benefits of the common market are to be realized." A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974), p. 58.

[33] "A strong antitrust policy, especially in the area of horizontal mergers, alliances and collusive behaviour, is essential to the upgrading of an economy." Porter, *supra*, note 9, p. 663.

[34] For background, see Sylvia Ostry, *Governments and Corporations in a Shrinking World: Trade & Innovation Policies in the United States, Europe and Japan* (New York: Council on Foreign Relations, 1990).

[35] See Bureau of Competition Policy, *supra*, note 30, Chapter II.

[36] See Bureau of Competition Policy, *supra*, note 30, Chapter II.

[37] See, for example, the discussion of the Consumers Packaging Inc.-Domglas Inc. and Asea Brown Boveri-Westinghouse mergers in Director of Investigation and Research, *Annual Report For the Year Ended March 31, 1990* (Ottawa: Supply and Services Canada, 1990), pp. 12 and 17, respectively.

[38] See, for example, *Canada (Director of Investigation and Research)* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Tribunal).

[39] See Bureau of Competition Policy, *supra*, note 30, Chapter III.

[40] For a discussion of these and other areas of policy interface, see Bureau of Competition Policy, *supra*, note 30, pp. 22-37. The interface between competition policy and intellectual property rights is discussed at length in Robert D. Anderson, S. Dev Khosla and Mark F. Ronayne, "The Competition Policy Treatment of Intellectual Property Rights in Canada: Retrospect and Prospect," in R.S. Khemani and W.T. Stanbury (eds.), *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991), 497-538.

[41] Bureau of Competition Policy, *supra*, note 30, pp. 38-44.

[42] See "Bureau Victory in Nova Scotia Case," in (1991), 12:2 *C.C.P.R.* at p. 1.

[43] See the discussion of the *Structural Impediments Initiative* in Part VI, *infra*, and references cited therein.

[44] Unlike Canadian legislation and policy, the *Merger Guidelines* issued by the U.S. Department of Justice (DOJ) in 1984 do not provide an outright defence for mergers that enhance economic efficiency. However, efficiencies are recognized as a factor to be considered in assessing mergers. More importantly, a key objective of the *Guidelines* was to facilitate efficiency-enhancing mergers by specifying thresholds for transactions that would not be affected by the antitrust laws. For an overview of conceptual aspects of the DOJ Guidelines and comparison to the Canadian merger provisions, see R.D. Anderson and S.D. Khosla, "Recent Developments in Canadian and U.S. Merger Policy" (1986), 7:3 *C.C.P.R.* 47-65. The *Antitrust Guidelines on International Business Operations* issued by the U.S. DOJ in the late 1980s dealt with technology transfer in the context of patent licensing agreements.

[45] In *Murphy* v. *C.P.R.*, [1958] S.C.R. 626, Mr. Justice Rand stated that "What is forbidden [under section 121] is a trade regulation that in its essence and purpose is related to a provincial boundary." For commentary, see Hogg, *supra*, note 24 at pp. 729-740.

[46] *Canadian Federalism and Economic Union: Partnership For Prosperity*, *supra*, note 2, p. 23.

[47] *Id.*, p. 23. The proposed changes to section 121 draw, to an extent, on suggestions that have been put forward previously by other knowledgeable persons. See, in particular, Macdonald Commission, *Report*, *supra*, note 1, vol. III, pp. 99-274. See also Minister of Justice, *Securing the Canadian Economic Union in the Constitution* (Discussion paper published by the Government of Canada, 1980).

[48] *Canadian Federalism and Economic Union: Partnership for Prosperity*, *supra*, note 2, p. 23.

[49] *Id.*, p. 23.

[50] *Id.*, pp. 23-24.

[51] From another perspective, the apparent collective aspect of section 91A could itself be viewed as posing a danger of leading to unwarranted uniformity of provincial policies. There may, however, be no way of avoiding collective deliberations on such intrinsically "joint" issues such as interprovincial trade barriers.

[52] *Shaping Canada's Future Together: Proposals*, *supra*, note 2, pp. 3-4.

[53] *Id.*, p. 37.

[54] *Id.*, p. 39.

[55] In his judgment in *Attorney General of Canada* v. *Canadian National Transportation Ltd.*, (1983) 2 S.C.R. 206 (S.C.C.), Mr. Justice Dickson (speaking for the minority) stated as follows (at p. 276):

> [A] scheme aimed at the regulation of competition is ...an example of the genre of legislation that could not practically or constitutionally be enacted by a provincial government...If competition is to be regulated at all it must be regulated federally.

More recently, in its 1989 decision in *General Motors of Canada Limited v. City National Leasing et al.* (1989), 58 D.L.R. (4th) 255, the Court held that the general scheme of the federal competition law is supportable under the general branch of the federal trade and commerce power, and is applicable in respect of intra- as well as interprovincial trade. For discussion, see Rutherford and Tyhurst, *supra*, note 24, pp. 267-277.

[56] The Council stated:

> We would to like to make it emphatically clear that... we intend no implication whatever that the federal government should seek exclusive occupancy of the field of competition policy.... On the contrary, while it is clear that a considerable proportion of Canadian economic activity crosses provincial boundaries, and would

be impossible to subject effectively to any provincial competition policy, we believe that the provinces could play a most useful role in respect of other lines of activity under their existing constitutional powers.... the door to such provincial participation should be left widely ajar.

Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969), p. 108.

[57] The Court noted:

...competition is not a single subject matter, any more than inflation or pollution. The provinces too, may deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like...

*General Motors of Canada* v. *City National Leasing*, (1989), 58 D.L.R. (4th) 255, at p. 284 .

[58] "Competition is... a subject to which the 'double aspect' doctrine applies— the provinces may regulate it under provincial heads of jurisdiction while the federal government may regulate it under the trade and commerce and criminal law powers." Rutherford and Tyhurst, *supra*, note 24, p. 275.

[59] Hogg, *supra*. note 24, pp. 123-126.

[60] *Shaping Canada's Future Together: Proposals*, *supra*, note 2, p. 36.

[61] See Porter, *supra*, note 9, p. 304.

[62] See Ivan Bernier, Nicholas Roy, Charles Pentland and Daniel Soberman, "The Concept of Economic Union in International and Constitutional Law," in Mark Krasnich, (ed.), *Perspectives on the Canadian Economic Union* (Toronto: University of Toronto Press, 1986) 35-154, at pp. 81-100.

[63] *Id.*, p. 86.

[64] Although the negative commerce clause is widely considered as a cornerstone of the U.S. economic union, it is worth noting that there is an alternative interpretation of the impact of the clause. This interpretation holds that the U.S. Supreme Court's use of the clause has imposed unnecessary centralization and rigidity on the operation of the union, to the detriment of interstate competition and the free flow of resources. See Kitch, *supra*, note 26. This interpretation of the commerce clause stands as a warning against excessively strict application of mobility rights, without regard to the benefits of intergovernmental competition through differing social and economic policies.

[65] Porter, *supra*, note 9, p. 304. It may be noted that Porter's view of the impact of U.S. antitrust enforcement on American industry is considerably more positive than that of certain other U.S. scholars. For an alternative viewpoint, see, e.g., Robert H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978).

[66] For background, see American Bar Association, Section of Antitrust Law, *Antitrust Federalism: The Role of State Law* (ABA Antitrust Section, Monograph No.15, 1988).

[67] *Id.*, and references cited therein.

[68] See the *Hart-Scott-Rodino Antitrust Improvement Act* (1976).

[69] For background, see American Bar Association, *supra*, note 66.

[70] The report concludes that, "To the extent that tension exists between state and federal antitrust policy, it is seldom reflected in state antitrust decisions." American Bar Association, *supra*. note 66, p. 105.

[71] For discussion of some pertinent issues, see Donald I. Baker, "Expanding the role of State Attorneys-General in Mergers: *American Stores* as a Door Opener" (1990), 11:4 *C.C.P.R.* 45-48.

[72] See, e.g., Bork, *supra*, note 65.

[73] See, e.g., *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), *Jefferson Parish Hospital District No.2* v. *Hyde*, 104 S. Ct. 1551 (1984) and *Matsushita Elec. Indus.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

[74] For useful analyses, see Thomas J. Courchene, *In Praise of Renewed Federalism* (Toronto: C.D. Howe Institute, July 1991) and Maxwell, *supra*, note 12. See also Wildasin, *supra*, note 27.

[75] Important aspects of EC competition policy are examined in *Europe 1992: Working Group Report on Competition Policy* (Ottawa: External Affairs and International Trade Canada, January 1991) and Mark Ronayne, "EC Competition Policy and Europe 1992: Implications for Canadian Businesses and Public Policy" (1991), 12:1 *C.C.P.R.* 39-45.

[76] Provisions relevant to the free movement of goods are found in Article 3 as well as Articles 12 -17 and 30-36 of the *Treaty of Rome*. For background, see Peter Oliver, *Free Movement of Goods in the EEC*, 2d ed. (London: European Law Centre Limited, 1988) and Bernier *et al*, *supra*, note 62.

[77] See Anderson, Hughes, Khosla and Ronayne, *supra*, note 31, chapter II (3).

[78] See, in particular Articles 48 and 51 of the *Treaty*. For pertinent discussion, see Wildasin, *supra*, note 27

[79] See Articles 85 and 86.

[80] For detailed discussion of these developments, see *Europe 1992: Working Group Report on Competition Policy*, *supra*, note 75 and Ronayne, *supra*, note 75.

[81] Anderson, Hughes, Khosla and Ronayne, *supra*, note 31, pp. 31-33.

[82] See, e.g., Barry E. Hawk, *United States. Common Market and International Antitrust: A Comparative Guide* (Englewood Cliffs, N.J.: Prentice Hall Law and Business), vol. II, pp. 306-7.

[83] Charles Lister, "Dawn Raids and Other Nightmares: The European Commission's Investigatory Powers in Competition Law Matters" (1990), 24 *George Washington Journal of International Law and Economics* 45-88.

[84] *Europe 1992: Working Group Report on Competition Policy*, *supra*, note 75, Part IV and Ronayne, *supra*, note 75.

[85] See, in this regard, Christian Marfels, "The New EC Merger Controls: An Appraisal" (1990) 11:4 *C.C.P.R.* 58-65.

[86] Courchene, *supra*, note 74, p. 7.

[87] Commission of the European Communities, Directorate General for Economic and Financial Affairs, "One Market, One Money" (1990), 44 *European Economy* p. 33. Excerpt quoted in Courchene, *supra*. note 74, p. 7.

[88] Presley Warner, *Round Two of the Canada-U.S. Free Trade Agreement: The Case for Replacing Antidumping with Antitrust* (Ontario Centre for International Business, Working Paper 1990-32, November 1990).

[89] H.R. Spier, "New Trans-Tasman Competition Laws" (1990), 11:4 *C.C.P.R.* 69-74.

[90] *Id.*

[91] For background, see Bureau of Competition Policy, *supra*, note 30, at pp. 14-15.

[92] Calvin S. Goldman, "Competition, Anti-dumping and the Canada-U.S. Free Trade Negotiations" (Notes for an Address to the Canada-U.S. Law Institute, Cleveland, Ohio, April 4, 1987).

[93] Robert D. Anderson, "Competition Policy Aspects of the U.S.-Japan Structural Impediments Initiative: Implications for Canada" (1991), 12:2 *C.C.P.R.* 39-50.

[94] For further details, see "Key Elements of U.S.-Japan Structural Impediments Initiative Report Released by the Office of the U.S. Trade Representative on June 28, 1990" (1990), 59:1473 *Antitrust and Trade Regulation Report* 28-31.

[95] James F. Rill (U.S. Assistant Attorney General for Antitrust), "*International Antitrust Policy — A Justice Department Perspective*" (remarks before the Fordham Corporate Law Institute Program on EC and U.S. Competition Law, New York, October 24, 1991).

[96] In particular, Bhagwati has suggested that, by subjecting virtually all aspects of national economic policy and business practices in Japan to bilateral negotiation, the *SII* negotiations have undermined the viability of a rules-based international trading system. See Jagdish Bhagwati, "U.S. Trade Policy Today," (paper presented at the Columbia University Conference on Trade Policy, September 8, 1989). For discussion, see Anderson, *supra*, note 93.