COMMENT & ANALYSIS

RAISING RIVALS' COSTS AND *ALCOA:* A REPLY TO WARE

By: John E. Lopatka*
University of South Carolina

In a recent edition of the *Record*, Roger Ware describes the analysis of anticompetitive exclusion known as "raising rivals' costs" (RRC).[1] Though he expresses certain reservations about it and cautions that, despite the claims of its proponents, RRC does not provide a single, comprehensive approach to the universe of complex strategic interactions, Ware endorses the analysis, commenting that it provides "important insights." In general, Ware's reservations are well taken, but they are not nearly strong enough. In particular, his comments critical of an article Paul Godek and I wrote dismissing the application of RRC to the United States *Alcoa*[2] case are misplaced.[3] If RRC offers any benefit in the enforcement of antitrust laws — a claim of which I am skeptical — it cannot demonstrate its merit by application to *Alcoa*.

The foreclosure branch of RRC analysis, as set forth by Steven Salop, David Scheffman, and Thomas Krattenmaker, purports to show that instances of anticompetitive exclusion are best understood as cases in which a predator transacts with suppliers to foreclose from its rival producers some of the supply of a vital input.[4] As long as the supply of input is not perfectly elastic, the transaction forces the input price up and thereby increases the marginal costs of competing producers. The price of the output is determined by the marginal costs of competing producers. The price of the output is determined by the marginal costs of these rival producers, and so long as the cost of the affected input represents a significant proportion of total production costs, output price increases. If the costs incurred by the predator in reducing the supply of the input are less than the costs imposed on the rivals, the strategy can return rents to the producer and economic welfare can decline.[5]

Alcoa is one of the most famous monopolization cases in United States legal history. Alcoa, formed in 1888, was for decades the dominant seller of aluminum in the United States, its output growing steadily with demand. For much of the time, it was the only producer located in the United States. In 1937, it was selling more than 90 percent of the ingot purchased in the United States, and the government sued, claiming it had monopolized the aluminum market. Judge Learned Hand reversed the district court, which had dismissed the complaint, and held that a monopolist violates the antitrust laws by expanding capacity in anticipation of increased demand.[6] The economic perversity of that proposition, which encourages a monopolist

to limit output and raise prices, was eventually recognized and condemned. But the case was resurrected in the guise of RRC. Krattenmaker and Salop assert that Alcoa succeeded in acquiring power over the price of aluminum principally by foreclosing competitors from two necessary inputs — electricity and bauxite. As the district court noted, all that is needed to produce aluminum is electric power and bauxite, except, of course, for "energy and industry and brains," but no one has yet accused Alcoa of driving up the price of aluminum by denying rivals cheap brain power.[7]

Krattenmaker and Salop have asserted that Alcoa entered into "naked exclusionary rights agreements" with electric utilities. These are agreements in which the purchaser acquires merely the promise that the seller will not sell its product to the purchaser's competitors; "no goods or other commodities are to be exchanged".[8] In fact, Alcoa entered into covenants with two utilities that prohibited them from selling power for aluminum production to firms other than Alcoa. It also purchased some form of power from both companies, however, and so the agreements were not naked.[9]

Ware remarks that, whether the utilities' commitments not to sell to Alcoa's rivals were "naked" or were attached to the purchase of power by Alcoa, the "competitive implications for electric power are the same".[10] In the sense that electricity is withheld from competitors in both cases, he is right. But the distinction is crucial if RRC is to be useful in practice. Consumption of any units of a private good deny them to others. If Alcoa purchased and efficiently used water power to produce electricity, it would drive up the price of power to its competitors, so long as the input's supply curve is upward sloping. But that could hardly be called anticompetitive; instead, it should be called an efficient market. RRC, then, must distinguish between efficient and anticompetitive exclusion.

Proponents of the analysis argue that when the exclusion is incidental to a naked agreement it is all but necessarily anticompetitive — it can serve no purpose other than to foreclose rivals and increase the prices of the input and output. Godek and I dispute this claim, pointing out that even naked agreements can serve a productive economic function and ought not be summarily condemned.[11] But proponents, in any event, cannot limit their attack to naked exclusionary rights agreements if their analysis is to have any practical utility. After all, Krattenmaker and Salop admit that, aside from cases involving abuse of government process, *Alcoa* is the only case in 100 years of United States antitrust jurisprudence that mentions a naked exclusionary rights contract, and they are wrong about *Alcoa*.[12]

Thus, Krattenmaker and Salop assert that exclusion in actual cases falls along a spectrum between naked exclusion on one end and the exclusion incident to the efficient consumption of a private good on the other and that exclusionary rights agreements falling along that spectrum can be anticompetitive. What do they call these non-naked but anticompetitively exclusionary transactions? Some are "overbuying": the predator buys more of the input than it needs. Others involve a kind of ancillary exclusionary rights agreement in which the predator buys what it needs and a commitment not to sell other units to its rivals. The two are functionally equivalent, for both involve denying a quantity of input to competitors for no reason other

than to increase the competitors' costs. The problem is that when a firm buys and uses an input, how can antitrust authorities determine that it foreclosed its competitors from too much? A firm that purchases its current requirements of an input and the right to obtain its requirements for some time in the future does indeed deny its rivals some amount that it is not currently using, but that could hardly be called anticompetitive. Or suppose a developer who owns three strip malls in an agricultural area wants to attract the first supermarket to the region. A store agrees to lease space in one of the malls, but because it is incurring a risk of failure, insists that the developer agree not to lease space in any of his malls to another grocer. The agreement forecloses competing supermarkets from land and the first store is not using, but the transaction efficiently prevents rivals from taking a free ride on the risk assumed by the pioneer and induces a productive investment that would otherwise have not been made.

Krattenmaker and Salop recognize that overbuying cases and presumably ancillary exclusion cases are competitively problematic and therefore would impose a greater burden on plaintiffs bringing such a case than on those challenging naked exclusionary rights agreements.[13] The point is that, contrary to the connotation of Ware's remark, the distinction between the kinds of exclusion RRC disciples deem anticompetitive is important even to them, for the ability to discern the competitive implications of the transaction under scrutiny varies depending on its form.

The only RRC claim that can be made about Alcoa's electricity transactions, then, is that they represent ancillary exclusionary rights agreements, which are economically equivalent to overbuying. Overbuying is the explicit claim leveled at Alcoa with respect to its bauxite purchases. The questions are these: Is overbuying or its analytical twin in theory an anticompetitive, rational, profit-maximizing strategy? If it is, can it explain *Alcoa*? Finally, is it in general a mode of analysis useful in practice? Ware says that Godek and I "seem unaware of the solid theoretical support for such a strategy."[14] Perhaps this is because only RRC advocates consider the theoretical support solid.

The idea behind RRC is that a firm can both disadvantage its rivals and profit by buying the right to control a quantity of product that it does not need. We called the notion counterintuitive, and it is. But we are also well aware that under certain very limited technical constraints, the theory holds. As Coate and Kleit explain, and Ware acknowledges, "the primary necessary condition for an RRC strategy to be profitable is for it to raise the predator's average costs less than it raises its rivals' marginal costs."[15] How can this occur? Suppose that the predator does not use input A in making widgets, but its rivals do. If it transacts with suppliers to foreclose some quantity of A from its competitors, it may be able to increase the price of A. Notice that it cannot simply buy A and resell it to firms that make different products, for that will not affect the total demand for or the market price of A. Rather, its purchases must represent new demand. So, for example, the predator might buy A and bury it or sell it for scrap. By doing so, the predator incurs a cost — not a marginal cost, for the cost is not a part of the production function of widgets, but a fixed cost. That cost is then spread over its entire output, increasing its average cost. If the increase in the marginal cost of the predator's rivals, who do employ A, generates a sufficiently large increase in the market

price of widgets, the predator can profit. The same result can be obtained if the predator uses A, but less intensively than does its rivals. If A is used in variable proportions, the predator might buy and use more A than it needs instead of effectively destroying the unneeded quantity. For instance, suppose the predator normally uses 1 unit of A to produce one widget and its rivals use 4 units of A per widget. the predator then buys additional quantities of A, changes its input mix, and uses 2 units of A per widget. The predator's marginal (and average) costs increase, for it is now making widgets less efficiently than before, but its rivals' marginal costs increase even more, for they use A more intensively.

What these scenarios have in common is that the predator has a different production technology from its rivals, a necessary but not sufficient structural condition for the ultimate prerequisite that the increase in the rivals' marginal cost exceed the increase in the predator's average cost.[16] Coate and Kleit specify various other necessary conditions for a rational RRC strategy that need not be explored here. With little elaboration, Krattenmaker and Salop assert that overbuying can be a rational predatory strategy in a number of situations, only one of which is that an input is used less intensively by the predator than by its rivals.[17] It is this broad claim about which we were and continue to be dubious. The theoretical support for it is at best flimsy.

The next question is whether some variant of overbuying explains *Alcoa*. As discussed above, a number or preconditions can be specified for the strategy to be theoretically viable. We need only address three. First, the predator must have a different production technology from its rivals. The fact is that all aluminum producers had access to and used the identical technology.[18] For that matter, bauxite was used in fixed proportions with electricity to make aluminum, and so Alcoa would not have been able to use any excess amount of the material it bought unless it increased production.[19]

Second, the amount of the input effectively withheld from competitors must have a significant impact on its price. Coate and Kleit note that "exclusion requires the market input supply curve be upward sloping."[20] A related proposition is that the smaller the quantity unnecessarily preempted in relation to the total amount of the input available, the less likely that the purchase will affect price. Alcoa controlled a tiny share of any plausible power market. Ware remarks that "there is a lot of room for discretion in defining the market."[21] Not that much room. At most, Alcoa's total purchases accounted for less than 4.8 percent, and they could have accounted for less than .0007 percent of a relevant market. Alcoa was estimated to have owned approximately one-half of the aluminum-grade bauxite reserves known to exist in the United States. But the world's supply of bauxite was considered "practically inexhaustible," and some 40 percent of the bauxite used in the United States during the relevant period was imported. Alcoa's purchases of bauxite likely had an insubstantial effect on price. But data on Alcoa's gross purchases, however small in relation to the input markets, can exaggerate the apparent anticompetitive potential, for only the fraction of Alcoa's purchases of power rights and bauxite representing the amount not needed, if any, could possibly have had an anticompetitive effect. Given the size of Alcoa's total purchases relative to the input markets and its undoubtedly vast requirements, the possibility that any unneeded quantities withheld from rivals could have affected price significantly is highly remote.

Third, the evidence, though not conclusive, suggests that Alcoa, rather than buying input rights merely to withhold them from its rivals, needed and used what it purchased. The district court concluded that Alcoa used, sold or exchanged all of its developed hydroelectric capacity and found no evidence that it acquired more water power sites than it needed in light of anticipated expansion.[22] That Alcoa had an incentive to secure the supply of power for its own use from hydroelectric sites it developed by insuring that no amount was sold to other aluminum producers seems self-evident. And Alcoa acquired rights to a modest, eight-year supply of bauxite at its 1939 rate of consumption, a rate that was surely expected to and did increase.[23]

The question remains whether RRC, though it cannot explain *Alcoa*, is a viable method of analysis in antitrust enforcement generally. If it is used in the way advocated by many of its disciples, the answer is surely no. That RRC may identify in theory a sphere of anticompetitive activity not fully captured by conventional analysis is not enough to commend its use in practice. In general, the methodology ought not be used if it produces no net gain in antitrust problem solving relative to traditional antitrust analysis.[24] For various reasons, some of which Ware notes, RRC seems to fail this test. It exaggerates the likely profitability to the predator of the postulated strategy.[25] It understates the reach of conventional antitrust analysis.[26] It ignores its own potential strategic use for anticompetitive ends.[27] Perhaps most importantly, its advocates appear happy to declare a practice illegal without rigorous analysis whenever some of the theoretical preconditions implicit in RRC — and to be sure they are merely necessary not sufficient conditions — seem potentially satisfied. This is a dangerous tendency because RRC does not inherently take efficiencies into account, and its proponents have little use for exogenous procompetitive explanations. Krattenmaker and Salop would require extensive quantitative proof of efficiencies to defeat an RRC claim, even though in practice RRC analysis itself is virtually never accompanied by analogous proof of harm.[28] Any antitrust enforcer knows that in the real world, cases in which an anticompetitive theory can be proven conclusively are exceedingly rare. Of course, procompetitive explanations are also usually impossible to establish empirically, and so the process of enforcement requires identifying relevant anticompetitive and procompetitive theories, analyzing all of the evidence consistent and inconsistent with each, and reaching the best possible judgment however fallible.[29] By calling into question a myriad of vertical transactions that undergird an efficient market, then imposing on defenders the obligation to prove unequivocally that they do indeed increase economic welfare under pain of antitrust penalty, RRC promises to work serious mischief.

Ware himself seems to fall into this mind set. Despite the record that demonstrates RRC's inapplicability to *Alcoa*, Ware calls it one of the "few major cases in which RRC activities are well documented."[30] And though Godek and I show that the conditions necessary for RRC to explain Alcoa's bauxite purchases are unsatisfied, Ware concludes that we "present no evidence to suggest that Alcoa's dominant position in the market for bauxite was not aimed at strategically disadvantaging its rivals."[31] This is akin to arguing that if I buy steak and you hamburger, I have the burden of proving that I value steak more than you do. Markets are fueled by vertical transactions — markets *are* vertical transactions. If antitrust law is not to subvert efficiency, those who would intervene in market transactions have the burden of proving that intervention is warranted.

Notes

* Mr. Lopatka is an Alumni Professor of Law at the University of South Carolina and a former Assistant Director for Planning, Bureau of Competition, Federal Trade Commission.

[1] See Roger Ware, "Understanding Raising Rivals' Costs: A Canadian Perspective", (1994) 15:1 *Can. Comp. Rec.* 9.

[2] *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), *rev'g* 44 F. Supp. 97 (S.D.N.Y. 1941).

[3] John E. Lopatka & Paul E. Godek, "Another Look at Alcoa: Raising Rivals' Costs Does Not Improve the View", 35 J. Law & Econ. 311 (1992).

[4] The origin of RRC, at least in its most recent incarnation, is usually traced to Steven C. Salop & David T. Scheffman, "Raising Rivals' Costs", 73 Amer. Econ. Rev. 267 (1983). The most comprehensive description of the approach, though, is contained in Thomas G. Krattenmaker and Steven C. Salop, "Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price", 96 Yale L. J. 209 (1986). A readable and succinct description is Thomas G. Krattenmaker & Steven C. Salop, "Exclusion and Antitrust", 11 Regulation 29 (1987).

[5] A second branch of RRC posits that the predator raises input costs by inducing collusion among input suppliers, but this analysis is not new, controversial, or particularly interesting.

[6] "It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity...." *Alcoa*, 148 F.2d at 431.

[7] *Alcoa*, F. Supp. at 144.

[8] Krattenmaker & Salop, "Anticompetitive Exclusion", *supra*, note 4 at 227, 235. See also Krattenmaker & Salop, "Exclusion and Antitrust", *supra*, note 4 at 29-30.

[9] See Lopatka & Godek, *supra*, note 3 at 319-20.

[10] *Supra*, note 1 at 12.

[11] See Lopatka & Godek, *supra*, note 3 at 325.

[12] See Krattenmaker & Salop, "Anticompetitive Exclusion", *supra*, note 4 at 228.

[13] *Ibid.* at 282.

[14] *Supra*, note 1 at 12.

[15] Malcolm B. Coate & Andrew N. Kleit, "Exclusion, Collusion, and Confusion: The Limits of Raising Rivals' Costs", Federal Trade Commission, Bureau of Economics Working Power No. 179 at 5 (October 1990).

[16] *Ibid.* at 14.

[17] See Krattenmaker & Salop, "Anticompetitive Exclusion", *supra*, note 4 at 238.

[18] See *Alcoa*, 44 F. Supp. at 144.

[19] See *Alcoa*, 44 F. Supp. at 116, 123. If the predator expands output, the welfare effects are ambiguous, as low cost output of the predator may replace high cost output of its rivals. See Steven C. Salop & David T. Scheffman, "Cost-Raising Strategies", 36 J. Indus. Econ. 19, 26 (1987); Coate & Kleit, *supra*, note 15 at 7.

[20] *Supra*, note 15 at 11.

[21] *Supra*, note 1 at 12.

[22] See *Alcoa*, 44 F. Supp. at 124-26.

[23] *Ibid.* at 120.

[24] See Frank H. Easterbrook, "Allocating Antitrust Decisionmaking Tasks", 76 Geo. L. J. 305 (1987).

[25] See, e.g., *supra*, note 15.

[26] See, e.g., Timothy J. Brennan, "Understanding Raising Rivals' Costs", 33 Antitrust Bull. 95 (1988); Wesley J. Liebeler, "Exclusion and Efficiency", 11 Regulation 34 (1987).

[27] See, e.g., "Antitrust in New Zealand: The Case for Reform" 36, New Zealand Business Roundtable (September 1988).

[28] See Krattenmaker & Salop, *supra*, note 4 at 278-82.

[29] See generally John E. Lopatka, "Antitrust and Professional Rules: A Framework for Analysis", 28 San Diego L. Rev. 301, 379-81 (1991).

[30] *Supra*, note 1 at 11.

[31] *Ibid.*

CANADIAN COMPETITION RECORD

THE *CATERPILLAR* DECISION: AN UNSATISFYING RESULT FOR COMPETITION LAW

By: James Musgrove
Lang Michener, Toronto

On March 8, 1994 the Alberta Court of Queen's Bench decided the case of *Miller* v. *Caterpillar*.[1] The case is by far the most extensive and expensive private action ever brought under the *Competition Act*. The trial itself took over 200 hearing days spread over two and one half years. The cross-examination of the plaintiff's expert alone took over 20 court days.

Many competition law practitioners were looking forward to the decision, principally for guidance on two important issues: whether reviewable conduct could or would be found to be the basis for civil tort actions; and whether such conduct could or would constitute a *Competition Act* conspiracy. Surprisingly, given the length of the trial and the decision (215 pages), the Court avoided these issues almost entirely.

FACTS

Caterpillar Tractor Co. ("Caterpillar") is a manufacturer of heavy earth moving equipment and parts for such equipment. The evidence in the case was that Caterpillar was "the industry giant" and "had dominance in almost all market segments" of this business.

The plaintiff, Ed Miller Sales & Rental Ltd. ("Miller") was engaged in the business of selling, renting and servicing heavy equipment and parts in Alberta. The new and used equipment sold by Miller was manufactured primarily by Caterpillar. In 1986, Miller went into receivership.

R. Angus Alberta Ltd. ("Angus") was the authorized Caterpillar dealer in a territory which included all of Alberta.

Caterpillar established dealers, such as Angus, with primary areas of responsibility in various parts of the world. It did not prohibit shipment of equipment between territories, although it did impose conditions which discouraged arbitraging to some degree. It prohibited the export of parts from the United States, except through authorized channels.

THE PLAINTIFF'S CASE

Miller alleged that Caterpillar and Angus unlawfully interfered with its business by limiting Miller's ability to acquire Caterpillar equipment and parts. It claimed damages in the amount of fifty-five million dollars. It alleged conspiracy contrary to section 45 of the *Competition Act*, and claimed civil damages under section 36.

It also alleged that the conduct constituted common law conspiracy, interference with contractual relations, intimidation and unlawful interference with economic interests.

A fundamental theory of Miller's case was that the Caterpillar dealer agreement was designed to discourage sales outside dealers' authorized territories. Miller alleged that this furthered an anti-competitive purpose. In particular, Miller alleged that Caterpillar's dealer agreement and ancillary actions made it difficult for arbitragers or grey marketers to obtain product at competitive prices. Miller alleged that one has to look beyond the dealer agreement itself to the "understandings" between the defendants in light of the "spirit of the Caterpillar agreement". There were various documents and letters in evidence referring to dealers not being in compliance with the "spirit" of the Caterpillar agreement when they pursued sales outside their territories. The plaintiff alleged a conspiracy involving the Canadian dealers, other authorized dealers and Caterpillar, to discourage grey marketing and sales outside authorized territories. Some of the methods allegedly used by Caterpillar to prohibit or discourage arbitrage in equipment parts are set out below.

(a) Exclusive Territories

The Court noted that, by electing to market its products through dealers assigned to specific territories, Caterpillar's ability to meet interbrand competition depended largely on the authorized dealers' efforts to market Caterpillar products through advertising, promotion, and provision of a high standard of service. (As well, of course, as attractive pricing.) Thus, Caterpillar required dealers to have sufficient capital investment to meet these goals. If the dealers believed they would face intrabrand competition within their territories, they would be less inclined to undertake such investment and would do less advertising. At the same time, Caterpillar recognized that exclusivity could result in uncompetitive pricing.

The Court found that Caterpillar managed the problem it faced by encouraging individual dealers to believe that they operated within exclusive territories, but at the same time tolerating, failing to suppress and, in some cases, encouraging intrabrand competition within the territories by way of grey marketing. The Court concluded: "It was an economic imperative that Caterpillar cultivate in its dealers the myth of the exclusive territory."[2] Thus, the Court found that enforcement of the exclusive territory policy was really an illusion to convince its dealers that Caterpillar was 'behind' them, so that they would continue making significant investments. The Court found that Miller and its like restrained the "arrogance" of Angus, and other such dealers, and that as a result prices were kept at a lower level than would otherwise have been the case. That was satisfactory to Caterpillar. At the same time, because Angus believed it had an exclusive territory, it continued to promote Caterpillar products and provide a satisfactory level of service.

(b) Equipment Allocation

The plaintiff alleged that one of the methods by which the conspiracy was advanced was the allocation of equipment to dealers. The plaintiff alleged that this discouraged the grey marketing of equipment. The

Court found that the allocation system was a fair approach to shortages, and in fact strengthened resellers/ brokers who sold equipment outside territories.

(c) Price Protection

Caterpillar had a price protection policy which applied in circumstances of increasing prices. It sought to protect the prices of equipment where a dealer had negotiated a sale with a customer, but was awaiting delivery of the machine when the price increased. The policy denied price protection to those who rented or leased machines to others. It also denied protection to resellers, unless they had a contractual commitment with an end user.

The Court found that the plaintiff failed to show that the price protection policy was an anticompetitive penalty imposed on resellers. The Court found that it was an appropriate mechanism to deal with increasing prices in a fair way.

(d) Service Fee

There was a 5% service fee charged to dealers selling machines outside their service territory. The plaintiff alleged that this was to discourage sales outside established territories. Since territorial dealers are responsible for after sales service, Caterpillar's position was that a 5% discount was provided to compensate dealers for delivery and warranty service. Where the dealer was not going to be required to provide ongoing service, the discount was to be refunded to Caterpillar. Thus, once it became clear that the use of the machine would be outside the dealer's territory, the dealer had to return the 5% service discount. The Court concluded:

> The plaintiff has failed to show that the 5% service fee charged under the sales and service agreement to a dealer selling a machine outside its service territory was a device to prevent interterritorial sales and to impede intra-brand competition from resellers and brokers such as the Plaintiff. I am not persuaded that Caterpillar's North American service fee did not fairly reflect the dealer's costs of providing product support services including (but not confined to) warranty and delivery service. It follows that it did not constitute a barrier to arbitrage by brokers and resellers such as the Plaintiff.[3]

(e) Japanese Export Fee

Caterpillar imposed a 15% penalty for export of machines made in Japan. The Court found that the policy was Caterpillar's mechanism to enjoy fully, rather than sharing with its joint venture partner Mitsubishi, the profit to be made because of the lower cost of manufacturing in Japan. The Court concluded that it was not unlawful to do so.

(f) Parts

In addition to its contention that Caterpillar's conduct restrained the movement of its equipment, Miller alleged that Caterpillar also illegally restricted the movement of genuine Caterpillar parts, with the effect of destroying Miller's parts business.

After Miller commenced its parts business Caterpillar sent a letter to its U.S. dealers. The letter advised them that, insofar as they were wholesaling parts for export from the United States, they were acting beyond the scope of their dealer relationship with Caterpillar and were undermining Caterpillar's ability to maintain a strong distribution system in foreign countries. Consequently it specified, as a term of the sale of replacement parts, that those parts could not be sold for export from the United States. Failure to comply would be regarded as a deliberate violation of the dealer's agreement, and could result in termination.

USE OF REVIEWABLE CONDUCT TO SUPPORT MILLER'S TORT CLAIMS

Miller argued that conduct contrary to the reviewable practice provisions of the *Competition Act* could constitute the necessary unlawful conduct to support the torts of unlawful interference with contractual relations and/or economic interests. There has been some limited jurisprudence on this issue to date. Two Ontario cases, in preliminary pleadings motions, have declined to strike out allegations of reviewable conduct in support of tort claims.

In the case of *Pindoff Record Sales* v. *CBS Music Products Inc.*,[4] Mr. Justice Montgomery declined to strike out a civil claim which relied on conduct contrary to the reviewable practice provisions of the *Competition Act*. In that case, CBS refused to sell products to Pindoff, as Pindoff would not agree that such products would not be exported from Canada. A pleading of civil conspiracy was successfully struck, with leave to amend, as having not been sufficiently pleaded. The plaintiffs also pleaded conspiracy to injure, and for the requisite illegal conduct under the *Canada Cement La Farge*[5] test, pleaded conduct contrary to the reviewable conduct provisions of the *Competition Act*, particularly abuse of dominant position and market restriction. The Court, in refusing the motion to strike the claim, relied upon two U.K. cases[6] based on the *Restrictive Practices Act*. Those cases had found that conduct under that Act's reviewable provisions could constitute illegal means to found civil proceedings. Mr. Justice Montgomery stated "[it] should not be the function of the motions court judge at this preliminary stage to make a determination which might restrict this head of the plaintiff's claim, *where there are other triable issues to be dealt with.*"[7] (Emphasis added.) The action ultimately settled.

Subsequently, an action was brought by the catering licensee for the Skydome alleging breach of the *Competition Act*, and breach of contract and tort, in relation to the requirement that the licensee buy all food for the Skydome from Skydome's exclusive supplier.[8] The plaintiff alleged a civil conspiracy to injure and cited, as the unlawful means necessary to support such a conspiracy, contravention of section 77

(exclusive dealing) and section 79 (abuse of dominant position) of the *Competition Act*. Mr. Justice Hoilett rejected this argument, stating "reviewable conduct is, *prima facie,* legal until the Tribunal, following a review, determines otherwise. That is in contrast to the British counterpart to the *Competition Act*, the *Restrictive Trade Practices Act, 1956,* which, under Section 21 of the Act, deems certain kinds of conduct 'contrary to the public interest'."[9] Mr. Justice Hoilett struck out the tort claim based on the reviewable practice provisions of the *Competition Act*. The Court of Appeal overturned this decision, but did not address the reviewable practice issue directly. Rather, it stated, "Portions of the Statement of Claim could well be struck out under rule 25.11 as frivolous and vexatious, but we are not concerned here with niceties of pleading. Given that the basic contractual and tortious reliefs sought are supportable, it will be up to the trial judge to determine what relief, if any, is appropriate."[10] The action is ongoing.

On the other hand, two reported cases have dealt with this question in relation to injunction applications, and have found that conduct falling within the reviewable practices provisions of the *Competition Act* does not constitute the basis for a civil action or constitute a civil wrong.

In a Federal Court patent case[11] the defendant alleged that the plaintiff was not entitled to the equitable relief it sought because it had engaged in the reviewable practice of abuse of dominant position. Mr. Justice Teitelbaum, who was then also a member of the Competition Tribunal, rejected the argument. He ruled that the principle of *ex dolo malo non oritur actio*[12] was not applicable, because the conduct was neither criminal nor civilly actionable; "there is no improper conduct until such time as the Competition Tribunal so finds".[13] The defendant also argued that, even if the *ex dolo* principle did not apply, the plaintiff should not be entitled to equitable relief because it had "unclean hands". Mr. Justice Teitelbaum also rejected this argument, but did so on the basis that there was no evidence that the plaintiff had engaged in activities constituting abuse of dominance. That language permits an argument that where there may be *prima facie* evidence of conduct which could constitute abuse of dominance, unclean hands might be found. That is the case where there is a breach of the criminal provision of the Act.[14]

In a 1993 case Mr. Justice Hutchinson of the B.C. Supreme Court clearly rejected reviewable conduct as a basis of a civil tort action. In the case of *Harbord Insurance Services* v. *Insurance Corporation of British Columbia*[15] the plaintiffs brought an action to attempt to prevent I.C.B.C. from offering an incentive to agents to place as much coverage as possible with I.C.B.C. The plaintiffs alleged that the conduct of I.C.B.C. was contrary to section 77 of the *Competition Act* and constituted unlawful interference with economic relations. The Court rejected the claim. Mr. Justice Hutchinson stated:

> The practices of "exclusive dealing", "market restriction" and "tied-selling", in the absence of legislation prohibiting them, *are legitimate, are lawful, and are prima facie not contrary to public policy.* Were they offences under Part VI and punishable by imprisonment or a fine, then they would be unlawful. However, as they do not attract such actions, those practices are not unlawful, and in the absence of some other culpability cannot be the foundation of a finding of unlawful means.[16] (Emphasis added)

The Court went on to state:

> The sections under Part VIII of the *Competition Act* deal with matters that are only reviewable by the Tribunal constituted under the Act and not by an ordinary court. The complainant, under Part VIII, may file a complaint with the Director of Investigation and Research. The Director then considers the complaint, and if he or she decides to do so, may place the allegations before the Tribunal. It is only the Director who can initiate applications before the Tribunal, not the complainant. If the Tribunal finds that the application is well-founded, it may prohibit the practice complained of or make a similar order to attain the objectives specified in the relevant section. The policy set by the Tribunal is dictated by economic and philosophical principles, and is flexible enough to cater to changing circumstances. The Tribunal is a statutory board of people appointed by the Minister to encourage competition in ways defined by the Act, but according to its own principles.[17]

The Court concluded that the conduct complained of was "*per se lawful* but may be prohibited under Part VIII because it lessens competition or offends against the policy set by the Tribunal to foster competition in the market: that does not make it unlawful".[18] (Emphasis added)

The more recent and, it is submitted, better reasoned cases conclude that reviewable conduct, absent a Tribunal Order, is not a basis for a finding of unlawful conduct or other civil wrong. However, there is still some dispute in the case law. It was hoped that the *Caterpillar* case would resolve the issue, as no reported case has addressed the matter after a trial. *Caterpillar* did not advance the debate however, as the Court sidestepped the issue. It found that Caterpillar used the "myth of the exclusive territory", and consequently concluded that there was no market restriction or other reviewable conduct *vis a vis* the supply of original equipment. With regard to parts supply, the Court found that Caterpillar did impose restrictions. However, it avoided the reviewable conduct issue in respect of parts as well. It concluded that Caterpillar had unlawfully interfered with Miller's contractual relations, but based the "unlawfulness" not on conduct contrary to the reviewable conduct provisions of the *Competition Act*, but rather on breach by Caterpillar of its dealer agreement with Peoria Tractor. Peoria was one of Caterpillar's U.S. dealers, which had been supplying parts to Miller. Having found that Caterpillar breached its contract with Peoria, the Court stated that it need not decide whether refusal to deal or market restriction was made out.

COMPETITION ACT CONSPIRACY

The plaintiff's allegation that Caterpillar had engaged in *Competition Act* conspiracy was defeated, both in respect of original equipment and parts supply. With respect to the original equipment, the Court's "myth of the exclusive territory" dealt with the issue on a factual basis. Nevertheless, the Court made statements which suggested, without actually so finding, that had there been exclusive territories a conspiracy would or could have been found:

> I accept the proposition that vertical restraints can constitute agreements in restraint of trade. For reasons which will emerge obvious, I do not consider it necessary, when considering the plaintiff's theory of conspiracy, to decide whether in Canadian law a unilaterally imposed term becomes part of an agreement or contract if the other side to the contract acquiesces expressly or implied. Without deciding the point, I am prepared to accept, in the course of evaluating the whole of the evidence, the Plaintiff's position, that there is no special principle of law dealing with acquiescence which would impose any special burden on the Plaintiff, beyond

> showing acquiescence. In other words, without deciding the point, I am prepared to adopt the Plaintiff's submission that, if a vertical restraint has been unilaterally imposed, but results in a new amended contractual agreement, under Canadian law, that could amount to a term of the conspiracy. The Plaintiff would not have to go on to establish that acquiescence or agreement was communicated.[19]
>
> When a vertical restraint conspiracy is alleged, as in the case at bar, even thought the restraints are imposed by the manufacturer, the Court can look at all of the foregoing factors, and whether acquiescence is communicated or not, find an agreement which amounts to a conspiracy.[20]

These statements suggest a willingness to find a section 45 conspiracy between a manufacturer and its distributors resulting from the establishment and enforcement by the manufacturer of an arrangement of market restriction, such as exclusive sales territories. That is a startling proposition. Exclusive sales territories are commonplace. If they can constitute criminal conspiracies, then the world is full of conspirators. While it is possible in law that reviewable conduct can constitute a conspiracy, no Canadian case has found it to be so, and exclusive sales territories are strange candidates for a conspiracy allegation. Given the structure of the *Competition Act*, which makes vertical conduct other than price maintenance reviewable only by the Tribunal, courts ought to be hesitant to enthusiastically embrace the possibility of vertical reviewable practices constituting criminal conspiracies. The language and tone of the *Caterpillar* decision are, it is submitted, unfortunate in that respect.

SOME THOUGHTS ON PARTICULAR COMPETITION LAW ASPECTS OF THE *CATERPILLAR* DECISION

The *Caterpillar* decision is disappointing, not only for its failure to directly address the reviewable conduct and conspiracy issues, but as well for some of the reasoning and language related to *Competition Act* issues. Some of the problems in that regard are noted above. Other aspects of the approach are highlighted below.

The Court's analysis begins with a recital of the Hymn to Free Enterprise[21], and thereafter evidences a hostility of tone and approach to any activity which restricts markets in any way. The Court fails, however, to provide an analysis of what is problematic about such conduct. The language of the decision suggests a willingness to regard vertical restraints as aspects of a criminal conspiracy. That is unfortunate. The genius of the *Competition Act* is to recognize that most vertical practices tend to be efficiency enhancing and pro-competitive. Thus, they are reviewable only upon application by the Director to the Competition Tribunal. They are not subject to attack by competitors or others in the distribution channel. If the courts are willing to sympathetically entertain arguments that such conduct constitutes criminal conspiracy, or price maintenance[22], or some other criminal conduct under the *Competition Act,* that will have the effect of undermining the structure of the *Competition Act*. If such conduct is open to civil attack, this will have a significant chilling effect on business decisions and, consequently, on the dynamism, efficiency and innovativeness of the Canadian economy.

This is the principal difficulty with the *Caterpillar* decision's treatment of *Competition Act* issues. As well, there are some other competition law aspects of the case which are deserving of comment.

The Court found that it need not determine whether Caterpillar's conduct constituted refusal to deal or market restriction, as it could found the necessary unlawful conduct on breach of the Peoria dealer agreement. That suggests, however, that if Caterpillar's conduct did constitute such reviewable conduct, that reviewable conduct could constitute the "unlawful" element of the plaintiff's tort claim. Yet the Court never came to grips with the issue of whether such conduct, even if so found, was unlawful. If the *Caterpillar* Court accepted the analysis of that issue as set out in the *Harbord Insurance*[23] case it would have been useful to say so. More importantly, if it rejected the *Harbord Insurance* analysis it should have expressly dealt with the reasons why it did so.

A second difficulty is found at page 24 of the decision. There the Court states:

> I accept the plaintiff's submission that it is not necessary for the Plaintiff to show that the Caterpillar Defendants met with their authorized dealers and specifically set out an agenda to deal with the Plaintiff and other resellers.[24]

Limited to the words in that statement, the position is unobjectionable. It is not necessary to have direct evidence of a conspiracy; circumstantial evidence will do. If, however, as the quote read in context suggests, the Court accepted that it is appropriate to infer a conspiracy on the basis of action which is as easily explained by the operation of conscious parallelism and enlightened self-interest, as it is by the existence of an agreement, then the statement is problematic.[25]

A third difficulty is that the Court was somewhat inconsistent as to whether unilaterally imposed conduct could constitute a conspiracy. In the quote set out above from page 25 of the *Caterpillar* decision[26] the suggestion was that unilateral conduct, imposed by a supplier and acquiesced in by the customer/distributor, might be sufficient to found a conspiracy. The Court expressly declined to determine the point. By contrast, at page 101 of the decision the Court stated, regarding the plaintiff's conspiracy allegation with respect to Caterpillar's parts policy:

> In part XVII of this judgment, I have considered the 1982 Parts Transshipment Policy and concluded that it was a unilateral act on the part of Caterpillar. The evidence fails to establish common design. I am unable to conclude that the Parts Policy was in furtherance of the conspiracy alleged by the plaintiff.[27]

The reasoning in this later quote is preferable to the Court's earlier unwillingness to determine the issue. It is also consistent with the reasoning of Mr. Justice Eberle of the Ontario Court, General Division in the recent case of *Du Pont* v. *Dennis*, where he stated:

> Du Pont's decision to cease selling to Interesins and other purchasers and sell only to Muchlstein was a unilateral decision by Du Pont. Du Pont alone could not engage in a conspiracy.[28]

However, the language at page 25 of the decision is unfortunate in suggesting that unilateral conduct may be sufficient to found a conspiracy.

Finally, the Court appears to have had little receptiveness to Caterpillar's argument that it had a legitimate business justification for discouraging Miller from establishing a business of supplying Caterpillar branded parts. The evidence was that users could buy either genuine Caterpillar made and branded parts, or "will fit" parts, made by others but which would work in Caterpillar machines. Typically, customers are somewhat hesitant to use the "will fit" parts and require a period of time to be convinced to use them. During this time the supplier must have access to genuine Caterpillar parts as well as the "will fits". It was Miller's express intention to convert parts users from buying genuine Caterpillar parts to using "will fit" parts. Once Miller had educated its customers as to the usefulness and economy of these alternately sourced "will fit" parts, its customers would be less likely to demand genuine Caterpillar parts. Thus, by allowing Miller access to its genuine parts, Caterpillar was undermining the long term health of its parts business. Despite understanding this question as a matter of fact, the Court in *Caterpillar* showed no interest in this legitimate business justification for Caterpillar's action in seeking to deny Miller a supply of genuine Caterpillar parts. Yet one can scarcely imagine a clearer or more legitimate motive for a manufacturer not wishing to permit a distributor to handle its goods.

RESULT

In 1986 Miller went into receivership. The Court found that Caterpillar's actions did not hasten Miller's demise, but denied it revenues and profits prior to that demise. The Court awarded damages to Miller of five million dollars for interference with contractual relations, with respect to Miller's parts and service business. It would also have been willing to find unlawful interference with economic interests, had that been necessary to support the damages award. The decision is not under appeal at the time of writing.

COMPARISON WITH RECENT ILLINOIS DECISION

Coincidentally, ten days after the *Caterpillar* case was decided in Alberta, a decision of the Illinois Court of Appeal[29] was released, dealing with a challenge by a U.S. based transshipper to Caterpillar's policy of refusing to permit its parts to be transshipped. The decision addressed the same issues as did the *Miller* v. *Caterpillar* case, although from a different perspective (the country of export rather than import). Otherwise, it is very different from the *Miller* v. *Caterpillar* case. It is 11, rather than 215, pages in length. In the 11 pages, however, it succinctly and effectively addresses many of the competition law issues which *Miller* v. *Caterpillar* avoids. The following quoted passages are illustrative:

- The effect of vertical restraints, such as territorial and customer allocations imposed by a supplier on its retailer, are not manifestly anticompetitive and promote intrabrand competition.[30]

- It is established that a manufacturer generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently....Unilateral conduct alone is not sufficient to establish a conspiracy, and the plaintiff cannot overcome this burden merely by alleging that the manufacturer

announced the restrictive policy to its dealers and then implemented enforcement of that policy....To satisfy its burden of proof, plaintiff was required to present evidence establishing that Caterpillar did not act independently in formulating and implementing its replacement parts policy.[31]

- A conspiracy will not be found where a dealer or distributor involuntarily complies with a manufacturer's restrictive parts policy in order to avoid termination of its product source....There can be no conspiracy where the party imposing the alleged restraint does not need the agreement of the other party. It is inappropriate to consider intrabrand restraints as "agreements to conspire," and manufacturers are permitted to independently impose appropriate vertical restraints where the manufacturers merely exercise the unilateral power over their own products....In these situations, no antitrust conspiracy will be found even if the manufacturer has forced others to abide by the restraints.[32]

- Although vertical restraints, such as the 1990 parts policy at issue here, invariably reduce intrabrand competition and may result in a higher aggregate price for the product, this is insufficient to prove a monopolization claim....Absent proof of any purpose to create or maintain a monopoly, a manufacturer engaged in an entirely private business, is free to choose the parties with whom it will deal....Proof of a monopoly claim requires that the plaintiff establish conduct designed to maintain or enhance monopoly power improperly....Where a monopolization claim has been alleged, courts will consider whether the defendant engaged in the challenged conduct for a legitimate business reason or solely to insulate the firm from competitive pressure.[33]

- Moreover, a manufacturer cannot be charged with antitrust violations if it monopolizes its own brand....A manufacturer is entitled to the benefits of maintaining a "monopoly" over products which it has developed and produced because the incentives for innovation and development of beneficial products would be stifled if manufacturers were denied a monopoly over their own unique products....Monopolization of a single brand is not an antitrust violation....Accordingly, Caterpillar's implementation of the 1990 export parts policy was insufficient to support a monopolization claim.[34]

- The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction in intrabrand competition and stimulation of intrabrand competition....Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers....Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited....by the ability of consumers to obtain competing products from other manufacturers. Vertical restrictions promote intrabrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of its products.[35]

- Manufacturers use vertical restrictions to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products; service and repair are vital for many products, and the availability and quality of such services affect a manufacturer's

goodwill and the competitiveness of its product....Marketing efficiency is not the only legitimate reason for a manufacturer's desire to exert control over the manner in which its products are sold and serviced; because society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products, vertical restrictions have been justified on the basis of the legitimacy of these concerns.[36]

Conclusion

The decision of the Alberta Court of Queen's Bench in *Miller* v. *Caterpillar* is disappointing from a competition law perspective. Disappointing because it failed to clearly address the key competition law questions put to the Court; and as well disappointing because the decision, by its tone, suggested a hostility to vertical marketing practices and legitimate business justifications. It shows some receptiveness to using the conspiracy and reviewable conduct provisions of the *Competition Act* in unexpected and arguably inappropriate ways. By contrast, ten days later the Illinois Appellate Court, in addressing the same distribution policy, dealt clearly and concisely with these competition law issues. That Court, both literally and, perhaps, philosophically, is from Chicago. Even if the approach taken by the Illinois Appellate Court is a matter for debate, however, it at least came clearly to grips with the competition law issues and provided a definite position on them. Failure by the Court in *Miller* v. *Caterpillar* to thoughtfully address the competition law issues undermines the usefulness of the decision as a precedent for other Canadian courts which may be asked to address vertical practices as aspects of civil causes of action. It is submitted therefore that while *Miller* v. *Caterpillar* contains various passages suggesting hostility to such conduct, that language must be read in the context of the result in the case. The Court ultimately rejected all of the *Competition Act* allegations, and declined to come to firm conclusions on the competition law issues raised by the case.

Notes

1 *Ed Miller Sales & Retail Ltd.* v. *Caterpillar Tractor Co., Caterpillar America Co., Caterpillar of Canada Ltd. and R. Angus Alberta Ltd.* (8 March 1994), Edmonton 8003/12393 (Alta. Q.B.).

2 *Ibid.* at 72. I am advised by counsel that the theory of the "myth of the exclusive territory" was not advanced by the parties in argument, but was found for the first time in the judgment of the Court.

3 *Ibid.* at 106.

4 (1989), 27 C.P.R. (3d) 380 (Ont. H.C.J.).

5 *Canada Cement La Farge* v. *B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452.

6 *Daily Mirror Newspapers Ltd.* v. *Gardner*, [1968] 2 Q.B. 762 (C.A.), and *Brekkes* v. *Cattel*, [1972] 1 Ch.D. 105.

7 *Supra*, note 4 at 387.

8 *R.D. Belanger & Associates Ltd.* v. *Stadium Corp. of Ontario* (1991), 26 A.C.W.S. (3d) 509, [1991] O.J. No. 538-OCJ, per Hoilett J.; revd 5 O.R. (3d) 778.

9 *Ibid.* at 13.

10 *Ibid.* at 782.

11 *Procter & Gamble* v. *Kimberley Clark of Canada Ltd.* (1991), 40 C.P.R. (3d) 1 (F.C.T.D.), 49 F.T.R. 31.

12 "From a fraud an action does not arise" - "A court will not lend its aid to a party which founds its action upon an immoral or illegal act."

13 *Supra*, note 11 at 55.

[14] See *Eli Lilly & Co.* v. *Marzone Chemicals Ltd.* (1976), 29 C.P.R. (2d) 253 (F.C.T.D.), affd 29 C.P.R. (2d) 255, [1977] 2 F.C. 104, 14 N.R. 311 (C.A.), and *Bell Canada* v. *Intra-Canada Communications Ltd.* (1982), 62 C.P.R. (2d) 21 (F.C.T.D.), revd on other grounds 70 C.P.R. (2d) 252 (C.A.).

[15] *Harbord Insurance Services Ltd.* v. *Insurance Corporation of British Columbia* (1993), 9 B.L.R. (2d) 81, 13 C.C.L.I. (2d) 262 (B.C.S.C.).

[16] *Ibid.* at 88.

[17] *Ibid.*

[18] *Ibid.* at 89.

[19] *Supra*, note 1 at 25.

[20] *Ibid.* at 26-27.

[21] "Free enterprise does not, of course, mean silly competition,
And cutting prices is a sin of which there is no remission;
A 'Gentleman's Agreement' is the best of all devices
To stabilize our dividends, our markets, and our prices;
For taking risks we've little love, we set our whole affection
On something like Monopoly, with adequate protection."
J.D. Ketchum, "Hymn to Free Enterprise" in L.A. Skeoch, Restrictive Trade Practices in Canada, p. vii. See also *supra*, note 1 at 18.

[22] See *Polaroid Canada Limited* v. *Continent Wide Enterprise Limited* Ontario Court General Div. File no. 18189/87Q- decision currently on reserve.

[23] *Supra*, note 15.

[24] *Supra*, note 1 at 24.

[25] See *R.* v. *Canadian General Electric* (1976), 75 D.L.R. (3d) 664 (Ont H.C.J.) at 674-675, 691-693 and 700; *Paradis* v. *The King* (1934), 61 C.C.C. 184 (S.C.C.); *R.* v. *Howard Smith Paper Mills et al.*, [1954] O.R. 543 (Ont. H.C.J.); and *R.* v. *Cooper* (1980), 115 D.L.R. (3d) 21 (S.C.C.).

[26] *Supra*, note 1 at 25.

[27] *Ibid.* at 101.

[28] (1993), 50 C.P.R. (3d) 53 at 58.

[29] *Intercontinental Parts, Inc.* v. *Caterpillar Inc. and Patten Industries, Inc.* 1-92-0420 (Appellate Court of Illinois, March 18, 1994).

[30] *Ibid.* at 5.

[31] *Ibid.* at 7.

[32] *Ibid.* at 7-8.

[33] *Ibid.* at 8-9.

[34] *Ibid.* at 9.

[35] *Ibid.*

[36] *Ibid.* at 10.

CANADIAN COMPETITION RECORD

CONFIDENTIALITY OF INFORMATION PROVIDED TO THE DIRECTOR: PROTECTION AND PITFALLS UNDER THE *COMPETITION ACT**

By: Susan M. Hutton and Lawson A.W. Hunter, Q.C.
Stikeman, Elliott, Ottawa

I. INTRODUCTION

As the chief enforcer of antitrust law in Canada, the Director of Investigation and Research (the "Director") under the *Competition Act* (the "Act") is charged with commencing an inquiry whenever he has reason to believe that there has been a violation of the Act's criminal provisions or that grounds exist for making a civil order in respect of anti-competitive behaviour or mergers.[1] An indication of the fundamental importance to Parliament of antitrust enforcement[2] is the strong measures available to the Director to compel the target of such inquiries[3] and third parties alike to provide information relevant to the inquiries. Such measures include the power to subpoena witnesses to give testimony under oath,[4] to produce documents[5] and, upon obtaining a court order, the power to search premises and seize potential evidence pertinent to the inquiry.[6] As a matter of practice, however, the Director seldom resorts to the use of these compulsory powers, particularly in civil matters, preferring where possible to obtain information from both targets and third parties without having to resort to compulsory measures. In the shadow of such sweeping powers of compulsion, the great majority of requests for the provision of information to the Director are complied with voluntarily.

Since the purpose of the Director's inquiries is the preservation of competitive markets in Canada, it is not surprising that the information supplied to the Director invariably includes the most sensitive commercial details of the operations, strategies, and financial health of the businesses and industries concerned. Safeguarding the confidentiality of this information and, in particular, preventing this information from being revealed to competitors is obviously of vital concern to the sources of such information. Moreover, insofar as the disclosure of such information to competitors might actually upset the competitive balance in a market, such disclosure could also be inimical to the very purpose of the Act. To the extent that disclosure of sensitive business information, or the potential for such disclosure, would discourage businesses from voluntarily disclosing information to the Director, it would also undermine the Director's program of compliance and thus the very effectiveness of the Director's efforts to preserve efficient, competitive markets in Canada.

Historically, the discretion and integrity with which the Director and his staff have treated all information provided to them, regardless of the legal circumstances under which it is provided, have been sufficient to ensure an admirable degree of cooperation with the Director's investigations. Nonetheless, the Act distinguishes between information provided voluntarily and that obtained under compulsion. The extent

of the protection which is legally afforded to information obtained pursuant to the exercise of the Director's powers of compulsion or statutory merger review is clearly of vital concern to the businesses who provide information in such circumstances. Most businesses provide information when requested to do so voluntarily, however, and recent questions as to the degree to which information provided voluntarily to the Director is actually safeguarded under the Act[7] have raised serious apprehension. Moreover, the expressed desire of the Director to cooperate more openly with antitrust enforcement agencies in other countries[8] raises the issue of whether such cooperation is feasible under the Act in its current form, and the proper balance which should be struck between enforcement efficiency and the protection of legitimate business interests in confidentiality.

The following sections of our paper address each of these questions in turn. To the extent that the Director's will and ability to protect all confidential business information provided to him is found to be less than clear, we urge the Director to take immediate steps to reassure the business community, lest the enviable level of cooperation of the Canadian business community with the administration and enforcement of the Act be undermined. Even with such assurances, however, business leaders should know that statutory reform ultimately will be required, in order to ensure that policies toward the protection of confidential information are consistent, as well as to address the emerging need to cooperate in anti-trust enforcement internationally.

II. CONFIDENTIALITY OF INFORMATION UNDER THE ACT

Subsection 10(3) of the Act provides that all inquiries conducted by the Director "shall be conducted in private". Just as certain court proceedings may be held *in camera*, with the result that information disclosed in the proceedings is not publicly divulged, the import of subsection 10(3) is to prevent the public disclosure of any information gathered by the Director pursuant to an inquiry commenced under section 10 of the Act[9] and to ensure that the process by which such information is gathered is not open to public scrutiny.

This prohibition on public disclosure is reinforced by subsection 29(1),[10] which prohibits anyone involved in the administration and enforcement of the Act from communicating, among other things, the identity of anyone from whom information has been obtained, information obtained pursuant to the Director's compulsory powers to gather evidence, and information contained in a pre-merger notification or ARC request. The exceptions to this prohibition permit disclosure to 1) a Canadian law enforcement agency, or 2) for the purposes of the administration or enforcement of the Act. Subsection 29(2) provides that in any event disclosure is permitted in respect of any information that has been made public. By virtue of section 126 of the Canadian *Criminal Code*, willing disclosure of non-public information in violation of the prohibition in subsection 29(1) of the Act is an indictable offence, punishable on conviction by up to two years in prison. The question of a violation of section 126 of the Code does not usually arise, however, as it has always been the Director's policy that his and his staff's entire enforcement activities are confidential.

With respect to the impact of the statutory language, subsections 10(3) and 29(1) taken together constrain the Director from disclosing information compelled pursuant to an inquiry to any third party other than a "Canadian law enforcement agency" or for the purposes of the administration or enforcement of the Act. The first exception to the rule of non-disclosure contained in subsection 29(1), therefore, limits disclosure to Canadian law enforcement agencies. In our view, the explicit reference in this first exception to domestic law enforcement agencies negates any possible implication that disclosure under the second exception, for the "administration or enforcement of this Act", contemplates unfettered disclosure to foreign law enforcement agencies, a topic to which we will return.

It should be noted, however, that the first exception to the rule of confidentiality would permit the Director to disclose information gathered pursuant to a subpoena or search, or pursuant to a pre-merger notification or ARC filing, to any law enforcement agency in Canada, and apparently (given the second exception) for purposes other than the administration or enforcement of the Act. This may be contrasted with the rather more narrow provision of the *Income Tax Act*[11] (the "ITA"), which protects information gathered for the purposes of the ITA or prepared therefrom which directly or indirectly reveals the taxpayer's identity ("taxpayer information"). Taxpayer information is protected from domestic[12] disclosure for purposes other than the administration or enforcement of the ITA or related fiscal legislation, except in the case of evidence required in criminal or tax enforcement proceedings.[13] Disclosure to any Canadian law enforcement agency, with no explicit limitation on the purpose of the disclosure would appear to be broader than that permitted under the ITA. In addition, what constitutes a "Canadian law enforcement agency" is not clear. Presumably, police forces and the federal and provincial Attorneys General are encompassed in the exception. What of Revenue Canada, however, or the Ontario Securities Commission? Whether these bodies constitute "law enforcement agencies" under the Act is not clear, although it would not seem unreasonable in our view to suppose that all bodies charged with law enforcement responsibilities could fall within the scope of this provision.

The question then arises as to the proper boundary of disclosure under the second exception, that is, disclosure for the purposes of the "administration or enforcement of this Act". Bériault and Renaud[14] have noted the lack of jurisprudence interpreting these words. On their face, the words used are broad and might encompass any disclosure which the Director felt might advance an inquiry, even an inquiry other than that for which the information was obtained. However, words of general import are to be interpreted in light of the purpose of the Act and the context in which they are found.[15] This principle would appear to be particularly applicable in the case of an exception to a rule which is designed to safeguard the rights of citizens from the otherwise intrusive actions of the state.[16] Moreover, such a broad interpretation of "the administration or enforcement of this Act" would strip the privacy provision of subsection 10(3) of all meaning since, if the Director felt that a public plea for information in a given case would yield results, he would presumably be able to divulge information relating to the case in the effort to "administer" the Act. Indeed, such an interpretation of the second exception would render the confidentiality guarantee contained in subsection 29(1) itself meaningless, a result which Parliament cannot have intended.

In order to give meaning to this exception to the rule of confidentiality it is necessary to consider the practical situations in which the Director might be tempted to disclose information in pursuit of his duties. For instance, it would be extremely difficult for the Director to conduct effective and efficient inquiries into a multitude of complex markets without hiring outside experts and, at times, outside legal counsel. It is therefore reasonable to suppose that Parliament meant to permit disclosure of confidential information to such outside experts and counsel, provided they are properly bound to honour confidentiality themselves. Bériault and Renaud point out that such outside agents are caught within the confidentiality provisions of subsection 29(1) as being themselves engaged in the "administration or enforcement of the Act",[17] and therefore reject this category of people as forming a potential basis for the second exception. In our view, however, stating the fact that the people who are permitted to receive information are subject to the duty to hold such information confidential does not define who is permitted to receive that information in the first place. Assuming outside experts are engaged in the "administration or enforcement" of the Act, it is to us entirely logical that Parliament provided within subsection 29(1) both that information could be disclosed to outside experts and counsel, and that further disclosure by such third parties would normally be prohibited.

Similarly, it is clear that in order to administer and enforce the Act, the Director must be free to disclose non-public information in the course of enforcement proceedings brought before courts or the Competition Tribunal (the "Tribunal"). Again, Bériault and Renaud reject this class of disclosure on the basis that it is already permitted.[18] They cite *Middlekamp*[19] and *Southam*[20] to the effect that subsection 29(1) does not create an exception to the rules of evidence in Tribunal proceedings. In our view, however, those cases merely confirm that the categories of permissible disclosure under the exceptions contained in subsection 29(1) do include disclosure in the context of judicial or administrative enforcement proceedings. This view is reinforced by the fact that the Director's powers to enforce the Act would be meaningless if such disclosure were not permitted. Simply because the need for an exception to a general rule is obvious does not mean that it need not be explicitly stated. Moreover, this interpretation is apparently shared by Strayer J. who, in *Director of Investigation and Research* v. *Air Canada et al.*,[21] interpreted this exception "to mean that any material which has not been protected pursuant to s. 19 (privilege) can be used by the Director in launching an application under the Act".

Upon closer inspection of these two plausible disclosure scenarios falling under the "administration or enforcement of this Act", we note that each entails some safeguard against further disclosure. Disclosure in public proceedings, for example, does not necessarily mean that the information will be publicized, since courts and the Tribunal alike have the power to protect truly sensitive information with the issuance of protective orders, and resort to *in camera* proceedings,[22] and documents obtained on discovery cannot be used for purposes outside of the proceedings without permission from the court or Tribunal.[23] As previously noted, outside agents are themselves subject to confidentiality under subsection 29(1). Thus, in each of the two instances which we have identified as likely candidates for permissible disclosure pursuant to the "administration of enforcement of this Act", we also note that further disclosure is prohibited by subsection 29(1)

itself, (courts and the Tribunal can also be said to be engaged in the administration or enforcement of the Act, and so bound by the rule in subsection 29(1)) and, in the case of tribunals, their own powers to protect confidential information.

Having determined two circumstances in which disclosure of confidential information by the Director would be necessary for the effective enforcement of the Act, and which would not otherwise be permitted without the second exception, we cannot agree with Bériault and Renaud's conclusion that the nature of the permission contained in section 29 to disclose information for the administration or enforcement of the Act is a mystery.[24] The question arises, however, as to whether this exception, worded as it is in a rather broad and vague manner, was intended to permit disclosure other than under such tightly controlled circumstances.

For instance, is the Director free by virtue of this exception to reveal cost information provided to him by a firm which is the target of a predatory pricing investigation to that firm's principle rival in order to gain the rival firm's view as to whether such cost data is accurate and appropriate for the industry? On the civil side, is the Director permitted to tell smaller firms in an oligopolistic industry that the industry "leader" is under investigation for abuse of dominance in order to gather information relating to the inquiry? With respect to mergers, is the Director permitted to reveal a non-public merger which has been notified under Part IX in order to gather information relating to the likely impact of such a merger on the remaining competitors?

In our view, disclosure for the purposes of the "administration or enforcement of this Act" must be read so as to permit the Director to do his job, but no more. Since the words appear as the exception to a rule which safeguards legitimate business interests in the confidentiality of the most sensitive kind of information, disclosure should not be assumed to be sanctioned whenever such disclosure would conceivably be useful to the Director. When interpreting the admittedly vague words in the exception, one must be mindful that they appear in the context of a provision which otherwise creates a criminal offence for the wilful disclosure of information and in the context of a statute which also provides that inquiries are to be conducted "in private".

Turning to the three scenarios queried above, it seems to us that gathering information from rival firms as to their own cost structures would certainly be necessary in a predatory pricing investigation, but that independent experts could be hired to evaluate the accuracy and appropriateness of the target firm's cost data in light of the information gathered from the rival firms. Disclosure to the rival firms themselves would not be required in order to conduct a thorough and efficient investigation.

With respect to an investigation into an alleged abuse of dominant position, it would likely be impossible to gather information from smaller competitors as to the impact of certain practices on those firms without revealing even if not in so many words the identity of the target of the inquiry and the nature of the

allegations against it. On the other hand, in this situation, the nature of the impugned practices and their impact will already be known to those smaller firms. Discussion of the practices in a general way in the context of inquiring as to their effect might be necessary, but this would not normally reveal anything of which the smaller firms were not already aware.

As to the conduct of an inquiry into the likely impact of a merger in a market, so long as the parties to the proposed transaction have not made the proposal public, it would behoove the Director to take special care not to divulge the plan. The announcement could have a serious impact upon the values and strategies of the firms involved, as well as their remaining competitors, with implications not only commercially but also for other aspects of public policy such as insider trading and securities law. Since the Director can challenge a merger any time within three (3) years of its completion, we submit that the delay entailed in waiting until a merger is public in order to review its effects does not seriously compromise the enforcement of the Act and was in fact contemplated by the provision of this three year period.

In our view, therefore, disclosure for the "administration or enforcement" of the Act does not encompass disclosure beyond those disinterested third parties who are directly engaged by the Director to assist in the conduct of the inquiry, or who will of necessity be empowered to hear evidence in judicial or administrative enforcement proceedings. The disclosure to third parties such as competitors and potential witnesses of confidential information gathered in an inquiry or pursuant to merger review was not contemplated in the enactment of subsection 29(1). Moreover, disclosure of the type we have identified as being permitted under this heading is subject to restrictions on unwarranted further disclosure, both by the very terms of subsection 29(1) and in the case of courts and the Tribunal by their ability to issue protective orders or go *in camera* in respect of extremely sensitive information. There are no such assurances in the case of competitors and other third party witnesses. The lack of any statutory duty binding third parties such as competitors not to divulge information disclosed by the Director reinforces our view that disclosure to such third parties was not contemplated in the scope of permissible disclosure under subsection 29(1).

It is clear, therefore, that the Director is not normally free to divulge information gathered under the mandatory provisions of the Act, and certainly not to business rivals. The question nonetheless remains as to whether such a person could force its disclosure under the provisions of the *Access to Information Act*.[25] This Act provides Canadians with the right to demand production of documents in the possession of federal departments and other institutions, subject to certain exceptions. Happily, one of these exceptions expressly excludes information covered by subsection 29(1) of the Act.[26] Therefore, no *Access to Information* request can be fulfilled in respect of non-public information covered by subsection 29(1).

It appears, therefore, that information provided to the Director in the context of a pre-merger notification, a request for an ARC, or pursuant to the Director's compulsory powers of search, seizure and subpoena, is assured of confidential treatment under the current provisions of the Act. It is important to note that this protection covers all such non-pubic information, regardless of whether or not it would be considered

truly sensitive, and for all time.[27] At the same time, disclosure is permitted in certain limited cases in which the public interest in Canadian law enforcement in general, or in the effective administration and enforcement of the *Competition Act* in particular requires disclosure, and in which the wider dissemination of extremely sensitive information can nonetheless be adequately controlled to protect business secrets from disclosure to rivals.

III. CONFIDENTIALITY OF INFORMATION SUPPLIED VOLUNTARILY

Information (other than the identity of any person supplying information obtained pursuant to the Act) which is provided "voluntarily" to the Director is not protected by the confidentiality requirements of subsection 29(1). By "voluntary" information, we mean all information provided pursuant to requests for information whether before or after the commencement of an inquiry, as well as all information provided in the pursuit of an advisory opinion or in the context of lodging a complaint under the Act indeed any information whose production is not compelled by the Director, required to be filed in connection with a qualifying merger transaction, or supplied in a request for an ARC.

Information provided voluntarily during an inquiry is protected by subsection 10(3) which provides that all inquiries will be conducted "in private". Therefore, information other than the identity of the source of information (which is protected unconditionally by subsection 29(1)), technically speaking is only protected from public disclosure if it is provided in the context of a formal inquiry. Information provided voluntarily outside of the context of a formal inquiry (the majority of merger cases, and requests for advisory opinions) is not statutorily protected under the Act. Although as a matter of practice the Director maintains the fact of pre-inquiry examinations or requests for advisory opinions and all information provided in relation thereto in the strictest confidence, there is in fact no statutory barrier in the *Competition Act* itself to the disclosure of the nature of the examination or of information voluntarily supplied.[28]

Parties who find themselves to be the object of "preliminary" examinations (which can be as substantive as many formal inquiries) find themselves in the position of being "damned if they do, and damned if they don't". That is, if they do voluntarily cooperate with the Director's "examination" in the hopes that he will conclude there is no reasonable basis for commencing an inquiry, any information they supply is not statutorily protected. On the other hand, a refusal to supply information voluntarily is likely to lead to the commencement of a formal inquiry in order that the Director can obtain the necessary information to look into the issue. Often, firms in this situation chose the lesser of two evils, trust in the historical integrity and discretion of the Director, and cooperate with the "examination". Should their faith be shaken in the future, however, they might actually be forced perversely to insist that a formal inquiry be commenced before supplying information to the Director.

Once a formal inquiry is commenced, information provided voluntarily is protected by subsection 10(3), which provides that all inquiries "shall be conducted in private". Again, these words do not appear to have

been the subject of judicial commentary in the context of the Act. In the criminal context, however, it has been held that the term *in camera* means "without publicity, privately, and, if possible, in the private office of the judge or a private room".[29] By analogy, therefore, subsection 10(3) would ensure that the Director does not announce the commencement of an inquiry, and that no persons who are not necessary for the conduct of the inquiry will be permitted to be present during the necessary examinations, nor to have access to the information gathered in the course of the inquiries.[30]

If, for the sake of argument, we suppose that the term "in private" is taken to mean the same thing as "*in camera*", then it would appear that, although the general public will not be informed as to the existence or progress of an inquiry, the disclosure of this and other sensitive information (other than the source of the information) by the Director to witnesses in the course of conducting the inquiry is technically permitted under the Act. The fact that such information is not explicitly protected by the Act from disclosure "in private" is reinforced by the fact that subsection 10(3) is not worded in such a way as to prohibit conduct or mandate action, and so a breach would not necessarily create liability under section 126 of the *Criminal Code*.

For anyone looking to statutes for reassurance that business information will be safeguarded, the sense of risk that information provided voluntarily to the Director might conceivably be disclosed to third parties is reinforced by the fact that such information is not covered by the mandatory exclusion from the *Access to Information Act*. The clear-cut exception mandated by subsection 24(1) of that Act pertains only to information covered by subsection 29(1) of the *Competition Act*. As Bériault and Renaud point out, there are several other exemptions under which the Director might refuse to disclose such information in response to a third party request for access. Subsection 20(2) of the *Access to Information Act*, for instance, would oblige the Director, upon receipt of an access request, to refuse to divulge financial, commercial, scientific or technical information which is confidential in nature and has been consistently treated as such by the provider of the information. The Director would also be obliged to refuse to disclose information if such could reasonably be expected to result in material financial loss or gain to or prejudice the competitive position of a third party, or to interfere with contractual or other negotiations of a third party.[31]

Even if the mandatory exemptions to access would not apply, subsection 16(1) of the *Access to Information Act* provides the Director with the discretion to refuse disclosure of all information gathered by him in the course of an inquiry. In practice, therefore, we expect that the Director would refuse to divulge case specific information requested under the *Access to Information Act*, even if such information had been provided to him voluntarily. Nonetheless, with the *Access to Information Act* as it stands, firms providing information voluntarily must realize that disclosure pursuant to access requests might not be prohibited, and that the burden would be on the Director to justify the non-disclosure if his refusal were challenged under the terms of that Act.

Thus, although the Director has indicated that his practice is to treat all information gathered under the Act as if it were covered by subsection 29(1), there is no legal requirement that he do so, and no penalties would be mandated by the Act should the Director disclose "voluntary" information provided outside an inquiry without the consent of the person providing the information. As Bériault and Renaud argue in their paper for this Panel, the lack of explicit protection of voluntarily supplied information under subsection 29(1) of the Act does not deprive such information of all protection. Inquiries are still conducted in private by virtue of subsection 10(3), and the Director is still bound by the doctrine of privilege.

Nonetheless, there does not appear to us to be any principled basis for the distinction drawn in the Act between information compulsorily or voluntarily supplied, nor for information supplied before or after the formal commencement of an inquiry. If confidential information is worthy of protection when provided under subpoena, it is no less worthy of protection when supplied under threat of a subpoena. Similarly, if there is a public interest in preserving the confidentiality of information supplied pursuant to an inquiry commenced under subsection 10(1), this public interest in privacy must also apply to information supplied under threat of the commencement of an inquiry. If anything, the public interest in the protection of "voluntary" information would be greater than for information to which subsection 29(1) applies, since voluntary cooperation obviates the need for adversarial-style enforcement with all of the attendant costs, delays and frustrations for all sides.

Indeed, it is largely because of faith in the Director's desire and ability to safeguard the highly sensitive information to which he must have access that Canadian businesses have been willing to cooperate with the Director in the voluntary provision of information. Without legally binding safeguards, however, this faith might easily be shattered, with the result being a return to adversarial relations between the Director and Canadian business and a return to the legal wrangling and arguments over procedure which typified enforcement efforts during the 1960s and 1970s.

In our view, both the *Competition Act* and the *Access to Information Act* should be amended to provide all information gathered by the Director for the purposes of the "administration or enforcement" of the Act with the same confidentiality protection, regardless of the procedural technicalities which have been invoked in order to obtain the information. Until such time as this can be accomplished, the Director should be willing to enter into undertakings with parties concerned about confidentiality to provide them with no less protection than is afforded under subsection 29(1).[32]

Furthermore, recent statements by the Director and others have indicated a desire on his part to exchange information concerning specific cases with foreign antitrust authorities in an effort to increase international cooperation and the effectiveness of national antitrust enforcement in respect of transborder business activities.[33] Such statements bring into question the extent to which information, whether covered by subsection 29(1) or not, may be provided to foreign antitrust authorities, a subject which we will now address. Even in a purely domestic context, however, faith and trust are fragile qualities, and to the extent

that the business community is becoming uneasy about placing their most sensitive information in the hands of the Director, clear policy statements from the Director both as to his interpretation of his obligations under the Act and his commitment to the preservation of confidentiality outside of those obligations would be welcome, and sooner rather than later.

IV. EXCHANGE OF INFORMATION WITH FOREIGN ANTITRUST AUTHORITIES

In our view, all but the most limited disclosure of subsection 29(1) information gathered by the Director to foreign antitrust authorities is currently prohibited. As discussed above, the exceptions to the rule of confidentiality permit disclosure to Canadian law enforcement agencies, or for the purposes of administration or enforcement of this Act. The express limitation of the law enforcement agency exception to Canadian agencies belies any suggestion that the first exception covers disclosure to foreign antitrust authorities.[34]

This view is reinforced when one compares the limited approach to disclosure permitted under the *Competition Act* with the broad disclosure permitted under subsection 231(2) by investigators appointed pursuant to section 229 of the *Canada Business Corporations Act*[35] (the "CBCA"). Subsection 231(2) of the CBCA provides as follows:

> In addition to the powers set out in the order appointing him, an inspector appointed to investigate a corporation may furnish to, or exchange information and otherwise cooperate with, any public official in Canada or elsewhere who is authorized to exercise investigatory powers and who is investigating, in respect of the corporation, any allegation of improper conduct that is the same as or similar to the conduct described in subsection 229(2).

This provision was added to the CBCA in the December 22, 1978 amendments.[36] It followed upon the decision of the Federal Court of Appeal in *Canadian Javelin Ltd.* v. *Sparling et al.*[37] which upheld the Trial Division's ruling that, in the absence of statutory provisions to the contrary, an inspector appointed pursuant to what is now section 229 of the CBCA could exchange information and otherwise co-operate with other Canadian or foreign law enforcement agencies. The *Sparling* case can be distinguished from cases involving the *Competition Act*, however, as the Act does provide to the contrary. It specifically prohibits the communication of information obtained by the Bureau under its compulsory powers or pursuant to merger filings for all but two limited instances, and limits these exceptions to communication to Canadian law enforcement agencies and for the purposes of enforcing the Canadian antitrust laws.

Furthermore, subsection 29(1) of the Act shows that Parliament was well aware of the difference between disclosure to Canadian law enforcement agencies and disclosure to foreign agencies. Parliament could easily have provided the Director with the same permission to share freely information with foreign counterparts as an inspector under the CBCA if it so desired. Instead, the rule in the *Competition Act* is non-disclosure, while the emphasis under subsection 231(2) of the CBCA is upon the exchange of information. In our view,

the marked contrast between the two provisions only serves to emphasize the intention of Parliament that the Director have only limited ability to disclose information to which the Act provided him with compulsory access.

Moreover, these limitations are not relaxed by other provisions of Canadian law. At first glance, the *Mutual Legal Assistance in Criminal Matters Treaty* (the "MLAT"),[38] and its implementing legislation in Canada[39] may appear to provide a procedure by which the U.S. government might seek to obtain information collected by the Bureau. The MLAT, however, provides a procedure by which criminal law enforcers in the U.S. might obtain court orders to permit them to gather evidence from primary sources of such evidence located in Canada. It does not provide authority for the voluntary provision of confidential information by a secondary source, namely the Director, at the request of U.S. law enforcers.

Moreover, as seen above, the *Competition Act* prohibits the disclosure to foreign law enforcement agencies of documents compulsorily obtained by the Bureau. By virtue of Article VII.2 of the MLAT,[40] provisions in other acts prohibiting disclosure prevail over any inconsistent provisions of the MLAT. Therefore, even if the MLAT on its face provided foreign agencies with potential access to information obtained by the Bureau for use in their own investigations, such requests would be wholly subject to the confidentiality provisions of the Act.

Furthermore, the MLAT expressly stipulates that it does nothing to derogate from any cooperation agreements between Canadian and U.S. law enforcers. The *Memorandum of Understanding between the Government of Canada and the Government of the United States as to Notification, Consultation and Cooperation with respect to the Application of National Antitrust Laws* (the "MOU")[41] is just such an agreement. It was entered into in March of 1984, but superseded prior cooperative understandings between the two countries entered into in 1959 and updated in 1969 and 1977.[42]

One stated purpose of the MOU is to recognize the desirability of cooperation between Canadian and U.S. antitrust authorities to the extent that this is permissible under domestic law. Thus, even under the MOU, any exchange of information between the Director and foreign antitrust authorities would be subject to "compliance with national laws, considerations of national interest and the establishment of adequate safeguards respecting confidentiality."[43] As always, we come back to the confidentiality provisions of subsection 29(1) of the *Competition Act,* and the assurance of subsection 10(3) that all inquiries will be conducted in private, not to mention any protections provided outside of the Act.

From the foregoing, it will be clear that we do not think that the Director has the power at the present time to exchange information covered by subsection 29(1) with foreign antitrust authorities to assist them in their investigations. Indeed, the provision of such information to foreign authorities could expose the Bureau officers involved to criminal liability under section 126 of the *Criminal Code* unless the disclosure were limited to that necessary to permit U.S. authorities to assist, to the extent permitted under U.S, law, in the Director's investigation, and with appropriate safeguards by the U.S. authorities.

This does not mean, however, that we are necessarily opposed to all disclosure by the Director to foreign antitrust authorities. Rather, the need for the development of orderly procedures and the clearcut demarcations of principled disclosure would appear obvious. As more companies in more countries take part in the export trade and opportunities for the provision of services abroad,[44] the possibility that anti-competitive actions undertaken by those companies will have effects in more than one country increases correspondingly. In light of the now widely-accepted "effects" test for antitrust jurisdiction,[45] the increases in world trade flows, and the marked increase in the flow of foreign direct investment in the last decade[46] the need for a coordinated approach to antitrust enforcement -particularly in the case of a small, open economy such as Canada - has become apparent.

The need for some sort of coordinated approach to antitrust enforcement is perhaps most obvious in the realm of merger review. Several high-profile transactions over the past few years have been subject to review by many different national antitrust enforcement agencies, each with their own filing requirements, waiting periods, and substantive merger law.[47] In some cases, such as the purchase by a French and Italian consortium of Boeing's Canadian de Havilland division, the country where the assets were located actually approved the transaction, only to have it blocked by a jurisdiction claiming that the anti-competitive effects in its markets would be too great.[48]

The need for cooperation in antitrust enforcement at the international level must be balanced, however, against legitimate business concerns for the confidentiality of sensitive business information. If information is to be exchanged among enforcement agencies, then Canadian businesses have a legitimate concern that all recipient countries must have at least equivalent statutory protection in respect of the confidentiality of information so obtained (assuming that the Act has been amended as outlined above in order to provide both voluntary and subsection 29(1) information with adequate protection). Moreover, it is not clear that case specific information should be exchanged at all in relation to actions which, although legal in Canada or subject only to civil proceedings before the Tribunal, might be criminal in the United States.[49] The question of whether such information might potentially fall into the hands of private litigants would also have to be addressed, particularly in light of the greater range of private causes of action in the U.S. as well as the trebling of damages in such actions. One would also think that issues such as the provision of notice when information is provided to foreign officials, and any appeal rights to prevent such disclosure, would need to be addressed.

When developing protocols under which information could be exchanged with foreign antitrust authorities at the same time that private interests in confidentiality are safeguarded, ideas might be drawn from other bilateral agreements on antitrust cooperation.[50] The Australia-U.S. agreement, for instance, provides that information supplied by the other country's authorities cannot be used as evidence in any judicial or administrative proceeding without the consent of the supplying country.[51]

Other helpful suggestions might be found in the provisions regarding the exchange of information in various bilateral tax treaties which Canada has entered into, and also in the OECD Model Tax Treaty upon which

many of these treaties are based. The Canada-France Convention, for instance, provides for the exchange of such information as is necessary for preventing double taxation or for the prevention of fraud in relation to taxes which are the subject of the Convention. The information is to be treated as secret and not disclosed to any one not concerned with the assessment or collection of taxes covered by the Convention.[52] The difference between this approach and that contained in the OECD Model Tax Treaty is striking. The OECD Model permits exchanges for the purpose of enforcing the parties' domestic taxation laws (not just the avoidance of double taxation). In addition, disclosure is permitted to courts and tribunals as well as to others involved in the enforcement or prosecution in respect of income taxes. Disclosure in *public* court proceedings is expressly permitted.[53]

Clearly, the private interests in the non-disclosure of sensitive information and the law enforcement concerns mitigating in favour of the exchange of information might very well be different in the context of competition law enforcement than in the context of income tax administration. Even in the content of income tax administration, it is clear that the balance is struck in different ways with different countries. Public debate in Canada about the pros and cons of various possible models for the exchange of information concerning antitrust cases is therefore essential. Such debate must address the policy choices underlying the particular models in the context of the issues raised above. If the era of international antitrust enforcement is inevitable, public debate on the issue of information exchanges and legislative action by Parliament is far preferable to *ad hoc* and perhaps legally debatable decisions taken by the Director alone in the context of the current Act.

V. CONCLUSION

The cornerstone upon which depends the success of the cooperative and compliance-oriented approach of the Director and Canadian business to antitrust enforcement in Canada is the absolute integrity with which the Director deals with all information provided to him under the Act. Statements to the effect that the Director considers himself already to be free to exchange information with foreign antitrust enforcement agencies not only run against the clear wording of the Act in the case of information covered by subsection 29(1), but also raise questions in the minds of Canadian business as to whether the Director might be wavering in his commitment to the confidentiality of information which is provided to him under circumstances which do not enjoy the explicit statutory safeguards of subsection 29(1) of the Act.

In order to quiet the fears which have been raised among the business community by the suggestion that confidentiality is even an issue worthy of discussion, we recommend that the Director publicly affirm his commitment to confidentiality, and clarify his interpretation both as to situations in which disclosure would be legally permissible, and as to situations in which he would actually contemplate disclosing confidential information supplied to him under the Act.[54] Such assurances will no doubt go a long way to reassuring the community that voluntary cooperation with the Director's enforcement efforts will not be penalized. Ultimately, however, such assurances cannot substitute for amendments to the *Competition Act* to ensure

that *all* information gathered by the Director for the purposes of the "administration or enforcement" of the Act will be kept confidential, except for certain necessary and carefully controlled situations.

Looking down the road five to ten years to a point when international antitrust cooperation becomes more than just buzz words,[55] preservation of this unique and highly productive enforcement environment will require careful safeguards for the protection of confidential information and against inappropriate disclosure.

Notes

* A substantially similar version of this paper was originally presented by Ms. Hutton at the Insight/Globe & Mail Conference on Emerging Issues in Competition Law held on March 10, 1994 in Toronto, Ontario and is reproduced here with permission. The paper itself was written prior to the release on July 22, 1994 of the draft Information Bulletin on "Confidentiality of Information under the *Competition Act* " by the Director of Investigation and Research. Ms. Hutton will be submitting an article on the Director's draft Information Bulletin for publication in the fall issue of the *Record*.

1 R.S.C. 1985, c. C-34, *as am.*, section 10.

2 Speaking for the Supreme Court of Canada, Gonthier J. pointed out in *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at 648 that "the Act is central to Canadian public policy in the economic sector" and, at 649, stated that "the Act can thus be seen as a central and established feature of Canadian economic policy".

3 *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 429, 29 C.P.R. (3d) 97, 67 D.L.R. (4th) 161, 76 C.R. (3d) 129, 39 O.A.C. 161.

4 R.S.C. 1985, c. C-34, *as amended*, section 11.

5 *Ibid.*

6 *Ibid.* at section 15.

7 Yves Bériault et Madeleine Renaud, "Divulgation volontaire au Directeur: confidentialité et privilège" (1993), 38 McGill Law Journal 778.

8 In a recent article in the Law Times, the Director was quoted as saying: "we're trying to get in place the tools that allow us to deal with trans-border activity. My belief is that there is a lot of activity going unchecked as a result of our inability to co-ordinate information and co-ordinate investigations with our counterparts" (Shawn McCarthy, "Addy Hopes to Demystify Competition Field," *Law Times*, Vol. 5, No. 7, Feb. 21-27, 1994.

9 See footnotes 29 and 30 and accompanying text, *infra*.

10 Subsection 29(1) provides as follows:

No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(a) the identity of any person from whom information was obtained pursuant to this Act;

(b) any information obtained pursuant to section 11 (order for oral examination, production or written return), 15 (warrant for entry of premises), 16 (search and seizure of computerized data), or 114 (pre-notification of qualifying merger transactions);

(c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; or

(d) any information obtained from a person requesting a certificate under section 102 (advance ruling certificate, or ARC, to the effect that the Director will not challenge a proposed merger).

11 R.S.C. 1952, c. 148, *as amended*, section 241.

12 Section 241 of the ITA, which prohibits disclosure of any information gathered pursuant to the administration or enforcement of the ITA except under the listed circumstances, is expressly overridden in the case of disclosure to foreign tax authorities under the terms of Canada's bilateral treaties for the avoidance of double taxation. See discussion in Part IV, below.

13 ITA, s. 241(3).

14 *Supra*, note 7.

[15] Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at 105.

[16] Driedger, *ibid.*, at 184, citing *A.-G. for Canada* v. *Hallett & Carey Ltd*, [1952] A.C. 427 at 450.

[17] *Supra*, note 7 at 783: "En effet, on pourrait penser qu'ils autorisent la divulgation aux experts ou juristes auxquels le Directeur a recours dans le cadre de ses enquêtes, mais à notre avis ces personnes sont déjà visées par les premiers mots de l'article 29."

[18] *Ibid.*: "On pourrait aussi penser qu'ils visent les cas où l'affaire est portée devant les tribunaux, mais il a cependent été décidé que l'article 29 ne créait pas une règle d'exclusion de la preuve."

[19] *Middlekamp* v. *Fraser Valley Real Estate Board* (1990), 32 C.P.R. (3d) 206 (B.C.S.C.).

[20] *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1991), 38 C.P.R. (3d) 390 (Comp. Trib.), *appeal denied*, F.C.A., May 6, 1993, Court File No. A-429-91, unreported.

[21] (1993), 46 C.P.R. (3d) 312 at 315.

[22] *Competition Tribunal Rules*, SOR/87-373, December, 1990, ss. 15 and 40.

[23] *Director of Investigation and Research* v. *Southam Inc., et al.* (1991), 38 C.P.R. (3d) 395 (Comp. Trib.), *affirmed*, F.C.A., A-634-91, May 6, 1993, unreported.

[24] *Supra*, note 7 at 783: "Si on l'ajoute la divulgation aux organismes d'enquête déjà prévue au paragraphe introductif de l'article 29, on se demande dans quels autres cas d'application ou de contrôle d'application de la loi le Directeur pourrait avoir à divulguer les renseignements énumérés à l'article 29."

[25] R.S.C. 1985, c. A-1.

[26] *Ibid.* at s. 24(1)

[27] To the extent that disclosure of information by the Director in the context of reporting on the disposition of individual cases after they are closed adds to the transparency of competition law in Canada, one might question whether *all* information need to be safeguarded for *all* time. It should be possible to obtain a waiver for the disclosure of information which is no longer sensitive.

[28] There is also no authorization for such disclosure. *Quaere* whether disclosure is not prohibited, however, by the Civil Service Oath of Office and Secrecy by which a Public Service employee promises "that I will faithfully and honestly fulfill the duties that devolve on me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my attention by reason of such employment".

[29] *British Columbia Attorney General* v. *Smith*, [1969] 1 C.C.C. 244 (SCC), at 250.

[30] *C.B.* v. *The Queen*, [1981] 2 S.C.R. 480, at 491: "the words 'without publicity' mean the opposite of 'in open court...'."

[31] *Access to Information Act, supra*, note 25 at subsection 20(1).

[32] *Hillsdown Holdings* confirmed that the Director can properly be made to enter into a confidentiality undertaking as a condition to receiving confidential information during the course of Tribunal proceedings. Since the alternative might be a return to adversarial relations with the business community, we would think that the Director would enter into such undertakings outside of the context of the Tribunal in respect of information supplied voluntarily. Such undertakings would merely ensure that the Director had no greater right to disclose information than he would if he had compelled the production of the information and, as such, would not detract from his ability to conduct inquiries or otherwise to enforce the Act.

[33] *Supra*, note 8. Mr. W.J. Miller, counsel at the Bureau, also reflected this view in a recent address:

> "A subject of considerable controversy is the topical question as to the extent of disclosure which the Director may permit of third party information in the course of an inquiry. This particularly concerns the business community when such disclosure is made to foreign government anti-trust authorities. The Director has, in my view, ample authority to make such disclosure in the ordinary course of the proper, proximate exercise of his mandate. At the same time, I hasten to add that we are aware of the dangers in such disclosure becoming disproportionate to the leeway created under the Act's confidentiality provisions, ss. 29 and 10(3). It may be that a special regime should be established for carefully identified transnational issues. I see little utility in confining enforcement activity respecting internationally coordinated, directed or impacting anti-competitive conduct to particular individual jurisdictions.
>
> However, I understand that the Director intends to act on these matters in the near future, and as all counsel must do, I defer to my client."

(W.J. Miller, address to Osler, Hoskin & Harcourt, Client Group, January 27, 1994, "New Perspectives on Civil Enforcement").

[34] Although there has been no case law interpreting the words "administration or enforcement of this Act" in the context of the *Competition Act*, these words also appear in section 231 of the ITA, a provision giving the Deputy Minister of National Revenue broad powers to require information for the purposes of the "administration or enforcement" of the ITA. In *Montreal Aluminum Processing Ltd.* v. *Canada (Attorney General)* (1991), 46 F.T.R. 177 at 181, the tax authorities required information to be provided from a Canadian source in order to assist the U.S. tax authorities. The trial court held that, absent the overriding provisions of the Canada-U.S. tax treaty, information required for the purposes of the U.S. *Internal Revenue Code* was not sought in relation to the "administration or enforcement of this Act" (*i.e.*, the ITA). The trial court held that the tax treaties overrode this provision of the ITA, however, and granted summary judgement against the plaintiff. The Federal Court of Appeal agreed with the trial court's analysis of the ITA, but went further to hold that it was at least arguable that the mischaracterization of the Requirement as being for the purpose of enforcing the ITA had invalidated the Requirement (F.C.J. No. 951, October 26, 1992 (F.C.A.), unreported). While not directly on point, this case indicates that information sharing with the United States in order to assist in the enforcement of U.S. antitrust law would not qualify for disclosure under subsection 29(1). Disclosure of subsection 29(1) information to foreign antitrust authorities must therefore be strictly limited to that which is required in order to gather information from that jurisdiction for the purpose of the Director's inquiry, and cannot be provided to assist a foreign investigation as a *quid pro quo* for assisting the Director in his, even if the two investigations are related.

[35] R.S.C. 1985, c. C-44, *as amended.*

[36] 27 Elizabeth II, Ch. 19, s. 73.

[37] (1978), 91 D.L.R. (3d) 64.

[38] Can. Gaz. pt. I, 953 (1990).

[39] *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. M-12.6.

[40] Article VII. 2 of the MLAT is implemented by subsection 3(1), *ibid.*

[41] March 9, 1984, 23 I.L.M. 275.

[42] Preamble and paragraph 12 of the MOU, *ibid.*

[43] Paragraph 9 of the MOU, *ibid.*

[44] Statistics drawn from the October, 1993 edition of *World Economic Outlook* (IMF: Washington, D.C.) and from the annual editions of the *International Financial Statistics Yearbook* (OECD: Paris) indicate that world trade has increased by more than 6,000% in nominal terms since 1948. In real terms, average annual growth in world trade has exceeded growth in global production by several percentage points in the 1970-79 and 1980-82 periods.

[45] This ground for accepting subject matter jurisdiction to consider the actions of foreign nationals on the basis of their effects on the domestic economy was expressed in the United States in the oft-cited *Alcoa* decision *(United States* v. *Aluminium Co. of America,* 148 F. 2d 416 (2d Cir. 1945). The European Commission's assertion of jurisdiction on this basis dates back to *Dyestuffs*, July 24, 1969, (1969) J.O. L195/1, CCH Comm. Mkt. Rep. paragraphs 2011.59, 2021.26 and 2524.31. While not expressly dealing with antitrust law, the Supreme Court of Canada's decision in *Libman* v. *The Queen,* [1985] 2 SCR 178, endorsed the application in general of Canadian criminal law on the basis of the effects test (at 202). The OECD Report, *Restrictive Business Practices of Multinational Enterprises,* para. 120 (cited in Graham, "The Foreign Extraterritorial Measures Act", [1986] 11 C.B.L.J. 411, note 76 at 433), states that the "effects doctrine" is recognized in antitrust legislation in Germany, Austria, Denmark, Spain, France, Sweden and Finland and in the case law of Canada, Japan, Switzerland, the United States and the EEC.

[46] Bail cites a more than 34% increase in global foreign direct investment flows between 1983 and 1989 (Bail, "Coordination and Integration of Competition Policies: A Plea for Multinational Rules", *Competition Policy in an Interdependent World Economy*, Kantzenbach, Scharrer and Waverman, eds. (Baden-Baden: Nomos Verlagsgesellschaft, 1993), 291 at 291).

[47] The Gillette/Wilkinson transaction was reviewed by eight different authorities. First proposed in 1989, the transaction was the subject of a consent decree with respect to U.S. intellectual property and voting rights in 1990. The German Federal Cartel Office expressed opposition to the merger on the basis of the 80% market share of the combined entity in Germany. British objections eventually blocked the deal entirely. Meanwhile, in 1992, an OECD roundtable discussion of the transaction was somewhat frustrated in light of the barrier to disclosure posed by each country's confidentiality requirements. This and other instances of multinational merger review are discussed in Addy, "International Coordination of Competition Policies", *Competition Policy in an Interdependent World Economy*, *ibid.*, at 297, and Campbell and Trebilcock, "International Merger Review: Problems of Multi-jurisdictional Conflict", *ibid.*, 129 at 138.

[48] Addy, *ibid.*, at 298; Campbell and Trebilcock, *ibid.*, at 138.

[49] The disparate treatment of "reviewable matters" such as tied selling under the *Competition Act* and under the *Sherman Act*, for instance, could lead to unfair disclosure of information by the Director if not recognized and provided for.

[50] The U.S.-German *Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices*, June 23, 1976, 15 I.L.M. 1282, for instance, provides that information including summaries of information gathered in respect of specific investigations will be exchanged on request provided, among other things, that disclosure does not violate domestic disclosure laws and that the requesting party complies with terms and conditions designed to protect the confidentiality of the information requested (Articles 2 and 3). The provisions for the exchange of information under the *Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws*, September 23, 1991, 30 I.L.M. 1487 (1991), are potentially even more far-reaching, as there is no explicit limit to the extent or nature of information which the countries might exchange in relation to potential violations of the other's antitrust laws. Even so, information exchanges are subject to domestic laws. See discussion in Walker, "Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community - United States Antitrust Agreement," 33 Harvard Int'l L.J. 583 (1992).

[51] *Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters*, June 29, 1982, 21 I.L.M. 702 (1982). See discussion of this agreement and a comparison to the U.S.-Germany agreement, as well as to the 1959, 1969 and 1977 Canada-U.S. Understandings, in King, "A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Dispute Between Sovereigns Arising From Extraterritorial Application of Antitrust Laws: The Australian Agreement", (1983) 13 Georgia Journal of International and Comparative Law 49 at 66.

[52] *Convention Between Canada and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 6 Canadian Tax Reporter (CCH), para. 31, 137, Article XXVI.

[53] *Model Convention for the Avoidance of Double Taxation with respect to Taxes on Income and Capital*, 6 Canadian Tax Reporter (CCH), para. 38, 012, Article 26.

[54] The authors note that the Director released his draft Information Bulletin on "Confidentiality of Information under the *Competition Act*" on July 22, 1994, and has invited comments from all interested parties.

[55] Indeed the International Antitrust Code Working Group published a *Draft International Antitrust Code* on July 10, 1993, proposing the establishment of an International Antitrust Authority under the auspices of the GATT (Special Supplement, August 19, 1993, 64:1628 *ATRR*).

INFORMATION PROVIDED TO THE DIRECTOR OF INVESTIGATION AND RESEARCH: TO WHAT EXTENT SHOULD IT BE KEPT CONFIDENTIAL*

By: Yves Bériault and Madeleine Renaud
McCarthy Tétrault, Montreal

In discharging his duties under the *Competition Act*[1] (the "Act"), the Director of Investigation and Research[2] (the "Director") has access to a wealth of competitive information on individual businesses and industries as a whole. Aside from the information gathered under the powers of compulsion found in the Act, such as search and seizure (section 15) and oral examinations (section 11), the Director is also provided with information which must be compulsorily disclosed in the application of the merger review provisions.

Information is also regularly communicated to the Director on a voluntary or semi-voluntary basis. Voluntary disclosure will occur where companies seek the Director's prior approval of various transactions, as encouraged

by his Compliance Program, or where a company decides to file a complaint against a competitor or a supplier, pursuant to various provisions of the Act. Semi-voluntary disclosure will occur where clients, suppliers or competitors are approached by the Bureau in the course of the merger review process or of an investigation related to alleged infringements of the civil or criminal provisions of the Act.

By its very nature, the information provided to the Director in any of the above situations is sensitive and, to a large degree, considered confidential. Companies generally wish to avoid disclosure of such information to the public or to their competitors, as it may prejudice their competitive position in the market.

Maintaining confidentiality of this information is essential not only in the interest of the business community, but also in the public interest, particularly in cases where the information is supplied on a voluntary basis. Without any assurance of confidentiality, a company which would otherwise have sought the Director's approval before finalizing a proposed transaction might prefer, in a borderline case, to take the risk and proceed without prior consultation. Similarly, compliance with the Bureau's requests for information in the course of inquiries and investigations will be discouraged if such information is not afforded confidential treatment.

As a result, while disclosure is inevitable in a number of situations, confidentiality is highly desirable both from the Director's point of view, acting in the public interest protected by the Act, and from the point of view of the person who provides the information.

Our purpose in this document is to analyze the legal basis underlying the Director's duty to keep this information confidential. This duty of confidentiality does not, as we shall see, extend to all of the information gathered by him, nor does it protect such information from disclosure in certain circumstances. Nevertheless, it is our view that most of the information submitted to the Director can be kept confidential for valid legal reasons.

The purpose of this paper is to demonstrate that the Director should preserve the confidentiality of most of the information provided to him. As we will see, the Director's duty of confidentiality cannot be based solely on the provisions of the Act, but should also take into account both the *Access to Information Act* ("AIA")[3] and the various privileges likely to be claimed in the course of legal proceedings. Additionally, we are of the view that any exception to this duty outlined in section 29 of the Act must be interpreted restrictively. The combination of all these factors means in our view that the Director's duty of confidentiality is much broader than appears at first sight.

DIRECTOR'S DUTY OF CONFIDENTIALITY: SOURCES

Our main proposition is that most of the information submitted to the Director should, by law, be kept confidential. While the Act contains a specific provision (section 29) dealing with the confidentiality of certain information, it does not in our view completely define the scope of the Director's obligations in this respect. To ascertain the scope of the Director's duty of confidentiality, resort must be had to other legal rules which restrict his ability to disclose information. Such rules are to be found in the AIA, as well as in the law of privilege. We will briefly examine each of the rules separately.

1. Section 29 of the *Competition Act*

The first legal rule which comes to mind when addressing confidentiality in the context of competition law is section 29 of the Act, which reads as follows:

> 29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act
>
> (a) the identity of any person from whom information was obtained pursuant to this Act;
>
> (b) any information obtained pursuant to section 11, 15, 16 or 114;
>
> (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; or
>
> (d) any information obtained from a person requesting a certificate under section 102.

While section 29 appears at first sign to impose a broad duty of confidentiality, a careful reading of the provision reveals that it is somewhat limited in scope. Essentially, section 29 protects from disclosure by the Director the following information:

1) The identify of anyone who provides information to the bureau pursuant to the Act (subsection 29 (1) (a)). It should be noted that it is only the *identity* of such person which must be kept confidential, and not the actual information which this person provides.

2) Any information obtained pursuant to the Director's powers of compulsion granted by sections 11, 15, and 16 of the Act (subsection 29 (1) (b)), i.e. search and seizure and compulsive oral examinations. In this case, it is the actual contents of the information obtained which must be kept confidential.

3) Generally, all information provided by those seeking an advance ruling certificate in respect of a merger (subsection 29 (1) (d)), or who must supply information in respect of a prenotifiable transaction (subsections 29 (1) (b) and (c)).

We have had little guidance from the courts in the interpretation of section 29 and of the exact scope of the protection afforded. In two cases where section 29 has been considered[4], the courts have held that it relates only to the inquiry or investigation stage of the Director's activities, and does not create an exclusionary rule of evidence once legal proceedings are commenced. This is consistent with the principles discussed below, and further means that once a matter is before the courts, the Director is no longer bound by the terms of section 29.

It is important to note that although section 29 protects information which is compulsorily supplied to the Director, its protection does not, oddly enough, extend to documents and information provided to the Director on a voluntary basis. This "loophole" is significant, namely because it may affect the effectiveness of the Director's Compliance Program: presumably, businesses would be reluctant to consult the Director without any guarantee that the information they provide will be kept confidential. However, as the Competition Tribunal stated in the *Gemini*[5] case: "I am unable to find any provision of the Act which protects the confidentiality of such voluntarily supplied material". Any such protection will thus have to be found in other statutory provisions or general legal principles.

The scope of section 29 is further limited by the two exceptions stated in its introductory paragraph, namely "to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act". While the exact meaning of the exceptions is far from clear[6], we are of the view that as in the case of other exceptions to a general rule, they should both be construed restrictively, otherwise section 29 would be devoid of any meaning.

For instance, "administration and enforcement" of the Act are very broad terms and may cover almost anything the Director does, since the Director is essentially responsible for the administration and the enforcement of the Act. Indeed "administering" and "enforcing" the Act is the only thing the Director can do, otherwise he would exceed his jurisdiction.[7] Were this exception construed as meaning that the Director is relieved of his duty of confidentiality every time he administers or enforces the Act, such an interpretation would negate the very existence of this duty. Since Parliament cannot have intended to adopt a meaningless provision, a more restrictive interpretation must be given to this exception. In our view, therefore, "administration and enforcement" should be strictly limited to cases where legal proceedings are taken pursuant to the Act (i.e. applications to the Competition Tribunal and prosecutions before criminal courts), and possibly to cases where information must be provided to outside experts or counsel for the purposes of administering the Act.

An interesting question is whether section 29 remains effective in the case of a private action in damages pursuant to section 36 of the Act. The issue here is whether a private party suing for damages could subpoena the Director to obtain, for instance, the information seized from an alleged contravener by claiming that the information is no longer confidential on the basis that a section 36 action is "for the purposes of...enforcement of the Act"?

Leaving aside any question as to whether the Director could resist disclosure by claiming any of the privileges discussed above, it seems to us that even though section 36 was incorporated in the Act as an added deterrent for seriously harmful anticompetitive conduct, the prime objective of section 36 proceedings is to obtain damages, not to enforce the Act, and that in consequence the Director could resist any claim for disclosure on the basis that the information is confidential pursuant to section 29.[8]

As for disclosure to Canadian law enforcement agencies, this exception is in our view intended to cover situations where in the course of an investigation or inquiry, the Director has reason to believe that an offence under the *Criminal Code* or other federal or provincial laws has been or is about to be committed. Since section 29 specifically limits disclosure to a Canadian law enforcement agency, it does not allow in our view the Director to communicate confidential information to foreign law enforcement agencies, such as U.S. antitrust authorities. Further, the explicit reference to Canadian law enforcement agencies excludes the possibility that the phrase "administration or enforcement of this Act" contemplates disclosure to foreign authorities. We therefore believe that the Director has no statutory authority to communicate the information listed in section 29 to foreign authorities.

The Director may consider it important to disclose confidential information to foreign agencies, particularly in this age of global economic activity. This the Director may wish to do, for example, in order to obtain in return information from these foreign agencies. Although this might be desirable, we think, unfortunately, that the Act will have to be amended to allow for such disclosure. Until then, the Director may have to obtain authorization to disclose such information or refrain from disclosing it in any specific manner that could identify its source.

Although section 29 imposes upon the Director a duty of confidentiality with respect to some information, this provision cannot, alone, support our proposition that most information supplied to the Director is legally confidential. This is why the AIA, and especially section 20 thereof, is so important.

2. *Access to Information Act*

As stated in section 2 thereof, the purpose of the AIA is to provide the public with a right of access to the information contained in records of government institutions, including the records of the Bureau of Competition Policy. We do not propose to make an in-depth review of the AIA, but merely to highlight the relevant provisions in the context of competition law and their potential impact on the confidentiality of information communicated to the Director.

Generally speaking, the rule under the AIA is that the public has access to records of government institutions, unless such records are covered by any of the specific exceptions found in the Act. Because the purpose of the AIA is to make government records available to the public, these exceptions are construed strictly, and any doubt is usually resolved in favour of access.[9]

The AIA contains two broad categories of exceptions to access: mandatory exceptions, where the government institution must refuse the request for access, and discretionary exceptions, which grant an institution the power to decide whether or not access will be granted.

The mandatory exceptions include section 24 of the AIA, which covers the information which must be kept confidential pursuant to section 29 of the *Competition Act*. The duty of confidentiality established by section 29 is thus logically reinforced by a duty to deny access to the public under the AIA.

A second and more significant mandatory exception is found in section 20.1, which states:

> 20.1 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
>
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

We will not canvass here the various tests developed in the case law under the AIA to determine whether specific types of information fall within the definition of section 20. In our view, much of the information provided to the Director pursuant to the *Competition Act* is likely to fall under paragraph 20 (1) (c), since it can reasonably be expected that disclosure of such information would cause prejudice to the competitive position of the person who provided it. Paragraphs (b) and (c) are also likely to be relied upon in this context.

It is debatable whether section 20 of the AIA creates a legal duty of confidentiality similar to the one found in section 29 of the *Competition Act*. However, logic commands that a government institution should have to keep confidential any information likely to be covered by section 20. Any other interpretation would lead to the rather odd result that the institution would be precluded from communicating this information upon request from the public, and yet be authorized to disclose it voluntarily in the absence of such a request. The only way to avoid this absurdity is to conclude that section 20 imposes an implied duty of confidentiality. In our view, therefore, a serious argument can be made that the Director must keep confidential all information likely to be covered by section 20.

A third relevant exception to disclosure is found in section 16 of the AIA, which confers on governmental institutions the discretion to refuse disclosure of information relating to the existence and the conduct of

investigations pertaining to the enforcement of a Canadian law. More particularly, paragraph 16 (1) (c) grants the power to deny access where disclosure "could reasonably be expected to be injurious to the enforcement of any law of Canada...or the conduct of an investigation". The wording of section 16 is therefore broad enough to enable the Director to refuse disclosure of information gathered in the course of investigations under the Act, in the interest of maintaining open lines of communication. Although section 16 does not create an express duty of confidentiality, it enables the Director to afford confidential treatment to all information covered by this section.

While the AIA was adopted with a view to broadening public access to governmental records, and not to outline specific duties of confidentiality, the fact that it denies access to a wide range of information gathered by the Director in the performance of his duties cannot be ignored. In our view, the implied duty of confidentiality created by the AIA must be taken into account in determining how the information voluntarily supplied to the Director is to be treated. To the extent that it falls within the ambit of section 20 AIA, this information must, in our opinion, be kept confidential. If the information is of the type mentioned in section 16 AIA, the Director has the option of maintaining confidentiality, and should maintain such confidentiality in order to preserve potential privilege claims, as discussed below.

3. The Law of Privilege

Where a matter is brought before the courts, all evidence which is relevant, probative and trustworthy is *prima facie* admissible and must therefore be disclosed. This is true in respect of criminal prosecutions by the Attorney General, applications launched by the Director before the Competition Tribunal, and private actions in damages pursuant to section 35 of the Act. The only relevant evidence which can be excluded in the course of these proceedings is information covered by a privilege.

Privilege is a rule of the law of evidence which operates to prevent disclosure, in the course of legal proceedings, of confidential information which, although relevant to the issues at stake, must be excluded from the evidence because of overriding policy reasons. The concepts of privilege and confidentiality are closely related, but not interchangeable: while privilege attaches only to confidential information, what is confidential is not necessarily privileged. In other words, confidentiality is an essential element of privilege, but is in itself insufficient to justify exclusion from the evidence: exclusion is only justified if the information deserves to be protected to serve some overriding social concern or judicial policy[10].

As a result, once proceedings are instituted, the Director is no longer bound by the duty of confidentiality provided by section 29 of the Act and section 20 AIA. However, we believe that the Director can and should preserve confidentiality at this stage by relying, where possible, on the law of privilege to avoid unnecessary disclosure. Further, confidentiality being essential to a claim of privilege, the Director must preserve, at the inquiry stage, the confidentiality of any information likely to give rise to such a claim.

Various privileges developed by the law of evidence can be relied on in connection with competition law proceedings. In its traditional form, the solicitor-client privilege cannot possibly be invoked to expand the Director's duty of confidentiality with respect to information voluntarily supplied: as no solicitor-client relationship exists between the Director (or the lawyers who represent him) and the person who supplies information, no claim of solicitor-client privilege can be put forward. Further, if a communication between a solicitor and his or her client is provided to the Director, the privilege is deemed to have been waived and the information will be admissible in evidence.[11]

However, the solicitor-client privilege also extends to all documents prepared "in contemplation of litigation", a concept commonly referred to as the "litigation privilege". This privilege would cover, for example, all communications between a complainant and the Director exchanged in preparation of proceedings before the Competition Tribunal, as was decided in the *Chrysler* case[12], and potentially to all information obtained from clients, suppliers or competitors in preparation for such proceedings.

Naturally, since only the director is entitled to launch applications before the Tribunal, the litigation privilege in these cases "belongs" to the Director, and as such can be either claimed or waived by him. As a result, the person who provides information has no control over whether or not the information will be disclosed by the Director before or in the course of subsequent proceedings. But if the Director wishes to keep the benefit of his privilege, he must, of course, refrain from making the information public before proceedings are instituted.

Another privilege which can and has been invoked by the Director in the context of an application before the Tribunal is the "public interest privilege", which is codified in sections 37 to 39 of the *Canada Evidence Act*.[13] Without discussing here the full scope of this privilege, we note that it can be claimed, for example, to protect the identity of persons interviewed in the investigation process as well as the contents of the information obtained during the investigation. For instance, in the *Southam* case[14], the Tribunal ruled that such information was privileged because of the public interest in protecting the effectiveness of the investigative process. As in the case of the litigation privilege, the public interest privilege belongs to the Director, and a person who provides information has no control over whether privilege will be claimed or not in subsequent legal proceedings.[15] Again though, it is obviously in the Director's interest to jealously protect information covered by this privilege, and one would normally expect that any such information should remain confidential at the inquiry stage to avoid jeopardizing a future claim of privilege.

Finally, the public interest in the resolution of litigated claims has given rise to the "without prejudice" privilege. This privilege covers all communications exchanged between the parties to a dispute, in the course of settlement negotiations. for instance, in *Middlekamp* v. *Fraser Valley Real Estate Board*[16], a panel of five judges of the British Columbia Court of Appeal decided that all communications exchanged between the Director and the Real Estate Board in negotiating a prohibition order under section 32 (now section 34) of the Act were privileged; as such, they were exempt from the discovery process in a private

action in damages instituted pursuant to section 36 of the Act. The majority of the Court further ruled that the public interest required that such communications be inadmissible in evidence, and that the privilege applied whether or not a settlement was reached.

In view of this decision, it is arguable that the contents of all communications made in the course of settlement negotiations with the Director are privileged, i.e. not only negotiations leading to a prohibition order, but also negotiations with a view to reaching a consent order under section 105 of the Act in connection with all reviewable matters such as mergers, refusal to deal, abuse of dominant position, tied selling, etc. Further, since negotiations are privileged whether or not a settlement is reached, these communications should be inadmissible in evidence even if the negotiations are unsuccessful and a contested application is brought before the Tribunal.

It is also important to note that according to the Court of Appeal in *Middlekamp*, the without prejudice privilege belongs to both parties to the negotiations, and can only be waived with the consent of both. As a result, contrary to what we have seen above, the person who provided information to the Director in the course of settlement negotiations has control over the information supplied, and can actively prevent disclosure or admission in evidence in subsequent civil proceedings.

As we have seen, both in applications brought before the Tribunal and in private actions before civil courts, disclosure will occur at the discovery stage as well as in the production of evidence at the formal hearings. As a result, the evidence adduced by the Director will be accessible to the respondent, to interveners, if any, and to the public at large, although confidentiality orders will be granted in appropriate cases.[17]

We recognize that no specific duty of confidentiality is found in the Act or otherwise with respect to privileged information. However, we suggest that the Director must keep confidential all communications made in the context of settlement negotiations, because these communications are protected by a privilege which he cannot waive on his own. Further, since confidentiality is a prerequisite to a claim of privilege, we believe that even though the Director is in a position to waive the litigation and the public interest privileges, he should preserve with the utmost care the confidentiality of information covered by these two privileges and limit its disclosure to what is absolutely required to prove his case. This attitude would benefit the public interest in the effective enforcement of the Act, because it encourages full and frank discussions between the Director and the business community.

The situation is however different in the context of criminal prosecutions. In light of the Supreme Court of Canada's decision in *Stinchcombe*[18], the Crown has a very broad duty to disclose to the defense all relevant information, whether inculpatory or disculpatory, and whether or not it is intended to be used in evidence[19]. This broad duty to disclose means that in criminal proceedings, the defense will have access namely to the identity of complainants and other persons, suppliers and competitors interviewed by the Bureau, the contents of the information given by these persons, and possibly the contents of materials seized from other co-accused, if more than one defendant is charged on the same indictment.

Finally, over and above any disclosure which must be made to the defense, it is useful to point out that criminal trials are as a rule public, and that evidence filed by the Crown will be accessible to the public. Also, in view of the rights guaranteed to the accused under the *Canadian Charter of Rights and Freedoms*, it is doubtful that any of the privileges claimed by the Director in civil cases would be given such broad scope in the criminal context. The Director's powers to limit disclosure of confidential information are thus more restrictive if the criminal process is resorted to.

CONCLUSION

Confidentiality of information supplied to the Director is essentially a legal issue. Defining the scope of the Director's obligation must be done by reference, we think, to the principles of law discussed above. It is undeniable that the Director's duty to confidentiality must be determined first by reference to section 29 of the Act: this provision creates a positive legal duty not to disclose any of the information mentioned therein. However, the scope of his duty must also be measured by reference to the AIA and the law of privilege, both of which considerably expand the Director's obligations and powers with respect to confidentiality.

Our brief analysis of these principles leads to the conclusion that most of the information supplied to the Director is and must remain confidential. There are exceptions to this rule and, as noted, information will have to be disclosed in the course of legal proceedings. Nevertheless, during the inquiry stage, confidentiality of most of the information supplied to the Director should be protected, and once proceedings are instituted, privilege should be claimed whenever necessary to prevent inappropriate disclosure.

The fact that most of the information supplied to the Director is, in our view, legally confidential, is desirable from a public interest point of view. Confidentiality is not just in the interest of the business community to which the Act applies. Public interest requires that the Director obtain information voluntarily by parties wishing to comply with the Act under the Compliance Program, and by third parties who wish to complain about anticompetitive conduct of others. This, in our view, could be seriously constrained if information supplied were not kept confidential to the greatest extent possible. As a result, we believe that the Director should rely on the various legal grounds outlined above to resist disclosure and protect confidentiality wherever possible.

Notes

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1 R.S.C . 1985, c. C-34 as amended.

2 In this paper, we are using the word "Director" to refer generally to any officer of the Bureau of Competition Policy who performs duties under the Act.

[3] R.S.C. 1985, c. A-1.

[4] *Middlekamp* v. *Fraser Valley Real Estate Board* (1990), 32 C.P.R. (3d) 206 (B.C.C.S.); *Canada (D.I.R.)* v. *Southam Inc.* (1991), 38 C.P.R. (3d) 390 (Comp. Trib.) (aff'd by the Federal Court of Appeal on May 6, 1993, no. A-429-91).

[5] *Canada (D.I.R.)* v. *Air Canada* (1993), 46 C.P.R. (3d) 312 at 315.

[6] The expression "for the purposes of the administration or enforcement of this Act" was briefly commented upon by the Competition Tribunal in *Canada (D.I.R.)* v. *Air Canada*, *ibid.*, and in *Canada (D.I.R.)* v. *Southam Inc.*, *supra*, note 4 at 392, and by the Supreme Court of British Columbia in *Middlekamp* v. *Fraser Valley Real Estate Board*, *supra*, note 4 at 210.

[7] See, for example, *Canada (D.I.R.)* v. *Newfoundland Telephone Co.*, [1987] 2 S.C.R. 466 at 478.

[8] It is however possible to argue that a wider interpretation of the word "enforcement" should be adopted, based on the decision of the Supreme Court of Canada in *Slattery (Trustee of)* v. *Slattery*, [1993] 3 S.C.R. 430.

[9] See, for instance, *Maislin Industries Ltd.* v. *Canada (M.I.C.)*, [1984] 1 F.C. 939 (T.D.); *Piller Sausages and Delicatessens Ltd.* v. *Canada (M.A.)*, [1988] 1 F.C. 446 (T.D.).

[10] *R.* v. *Gruenke*, [1991] 3 S.C.R. 263 at 295 and ff.

[11] *Canada (D.I.R.)* v. *Air Canada*, *supra*, note 5 at 314 and ff.

[12] CT-88/4, document no. 180, July 5, 1989.

[13] R.S.C. 1985, c. C-5.

[14] *Canada (D.I.R.)* v. *Southam Inc.* (1991), 38 C.P.R. (3d) 68 (Comp. Trib.).

[15] See the Tribunal's comments in *D.I.R.* v. *Air Canada*, *supra*, note 5 at 314.

[16] (1992), 17 B.C.L.R. (2d) 276, 96 D.L.R. (4th) 223 (B.C.C.A.).

[17] *Competition Tribunal Rules*, s. 15, DORS/87-373; See also *Canada (D.I.R.)* v. *Southam Inc.* (1991), 38 C.P.R. (3d) 395 (Comp. Trib.).

[18] *Stinchcombe* v. *R.*, [1991] 3 S.C.R. 326.

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