

CANADIAN COMPETITION RECORD

COMMENT & ANALYSIS**REMEDIES FOR REVIEWABLE CONDUCT:
ADJUSTING THE BALANCE**

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Introduction

There has been considerable discussion in the competition law community about possible amendments to the reviewable conduct provisions of the *Competition Act*. The proposals for amendment turn on whether reviewable conduct should be subject to civil actions before the ordinary courts by alleged injured parties; subject to applications to the Tribunal for damages or penalties by the Director and/or injured parties; or subject to applications to the Tribunal by alleged injured parties seeking only prohibition orders. Any of these amendments would broaden the scope of potential liability for those engaged in reviewable conduct (typically vertical distribution arrangements) and, therefore, would have some impact on their conduct. On June 28, 1995, the Bureau of Competition Policy released its discussion paper on possible amendments to the Act.¹ One of the issues raised in the discussion paper is the possibility of private parties bringing reviewable conduct proceedings before the Tribunal.

The fundamental question underlying all the proposals is: What are the goals sought to be achieved? Are those goals valid, defensible, and preferable to the goals achieved, and intended to be achieved, by the present regime?

This article outlines the law and cases to date. It then addresses the principal goals sought to be achieved by those advocating amendments. It concludes with an expression of views on such amendments. The preliminary conclusion, potential benefits to the private competition bar notwithstanding, is that the existing system is preferable to an expanded right to attack reviewable conduct. Others may come to different conclusions; but this article hopes to address some of the arguments and provide a preliminary challenge to them. The debate will no doubt continue.

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The "Problem"

Advocates of change support proposals to increase liability for reviewable conduct for at least three reasons:

1. In an age of restricted government budgets, the Director cannot, and should not, be expected to bring every case.²
2. A greater number of decisions would have a beneficial effect in the development of jurisprudence in this area.³
3. The dearth of cases under the reviewable conduct provisions may suggest that enforcement of these provisions is not "tough" enough.

Enforcement History

Before specifically addressing these arguments, it is worth considering the status quo. The Director has in fact brought a number of reviewable conduct cases⁴ and has won the vast majority of them. He has threatened or begun investigations in respect of other conduct, and achieved at least some of his desired goals without having to bring an application.⁵ In fact, when compared with the Director's record in the core section 45 matters, his level of activity as well as his level of "success" in respect of reviewable conduct is significant.

In addition to government enforcement, there have been a number of civil actions which have made reference to the reviewable conduct provisions in support of those allegations.⁶ Each of those actions is reviewed in a little detail below, but the courts have not yet reached a definitive position on the relevance of reviewable conduct to civil causes of action. While the preliminary conclusion is, and I submit should be,⁷ that such conduct is proper and lawful in and of itself, and should not be the foundation for a civil cause of action, that is a matter which is still before the courts. Further, there is no doubt that actions which can constitute reviewable conduct may also fall within one or more of the criminal prohibitions.⁸ The *Competition Act* itself acknowledges that possibility.⁹ In addition, agreements which may constitute some form of reviewable conduct may also be unenforceable at common law because they are unreasonably in restraint of trade.¹⁰

Contract Enforceability

It is trite law that illegal contracts are unenforceable. In circumstances in which breach of a statute is reasonably unambiguous, the rule gives little difficulty. Frequently, however, the question of legality under the *Competition Act* will be far from clear. Nevertheless, in one of the earliest of such cases to come before it, the Supreme Court of Canada had little difficulty in determining that the contract had, and was intended

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to have, the effect of unduly preventing or lessening competition, and it declared the contract unlawful and unenforceable.¹¹

As well as illegal contracts, contracts that restrain trade are contrary to public policy and void at common law unless they are reasonable with reference to the interest of the parties, and also with reference to the interest of the public.¹² Obviously, not all agreements which restrain trade will constitute illegal conspiracies. However, such covenants, while not illegal, may well be too broad to protect the legitimate interests of the parties, and will therefore be unenforceable.

There is interaction between the test as to what is reasonable in relation to the interest of the public and the provisions of the *Competition Act*. The Act represents a standard of undue limitation on competition. The courts have recognized that the Act represents at least a statement of what is reasonable, having regard to the interest of the public.¹³ In the case of *Stephens v. Gulf Oil*,¹⁴ the Court of Appeal stated that when attempting to ascertain what is reasonable in the interest of the public, one should look to propositions of law, rather than some less ascertainable proposition of the interest of the public at large. However, in the *Tank Lining* case,¹⁵ the Court of Appeal questioned whether this requirement of the public interest as expressed in a proposition of law need always govern, and suggested that a more flexible approach is appropriate.

As well as issues related to illegal contracts and contracts in restraint of trade, the general principle of *ex dolo malo non oritur actio* (an action does not arise from a fraud) applies generally in any case in which a plaintiff must, to make out its cause of action, prove that its right or claim is based on illegal conduct by it. Thus actions in patent, tort or contract will not be upheld by the courts where the plaintiff's claim rests on illegal conduct, including illegal conduct under the *Competition Act*.¹⁶

Civil Tort Actions

Conduct which constitutes an actionable wrong at common law, whether or not it is also contrary to the Act, will give rise to a claim for damages. Conspiracy to injure or interference with economic or contractual relations are perhaps the most obvious of such possible torts.¹⁷ Conspiratorial conduct which has as its primary object injury to some person is actionable, as is conspiracy involving unlawful conduct which has as its principal object a benefit to the conspirators. The unlawful conduct can be a breach of the criminal provisions of the *Competition Act*. This analysis also applies with respect to the tort, or possible tort, of unlawful interference with economic or contractual interests or relations.¹⁸

Brief Review of Civil Jurisprudence

This section of the paper contains a brief summary of the various civil cases which have attempted to employ reviewable conduct as an aspect of a civil claim.

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(a) *Procter & Gamble*

In a Federal Court patent case,¹⁹ 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. Procter & Gamble alleged that Kimberly-Clark violated a patent relating to material used in disposable diapers. In addition to denying infringement and validity of the patent, Kimberly-Clark alleged that Procter & Gamble was estopped from claiming any relief by reason of a breach of section 79 of the *Competition Act*, relating to an abuse of dominant position in the disposable diaper market. 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* was not applicable, because the conduct was neither criminal nor civilly actionable:

In the case before me, abuse of dominant position in the *Competition Act* is not a criminal or even civil illegality. It is a reviewable practice under Part VIII of the Act and any proceedings relating to the practice are conducted before a civil administrative tribunal. There is no improper conduct until such time as the Competition Tribunal so finds.

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 the allegation that the plaintiff had engaged in activities constituting abuse of dominance, but did so on the basis that there was no evidence of such conduct. The ruling suggests, however, that where there may be *prima facie* evidence of conduct which could constitute abuse of dominance, unclean hands might be found (as is possible in connection with a breach of the criminal provision of the Act²⁰).

(b) *Pindoff Records*

In the case of *Pindoff Record Sales v. CBS Music Products Inc.*,²¹ Mr. Justice Montgomery declined to strike out a civil claim which relied on conduct contrary to the reviewable conduct provisions of the 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 as having not been sufficiently pleaded. The plaintiffs also pleaded conspiracy to injure, as well as conduct contrary to the reviewable conduct provisions of the Act, particularly abuse of dominant position and market restriction, as the requisite illegal conduct under the *Canada Cement La Farge* test.²² The Court, in refusing the motion to strike such a claim, relied upon two U.K. cases²³ based on the U.K. *Restrictive Trade Practices Act*, which had found conduct under that Act's reviewable provisions could constitute illegal means to found civil proceedings. Mr. Justice Montgomery stated: "[i]t should not be the function of the motions court judge at these preliminary stages to make a determination which might restrict this head of the plaintiff's claim, where there are other triable issues to be dealt with".

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(c) *Belanger v. Stadium Corp.*

An action was brought by the catering licensee for the Skydome, alleging breach of the Act, tort and breach of contract in relation to the requirement that the licensee buy all food for the Skydome from Skydome's exclusive supplier.²⁴ 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*. The defendants brought a motion to stay the claim. The court of first instance accepted the defence argument, stating:

Alleged contraventions of sections 77 and 79 of the *Competition Act* may not in the circumstances of the instant motion be the bases for founding a cause of action inasmuch as sections 77 and 79 do not, *prima facie*, create a cause of action. Those two sections catalogue conduct upon which application by the "Director" may be reviewed by the "Tribunal". The Tribunal, upon review, may make one of the orders it is authorized to make under the *Competition Act*. It is the failure of a party to comply with such an order made that would be impugned conduct within the purview of section 36 of the Act. ... The point should be made that under the *Competition Act* reviewable conduct is, *prima facie*, legal until the Tribunal, following a review, determines otherwise. That is in contrast to the British counterpart of the *Competition Act*; the *Restrictive Trade Practices Act*, 1956; which under section 21 of the Act, deems certain kind of conduct "contrary to the public interest" unless the Court is satisfied in respect to anyone of a number of circumstances enumerated.

The Court of Appeal overturned this decision, but did not address this issue specifically. Rather, it stated:

Portions of the Statement of Claim could well be struck out 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.

(d) *Harbord Insurance*

A British Columbia case²⁵ affirmed that reviewable conduct is not illegal. In that case a competitor of the Insurance Corporation of British Columbia ("ICBC") brought an action to attempt to prevent ICBC from offering an incentive to agents to place as much coverage as possible with ICBC. Harbord Insurance was an agent of ICBC for the purposes of selling optional insurance coverage. Family Insurance Corporation was a competitor of ICBC. ICBC typically paid a fixed commission. It announced a plan to implement a sliding commission scale that would give a higher commission to an agent dependant on the quantum of ICBC optional insurance placed by that agent. The plaintiffs asked for an injunction to prevent this sliding commission scale, alleging that it would drive agents to sell ICBC optional insurance rather than that of Family Insurance Corporation. It was alleged that the proposed scheme by ICBC violated section 77 of the *Competition Act*. This breach was argued to be the basis for unlawful interference with economic relations by ICBC. 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 *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 sanctions,

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those practices are not unlawful, and in the absence of some other culpability cannot be the foundation of a finding of unlawful means.

He 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.

In fact, the Court concluded that the conduct complained of is:

... *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.

(e) *Caterpillar*

In the case of *Ed Miller Sales & Rental Ltd. v. Caterpillar Tractor Co. et al.*,²⁶ Miller alleged that Caterpillar unlawfully interfered with its business by limiting Miller's ability to acquire Caterpillar equipment and parts. Miller was not an authorized Caterpillar dealer, but it dealt in Caterpillar equipment in Alberta. 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 basis of Miller's case was the allegation 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, such as Miller or its suppliers, to obtain product at competitive prices. 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.

The Court found that Caterpillar used the "myth of the exclusive territory" but did not actually impose an exclusive territory relationship, 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

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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 by forbidding Peoria to supply Miller, the Court stated that it need not decide whether refusal to deal or market restriction could be the basis of a tort action.

(f) *Polaroid v. Continent-Wide*

The decision in *Polaroid Canada Limited v. Continent-Wide Enterprises*,²⁷ like the *Caterpillar* case, was delivered after a trial, rather than on an interlocutory basis. Unlike *Caterpillar*, however, the Court in *Polaroid* did not sidestep the issue of civil liable for reviewable conduct.

Polaroid Canada established a mechanism to discourage the export of its film products from Canada by its dealers. The mechanism was a "two-price" policy, whereby purchases for consumption within Canada would be at one price, and purchases for export would be at a higher price. The export price was so high that it effectively prohibited exports that were purchased at the higher price.

Polaroid sued the defendant, Continent-Wide, for purchases made at the domestic price but which were actually exported. Continent-Wide alleged that there was no contract for payment of the higher price and counterclaimed for damages for termination of the dealership arrangement. It also alleged that the two-price policy was contrary to public policy. Continent-Wide sued for damages under the conspiracy and price maintenance provisions of the *Competition Act*, pursuant to section 36, although it ultimately did not argue the conspiracy issue.

The Court found, based on *Tank Lining Corp. v. Dunlop Industrial Ltd.*,²⁸ that parties seeking to enforce a restraint of trade must demonstrate that the restraint is reasonably in the interests of the parties. That is, the restraint must be intended to protect some legitimate interest of the party seeking to enforce it, and must not go beyond what is adequate to accomplish that end. In this case, Polaroid's goal was to eliminate or reduce interruptions to and disruption of supply to Canadian customers; and to reduce gray marketing in foreign markets, disrupting prices and distribution in those markets. That is, Polaroid's goals were to preserve and maintain stability for customers of Polaroid products in Canada and preserve its international distribution and pricing system. The Court found, based on the evidence of the economists, that the most likely result of gray market export sales from Canada, carried on at a significant level over an extended period, would be to increase Canadian prices towards U.S. prices. The Court found that Polaroid had a proper commercial interest in avoiding price increases in Canada, and also in defending the viability of its international distribution and pricing policy. Thus, the restraint was reasonable in the interest of the parties.

Continent-Wide argued that the two-price policy was not reasonable in respect of the public interest and it had the onus to prove that allegation. In this case, all of the submissions by Continent-Wide as to the interest to the public were based on provisions of the *Competition Act*.

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Polaroid argued that the two-price policy constituted a market restriction within the definition of section 77(1) of the *Competition Act*. The Court accepted this characterization, and noted that market restriction was not an offence under the Act, but rather was reviewable conduct. The Court pointed out that unless there was an application by the Director to the Competition Tribunal, no action may be taken under the *Competition Act* in respect of market restriction.

Continent-Wide argued that the two-price policy constituted a refusal to deal within the meaning of section 75 of the *Competition Act*, and for that reason the policy should be found to be unreasonable in respect of the interest of the public. The Court rejected this argument, noting that for section 75 to apply there must be a finding by the Tribunal with respect to a number of things, including the availability of supply in a market and the lack of sufficient competition in the market. The Court stated that it was not satisfied that it should make a determination on such points in the absence of a finding by the Tribunal: "To do so might be improperly pre-emptive of the jurisdiction of the Tribunal to make such determination."

The Court also pointed out that in a situation where no Tribunal order has been granted, or no application has been made to the Tribunal, the mere possibility of those outcomes in the future cannot justify a determination that the conduct is contrary to the public interest. The scheme of the Act contemplates that the Tribunal may properly decide to make no order. In taking that decision, the Tribunal would be obliged to direct its attention to the purposes section of the Act which focuses on the benefits to Canadians. Based on the evidence of economic experts, absent the two-price policy, the result over time would be that prices in Canada would trend upward, which is at odds with the basic purposes of the *Competition Act*.

(g) *Cellular Rental v. Bell Mobility*

Cellular Rental Systems Inc.,²⁹ ("Cellular Rental") was a Bell Mobility approved agent for cellular telephones, and had been so since 1987. In 1990, it entered into a three year contract which was renewable upon terms and conditions to be agreed upon by the parties. Bell decided not to continue the agreement, except for a few months past the end of the term. Cellular Rental argued that the agreement had been extended for another three years.

In addition to its contract action, Cellular Rental also applied, by way of a six person complaint, to the Director of Investigation and Research for an inquiry to be commenced against Bell Mobility, and for the Director to seek an order under section 75 of the Act, compelling Bell Mobility to continue to supply products to Cellular Rental. A mandatory injunction was sought in the civil action to compel Bell Mobility to continue to deal with Cellular Rental until the Director determined not to bring an Application, or the Tribunal made its ruling.

Unlawful interference with economic relations was pleaded and the Court was prepared to say that it might have a bearing on the outcome. To support the unlawful aspect of such tort, the Court stated: "If the

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Competition Tribunal concludes that the conduct of Bell Mobility was in restraint of trade, that might constitute the unlawful means of interference." It granted the requested injunction.

On appeal, the Divisional Court noted with approval the statement of Mr. Justice White, in granting Bell leave to appeal:

In my opinion, the order of Montgomery J. conflicts with the principle of law stated by Phelan J. in *Travailleurs et Travailleuses Unis De L'Alimentation et Du Commerce, Local 500 et al v. Corporation D'Acquisition Socanav-Caisse Inc.* That principle is that an allegation pertaining to Part VIII of the *Competition Act* is within the sole purview of the Director and the Competition Tribunal under the Act, and cannot be the basis of injunction proceedings in a superior court of record. Phelan J., at p. 12 of his reasons epitomizes the principle of law in question by quoting these words of Turgeon J.A. of the Quebec Court of Appeal as such words were repeated by Chouinard J. in reasons of the latter in a case of the Supreme Court of Canada.

Parliament has bestowed on the Director and the Competition Tribunal under the *Competition Act* full jurisdiction to deal with alleged violation of the Act, including the jurisdiction of the Competition Tribunal to entertain and grant applications for interim orders, if sought by the Director, having regard to the principles of ordinary considerations by superior courts when granting interlocutory or injunctive relief. (See s. 104(2) of the Act).

It would appear that Montgomery J. has granted the type of relief which Parliament intended should be granted by the Competition Tribunal at the request of the Director.

The plaintiff has satisfied me that the order of Montgomery J. conflicts with the principle of law espoused by Phelan J. above, which principle is stated and restated in authorities relied upon by Phelan J. in his reasons.

The Divisional Court noted that section 75(1) of the *Competition Act* does not confer any cause of action which Cellular Rental could enforce against Bell in a court of common law or equity. It stated (at page 16):

In granting the order under appeal, the motion judge somehow combined the injunctive relief sought by [Cellular Rental] [an injunction to prevent Bell from breaching the terms of the approved agent agreement and to prevent Bell from violating the provisions of Section 75(1) of the *Competition Act*.] The effect of the order was to provide [Cellular Rental] with the benefit of an order which it hoped would be forthcoming pursuant to s. 75(1), if the Director saw fit, after completing the inquiry under s. 10, to bring an application to the Tribunal under s. 75(1), and the Tribunal granted an order favourable to [Cellular Rental]. In my view, in granting the order Montgomery J. misconceived the meaning and purpose s. 75(1) and exceeded the jurisdiction of the Ontario Court of Justice (General Division) by granting an order which, if appropriate, could be granted only by the Tribunal under s. 104 on the application of the Director.

Montgomery J. was no doubt led astray by the request of [Cellular Rental] for an injunction to restrain Bell 'from violating the provisions of s. 75(1) of the Act', because s. 75(1) does not proscribe any conduct and, therefore, can neither be 'breached' nor 'violated'. Nor does s. 75(1) confer a civil right of action. There is a right of action which is derived from non-compliance with an order made under s. 75(1); but that is not this case: s. 36(1)(b). Under s. 75(1) the Tribunal does not determine whether a party has a right to be supplied by another party and whether that other party is in breach of a corresponding obligation to supply. Rather, the Tribunal 'may order one or more suppliers of the product in the market [to] accept the person as a customer'. Section 75(1) does not require the Tribunal to determine retrospectively whether the conduct of any supplier has been 'in restraint of trade', as Montgomery J. stated, and, thus 'unlawful'. Rather, its focus is prospective, in that the Tribunal must determine whether a person who has been unable to obtain a supply of a product because of insufficient competition in a market should be put on a footing equal to those who are able to obtain the product. The Tribunal's discretion to issue such an order is based upon the policy

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objectives of the Act and the balance of interests of those potentially affected by such an order. Indeed, the individuals who make a request to the Director under s. 9(1)(b) for an inquiry are not parties to a s. 75(1) application before the Tribunal; the parties are the Director and the company in respect of which a complaint is made. Only the Director may bring a matter before the Tribunal. ...

Even if the facts and s. 75(1) justified the granting of an order on the terms of the order under appeal, it is my view that, pursuant to s. 104, the Tribunal has been given exclusive jurisdiction to grant the order. This follows from the reasons for judgment of Gonthier J., on behalf of a majority of the Supreme Court of Canada, in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394.

The Divisional Court therefore found that in issuing the injunction Mr. Justice Montgomery exercised jurisdiction exclusively enjoyed by the Competition Tribunal under section 104 of the *Competition Act* and incorrectly concluded that the *Competition Act* provides Cellular Rental with a cause of action against Bell. Cellular Rental's remedy under the Act is purely statutory, independent of any contract which may exist between Cellular Rental and Bell. The *Competition Act* does not provide any remedy enforceable by action and cannot serve as a foundation for mandatory relief. Such relief is only available on application to the Tribunal made by the Director.

Further, the Divisional Court noted that Cellular Rental's request to restrain Bell from violating section 75(1) was somewhat misleading. Section 75(1) does not proscribe any conduct, and cannot be breached or violated.

It would appear that throughout his reasons, Montgomery J. confused the issue of whether Bell had provided proper notice to terminate the Approved Agent Agreement with the issue of the remedy which [Cellular Rental] may have under s. 75(1). As Parliament has assigned exclusive jurisdiction over Part VIII of the Act to the Tribunal, the court should have refused to intervene.

Conclusion Regarding Civil Actions

Having reviewed the civil jurisprudence which refers to reviewable conduct in support of private claims, the preliminary argument in support of the status quo is that advocates of change overstate the need for that change. Criminal provisions of the Act give rise to civil causes of action, as do common law tort or contract claims. The effect of reviewable conduct on civil causes of action is not yet authoritatively determined by the courts. Even if it is irrelevant to civil actions, however, such conduct may well give rise to independent contract or tort actions. There is no demonstrable need for a broader right of private remedy.

Arguments in Favour of a Broadened Right of Action and Responses Thereto

(a) Budgetary Issues

The simplistic budgetary argument for increasing access to the Tribunal is that the Bureau does not have sufficient resources to pursue all worthy cases. Therefore, allowing private access will save money by having private parties bear the financial burden of such applications. A related argument is that since many

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disputes before the Tribunal are really commercial disputes between well funded adversaries, they, not the public purse, should bear the cost of such disputes.

In response, while such an amendment might lighten the Bureau's budgetary load, that saving may well be more than offset by increases to the Tribunal's budget, loss of tax revenue through the resources wasted in additional litigation, and, most fundamentally, loss of growth to the economy through greater likelihood of such actions resulting in a chilling effect on businesses.

There is no study I am aware of that determines whether government revenues will be increased or decreased by a larger number of applications, given the impact of competition policy on the economy. There is at least a not insignificant risk that more applications, and the risk of applications being pursued as an instrument of strategic behaviour³⁰ by private parties, will inhibit firms from engaging in vertical restraints. That may well be inefficient and harmful to the economy - and may therefore decrease tax revenue. Direct expenditures on enforcement or adjudication should be largely irrelevant to the debate as to the proper type and level of antitrust enforcement. Getting enforcement "right" in this area will add to government revenues, almost regardless of direct cost. Getting enforcement "wrong", however, can be expected to shrink government revenues, even if immediate direct expenses are reduced.³¹ Allowing private actions to save money, at least without some considerable study, is a penny wise, pound foolish strategy.

(b) Private Contract Claims

The Bureau, in its discussion paper, notes that resource constraints prevent as much emphasis being placed by it on cases which do not have a great economic impact: However, there are some matters that do not harm a broad class of consumers, but take the form of violations of contractual arrangements between commercial interests. If indeed it is these matters in respect of which the Bureau does not have the budget to act, there seems to be no need for reform. If there is a contractual violation, then private parties have a right of action. Whether or not there is a contract or tort claim, however, if there is no harm to a broad class of consumers, why should it be a concern of competition law at all?

(c) Development of Jurisprudence

Another argument advanced for permitting increased access to the Tribunal, or private civil actions in respect of reviewable conduct, is that there is very little jurisprudence on these points, and such an amendment is a mechanism for developing jurisprudence. It is undeniable that greater access to the Tribunal will lead to greater jurisprudence. However, such things as price discrimination, predatory pricing, regional price discrimination and discriminatory allowances, are now all subject to private actions. A huge amount of time and money is spent on legal and business advisers designing distribution systems to accommodate those provisions. Yet there is little jurisprudence in respect of those matters less of any consequence than for other aspects of reviewable conduct.

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Further, more jurisprudence does not necessarily mean good jurisprudence. Even the specialized Competition Tribunal has not yet defined the central test for most reviewable practices: what constitutes a substantial lessening of competition? Some commentators have suggested that so far the Tribunal has really dealt with cases before it as a court of equity,³² seeking to address perceived hardships, but has yet to develop significant economic jurisprudence.³³

There is an alternative to developing more jurisprudence under these provisions. That alternative has the attractions of lower cost and more certainty of outcome. The Bureau might consider issuing enforcement guidelines covering at least some aspects of reviewable conduct. The guidelines so far released have met with genuine enthusiasm. The cautions raised respecting the predatory pricing and price discrimination guidelines, insofar as they may not bind private parties,³⁴ are irrelevant if private parties do not bring reviewable conduct applications. Further, at least one court in a civil action has taken some positive judicial notice of the Guidelines.³⁵ Finally, dealing with the Bureau in respect of such conduct is likely to be a more certain and predictable exercise than going before the Tribunal. It is also much less expensive than litigation.

(d) "Tough" Enforcement

A further argument that has been advanced in support of the right to have private access to the Tribunal, or private actions for reviewable conduct, is that such an amendment will result in more aggressive, tough enforcement of these provisions. But tough enforcement only makes sense when the conduct is unambiguously harmful. Even so, the "war on drugs" now attracts considerable criticism as many argue that the cure is socially and economically worse than the disease.

In the area of reviewable conduct, there is no consensus that the conduct is "bad". In fact, even those who say it can be bad admit that it is frequently economically beneficial, or at least of ambiguous consequence.³⁶ Others argue that it is virtually never bad, or at least that it is so rarely harmful that enforcement regimes do more harm by deterring beneficial conduct than good by deterring wasteful conduct.³⁷ They also argue that tougher vertical rules will lead to greater vertical integration, which is inherently more restrictive than contractual vertical arrangements.

There is good reason to believe that vertical restraints are frequently pro-competitive.³⁸ Were reviewable conduct to be civilly actionable, or were private parties to have access to the Tribunal, much more anti-trust chill would occur. A substantial degree of restraint would be unavoidable. Even if the Tribunal decided the cases which came before it in an economically sophisticated way, private parties would use litigation as a strategic tool. There would still be hesitation to undertake aggressive conduct due to the desire to avoid litigation. Much conduct would be avoided which would be beneficial. Unnecessary, expensive and potentially restrictive vertical integration would be encouraged.

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One Approach

One policy which has some superficial attraction is to take the Bureau out of the business of bringing applications in respect of reviewable conduct, but leave it in a gatekeeper role. That is, allow private parties to bring applications, but only with authorization from the Director. In order to determine which cases are deserving of authorization, the Bureau would still have a significant investigatory role, but it would be spared the costs of litigation. Having noted this possible approach, however, it has its drawbacks. When one does not have to carry the actual litigation, it is easier, perhaps too easy, to say "yes". If the Director has the role of the gatekeeper, he will be importuned to open the gates. The arguments made will include the proposition, however, crudely or otherwise put, "what do you care, it is not your money anyway". When that argument is put more elegantly it may be difficult to resist, even though sound economics might suggest it should be resisted.

The Director loses the moral high ground to say "no" when it is not his money or credibility on the line. Changing the Director's role to one of gatekeeper will likely have the practical result of increasing such applications. There is no evidence that more applications would be beneficial, and certainly will chill at least some benign or pro-competitive behaviour.³⁹

Particular Amendments

In addition to the general question of access to the Tribunal, there is a specific problem which would have to be addressed if greater access were given to private parties in respect of reviewable conduct. Some aspects of reviewable conduct (refusal to deal, delivered pricing, and refusal to supply by foreign suppliers) contain no requirement of injury to the marketplace. So long as such provisions can only be activated by a public official, proceedings are unlikely to be commenced unless there is some concern about economic injury. However, private parties would feel no such hesitation. If private parties were given access to the Tribunal or to the courts in respect of reviewable conduct, a "substantial lessening" or other similar test would have to be imported into those provisions which do not have such a test. In fact, it might be wise to import such a test in any event, but that is another debate.

Conclusion

In brief conclusion, the arguments advanced by advocates of change are not sufficiently persuasive to make the fundamental shift in the structure of Canadian competition law which any private remedy for reviewable conduct would constitute. The genius of the *Competition Act* is that it recognizes that reviewable conduct is ambiguous as to its economic consequences. This ambiguity of benefit associated with most aspects of vertical conduct gave rise to an enforcement regime expressly and explicitly designed to minimize the chilling effect on pro-competitive conduct, or conduct which is at least not substantially anti-competitive. The proposals being advanced would disturb the careful balance. What such a change may lead to is not

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“tough” enforcement, but “dumb” enforcement, by self-interested plaintiffs and, more worrisome by far, self denial by businesses weary of litigation.

A review of the economic costs and benefits of the proposal to permit private enforcement is a debate which has not been joined. It is a debate which lawyers are largely unequipped to address, except conceptually. Further, we suffer from an acute conflict of interest. Economists, to a lesser but not insignificant degree, also have some conflict of interest. They are, however, at least better suited to engage in the cost-benefit analysis. Such a discussion and debate must occur if these proposals are to be seriously advanced.

In addition to the debate as to the economics, there needs to be a broad debate in the business community as to the wisdom of such amendments. By and large, businesses, not consumers, will be both the defendants and the plaintiffs in these proceedings. Thus, the business community will likely not speak with one voice. Nor, as a result, can its views be dismissed as purely self-interested. Creation of the existing structure of reviewable conduct enforcement resulted from significant study⁴⁰ and input from the business sector.⁴¹ If any fundamental shift is contemplated, it is appropriate to revisit the debate.

Finally and fundamentally, the arguments of the reformers, given that the system we now have is a result of lengthy debate and careful weighing of the issues and interests, and given that it appears to work, are not persuasive that change is necessary or desirable. Those who wish to make such a change have the burden of proof. That burden has not yet been met, or even adequately acknowledged. If and when the debate is joined in earnest, however, there are many stakeholders to be heard. I hope this article has flagged some of the issues which must be addressed in such a review.

Notes

¹ Bureau of Competition Policy, *Competition Act Amendments - Discussion Paper* (Ottawa: Industry Canada, 1995).

² “Given the large volume of business activity that is subject to the Act, it is difficult for the Director to investigate and pursue all seemingly meritorious complaints that are brought forward. In determining resource allocation for investigations, greater emphasis is placed on cases that are perceived to have a greater economic impact. However, there are some matters that do not harm a broad class of consumers, but take the form of violations of contractual agreements between commercial interests. These types of violations of the Act may still be judged important by private parties.” *Ibid.* at 21.

³ “As a result, the limited resources available to the Director to enforce the law with respect to reviewable matters would be supplemented, and jurisprudence would develop more quickly.” *Ibid.*

⁴ *BBM Bureau of Measurement v. Canada (Director of Investigation & Research)* (1984), 82 C.P.R. (2d) 60 (F.C.A.); *Canada (Director of Investigation & Research) v. Bombardier Ltd.* (1980), 57 C.P.R. (2d) 216 (R.T.P.C.); *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. AGT Directory Limited* (18 November 1994), No. CT9402/19 (Comp. Trib.) [Unreported]; *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); *Canada (Director of Investigation & Research) v. D & B Cos. of Canada* (Comp. Trib.) (Reserved); *Canada (Director of Investigation & Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.), *aff'd* (1991), 38 C.P.R. (3d) 25; 129 N.R. 77 (F.C.A.); and *Canada (Director of Investigation & Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

⁵ See undertaking by Digital Equipment of Canada in the *Annual Report of the Director for the year ended March 31, 1994* at 24-25. See undertaking by Yuk Yuk's Comedy Cabaret in the *Annual Report of the Director for*

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the year ended March 31, 1994 at 23. See note regarding Electronic Publication of Law Reports in the Annual Report of the Director for the year ended March 31, 1994 at 22. See note regarding Telecommunications Equipment in the Annual Report of the Director for the year ended March 31, 1994 at 22. See note regarding trade publications in the Annual Report of the Director for the year ended March 31, 1994 at 22. See "Undertaking by Insurance Corporation of British Columbia" *The [Toronto] Globe & Mail* (14 July 1995).

⁶ See *Procter & Gamble Co. v. Kimberley-Clark of Canada Ltd.* (1991), 40 C.P.R. (3d) 1, 49 F.T.R. 31 (T.D.); *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario* (1991), 26 A.C.W.S. (3d) 509; rev'd. 5 O.R. 3d 778, 57 O.A.C. 81; *Harbord Insurance Services Ltd. v. Insurance Corp. of British Columbia* (1993), 9 B.L.R. (2d) 81 (B.C.S.C.); *Pindoff Record Sales v. CBS Music* (1989), 27 C.P.R. (3d) 380, 49 C.P.C. (2d) 308 (Ont. H.C.); *Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co.* (1994), 54 C.P.R. (3d) 1 (Alta. Q.B.), 17 Alta. L.R. (3d) 251; *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1994), 48 A.C.W.S. (3d) 409 (Ont. Civ. Div.); rev'd (May 30, 1995), (Ont. Div. Ct.) [Unreported]; and *Polaroid Canada v. Continent-Wide Enterprises* (November 15, 1995), (Ont. Gen. Div.) [Unreported], rev'd (May 30, 1995) 482/94 (Ont. Gen. Div.).

⁷ See J. Musgrove, "Civil Actions and the Competition Act" (1994) 16 *Advocates Quarterly* 94.

⁸ See *Caterpillar*, *supra*, note 6.

⁹ See sections 45.1 and 98.

¹⁰ See *Polaroid*, *supra*, note 6.

¹¹ *Weidman v. Shragge* (1912), 46 S.C.R. 1, 2 D.L.R. 734, 2 W.W.R. 330.

¹² *Nordenfelt v. Maxim Nordefelt Guns and Ammunition Co., Ltd.*, [1894] A.C. 535 (H.L.).

¹³ *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 140 D.L.R. (3d) 659, 40 O.R. (2d) 219, 68 C.P.R. (2d) 162 (C.A.). See also *Polaroid*, *supra*, note 6.

¹⁴ *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129, 65 D.L.R. (3d) 193, 25 C.P.R. (2d) 64 (C.A.).

¹⁵ *Supra*, note 13.

¹⁶ *Philco Products Ltd. v. Thermionics Ltd.*, [1940] S.C.R. 501 at 503, [1940] 4 D.L.R. 1.

¹⁷ See *Westfair Foods Ltd. v. Lippens Inc.*, (1989) 64 D.L.R. (4th) 335, 30 C.P.R. (3d) 209 (Man. C.A.); *Canada Cement La Farge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452.

¹⁸ *Westfair Foods Ltd. and Canada Cement La Farge Ltd.*, *ibid.* See also *Direct Lumber Co. v. Western Plywood Co.*, [1962] S.C.R. 646, 35 D.L.R. (2d) 1, 40 C.P.R. 9; *Valley Salvage Ltd. v. Molson Brewery* (1975), 64 D.L.R. (3d) 734, [1976] 1 W.W.R. 597, 25 C.P.R. (2d) 37 (B.C.S.C.); *Philco*, *supra*, note 16; *Ex parte Island Records Ltd.*, [1978] 3 All E.R. 824.

¹⁹ *Procter & Gamble*, *supra*, note 6.

²⁰ See *Eli Lilly & Co. v. Marzone Chemicals Ltd.* (1976), 29 C.P.R. (2d) 253 (F.C.T.D.), aff'd 20 C.P.R. (2d) 255 (F.C.A.), [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.), rev'd on other grounds 70 C.P.R. (2d) 252 (F.C.A.).

²¹ (1989), 27 C.P.R. (3d) 380, 49 C.P.C. (2d) 308, [1990] I.L.R. ¶93-057 (Ont. H.C.J.).

²² *Supra*, note 17.

²³ *Daily Mirror Newspapers Ltd. v. Gardner*, [1968] 2 Q.B. 762 (C.A.); and *Brekkes v. Cattell*, [1972] 1 Ch.D. 105.

²⁴ *R.D. Belanger & Associates Ltd.*, *supra*, note 6.

²⁵ *Harbord Insurance Services Ltd.*, *supra*, note 6.

²⁶ *Caterpillar*, *supra*, note 6.

²⁷ *Polaroid*, *supra*, note 6.

²⁸ *Supra*, note 13.

²⁹ *Cellular Rental Systems Inc.*, *supra*, note 6.

³⁰ *Supra*, note 1 at 21.

³¹ More than twenty five years ago in the *Interim Report on Competition Policy* (July 1969), the Economic Counsel of Canada noted "A well-conceived competition policy endeavours to further the achievement of this goal [rapid economic growth] by removing impediments to the attainment of maximum dynamic efficiency in the use of resources by the Canadian economy" (at 99).

³² B.M. Graham, "Abuse of Dominance - Recent Case Law: NutraSweet and Laidlaw" (1993) 38 McGill L.J. 800.

³³ J.W. Rowley and A.V. Campbell, "Refusal to Deal with Economics" (Recent Developments in Canadian Competition Law Symposium, 15 December 1992).

³⁴ L.A.W. Hunter and S.M. Hutton, "Is the Price Right?: Comments on the Predatory Pricing Enforcement Guidelines and Price Discrimination Guidelines of the Bureau of Competition Policy" (1993) 38 McGill L.J. 830.

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³⁵ *947101 Ontario Ltd. (c.o.b. as Throop Drug Mart) v. Barrhaven Town Centre Inc.* (1995), 52 A.C.W.S. (3d) 627 (Ont. Gen. Div.).

³⁶ S.C. Salop and T.G. Krattenmaker, "Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price" (1986) 96 Yale L.J. 209.

³⁷ R.H. Bork, *The Antitrust Paradox* (New York: Basic Books, Inc., 1978) at 406.

³⁸ G.F. Mathewson and R.A. Winter, *Competition Policy and Vertical Exchange* (Toronto: University of Toronto Press, 1985).

³⁹ "Despite the issuance of detailed price discrimination enforcement guidelines in 1992, the threat of private action may still chill price behaviour that would be benign or even pro competition." *Supra*, note 1 at 19.

⁴⁰ See Interim Report on Competition Policy and the Dynamic Change Report. The Interim Report on Competition Policy recommended a private right of access to the Tribunal. The Dynamic Change Report suggested allowing private parties to apply in respect of abuse of dominance in urgent situations with leave of the Tribunal.

⁴¹ Various submissions of the Business Council on National Issues, Canadian Manufacturers' Association, Canadian Chambers of Commerce, Grocery Products Manufacturers' Council and Canadian Bar Association.

GOVERNMENT ISSUES DTH DIRECTION TO CRTC

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On July 7, 1995 the federal Cabinet issued its formal direction to the CRTC on licencing policy for direct-to-home ("DTH") satellite distribution undertakings and DTH pay-per-view television programming undertakings. This direction followed the report on a proposed direction by Parliamentary Committee, in this case the Standing Senate Committee on Transport and Communications, before which the proposed direction had been tabled as is required by the *Broadcasting Act*.

The government's final direction to the CRTC is largely based on the report to the government of an independent review panel pursuant to a public consultation process initiated by the government in November 1994 on certain issues concerning DTH satellite distribution undertakings. However, the final direction also adopts several specific recommendations of the Senate Committee in its report, a report noteworthy for its quality of legal and policy analysis as well as its objectivity and even-handedness towards a matter that had been the subject of considerable inflammatory and poorly informed commentary.

(a) The Licencing Exemption Power

There has been considerable misinformation concerning the purpose and effect of an order issued by the CRTC conditionally exempting DTH satellite distribution undertakings from the requirement to obtain a CRTC licence under the *Broadcasting Act*.

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The 1990 revision of the *Broadcasting Act* included a group of measures aimed to increase the CRTC's regulatory flexibility and to confine the use of detailed regulation to instances where it was really required. One of these provided that the CRTC shall by order, on such terms and conditions it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from the requirement to hold a licence under the Act, or from any Regulations under the Act, "where the Commission is satisfied that compliance with these requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in the Act".

Important features of this provision are:

- (1) The CRTC appears to be obligated to issue some form of exemption order for a class of undertakings once it makes the finding that licencing of the exempted undertaking would not materially contribute to achieving the Act's policy objectives. The provision uses mandatory language: "shall";
- (2) The CRTC is the sole judge of whether or not licencing of the class to be subject to the exemption order would materially contribute to achieving the Act's policy objectives;
- (3) The exemption order itself, and the conditions for exemption eligibility which it contains, are, unlike CRTC licencing decisions, not subject to a Cabinet power review and referral back to the Commission. However, the CRTC's discretion to make such an exemption order, such as it exists (see (1) above), and perhaps its discretion to impose conditions on exempted undertakings, might be subject to the government's power to issue binding "broad policy" directions to the Commission, at least perhaps when such a direction has been issued prior to an exemption order; and
- (4) There may be no capacity on the part of the CRTC to amend or withdraw an exemption order if the CRTC finds subsequently that the facts upon which its original findings were based have changed, that new relevant facts have arisen, or that it was just wrong in the first place. There is no express CRTC review and variance power under the *Broadcasting Act* as there is under the *Telecommunications Act*, and, moreover, the *Broadcasting Act* expressly states that, apart from certain restricted appeal rights to the courts, "every decision and order of The Commission is final and conclusive".

More significantly, the making of an exemption order does not appear to preclude the CRTC from licencing on a case-by-case basis undertakings which are part of the exempted class but which are unable or unwilling to adapt their business plans to the Commission's exemption conditions.

From these observations, it appears that the government of the day and Parliament may not have adequately addressed the implications of the exemption power and its relationship to the overall scheme of the *Broadcasting Act* as a case-by-case licencing and periodic licence renewal statute. Nor does careful attention appear to have been given to the balance between political accountability and regulatory independence

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generally established under the Act in relation to the highly sensitive arena of cultural promotion. The exemption power would seem to be a unique and alien regime within the *Broadcasting Act* providing, as it does, for effective repeal of part of the coverage of the *Broadcasting Act* at the sole discretion of the CRTC.

For its part, prior to the DTH exemption order, the CRTC appears to have been sensitive to the peculiarities of the exemption power and has applied it only in clear cut cases, and in one case (video-game services) arguably to undertakings that are not really "programming undertakings" as defined in the *Broadcasting Act*.

The balance of this article will consider whether the CRTC can be faulted for having issued any DTH exemption order, as contended by the government's DTH policy review panel, or whether only the terms of the order were inappropriate "in that they unduly restricted competition as implied by the Senate Committee".

(b) The DTH Exemption Order

(i) The Telesat-only condition

The conditions that had to be observed by exempted DTH distribution undertakings were, for the most part, fairly standard and reflected the CRTC's original proposal including Canadian ownership, and Canadian content, including a restriction that, apart from pay-per-view programming, only conventional programming authorized by the CRTC for distribution by cable TV services could be carried. These fairly non-controversial conditions reflected a desire to protect cable TV services from DTH competition by severely restricting the ability of DTH services to provide different packages of conventional TV services, and to focus DTH/cable competition on competition between conventional Pay-TV and pay-per-view programming offerings of the cable and DTH satellite distribution services.

However, the exemption order's condition that exempted DTH distribution undertakings must make exclusive use of Canadian satellites (i.e. Telesat) for all programming, both domestically and foreign, became immediately controversial. This appeared to be a significant change from the satellite condition in the CRTC's proposed exemption order of March 1994 which, somewhat vaguely, would have required that an exempted DTH undertaking "makes use of Canadian satellite facilities to distribute programming services".

By the time of the CRTC's March proposal, two potential Canadian DTH service suppliers emerged, Expressvu (a consortium of Tee-Comm, a DTH equipment supplier, BCE, and WIC, a Western Canadian broadcasting conglomerate), and Power DirecTV (80% owned by Power Corp. and 20% owned by Hughes DirecTV, a U.S. DTH service supplier and DTH satellite owner).

The exemption order's conditions fit the Expressvu business plan well. However, Power DirecTV's business plan involved direct viewer reception of foreign programming from Hughes' satellites, although

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Power DirecTV would be the actual vendor of services delivered by these satellites, as well as the transmission of Canadian programming, including conventional TV services, using Telesat.

Accordingly, Power DirecTV would have required a broadcasting licence if it wished to employ its two satellite model. This could impact Power DirecTV's launch.

To this date, the record is unclear as to whether Power DirecTV actively sought an expedited licencing process from the CRTC in order to permit it to launch around Expressvu's originally announced launch date (September 1995 - Expressvu has recently advised that its launch has now been postponed indefinitely pending resolution of equipment supply problems and may be initially quite restricted geographically), or as to whether the CRTC, in response or otherwise, had done anything that might be construed as ensuring Expressvu would be the sole Canadian DTH supplier either for an initial limited period or, indeed, indefinitely.

Claims that the CRTC had given Expressvu a de facto monopoly or even a preferred launch window, would therefore appear to be lacking in evidentiary support. However, as discussed in the Senate Committee report (see below), the one effect of the CRTC order was to eliminate all but the highest cost DTH business models from eligibility for exemption. It is arguable that no business model other than Expressvu's might profitably be able to take advantage of the exemption, raising the question of whether more than one Expressvu-type DTH service could be economically viable (based on costs and ability to differentiate) in the Canadian DTH service market.

The CRTC and the Senate Committee have suggested that the Telesat-only exemption condition was a response to previous government statements that U.S. satellites should not be used to deliver digital radio signals. The DTH policy review panel, and the Senate Committee, however, have noted that the original satellite use term of the proposed exemption order was similar in spirit to the current practice of letting cable TV service source U.S. programming directly from U.S. broadcast satellites.

Significantly, in recommending against a Telesat-only DTH licencing policy, the Senate Committee attached considerable weight to the analysis of the Director of Investigation and Research regarding the inefficiencies and additional costs that would arise if U.S. sourced DTH signals were "double-hopped" onto Telesat satellites. (Indeed, the entire Senate report is significant for its reliance on the advice of the Director, and for the absence of any positive treatment of the representatives of the Minister of Canadian Heritage and their Department of Justice legal advisors.)

With respect to the Telesat-only condition, the Senate Committee endorsed the following conclusion of the Director:

The large claim on resources produced by the exclusive use policy makes entry by U.S. DTH providers willing to conform to Canadian content rules not economically viable. This has the immediate impact

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of reducing competition by eliminating Power DirecTV from the market and from precluding entry in the future by any other U.S. DTH provider willing to follow this model.

A question that has yet to be directly put to the CRTC is, whether or not, as the expert regulator, it had conducted an efficiency analysis similar to the one conducted and publicly presented by the Director (which analysis found that several hundred million dollars per year of DTH service revenues would be diverted to Telesat as a duplicative "footprint" supplier and away from support for Canadian programming and content), and, if so, whether its findings were similar, and therefore whether the CRTC appreciated the likely economic consequences of its order, particularly in relation to the promotion of Canadian programming.

The Senate Committee found that the Telesat-only condition was "unjustly discriminatory". The government's direction now provides that, in licencing DTH distribution as a pay-per-view service, an application cannot be denied for the sole reason that a foreign satellite is to be used for the distribution of the non-Canadian programming of that pay-per-view service, "provided that such use is consistent with generally applicable Canadian satellite policy". Result: some assurance that Power DirecTV can use Hughes' satellites to some extent with some discretion still given to the CRTC on controlling this use with a view to protecting Telesat. This represents only a partial win for Power DirecTV since this firm appears to have wanted to be able to supply Canadian pay-per-view programming carried on Hughes' satellites directly to Canadian homes, and it had adopted a broader definition of pay-per-view that included "per-per-series", a concept that overlaps with conventional notions of TV programming.

However, lest the CRTC continue to be inclined to micro-manage DTH competition, as appears to have been the case with the Telesat-only condition, the Senate Committee recommended - and the government adopted, the following regulatory policies for the DTH service industry:

- (1) the CRTC is directed to promote, through licencing, a dynamically competitive market for DTH services; and
- (2) the order notes that the CRTC should not refuse to issue a DTH programming or distribution licence "on the basis of a concern for economic viability".

(ii) Contribution to Canadian Programming

A second issue raised during the policy review stage was how to ensure that DTH services contributed to the development of Canadian programming. Cable TV services now contribute 5% of revenues to a program development fund, but this surcharge was not made an exemption condition for DTH undertakings under the CRTC's August 1994 order. The DTH policy review panel recommended such a surcharge should apply to all DTH distribution undertakings, given that they will compete with cable. Both Expressvu and Power DirecTV told the Senate Committee that they would also pay 5% of revenues to a Canadian programming production fund. The government's direction now requires the CRTC, in

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licencing DTH distribution undertakings, to make them subject to equitable obligations and to make maximum contributions to Canadian programming "including a significant financial contribution derived from a percentage of gross annual revenues to the production of Canadian programming".

The catch will be how to require Expressvu to contribute equitably when compared to Power DirecTV if, as may be the case, it remains exempted from licencing. The exemption order does not have a 5% of revenue condition, and as noted there may be no basis to withdraw or amend the currently applicable order.

(c) Policy Direction - Legal Issues

A substantial part of the reports of the DTH policy review panel and the Senate Committee were devoted to what to do with the CRTC's exemption order. The review panel had concluded that DTH was the very type of activity which should be subject to detailed case-by-case licencing and proposed withdrawal of the exemption order. This was reflected in the government's proposed order.

However, in what may become a seminal discussion of the proper use of the policy direction power of the *Broadcasting Act*, the Senate Committee concluded that the government lacked the legal authority to order the CRTC to rescind the exemption order (because the Senate was only required to report on the proposed direction, it did not address whether the CRTC had the capacity to do so whether or not it was so directed).

In reaching this conclusion, the Senate Committee adopted the conclusions of two private law firms provided in submissions to it, notwithstanding that they had been prepared for interested parties. Both opinions concluded that the proposed direction (that the CRTC not authorize a DTH service other than by means of a licence) was invalid in that:

- (1) It was not a broad or general policy direction as required by the Act, but was a specific direction aimed at a particular exemption order and undertaking. (There is some judicial support for the proposition that a government direction cannot dictate a particular regulatory decision. The *Broadcasting Act* was clearly drafted to preclude this possibility by allowing the Cabinet to issue only "broad policy" directions); and
- (2) It purported to require the CRTC to ignore the requirement of procedural fairness by changing a lawful framework upon which Expressvu had relied without due process.

The Senate Committee critically noted that government legal opinions, which the Department of Canadian Heritage contended supported the proposed direction, were not provided to the Committee on the basis of solicitor-client privilege, and that "the Minister of Canadian Heritage did not appear before the Committee to explain this important matter". The Committee concluded:

The Committee did not have cooperation from the departments who are seeking to advance a new departure in statutory interpretation.

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Not surprisingly, Expressvu indicated that it would challenge in the courts any attempt to repeal or amend the exemption order, or to require the company to obtain a licence, as long as it complied with the conditions of the order.

The government, for its part, has stuck to its guns in its final direction and dumped this thorny legal problem in the CRTC's lap. It has directed the CRTC, following the conclusion of its licencing process, "to take all necessary and appropriate steps to ensure that no person is authorized to carry on a DTH distribution undertaking by any means other than a licence".

Expressvu, for its part, appears to be trying to provide an opportunity to fudge the issue by applying for a licence to carry on a DTH distribution undertaking. Expressvu might therefore purport to operate under a licence event though that method of operation remains exempt from licencing under the exemption order (assuming that it is not repealed or is not repealable). A problem might still arise if Expressvu is denied a licence (either on the merits or because the CRTC eventually concludes that the exemption order creates no basis for licencing the undertaking subject to the conditions of licence it finds to be in the public interest). A problem may also arise if the CRTC licences Expressvu but on terms that Expressvu considers to be less profitable than the conditions of the exemption order. Would Expressvu then purport to operate as an exempted undertaking and deny the validity of the CRTC licence?

The current situation leaves open the interesting questions of whether the CRTC can repeal its exemption order, and, if not, whether it has the jurisdiction to licence an undertaking that is otherwise exempted from the statutory requirement to obtain a licence before operating. Stay tuned.

The government directed the CRTC to call for DTH distribution undertaking licence applications immediately upon the order's coming into force and to complete the licence process not later than November 1, 1995 unless compelling circumstances prevent the CRTC from doing so.

The CRTC has proceeded to call for licence applications and has announced that its hearing will begin October 30, 1995. The application of a third potential DTH entrant, a consortium of cable TV services known as Homestar, will be heard by the CRTC.

The Homestar application promises to make the CRTC proceeding even more controversial since it raises the competition issues of the possible establishment of a "fighting brand" to attack other entrants, possible dominant firm cross- subsidization of new competition services, and the impact on competition of Homestar's use of the same digital video compression standard as is planned for introduction on a number of conventional cable TV systems.

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(d) A Separate Canadian Pay-Per-View Rights Market

In addition to directing the CRTC on DTH distribution undertakings, the government, at the same time, issued a direction on DTH pay-per-view television programming undertakings that would require the separate licencing of this class of undertaking.

It would appear that the principal reason for doing so is to provide for managed competition between DTH pay-per-view services, and, taking into account that Power DirecTV would source Canadian pay-per-view distribution rights to non-Canadian works from Hughes DirecTV to preclude this arrangement from giving Power DirecTV "exclusive or other preferential rights to pay-per-view distribution of feature films and other programming within Canada". That is, the CRTC is to police the maintenance of a distinct Canadian pay-per-view rights market to prevent tying arrangements with the U.S. rights market.

The CRTC has also been directed to require satellite pay-per-view programming undertakings to be subject to Canadian exhibition ratios, Canadian film and event exhibition minima, and rights payments which are comparable or equivalent to the obligations of cable-based pay-per-view programming undertakings.

(e) Concluding Observations

A key plank in the Power DirecTV presentation to the Senate Committee was its contention that its early entry would be necessary to halt the spread of the DTH "gray market" (i.e. Canadians subscribing directly to a U.S. DTH service, principally Hughes DirecTV, using U.S. mailing addresses and U.S. bank accounts for direct payments). Power DirecTV contended that it alone could win over the bulk of the Canadian gray market for Hughes DirecTV services to its Canadianized version of the service through direct solicitation of known Hughes' customers in Canada.

It remains to be seen whether Canadian gray market customers can indeed be won over in large numbers given that the Power DirecTV service will probably cost more than the American service and will be subject to choice limiting Canadian film/event quota. It also remains to be seen whether, depending on the growth potential of this gray market, Hughes will ultimately conclude that it has more to gain by dealing through a legitimate Canadian middleman, rather than letting the gray market grow on its own.

Taking into account the declining cost of DTH equipment and its increasing standardization in the U.S., the ease of electronic funds transfer and the North-Americanization of "800" toll free telephone services, the ability of Canadianized DTH services to supplant this gray market is probably in some doubt.

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