COMMENT & ANALYSIS

THE USE OF FORMAL INVESTIGATORY POWERS IN MERGER EXAMINATIONS BY THE DIRECTOR UNDER THE *COMPETITION ACT*: SECTION 11 IF NECESSARY BUT NOT NECESSARILY SECTION 11

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Introduction

Voluntary compliance is an integral part of the enforcement of Canadian competition legislation. In fulfilling his mandate of enforcing the *Competition Act* (the "Act"), the Director of Investigation and Research (the "Director") has acknowledged that there are instances where "the goals of maintaining and encouraging competition can be pursued with greater effectiveness and certainty, and with less time and expense, through an approach to enforcement which stresses the promotion of continuing voluntary compliance with the Act."[1] A major advantage of this approach is reduced reliance on the more time-consuming and costly formal investigatory mechanisms in sections 11 and 15 of the Act. However, voluntary compliance is only advantageous so long as the administrative benefits are not at the expense of the effective information collection necessary for the evaluation of transactions.

In a recent address to the Competition Law Section of the Canadian Bar Association, the Director, Mr. George N. Addy, expressed concerns about the effectiveness of voluntary compliance for information collection. As a result, the Director said he had felt it necessary to use the formal investigatory power in section 11 of the Act in some recent merger examinations. This suggests that the Director may now be carrying out a previously stated intention "to expand the use of formal investigatory powers in the enforcement of civil reviewable matters under the Act."[2] Nonetheless, the Director maintained that the voluntary compliance program would continue, as resort to such mechanisms would be determined on the merits of each case.

This paper questions the merits of expanding the use of formal investigatory procedures for enforcing the Act, in particular in relation to its merger provisions. While the legitimacy of the Director's motivation for such an expansion is not questioned, there are practical risks in his approach, including the undermining of voluntary compliance, that could compromise the Director's ability to facilitate effective enforcement of the Act.

The Rationale for Voluntary Compliance

It is well recognized that enforcement of competition legislation presents unique challenges. Why this is so was well stated by La Forest J. in *Thomson Newspapers Ltd.* v. *Canada (Director of Investigations, Restrictive Trade Practices Commission)*:[3]

> ... In terms of enforcement mechanisms, combines legislation cannot rely on the type of periodic on-site inspection which is characteristic of many other types of regulatory legislation. This is because it regulates economic activity generally, whereas most other types of regulatory legislation are designed to deal only with certain trades or businesses. To undertake the periodic visitation of all or even most businesses operating within Canada would, from a financial and administrative standpoint, be a massive and perhaps impossible task.[4]

The result, La Forest J. noted, is that enforcement of competition legislation relies largely on the willingness of businesses to conform to its standards. Thus, competition authorities in Canada rely heavily on voluntary compliance programs, supported by penalties, among other things, to provide incentives as an alternative to regular periodic inspections.[5] Similarly, voluntary compliance may also be considered an economical alternative to the constant use of formal investigatory powers.

This approach is reflected in the Director's current enforcement process, which permits substantial flexibility respecting the manner in which the Director pursues compliance with the Act.[6] The Director typically initiates the process with a preliminary examination to assess whether a matter may raise problems under the Act. If the Director identifies a potential problem, he conducts a further examination, which may include bringing the matter to the attention of the parties involved and trying to negotiate a resolution to the matter. In the absence of a negotiated solution, if the Director determines there are reasonable grounds to believe there has been a violation of the Act, he commences an inquiry pursuant to section 10.[7] This inquiry is essentially a fact-finding exercise undertaken by the Director to determine whether he should recommend prosecution of a criminal matter to the Attorney General or pursue a reviewable matter before the Competition Tribunal.

In a section 10 inquiry, the Director may apply to a court to invoke powers of investigation granted to him under sections 11 and 15 of the Act.[8] As a practical matter, the Director, in the past, has resorted to sections 11 and 15 on a selective case-by-case basis and, in the case of mergers, only where voluntary disclosure has yielded insufficient information for the proper evaluation of the transaction. However, the Director has recently expressed and exhibited a greater openness to using the section 11 and 15 powers.

The Formalization of Merger Investigations

On September 29, 1995, the Director addressed the 3rd Annual Competition Law Conference of the Competition Law Section of the Canadian Bar Association.[9] In his remarks, the Director noted that "enforcement of the [Act's] reviewable matters provisions, and most particularly the merger provisions, has been characterized by an approach of voluntary cooperation."[10] While acknowledging that the voluntary

approach has worked in the majority of merger cases, the Director also expressed concern about its effectiveness in cases that raise *prima facie* competitive concerns or in which information is sought to alleviate competitive concerns. The Director then said:

> For example, I am aware that some counsel advise their clients to take a very narrow view of the voluntary requests that we send out in the course of our examinations. And in every merger case that we have brought before the Tribunal we have obtained, during the discovery process, documentary information that we believe should have been made available during the course of our preliminary examination of the matter.
>
> Accordingly, to ensure the effectiveness of our review process we have recently felt it necessary to use the provisions of section 11 in the course of some merger examinations. Previously, we found, by requesting parties to respond to information requests as though they were made under section 11, an improvement in the quality of information provided to us. Counsel not only provide their usual competition brief, but counsel will also provide corporate documents and more factual information. In one case, orders under paragraphs 11(1)(a) and (b) were used to obtain information that parties to transactions refused to provide. These provisions have also been used in a civil abuse examination and most recently we have conducted the first section 15 searches in respect of a non-criminal provision of the Act.[11]

This statement suggests the Director may be increasing his reliance on formal investigatory procedures and powers in the context of, among other things, merger investigations in a manner that is consistent with the intention announced in his 1994 *Annual Report*.[12]

The Director further stated that he did not believe a shift toward greater use of formal investigatory procedures and powers spelled the end of voluntary compliance. In fact, he portrayed the above measures as a regrettable necessity in those cases where voluntary cooperation by the parties is incomplete. He therefore appealed to members of the Bar to consider the important contribution that voluntary compliance makes to the enforcement of the Act when they dispense legal advice to their clients.

Despite the Director's confidence that the current voluntary compliance program will continue, there is reason to doubt this can be true. The trend toward formalization of the Director's investigatory process has blurred the distinction between voluntary and forced compliance. Even before the Director applies to a court to use the formal investigatory mechanisms in section 11 or 15, he makes use of formal investigatory techniques. For example, when the Director requests information under the voluntary compliance program, he asks that his request be treated as if it were a formal section 11 request,[13] including the requirement that information be provided under oath.[14] While such "notional" section 11 requests are formally part of the program of voluntary compliance, they differ little in substance from the formal mechanisms in sections 11 and 15 of the Act. This is especially true in light of the Director's recent statement, which effectively requires parties to submit to voluntary compliance or face a section 11 or 15 order. Finally, in addition to the Director's verbal indications of a greater willingness to resort to more formal measures, recent jurisprudence reflects the fact that he has done so and further indicates that the courts will permit him considerable latitude in this regard.

Judicial Acceptance of an Increased Use of Formal Investigatory Powers

Where possible, the Director has avoided resorting to the formal use of sections 11 and 15. In recent instances where he has chosen to use these provisions, the courts have generally been accepting of his choice. The Director has applied for and obtained a section 15 order in one civil case, although the information available on this is limited. As for section 11, there have been at least two recent reported cases in which parties have applied to the courts to challenge the validity of an *ex parte* order granted to the Director in a merger case pursuant to that section. Additionally, the Federal Court of Appeal appears to have endorsed a liberal approach to the interpretation of section 11 in a recent decision.

In *Canadian Pacific Ltd.* v. *Canada (Competition Act, Director of Investigation and Research)*,[15] Farley J. refused an application by Canadian Pacific ("CP") to set aside an *ex parte* order that Farley J. had granted pursuant to section 11(1)(a) of the Act. The Director had sought the order to compel the attendance for examination of a third party witness in relation to a merger to which CP was a party. CP applied to set aside the order on the grounds that Farley J. had failed to consider whether the Director had reasonable grounds for proceeding with a section 10 inquiry.

Farley J. held that CP lacked standing to bring the application, because, while CP was a party to the merger that was the subject of examination by the Director, CP had no proprietary interest in the examination of the third party witness. Even if CP had had standing, Farley J. said he would have rejected its application. In so stating, Farley J. stated that the decision of the Director to seek an order under section 11 is an administrative decision to which the rules of procedural fairness do not apply. Moreover, Farley J. expressed a strong reluctance to consider whether the Director had reasonable grounds for commencing a section 10 inquiry:

> CP raises the question of whether the Director has reasonable grounds to cause an inquiry to be made. That would not appear to me to be the subject of any reconsideration by me. That question is not before me. It is clear that the Director has caused an inquiry to be made pursuant to s. 10. As to the technical aspects of whether the Director has cited whether he has reasonable grounds, while I do not see that as a point before me, I note that the Director has confirmed that he is causing an inquiry to be made pursuant to s. 10(1)(b)(ii) which by implication would indicate that he has reasonable grounds in his view. It would be wrong for me to delve into those grounds in this application .... This objection is to whether the Director should instigate an inquiry (s. 10) not as to whether there should be an examination of Mr. Keller (s. 11). CP has not objected to the legitimacy of the inquiry but has in fact filed material in connection with the Director's inquiry request.[16]

Farley J.'s reasoning appears to make it difficult for a party to challenge the validity of a section 11 order on the grounds that the Director lacked a reasonable basis for commencing a section 10 inquiry.[17] While Farley J. suggested that CP should have raised the issue when the Director initiated the inquiry, it is hard to envisage how a party might have challenged that decision given the finding that the Director's decision to seek a section 11 order is a mere administrative decision and therefore not subject to procedural fairness; this being so, the decision to commence an inquiry is likely also to be a mere administrative decision.

Regardless of the type of decision, the court retains its jurisdiction to review the legality of the Director's conduct, but Farley J.'s reasoning shows a strong reluctance to question the Director's justification for initiating an inquiry. In short, if subsequent jurisprudence follows a similar path, the courts risk becoming the rubber stamp that rendered the Director's decisions to commence an inquiry virtually unreviewable prior to the passage of the *Charter of Rights and Freedoms*.[18]

Farley J. also considered an application to set aside a section 11 *ex parte* order in *Raimondo* v. *Canada (Director of Investigation and Research)*,[19] which stemmed from the same merger inquiry. From the perspective of the Director's entitlement to a section 11 order, Farley J. made two important holdings. First, he held that a party cannot avoid a section 11 order by arguing non-possession of the sought-after material, because no liability derives from non-possession, provided there was no improper divestiture of the material. And second, Farley J. dismissed an argument that the Director had alternative sources for the information, because the Director is entitled to obtain the information from his preferred source.[20]

Finally, and perhaps most significantly, the Federal Court of Appeal recently considered section 11 of the Act in *Samson* v. *Canada (Director of Investigation and Research)*.[21] Although *Samson* involved a criminal (price-fixing) inquiry, the decision contains perhaps the most important statement about the Director's entitlement to a section 11 order to date.

In *Samson*, the Director applied for and obtained section 11(1)(a) orders to compel notaries in Sherbrooke, Quebec, who were suspected of having participated in a price-fixing arrangement, to appear for examination. The notaries then applied to the Federal Court for a declaration that section 11(1)(a) was of no force and effect. Leaving aside the constitutional discussion in the case, which involved the right not to incriminate oneself, the trial and appeal decisions differed substantially in their depiction of the scope of the Director's role in carrying out a section 10 inquiry.[22]

According to the trial judge, Madam Justice Tremblay-Lamer, the Director already had sufficient information to conclude that the plaintiffs had committed a criminal offence by conspiring to fix prices, therefore the Director's further examination pursuant to section 11 could only be for the purpose of collecting information for the eventual prosecution of the parties.[23]

On appeal, Hugessen J. held that, while Tremblay-Lamer J. may have been correct to conclude that the Director had sufficient evidence to determine the parties had conspired to fix prices, she erred in law by overlooking the element of undueness that was part of the offence. According to Hugessen J., the Director lacked sufficient information to carry out the type of undueness analysis prescribed by the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society*.[24]

In summary, the courts have generally been accepting of requests from the Director for orders pursuant to section 11 of the Act. Similarly, the Director successfully obtained an *ex parte* order under section 15

of the Act in the only civil case in which he has sought such an order. The Director thus *appears* to have the best of both worlds: he either obtains information by way of "voluntary" examination under a notional section 11 request, or, if necessary, he obtains a formal order from the court pursuant to sections 11 or 15. However, the apparent advantages of this arrangement may be illusory given the practical problems with a more formalized investigatory approach that may undermine voluntary compliance, thereby complicating rather than facilitating the Director's enforcement of the Act.

The Risks of Increased Formality: Undermining Voluntary Compliance

As previously noted, the importance of voluntary compliance to the enforcement of competition legislation is well recognized. Accordingly, even while admitting that he felt it necessary to increase his reliance on formal investigatory procedures and powers in merger investigations, the Director was careful to state that this would not compromise the continuation of the voluntary compliance program. However, as already pointed out, it is questionable whether the Director's assurances are adequate guarantees of the continued existence of the voluntary compliance program in its present form. On the contrary, voluntary compliance in the context of mergers could be rendered more a fiction than reality, which should raise concerns given the importance of voluntary compliance to the effective and efficient administration of the Act. The erosion of voluntary compliance may even create a perception that the Director intends to adopt a more adversarial stance in his investigatory duties similar to that taken by antitrust authorities in the United States.[25]

The Director has significant powers to complicate the realization of a merger. It is therefore logical that parties to a proposed merger should prefer to cooperate with the Director. However, in reality, the Director has found that he has obtained insufficient voluntary compliance in certain cases, in particular those giving rise to *prima facie* competitive concerns or in which competitive concerns arise during the course of his inquiry. The Director's response, which has been to increase his use of formal investigatory procedures, may aggravate rather than remedy these informational difficulties. Moreover, by lowering his threshold for using formal powers, he may also create new informational deficiencies in cases where voluntary compliance would previously have been sufficient.[26]

In cases raising *prima facie* competitive concerns or in which competitive concerns arise during the Director's inquiry, parties to the proposed merger are likely to be reluctant to disclose information that could threaten or complicate the transaction by inviting a more detailed investigation by the Director. Nonetheless, there is no reason why such parties should not voluntarily disclose some information pursuant to a voluntary compliance program. If, however, the parties perceive that any voluntary provision of information is likely to be followed by a formal request under section 11 or a warrant under section 15, then they may choose to wait until the Director has obtained a section 11 or 15 order before they surrender any information. In addition to saving the time and expense of submitting to disclosure twice, it may be less damaging to their relations with the Director to require him to use his formal powers from the outset than to require him to do so based on a suspicion that they are deliberately withholding information at the voluntary compliance stage.

The Director's greater propensity to use his formal investigatory powers may also create a chilling effect among parties to merger transactions that, in the past, have not been perceived as giving rise to competitive concerns and therefore have attracted effective voluntary compliance. Having perceived the Director to have lowered the threshold for using his formal investigatory powers, some parties may infer from this a stronger determination on the part of the Director to investigate mergers for anti-competitive effects. In the short term, such parties may simply choose to forgo voluntary compliance. The longer term effects may be more serious: the development of a more adversarial approach to merger review investigations. In either case, the Director's decision to increase the use of formal investigatory powers may result in cases in which the Director would previously have received sufficient information by way of voluntary compliance but for which he will in the future have to use his formal powers.

The Director may also find that increased use of formal investigatory powers increases the costs of enforcement. Section 11 and 15 procedures are more costly than voluntary compliance, in part because parties may subsequently challenge the *ex parte* order, thereby necessitating court appearances and related costs. This could add an additional strain on already limited resources available to the Director for fulfilment of his enforcement mandate.[27] The mergers section of the Bureau is not exempt from these problems.[28] Parties may recognize this squeeze on resources, and therefore shun voluntary compliance based on their knowledge that the Director can only afford to make a limited number of section 11 and 15 requests. While these problems may be offset to some degree by the benefits to a party of cooperating with the Director, this will not be the case where parties perceive that disclosure is contrary to their interest.

In short, the effect of the Director's increased use of formal investigatory procedures and powers may be that there is little voluntariness left in the voluntary compliance program, which would mean there is much less incentive for a party to take advantage of voluntary compliance. While this would be especially true in those cases where the Director has had difficulties in obtaining sufficient voluntary disclosure of information, namely in cases raising *prima facie* competitive concerns or in which information is sought to alleviate competitive concerns, the Director may find his informational difficulties becoming even more widespread now that he appears to have increased his propensity to proceed by way of formal procedures and powers. As a result, the Director may find that he obtains less information in the long run than he does now and that he must therefore rely to an even greater degree on formal powers to obtain the information he needs. The Director is correct to determine whether to resort to formal powers on a case-by-case basis, but his case-by-case analysis should factor in the potential precedential impact of increased use of formal investigatory procedures and powers.

Conclusion

The insufficient voluntary disclosure of information necessary for the Director to carry out his mandate in enforcing the *Competition Act* is a serious problem. Moreover, the response the Director has chosen, namely to increase his reliance on formal investigatory procedures and powers, is a legitimate response in terms

of his statutory authority, although the constitutional validity of sections 11 and 15 have yet to be conclusively determined by the courts.

Notwithstanding the statutory legitimacy of the Director's response, there are practical problems with it that may aggravate rather than alleviate his informational problems. Greater formality necessarily reduces the scope for voluntary compliance, which puts at risk the benefits of voluntary compliance on which enforcement of the Act greatly relies. Specifically, the Director may find that the decision to resort to more formal investigatory measures creates a chill in the use of voluntary compliance and increases the Director's costs for enforcing the Act. Given the importance of voluntary compliance to the enforcement of competition legislation generally, these are risks the Director should not ignore.

Ultimately, the question is not whether the Director needs the information he is seeking, but rather how he obtains that information. While voluntary compliance has proven insufficient in certain circumstances, there are also problems with increasing the use of formal investigatory powers. Given the importance of voluntary compliance to the enforcement of competition legislation, the Director may find it more advantageous to focus his efforts on finding a means to increase disclosure in a manner that complements rather than dilutes voluntary compliance. Although such efforts to enhance voluntary compliance may prove unsuccessful in the end, the importance of voluntary compliance suggests that efforts at reform be undertaken before resorting to an increase in the use of formal powers under the Act.

Appendix: Sections 10, 11 and 15 of the *Competition Act*

Sections 10, 11 and 15 of the Act read, in part, as follows:

10. (1) The Director shall

(*a*) on application made under section 9,

(*b*) whenever he believes on reasonable grounds that

(i) a person has contravened or failed to comply with an order made pursuant to section 32, 33 or 34, or Part VIII [matters reviewable by the Competition Tribunal],

(ii) grounds exist for the making of an order under Part VIII, or

(iii) an offence under Part VI or VII [criminal offences] has been or is about to be committed, or

(*c*) whenever he is directed by the Minister to inquire whether any of the circumstances described in subparagraphs (*b*)(i) to (iii) exists,

cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts.

11. (1) Where, on the *ex parte* application of the Director or the authorized representative of the Director, a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn

affirmation that an inquiry is being made under section 10 and that any person has or is likely to have information that is relevant to the inquiry, the judge may order that person to

(*a*) attend as specified in the order and be examined on oath or solemn affirmation by the Director or the authorized representative of the Director on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in that order;

(*b*) produce a record, or any other thing, specified in the order to the Director or the authorized representative of the Director within a time and at a place specified in the order; or

(*c*) make and deliver to the Director or the authorized representative of the Director, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

15. (1) Where, on the *ex parte* application of the Director or the authorized representative of the Director, a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation

(*a*) that there are reasonable grounds to believe that

(i) a person has contravened or failed to comply with an order made pursuant to section 32, 33 or 34, or Part VIII,

(ii) grounds exist for the making of an order under Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, and

(*b*) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (*a*)(i), (ii) or (iii), as the case may be,

the judge may issue a warrant under his hand authorizing the Director or any other person named in the warrant to

(*c*) enter the premises, subject to such conditions as may be specified in the warrant, and

(*d*) search the premises for any such record or other thing and copy it or seize it for examination or copying.

Notes

[1] Director of Investigation and Research, *Annual Report, for the year ended March 31, 1990* (Ottawa: Consumer and Corporate Affairs, 1990) at 4.

[2] Director of Investigation and Research, *Annual Report, for the year ended March 31, 1994* (Ottawa: Industry Canada, 1994) at 10.

[3] (1990), 29 C.P.R. (3d) 97 (S.C.C.).

[4] *Ibid* at 161.

[5] *Ibid.*

[6] This process is summarized in Director of Research and Investigation, *Program of Compliance* (Ottawa: Consumer and Corporate Affairs Canada, 1993) at 9-10.

[7] Section 10 of the Act is reproduced in the Appendix.

[8] Section 11 of the Act empowers the Director to compel oral examination, production of documents, or the preparation

of a written return by any person having knowledge pertaining to a section 10 inquiry. Section 15 provides for search and seizure powers of the Director. The relevant parts of these sections are reproduced in the Appendix.

[9] Address by George N. Addy, Director of Investigation and Research, Bureau of Competition Policy, to the 3rd Annual Competition Law Conference of the Competition Law Section of the Canadian Bar Association, Aylmer, Quebec, on 29 September 1995). For a complete copy of the Director's address see (1995) 16:3 Can. Comp. Rec. 1.

[10] *Ibid.* at 8, cited to Can. Comp. Rec.

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

[12] *Supra*, note 2.

[13] *Supra*, note 9 at 9, cited to Can. Comp. Rec.

[14] Address of George N. Addy, Director of Investigation and Research, Bureau of Competition Policy, to the 2nd Annual Competition Law Conference of the Competition Law Section of the Canadian Bar Association, Montreal, Quebec (30 September 1994) at 10. Francine Matte, Senior Deputy Director of Investigation and Research (Mergers), Bureau of Competition Policy, excerpt of speech delivered 25 January 1995, reproduced in (1994-1995) 15:4 Can. Comp. Rec. 1 at 3. See also Calvin S. Goldman and Richard F.D. Corley, "Recent Developments in Merger Review" (1995) 16:1 Can. Comp. Rec. 42 at 46.

[15] (1995), 61 C.P.R. (3d) 137 (Ont. Gen. Div.).

[16] *Ibid.* at 141-2.

[17] Not all inquiries are commenced on the Director's own initiative. Paragraph 10(1)(a) of the Act requires the Director to commence an inquiry upon the application of six residents. Where this is the case, it may be difficult for a party to challenge an *ex parte* section 11 or 15 order on the grounds that the inquiry commenced by the Director was somehow unjustified.

[18] Although Farley J.'s reasons suggest that a court need not consider the Director's reasons for commencing a section 10 inquiry, it is unclear whether his conclusion would be supported by the Supreme Court of Canada. In *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 165, in which the court struck down the predecessor to the current section 15 of the *Act*, Dickson C.J. referred to the pre-*Charter* case of *Petrofina Canada Ltd.* v. *Chairman, Restrictive Trade Practices Commission (No. 2)*, [1980] 2 F.C. 386 (C.A.), in which Prowse J.A. remarked, at 391, that there was no obligation on members of the Restrictive Trade Practices Commission, to whom the Director applied for *ex parte* orders under the old legislation, "to determine the legality of the Director's decision to hold an inquiry; they are merely required to ascertain that there is, *de facto*, an inquiry in progress under the Act." Dickson C.J. went on to hold that section 8 of the *Charter* now required the person to whom the Director makes *ex parte* applications to satisfy himself or herself of the legality of the inquiry and the reasonableness of the Director's belief in the possible existence of evidence to be obtained from the person for whom he sought the *ex parte* order.

Southam dealt with the search and seizure provisions in what is now section 15 of the Act. In *Irvine* v. *Canada (Restrictive Trade Practices Commission)* (1987), 15 C.P.R. (3d) 289 (S.C.C.), among the issues considered by the court was whether the Director must disclose justification for an inquiry under the predecessor of section 10 of the Act prior to acting upon an *ex parte* order pursuant to the predecessor to section 11. Although the court found there was no such precondition, thereby rendering it practically impossible for a party to challenge the legality of an inquiry, section 10 of the present Act differs substantially from its predecessor, with the result that a court might not reach the same result today. Moreover, whether disclosure is required or not, section 10 clearly states that the Director must believe "on reasonable grounds" that the requirements for an inquiry have been met, which suggests a party should be entitled to challenge a section 11 order on the grounds that the Director lacked such grounds.

[19] (1995), 61 C.P.R. (3d) 142 (Ont. Gen. Div.).

[20] See also *Canada (Director of Investigation and Research)* v. *Cast Group Ltd.* (1995), 61 C.P.R. (3d) 219 (Presiding Officer).

[21] (13 June 1995), No. A-184-94 (F.C.C.A.), rev'g (1994), 55 C.P.R. (3d) 19 (T.D.)

[22] This is not to downplay the issue of the constitutionality of section 11, which has yet to be resolved conclusively by the Supreme Court of Canada. The Federal Court of Appeal recently upheld the constitutionality of section 11 in *Samson*, *ibid.*, but the Supreme Court of Canada has not considered the new section since a divided court narrowly upheld its predecessor provision in *Thomson*, *supra*, note 3. The constitutionality of section 11 was cast into some doubt by *R.* v. *S.(R.J.)*, [1995] 1 S.C.R. 451, although some of these doubts were removed by the subsequent decision in *British Columbia Securities Commission* v. *Branch*, [1995] 2 S.C.R. 3. See Paul Collins, "*British Columbia Securities Commission* v. *Branch*: Implications for Section 11 of the *Competition Act*" (1995) 16:1 Can. Comp. Rec. 6. As for section 15, its constitutionality has yet to be challenged, although it appears to be worded so as to respect the Supreme Court's reasons in *Southam*, *supra*, note 18, in which the court struck down the predecessor to section 15.

[23] *Ibid.* at 29.
[24] [1992] 2 S.C.R. 606; see also *ibid.* at paras. 7 and 9.
[25] See, for example, Caswell O. Hobbs, "Corporate Antitrust Compliance Programs," paper presented to the 3rd Annual Competition Law Conference of the Competition Law Section of the Canadian Bar Association, Aylmer, Quebec (28-29 September 1995) at 13.
[26] There is also a third category of transactions that clearly do not raise competition concerns. Voluntary compliance has never been a problem with such transactions, and it is unlikely that any change in the Director's compliance approach would significantly change this.
[27] In his 1994 *Annual Report*, *supra*, note 2, the Director recognized that he is being forced to fulfil his statutory mandate with fewer resources:

> the Bureau, like all parts of the federal government, is experiencing ongoing resource constraints. At the end of the fiscal year, the Bureau's budget was reduced by nine percent and, consequently, staff reductions were undertaken. ... Limited resources are an ongoing reality that will challenge the Bureau's ability to maintain its historical levels of service to the public without sacrificing quality.

[28] Francine Matte, the Senior Deputy Director of Investigation and Research (Mergers) recently acknowledged the especially heavy burden on the Competition Bureau Mergers Review section: "It is worth noting that there are 20 officers involved in Mergers Review. The number of transactions to be reviewed is increasing. Cases are getting more and more complex." *Supra*, note 14 at 4.

MERGER REVIEW UNDER THE *COMPETITION ACT*: REFLECTIONS ON THE FIRST DECADE

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The following is the text of a paper prepared by Mr. Crampton and Mr. Corley for the Roundtable on the Competition Act Ten Years On: A Stock-Taking, sponsored by The Law and Economics Programme, University of Toronto; Davies, Ward & Beck; and Stikeman, Elliott and is reproduced with permission.

I. INTRODUCTION

It is now almost a full decade since the criminal merger provisions of the *Combines Investigation Act*, which had served Canada without distinction for over sixty years, were replaced with state-of-the art non-criminal provisions. Almost immediately upon their enactment, the new provisions led to a virtual explosion of activity in the merger review area, as businesspersons, their counsel and the Competition Bureau (the "Bureau") (formerly the Bureau of Competition Policy) all struggled to come to grips with the revised merger law.

This paper will discuss various key aspects of the merger review process and the more important substantive standards that have emerged from the first decade. With respect to the merger review process, Messrs. Goldman, Wetston and Addy, who served successively as Director of Investigation and Research (the "Director") from 1986 to the present, as well as Mergers Branch staff, have done a fine job in establishing and

implementing a first rate merger review process.[1] Some of the key areas in respect of which considerable credit is due include certainty, transparency, accountability, confidentiality, accessibility and the compliance oriented approach. However, as with any record, there are some "fine tuning" constructive suggestions that can be made. These relate to measures to expedite the timing of the merger review process, ways of using Bureau resources more efficiently, the practice that has emerged with respect to advance ruling certificates ("ARCs"), the streamlining of information requests, case resolution and the Bureau's policy with respect to making market contacts.

With respect to substantive merger standards, the Bureau arguably has placed more information on the public record, through the *Merger Enforcement Guidelines* ("MEGs"), speeches, press releases and backgrounders, than any other antitrust enforcement authority in the world. Through these initiatives, the Bureau's approach to a broad range of substantive issues has been clarified and refined. Unfortunately, the contribution of the Competition Tribunal (the "Tribunal") to the evolution of merger standards, which has been helpful in respect of certain matters, (such as the approach to be taken to market shares/concentration levels, barriers to entry and excess capacity), has fallen somewhat short of the expectations that were generally held in 1986 when it was established. In fairness, this record is in part attributable to the fact that there have only been two contested cases to date, which will be discussed below.

Some of the key merger standards in respect of which the analytical approach of both the Bureau and the Tribunal arguably could be significantly refined include theories of anti-competitive effects, the analysis of ease of entry, and the approach to efficiency gains. In addition, we suggest that the Tribunal could significantly further refine its approach to market definition and, in a subtle way, refine its approach to market shares/concentration levels. We are also hopeful that the Federal Court of Appeal will have another opportunity to address the legal principles applicable to market definition, so that it can build upon the principles it recently articulated.

II. THE MERGER REVIEW PROCESS

(a) Success in Key Areas

By many objective measures, the merger review process has been exemplary. Some of the key areas where credit is due are the following:

Certainty

In a small economy like Canada's, it is critical that restructuring not be undermined by the existence of significant uncertainty regarding the Bureau's merger review process. In a number of ways, the Bureau's track record lends a high degree of certainty to its decisions. For example, we are aware of only one case in which the Director has challenged a merger after having previously reviewed it and concluded that it

did not warrant a challenge.[2] In addition, the Director has not subsequently challenged any of the over 700 transactions in respect of which an advance ruling certificate ("ARC") has been issued under section 102 of the Act, although he recently re-examined a matter after receiving "new information which raised some concerns as to the competitive impact of the proposed transaction."[3] This was "the first time that the Bureau has received new information that has raised a concern with a transaction in which an ARC had already been issued."[4] Similarly, it appears that the Director has only exercised his discretion to "bounce" a short-form filing to a long-form filing on two occasions, although this number may be as high as five.[5] To put this in context, up until March 31, 1995 there had been approximately 330 short-form filings made under the pre-merger notification provisions in Part IX of the Act.

Certainty has also been significantly enhanced through the maintenance of a consistent enforcement policy. Although there were the inevitable growing pains associated with "learning on the fly" in the early years, the Bureau has maintained a consistent approach to key issues such as market definition, market shares, barriers to entry, failing/exiting firms, efficiencies and the test against which it assesses whether a merger is likely to prevent or lessen competition *substantially*.[6] In early 1991, the Bureau's approach to these and other issues was explained in considerable detail in the MEGs.[7] Unlike the U.S. DOJ in the mid-1980s, there has never been any serious suggestion that the Bureau assesses cases against "shadow guidelines."[8]

Transparency and Accountability

In addition to increasing the certainty and consistency of the Bureau's review process, the MEGs, together with the substantial information that has been placed on the public record (through press releases, backgrounders and speeches) with respect to a significant number of specific cases, have served to substantially increase the transparency of the merger review process and the accountability of the Bureau. Although the Bureau has been criticized for not being more accountable,[9] as noted in the introduction, it arguably has placed more information on the public record regarding its merger review and enforcement policy than any other antitrust/competition law authority in the world. With respect to its *general* enforcement policy, it is difficult to see how the MEGs could reasonably have gone much further in articulating objective standards and bright lines to increase the transparency of the Bureau's merger review process and the accountability of the Director, without unduly constraining the Director's ability to depart from the guidelines where rigid adherence to them would lead to inappropriate results. To the extent that merger analysis remains both an art and a science, any attempt to achieve scientific precision would be undesirable and inappropriate.

However, notwithstanding the foregoing, we believe that there is scope for the release of additional information concerning the conclusions reached by the Director in specific cases, for example with respect to matters such as market definition, barriers to entry and other significant aspects of cases in respect of which the Bureau has carried out an extensive review. This would help to fill the precedential vacuum created by the paucity of Tribunal

decisions. However, in view of the Director's recent commitment to provide additional information concerning his decisions,[10] there is no need to belabour this point.[11]

Confidentiality

Public confidence in the merger review process cannot be achieved unless there is a high degree of certainty that information provided to the Bureau in the merger review context will be kept confidential. Since the creation of the Mergers Branch, Bureau staff have been vigilant to ensure that all confidential information, even voluntarily provided information that does not enjoy the protection of section 29 of the Act, is retained in confidence.[12] These efforts are widely viewed as having been successful, and we are not aware of any cases in which confidential information has been leaked by the Mergers Branch. However, notwithstanding these successes, the Director's stated policy with respect to the exchange of confidential information with foreign authorities has sparked widespread concern among members of the competition law bar.[13] As a result, amendments to clarify the Director's powers in this regard have been proposed.[14] We are confident that an acceptable balance ultimately will be struck between the need to exchange confidential information with foreign authorities in appropriate circumstances and the need to ensure that acceptable safeguards apply with respect to the maintenance of the confidentiality of the information provided to the receiving authority.

Accessibility

The Director and senior Mergers Branch personnel also deserve high marks for making themselves accessible to merging parties. It is important, at key stages of the merger review process, to be able to speak or meet with the Chief of the relevant division, the Senior Deputy Director or even the Director. This is recognized by those individuals, who routinely rearrange their schedules to accommodate requests for meetings and who have made it a practice to promptly return telephone calls.

Compliance-Oriented Approach

The access referred to above is part of the compliance-oriented approach instituted when the Mergers Branch was created. This approach has become one of the hallmarks of Canada's merger review process. To the extent that the compliance approach has facilitated streamlined filings, greater certainty and more expeditious resolution of cases than might otherwise be the case, it has undoubtedly been a success. This approach stands in stark contrast to the more litigious approach to merger review in the U.S., which appears to impose significantly greater costs on all parties involved, including federal and state antitrust enforcement authorities, and arguably gives rise to greater uncertainty for merging parties.

However, the tensions resulting from the Bureau's ongoing struggle to balance use of the compliance-oriented approach with the effective enforcement of the Act in cases where the parties do not provide the Bureau with the information or assistance it requires are apparent in a recent speech in which the Director noted that the increased use of formal powers "in no way spell[s] an end to our traditional, compliance oriented approach"; and then proceeded to state: "As important as voluntary cooperation is, I will not let a question of process, no matter how attractive, put the fulfilment of my oath of office at risk."[15]

We recognize that in order to "walk softly", the Bureau has to wield a "big stick" from time to time. In keeping with the Bureau's long-standing tradition, such wielding should continue to be limited to situations where cooperation is not forthcoming *and* there is a serious likelihood that in the absence of the "big stick", competition will be prevented or lessened substantially. However difficult it may be for Bureau staff to resist flexing its muscles when someone appears to be playing "hardball", it must keep firmly in mind that its mandate in the mergers area is limited to ensuring that mergers do not prevent or lessen competition substantially, unless the requirements of the efficiency exception are met. Where a merger is highly unlikely to prevent or lessen competition substantially, the "big stick" should be kept in the closet. In addition, even where there is significant uncertainty as to the likely effects of a merger on competition, caution needs to be exercised to ensure that the "big stick" is used in a measured fashion.

(b) Fine Tuning Suggestions

As the Director recently noted, "there will always be a need to fine tune, constantly, the balance between vigorous enforcement and the compliance approach."[16] It is in that spirit that we offer the following suggestions, which are meant to be constructive, rather than critical. Most of our suggestions are directed towards streamlining the merger review process.

Timing

As currently structured, the Bureau's merger review process probably works as expeditiously as can reasonably be expected, given the Bureau's caseload. We do not believe that fixed time constraints would be helpful. On the contrary, to the extent that fixed time limits likely would result, in many cases, in the Bureau having less time to conduct interviews and obtain information from other sources, counsel would be obliged to furnish a substantial amount of information "up-front", as is the practice in Europe. To the extent that in many cases this would result in the filing of much information that otherwise would not have had to be provided, it would increase the costs of the merger review process for merging parties and the Bureau.

Time limits also would make it much more difficult for the Bureau to juggle cases. This would adversely impact upon the review of non-merger matters and the processing of requests for certain types of advisory opinions, which would keep getting bumped to the "back burner".

In our view, a better way of reducing the average time required for the review of mergers is to adopt a number of complementary measures designed to reduce bottlenecks and the workload in the Mergers Branch. Bottlenecks could be reduced by delegating to the two Mergers Branch Chiefs, and even to Senior Commerce Officers, the ability to sign ARCs and *favourable* Advisory Opinions in cases which do not warrant the involvement of the Director or even the Senior Deputy Director. The weekly meetings at which the more significant cases in the Mergers Branch are discussed with the Senior Deputy Director and then with the Director, provide a sufficient opportunity for those individuals to determine whether a particular case can appropriately be dealt with by the relevant Chief or Senior Commerce Officer. Given the increasing demands on the time of the Director and the Senior Deputy Director, it is unreasonable to expect them to continue to get involved in the less contentious cases.

We also would suggest that, in appropriate cases, such as where parties other than customers are opposing a merger, the Bureau consider encouraging merging parties and opposing third parties to attend a common meeting with representatives of the Bureau to make representations on contentious issues. In addition to expediting the merger review process, this would have a number of benefits, including (i) giving both sides a better understanding of and an opportunity to quickly respond to the opposing case; and (ii) giving the Bureau a better opportunity to evaluate the conflicting representations. Of course, it would have to be made clear that a refusal to participate in such meetings would not, in and of itself, adversely impact upon the weight given to the representations that had been made.

From time to time, the speed and transparency of the merger review process also could be enhanced by the Bureau providing merging parties or complainants with a better general sense of the information that it has received, or the tentative conclusions that it has reached on particular issues. This could be done in a way which does not compromise the confidentiality of the information received, while at the same time enabling merging parties or the complainants in question to directly address areas where there appear to be contradictions, instead of "shadow boxing", through the Bureau, with the party adverse in interest. On occasion, we have found it somewhat difficult to ascertain the reasons behind the apparent reluctance of Bureau staff to accept certain representations. The inability to obtain information in this regard can be particularly frustrating for complainants who may feel that they have not received sufficient information to understand the Bureau's position, have no avenue of appeal, and who may view the Bureau's approach as inconsistent with the spirit of subsection 10(2).

In addition to the foregoing, the Bureau should give serious consideration to adopting a U.S.-style "quick look" process in cases where one or two issues such as market definition or ease of entry may be dispositive. By focusing the initial information request on such issues, significant time and effort can be saved if the requested information satisfies the Bureau that the merger is unlikely to result in a substantial prevention or lessening of competition. Of course, merging parties would have to carefully assess their prospects of succeeding with this type of a short-cut, because the downside of pursuing such an approach would be that if it did not succeed, the merger review process would be longer than would otherwise be the case.

Internal Written Assessments

Consideration also should be given to whether the written case assessments which are currently prepared by officers can be streamlined. In the Auditor General's 1990 Annual Report, it was noted that "management decisions [in the Mergers Branch] on whether to exempt a merger from further review were often not supported with even the minimum amount of information needed for making such decisions."[17] As a result, a decision was taken within the Bureau to require Mergers Branch staff to prepare a written case report in connection with virtually all ARC requests, advisory opinions and other matters requiring a non-trivial amount of an officer's time.

To the extent that current fiscal constraints are much tighter than they were when the Auditor General conducted his review of the Bureau in 1989, and now appear to have reached the point where the Bureau does not have sufficient resources to bring certain cases that would otherwise be brought, there would appear to be good reasons for revisiting the policy of devoting scarce resources to the preparation of written assessments in respect of transactions which are highly unlikely to result in a substantial prevention or lessening of competition. We would suggest that this policy be reconsidered, with a view to eliminating or reducing the time spent in the preparation of reports respecting uncontentious transactions.

It also may be possible to reduce the workload in the Bureau by refining the Bureau's case-screening criteria, to further reduce the number of cases reviewed in detail by the Bureau. This is discussed under the next heading.

Reducing the Number of Cases Closely Reviewed

Given expectations that the Bureau's budget will continue to decrease while "demands on the Bureau continue to increase", as deregulation effectively expands the portion of the economy to which the Act applies,[18] the Bureau is in the difficult position of having to do more with less. This, in and of itself, provides a good reason to search for additional screening devices or other approaches to reduce the number of cases that are closely reviewed by the Bureau.

Quite apart from the foregoing, the record to date suggests that the Bureau may be spending too much time on cases that are unlikely to ultimately be challenged. According to the Director's Annual Reports for the years 1986-87 to 1993-94, approximately 1,380 examinations were commenced by the Bureau during that period. These examinations are identified as having required "2 or more days of review" and as having included "notifiable transactions, advance ruling certificates and examinations commenced for other reasons." However, we understand that some of the 537 total notifiable transactions and some of the 517 total advance ruling certificates may not have required "2 or more days of review." Even if one conservatively assumes that 50% of these transactions did not require 2 or more days of review, there would still be 852 transactions

which required 2 or more days of review. In the same period, approximately 34 mergers were challenged, restructured or abandoned as a result of the position taken by the Bureau. In short, based on these numbers, less than 4% of the cases in respect of which the Bureau has conducted a "significant review" have raised sufficiently serious issues to warrant a challenge, restructuring or abandonment. This would seem to indicate that the Bureau is "significantly reviewing" too many cases.

As has been suggested elsewhere,[19] one additional screening device that would reduce the number of mergers significantly reviewed would be to eliminate from consideration mergers involving markets which have total sales of less than a certain minimum threshold (for example, $5 million), unless the market involved a "public interest" product. A public interest product would be a product which meets certain defined criteria, such as being a medical product or a critical input into products in more substantial markets.

In addition to a "size of market" criterion, a "size of transaction" screen, such as $2 million or $3 million, would make sense. Once again, there should be an exception where the relevant market involves a "public interest" product. These suggested screens arguably can be accommodated within the "economic impact" branch of the Bureau's current case screen factors, i.e., the "size and strategic importance of the sector" factor.[20] Indeed, these screens also indirectly relate to one of the "management factors" of the current case-screening criteria, i.e., the cost of bringing the case, since the cost of bringing proceedings where the two suggested screens are not exceeded can easily exceed the gain to society, even after due weight has been given to the deterrent effect of such action.

To further reduce the case load in the Mergers Branch, a special task force could be established within the Bureau to compile standing lists of unconcentrated industries and certain types of transactions, such as those identified in the CBA's commentary on the Director's June 1995 Discussion Paper entitled *Competition Act Amendments*,[21] in respect of which there would be an informal presumption that mergers would not warrant significant review unless there are strong *prima facie* grounds for concern.

Advance Ruling Certificates

Although some effort has been made to clarify the Bureau's approach to the issuance of ARCs, there remains some uncertainty regarding the Bureau's policy in this regard. For example, the fact that a proposed merger exceeds the market share/concentration thresholds in the MEGs has sometimes been mentioned as a reason for not issuing an ARC, yet no one has ever stated that there is a presumption or rule of thumb against giving ARCs in such circumstances. We would suggest that such a presumption would be entirely unwarranted. It is precisely where the market share/concentration thresholds in the MEGs are exceeded that an ARC has the greatest value, since the MEGs already tell us that "[m]ergers generally will not be challenged" when those thresholds are not exceeded.[22]

We suspect that a review of the merging parties' market shares and the four-firm concentration levels in respect of those mergers which were challenged, restructured or abandoned, or which were not challenged but were the subject of a press release, since the 1986 amendments were proclaimed into force, would reveal that virtually all such transactions involved market shares/concentration levels substantially in excess of the levels in the MEGs. This suggests that the test for issuing ARCs may be too strict. We would not go so far as one commentator, who suggested that ARCs be issued whenever the Bureau decides not to challenge a merger, however, we would suggest that the threshold be raised significantly above where it appears to be today. At the inaugural annual conference of the Canadian Bar Association's Competition Law Section, a senior representative of the Bureau stated: "There is a big difference between transactions in which the Director exercises his discretion not to issue an ARC and a transaction that will likely be challenged."[23] We suggest that this should not be the case. We now have almost a full decade of experience with mergers under section 92. As noted above, there has been only one case in which a merger has been challenged after having initially been permitted to proceed. This suggests that the threshold for issuing ARCs could be moved substantially closer to the point at which the Bureau has real concerns without creating a significant risk of immunizing an anti-competitive merger.

Information Requests

For the most part, Mergers Branch staff have refrained from requesting information which they do not need to conduct their review. However, on occasion, information has been requested which arguably went beyond that which was strictly necessary.

In addition, the information gathering process is becoming noticeably more formal. In this latter regard, the Director recently observed that "to ensure the effectiveness of our review process we have recently felt it necessary to use the provisions of section 11 in the course of some merger examinations."[24] While we acknowledge that it may be necessary to resort to the use of section 11, or the slightly less formal approach of requesting that information be provided under oath, we believe that use of these mechanisms should be reserved for exceptional cases where the Bureau has reason to believe that it is not receiving, on a voluntary basis, the information that it requires to carry out an appropriate review of a matter which raises strong *prima facie* competition concerns. However, we would be concerned if these mechanisms were adopted on a routine basis, as was suggested in 1994.[25]

We believe that the compliance-oriented approach, supported, as required in unusual cases, by the formal investigative powers under the Act, has served the Bureau well and that any move toward broader information requests or an expanded use of formal powers would be unnecessary and inappropriate. Routine use of formal powers could be expected to increase the costs and time required for merger review with little, if any, offsetting benefits in terms of the identification of mergers which are likely to prevent or lessen competition substantially. The smaller size of the Canadian economy, relative to that of the U.S., could make the Type III error costs (i.e., compliance and enforcement costs) associated with more extensive, formal

information requests a substantial impediment to the efficient restructuring of the Canadian economy. In any event, those costs, together with the increased Type I error costs which would result from the greater use of formal powers in merger review, likely would exceed any reduction in Type II error costs achieved by the use of greater formal powers.[26]

In our experience, the high costs associated with the review and production of documents pursuant to requests made by way of section 11 orders, or under the shadow of a section 11 order, suggest that these information gathering mechanisms should only be used as a last resort and should be carefully tailored so as to avoid corporation-wide document reviews and the production of large quantities of redundant information. The formality of section 11 orders and the possibility of contempt proceedings for non-compliance has the effect of limiting the Bureau's ability to narrow or otherwise vary the scope of the information requested in the order in response to changing circumstances. Uncertainty with respect to the extent to which requests for "records" requires the delivery of different types of machine-readable information is a further consideration which argues against the routine use of section 11 orders in merger cases.[27]

Case Resolution

In order to minimize the delays and Type III error costs associated with unnecessary formal proceedings, it is preferable that the Director's concerns about potentially anti-competitive mergers be resolved with the minimum level of formality consistent with the Director's duties under the Act. In particular, we favour the use of fix-it-first resolutions of potential issues before closing and the use of undertakings (convertible into a consent order in the event of noncompliance) to resolve concerns which cannot be addressed pre-closing. We believe that such undertakings, which could be supplemented by press releases and backgrounders, could address the concerns the Director has expressed in the past concerning the effectiveness[28] and lack of openness of undertakings.[29]

The recent decisions of the Tribunal[30] and the Federal Court[31] in the cases brought by Local 1 of the Atlantic Oilworkers Union and the Province of Nova Scotia in respect of the undertakings (the "Undertakings") given by Ultramar in connection with the 1990 acquisition of Texaco Canada Inc. by Imperial Oil Limited have removed any doubts with respect to the legitimacy and enforceability of such undertakings. The applicants in those proceedings were seeking to compel the Director to enforce the provisions of the Undertakings which required Ultramar to operate the Texaco refinery which it had purchased from Imperial in 1990 for seven years, barring a material adverse change. In *Ultramar*, the Federal Court decided that the Director was not performing an adjudicative function in interpreting the Undertakings and "is free within the terms of his statutory authority to devise processes for dealing with matters that lie within his investigative and administrative functions."[32] In the result, the Court decided that the interpretation and enforcement of the Undertakings was "a duty to be exercised within the discretion vested in the Director by statute" and as such that it was "not subject to direction or intervention" by the Court.[33] While the Court declined to fully explore the "ethical implications" of the Undertakings, it noted that "by their express terms the undertakings are deemed to be a contract governed and construed for all purposes under the laws of Ontario and Canada" and "[a]t the least those purposes include that of interpretation and that of enforcement."[34]

The judicial recognition accorded the use of undertakings by the Quebec Court of Appeal in *Couture*,[35] and by the Tribunal and the Federal Court in the Ultramar decisions, suggests that undertakings, rather than consent orders,[36] should continue to be used where the Director's concerns are likely to be effectively addressed within a relatively short period of time (e.g., well within the three-year limitation period under the Act) subsequent to closing. Undertakings permit the timely resolution of the Director's concerns in a flexible, less costly and uncomplicated manner. In the event that a party fails to observe its undertakings, the Director may, at his option, either apply for and seek to enforce a consent order or bring an action to enforce the contractual terms of the undertakings. While the Director may, in certain particularly contentious cases, wish to have the terms under which a merger is to be permitted to proceed approved by the Tribunal, we would expect such cases to be relatively rare.

Market Contacts

Traditionally, the Bureau's policy "has been that we will not go out to the street without the consent of the parties,"[37] unless the Director "feel[s] compelled to do so."[38] However, in one recent advisory opinion, it was suggested that the Bureau should not be expected to delay initiating its contacts in the market after a pre-merger notification filing has been made. The question therefore arises whether there has been a policy shift within the Bureau. We recognize that the Bureau needs a certain minimum amount of time to conduct its contacts in the market and that where it appears that delay in contacting the market will not enable the Bureau to have this minimum amount of time in the market, there is a legitimate public interest in the Bureau taking steps to ensure that it has sufficient time in the market. Two exceptions would be where (i) the transaction will not involve a "scrambling of the eggs" and the parties are willing to proceed with closing at their own risk; or (ii) the parties are willing to proceed subject to a "hold-separate" undertaking.

However, as a general principle, where the parties are prepared to provide the Bureau with the time it requires in the market prior to closing, the Bureau should continue its long-standing policy of respecting the parties' request that market contacts not be made prior to a certain point in time. To do otherwise would be to discourage parties from approaching the Bureau before they are prepared to permit the Bureau to discuss their transaction with customers, suppliers and others in the industry. In turn, this would seriously undermine the compliance-oriented approach to merger review and considerably extend the average period between public announcement of transactions and their consummation.

Personnel

One of the ways the Bureau has maintained consistency in its merger review is by minimizing the shuffling of personnel in the Mergers Branch. However, from time to time, personnel entering the Mergers Branch from other branches, where a somewhat more guarded approach is more common, are not fully sensitized to the differences that are warranted in respect of merger review. In our view, this issue deserves greater attention than it appears to have received in the past.

III. MERGER STANDARDS

When the merger provisions of the Act were proclaimed into force on June 19, 1986, there was very little jurisprudence to provide guidance to the Bureau and businesses regarding key issues such as market definition, barriers to entry, foreign competition, excess capacity, the role of innovation and change, efficiencies and what constitutes a "substantial prevention or lessening of competition". This contrasts sharply with the state of antitrust jurisprudence in the U.S., Australia and Europe at that time. In the intervening decade, we have come a long way in respect of some merger standards, but not very far in respect of others. The key areas are addressed below.

Theories of Anti-competitive Effects

Merger enforcement in Canada since 1986 has focused largely on unilateral effects, i.e. the ability of the merged entity, acting alone, to exercise greater market power than it would be able to exercise in the absence of the merger. The substantial majority of the cases that have been brought before the Tribunal, restructured on an informal basis or abandoned, have been cases which raised concerns about the merged entity's ability to exercise market power unilaterally. However, several cases also have been evaluated in whole or in part in terms of whether increased scope for interdependent behaviour between remaining firms likely would result from the merger.[39] Without having carried out a detailed study of U.S. cases, it is probably fair to state that the experience there has been the reverse, i.e., the majority of cases brought have been pursuant to the interdependence theory, with relatively few brought pursuant to the unilateral theory, although the ratio has been narrowing in recent years. Both the unilateral effects theory and the interdependence theory are explicitly recognized in the MEGs[40] as well as in the decisions of the Competition Tribunal.[41]

In the 1992 *Horizontal Merger Guidelines* released jointly by the FTC and the DOJ, a considerable effort was made to describe the market conditions required for there to be a significant risk of the exercise of unilateral or interdependent market power. That section of the *Horizontal Merger Guidelines* appears to represent by far the most advanced and state-of-the-art treatment of theories of competitive effects in any guidelines or similar document released by an antitrust/competition law enforcement authority anywhere. By requiring an evaluation of specific likely competitive effects as a necessary component of merger analysis, the *Horizontal Merger Guidelines* advanced the analytical framework beyond the comparatively unstructured approach of the DOJ's 1984 *Merger Guidelines* and the MEGs, which simply discuss a number of factors which should be considered and which identify what factors are particularly important.

The time has come to incorporate into Canadian merger analysis some of the refinements regarding competitive effects introduced in the 1992 *Horizontal Merger Guidelines*. Specifically, in assessing whether a merger is likely to facilitate the exercise of interdependent behaviour, we should begin addressing the presence or absence of the particular market conditions that are conducive to (i) reaching terms of coordination; and (ii) detecting or punishing deviations from those terms.

In assessing whether a merger is likely to facilitate the exercise of unilateral market power, we should make a clearer distinction between differentiated and undifferentiated product markets. Where the relevant market involves differentiated products, we should attribute greater significance to assessing: (i) the extent to which the products of the merging parties are the next-best or second-best substitutes for each other; (ii) if so, the extent to which remaining firms would likely replace any localized competition lost through the merger by repositioning their product lines; and (iii) if not, whether the loss of competition would therefore be "substantial".

Where the relevant market involves undifferentiated products, the key issue is whether remaining firms have sufficient excess capacity to be able to constrain a material price increase. This was clearly recognized in *Hillsdown*.[42] Notwithstanding this, and notwithstanding the fact that there was a large disparity[43] in market shares in *Hillsdown* (where the Tribunal concluded that the merger would not likely prevent or lessen competition substantially), the Bureau sometimes displays a certain reluctance to give excess capacity appropriate weight when the merged entity has a large market share or when there is a large gap between its market share and that of the next largest competitor.

Market Definition

Market definition has come a long way in Canada over the last decade. However, it still has a long way to go. At the time the 1986 amendments were proclaimed into force, the state of the jurisprudence was somewhat embarrassing, to say the least. Apart from a few cases where a number of market definition assessment criteria were briefly discussed,[44] the jurisprudence that had developed under the *Combines Investigation Act* over several decades reflected a total absence of any discussion relating to relevant markets.[45] In the absence of any contested cases brought before the Competition Tribunal during the five years which followed the 1986 amendments, or any helpful decisions from the courts, this situation remained unchanged at the time the MEGs were released in early 1991.

In an effort to fill the void and provide merging parties with as much guidance as possible regarding the principles they should apply and the factors they should consider when defining markets, the MEGs devoted considerably more attention to market definition than any other issue. Since the release of the MEGs, the Bureau has been fairly consistent in applying them in specific cases, although there have been some lapses[46] and exceptional situations where certain aspects of the approach set forth in the MEGs could not be applied.

It was hoped that the Tribunal would build on the Bureau's contribution to market definition, once contested cases began to be heard. However, the experience to date has been somewhat disappointing, in the sense that the Tribunal has missed opportunities to articulate general principles. While it has recognized the practical necessity of determining the boundaries of the relevant market,[47] it has also de-emphasised the significance of market definition[48] and not been particularly helpful in assisting the Canadian public to ascertain whether a competing product or plant should be included in the relevant market or considered only at the post-market definition stage of merger analysis.

In addition, the Tribunal has not provided any guidance with respect to the *degree* or *threshold* of market power one should use in defining markets. It has only observed that the "relevant market for purposes of merger analysis is one in which the merging parties acting alone or in concert with other firms could exercise market power";[49] and that one must assess the extent to which "there are any close substitutes"[50] for the merging parties' products. It would have been helpful for the Tribunal to provide some objective measure of how "close" substitutes need to be for them to be in the same market, and how much market power people should have in mind when attempting to ascertain whether two products or plants are in the same relevant market. Rather than increasing certainty in this regard, the Tribunal reduced certainty, by stating that it did not "find it useful to apply rigid numerical criteria", such as "a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise", in determining what will constitute a "substantial" lessening of competition.[51] Notwithstanding that the "5%", "one year" and "small but significant and nontransitory" tests are part of the Guidelines' treatment of market definition, rather than their treatment of what constitutes a substantial lessening of competition, the message conveyed was that the Tribunal does not consider objective measures to be helpful in measuring market power.[52]

Moreover, in *Hillsdown*, the Tribunal declined, without any explanation, to take account of supply-side substitution in market definition; preferring instead to take account of supply-side constraints on market power in the post-market definition stage of the analysis.[53] To the extent that such constraints exist in any given case, their exclusion from the relevant market results in unrealistically narrow markets and unrealistically high market shares. Given that the Tribunal also stated in *Hillsdown* that "[m]arket share data can give a *prima facie* indication as to whether" a merger is likely to create, increase or maintain market power,[54] and given that high market shares tend to weigh against a merger (even though they are typically offset by other factors, as occurred in *Hillsdown*), the exclusion of supply-side constraints from the relevant market is troublesome.

Furthermore, the Tribunal has not recognized the important "smallest market" principle. Under the MEGs and the DOJ/FTC *Horizontal Merger Guidelines*, this is the principle that distinguishes the *relevant* market from other potential markets. Without this principle, there would be no objective basis for selecting the appropriate market to assess from a variety of alternative "markets" in which the threshold degree of market power, whether it be 5%/one year or some other measure, could be exercised by a hypothetical cartel or monopolist.

For example, most observers would agree that if all beer producers in Canada acted as a perfect cartel and if foreign beer producers faced significant barriers to entry into Canada, the cartel could probably impose and sustain a 5% price increase for one year. (The Director, the DOJ and the FTC assume, for the purpose of market definition, that market participants act as a single hypothetical monopolist rather than as a cartel, because cartels are inherently unstable.) Therefore, if everyone accepted the 5%/one year test (or any other reasonable test), it would be agreed that the production and sale of beer in Canada was *a* potentially

relevant competition law market. However, that would only be one of a number of potential relevant markets, because if, for example, all sellers of wine joined the cartel, the larger cartel would also have the ability to impose and sustain a 5% price increase for one year in respect of beer *and* wine. Thus, the production and sale in Canada of "beer and wine" would also be *a* potentially relevant market. The same would be true if all sellers of hard liquor joined the cartel. In short, at each successive stage, *a* potentially relevant competition law market would be identified. Without an additional parameter, market definition would be arbitrary, to say the very least. Accordingly, enforcement authorities in North America take the position that the "relevant" market is typically the *smallest* market in which the proscribed degree of market power can be profitably exercised.[55] In this way, it is clear that the market in the above example should be limited to beer.[56]

Fortunately, the Federal Court of Appeal has recently made a substantial effort to bridge the jurisprudential void in the area of market definition. In its *Southam* decision, the first merger case contested under section 92 to reach that Court, it observed that "the analytical framework for determining whether the products produced by two merging firms are sufficiently close substitutes so as to be placed in the same product market is critical to the achievement of the objectives underlying the merger provisions of the Act."[57] In that case, the Director alleged that the Tribunal (i) failed to properly apply its own stated approach to defining the relevant market by requiring direct evidence of high price sensitivity; and (ii) erred in concluding that Southam's daily Vancouver area newspapers were not in the same product market as the acquired community newspapers, in respect of retail print advertising services.

In response to Southam's position that market definition is a question of fact for which leave to appeal (which was not sought), is required, the Court replied: "The test or analytical framework that is to be adopted in determining whether the products offered by two merging firms are 'close substitutes', and therefore in the same product market, is a question of law."[58] It then observed that "there are a number of tests or analytical frameworks that can be adopted for purposes of defining a relevant market", and that "[t]he adoption of the appropriate framework and its proper application remain a question of law."[59] As a third principle, it ruled: "Whether the facts in a particular case satisfy the requirements of any one framework is a question of fact or more precisely a question of mixed law and fact."[60]

The Court then appeared to criticize the Tribunal for not even referring to the MEGs,[61] and proceeded to highlight the relevant passages of the MEGs, which it suggested "should have informed the Tribunal's approach to market definition."[62] It then adopted the MEGs' principle that "functional interchangeability is a necessary but not sufficient condition to be met before products will be placed in the same market."[63] Stating the proposition in alternative terms, the Court observed that "functional interchangeability is a vital feature of substitutability and therefore an indispensable component of product market definition."[64] It then found that "the Tribunal erred in ignoring evidence of functional interchangeability by summarily dismissing the relevance of that factor";[65] and further erred in "ignoring ... evidence of inter-industry competition."[66]

It found that when these factors were "considered in conjunction, it is clear that the Pacific Dailies and the community newspapers are in the same product market."[67] Elsewhere, it noted that the Tribunal "erred in focusing predominantly on price sensitivity."[68]

The principal contributions of the Federal Court of Appeal's *Southam* decision to market definition jurisprudence are that it clarified:

(i) that the test or analytical framework to be applied in determining whether the two products are in the same relevant market is a question of law;

(ii) that the proper application of the market definition test or framework in any given case is a question of law, such that it is an error if critical factors are ignored;

(iii) that the determination of whether the facts in a particular case satisfy the requirements of the legal framework is a question of mixed law and fact;

(iv) that functional interchangeability is a necessary but not sufficient condition to be met before two products will be placed in the same relevant market;

(v) that "evidence of price sensitivity is not a condition precedent for finding that two products are in the same product market";[69]

(vi) that internal documents of the merging parties which reflect competition between them are an important factor to be considered in market definition analysis; and

(vii) that the MEGs should inform the Tribunal's approach to market definition.

Unfortunately, the Court did not address some of the other gaps in the jurisprudence. For example, it did not take the opportunity to identify the *degree* or *threshold* of market power one should use in defining markets. It simply observed:

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e., if there is buyer price sensitivity.[70]

It would have been more helpful if the Court had gone further and identified the degree of price "change" that is required. That would have provided businesspersons and their advisors with an objective standard to apply when attempting to determine whether two products are likely to be found to be in the same relevant market. As it stands, the merging parties will have to continue to grapple with the issue of how

"close" two substitutes have to be before they may be included in the same relevant market. Unfortunately, the recent decision in *R.* v. *Clarke Transport Canada Inc. et al.*,[71] which provides one of the better discussions of market definition in respect of a criminal case under the Act, reflects the same shortcoming.

It would also have been helpful if the Court had taken the opportunity to clarify that supply-side constraints should be included in the relevant market if they meet some test, for example, the test set forth in the MEGs.

In addition, it would have been very helpful if the Court had taken advantage of the opportunity to indicate which of the alternative tests or analytical frameworks should be employed, as a matter of law, in most circumstances. Instead of stating that a specific approach (such as the hypothetical monopolist approach or the reasonable interchangeability approach) should be applied as a matter of law unless there are very good reasons for applying a different approach, it left this question open. The result is that future decisions of the Tribunal will be subject to appeal on the ground that the Tribunal applied the wrong analytical approach in defining the relevant market.

In our view, it would have been much better if the Court had ruled that the hypothetical monopolist is the superior analytical approach and that that approach should be adopted as a matter of law in all cases unless there are very good reasons for adopting a different approach. This would have provided much more certainty for the Canadian public and the Tribunal. We favour the hypothetical monopolist approach over the alternative approaches,[72] primarily because the hypothetical monopolist is more objective and focused. For example, unlike the other approaches, it provides an objective conceptual boundary around the relevant market by defining the threshold degree of market power required and it confines the analysis to the smallest market in which the threshold degree of market power is exercisable. While some observers have objected to the hypothetical monopolist approach on the ground that the Bureau's 5%/one year market power threshold is unrealistically low, that is not a critique of the hypothetical monopolist approach *per se*, because that approach can accommodate a higher or lower market power threshold if the Tribunal, the Federal Court of Appeal or the Supreme Court of Canada determined that a higher or lower threshold is warranted. The objection, made by some commentators in respect of the 1982, 1984 and 1992 merger guidelines in the U.S., to the effect the hypothetical monopolist framework does not provide much guidance as to its practical application,[73] is inapplicable in respect of the MEGs, which provide substantial guidance as to its practical application.

Parenthetically, we question the suggestion that the hypothetical monopolist framework is not helpful in abuse of dominance cases. In *Laidlaw*, counsel for the Director argued, and the Tribunal appeared to be sympathetic to the view, that "it is not obvious that a significant and non-transitory price increase test for determining market boundaries is useful in an abuse of dominance test."[74] This misinterprets the way in which the market power threshold test is applied in the hypothetical monopolist framework. As indicated in the MEGs, the test is whether the hypothetical monopolist "could profitably impose and sustain a significant

and nontransitory price increase above levels *that would likely exist in the absence of the merger*". Thus, in "lessening of competition" cases, the focus is typically upon whether there is likely to be a significant and nontransitory price increase relative to the prices which prevail at the time of the merger analysis. By contrast, in "prevention of competition" cases, the focus is upon the extent to which prices in the future would likely be lower in the absence of the merger, and if so, whether the merger is likely to result in maintaining prices at a significantly higher level than the *likely future price*, for a nontransitory period of time.

Similarly, in abuse of dominant position cases, if there is reliable evidence that in the absence of the alleged exclusionary or predatory practices, prices would be, say, 10% lower than prevailing prices, then the question to be asked for market definition purposes is whether it would be profitable for a hypothetical monopolist of the tentatively defined market to impose a significant and non-transitory price increase *in respect of that lower price*. If the answer is affirmative, then the market should not be expanded to include the various other substitutes which the respondent claims are in the relevant market. Thus, the "Cellophane Trap" would be avoided.

Market Shares/Concentration Levels

We are generally pleased with the approach that has been taken by the Bureau with respect to market shares and concentration levels. The Bureau has been very consistent in following the spirit of the policy set forth in the MEGs, which explicitly state: "No inferences regarding the likely effects of a merger on competition are drawn from evidence that relates solely to market share or concentration. In all cases, an assessment of market shares and concentration is only the starting point of the analysis."[75] The significant number of mergers that have resulted in three or even two large remaining entities but have not been challenged confirms that the Bureau views competition as a process that can be just as intense, if not more intense, in a market involving two giants like Coke and Pepsi, or Labatts and Molsons, as it is in a less concentrated market. This is particularly so in a small economy such as Canada's, where markets often cannot sustain more than two or three entities of minimum efficient scale.

However, given that high market share or concentration "is a necessary condition that must exist"[76] before a merger can prevent or lessen competition substantially, it is entirely appropriate that market share/concentration thresholds be adopted to take mergers "off the table" (rather than putting them "on the table"), in terms of the review of their likely competitive consequences.

To draw an adverse inference from a high post-merger market share or level of concentration arguably would be contrary to the spirit of subsection 92(2) of the Act, which states:

> For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

This provision was introduced to the Act in 1986. The *Guide* which explained the 1986 amendments described this provision as follows:

> This provision is designed to ensure that the Tribunal's consideration is more than a mere mechanistic process and focuses on both the qualitative and quantitative aspects of competition, thereby avoiding an overly structuralist approach to the law. Competition is a dynamic process, and merely adding up market shares, after the merger, in some circumstances may tell little about the effect of a merger on competition.[77]

Notwithstanding the existence of subsection 92(2), the Competition Tribunal observed in *Hillsdown* that "market share data can give a *prima facie* indication as to whether" a merger is likely to lead to "an enhancement of market power."[78] By *prima facie*, the Tribunal meant "at first sight" or "on first impression". It did not intend to "signify that the Director has by merely proving market share thereby proved his case subject to whatever rebuttable evidence the respondents might adduce."[79] The Tribunal explicitly stated: "A responsibility still remains with the Director despite the market share evidence to adduce some evidence regarding barriers to entry."[80] We would add to the latter sentence the words "and any other relevant factor, including those set forth in section 93 of the Act". We would also suggest that it is contrary to the spirit of subsection 92(2) to take the position that a high post-merger market share or level of concentration can give a *prima facie* indication of whether a merger is likely to prevent or lessen competition substantially, even in the sense in which the Tribunal used the term "*prima facie*".

It is noteworthy that the Supreme Court of Canada stated in *R.* v. *Nova Scotia Pharmaceutical Society* that the conspiracy provision in the Act "would lose some of its effectiveness and would stray from its objectives if it incorporated a market share threshold."[81] The Court added: "Market share alone is not determinative, as was rightly pointed out in *Canadian General Electric...*"[82] In the latter case, Mr. Justice Pennell of the Ontario High Court of Justice stated: "Market share is one aspect but not the only aspect which the Court must consider in determining the question of control of the relevant market...", for the purposes of the conspiracy offence.[83]

Barriers to Entry

The Bureau and the Tribunal should be applauded for making it clear that in the absence of significant barriers to entry, a merger cannot prevent or lessen competition substantially. This is a clear principle which everyone can understand.

In *Hillsdown*, the Tribunal observed:

> In the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time. An attempt to do so would cause competitors to enter the market and the additional supplies created in that manner would drive prices back to the competitive level.[84]

The Tribunal added:

> The test as to whether potential entry will discipline the market is whether such entry is likely to occur, not merely whether it could occur.[85]

The Tribunal's view of the critical importance of barriers to entry is also reflected in the following passage from its decision in *Southam*, the only other contested merger case the Tribunal has heard to date:

> In the light of the fact that all the other relevant elements clearly point to a substantial lessening of competition, the question is whether entry barriers are sufficiently low that actual entry or the threat of entry can be relied on to conclude that the acquisitions have not lessened competition substantially and are not likely to do so.[86]

Another case where the existence of low barriers was given substantial weight by the Tribunal is *DIR* v. *Imperial Oil*, a consent proceeding under the merger provisions of the Act. In addressing the retail gasoline markets in its interim decision, the Tribunal observed: "Undoubtedly the most significant consideration with respect to the retail markets, however, has to be that generally low barriers to entry exist."[87]

The Tribunal's position with respect to entry barriers being a "trump" consideration is embraced in the MEGs, which state:

> As indicated in part 4.1, the Director will generally conclude that a merger is not likely to prevent or lessen competition substantially where it can be established that in response to the merger or to the exercise of increased market power resulting from the merger, sufficient entry into the relevant market would occur to ensure that a material price increase would not likely be sustainable in a substantial part of the relevant market for more than two years.[88]

This position is reflected in a number of decisions of the Bureau,[89] most notably in the decision released earlier this year with respect to the SmithBooks/Coles merger. According to the backgrounder released by the Bureau in connection with its review of that transaction, the key factor in the Director's decision not to challenge the merger was his conclusion that "the merged entity would [not] be able to exercise increased market power for a sustained period of time without attracting competitive entry."[90] This conclusion was reached notwithstanding a finding that the largest remaining competitor has "only 8 stores in comparison to the approximately 420 stores of SmithBooks and Coles combined,"[91] that the merged entity would account for "approximately half of the market on the supply side" and that its share of retail markets would be "at most a few percentage points lower, due to imports" from the U.S. (which were excluded from the buying side market).[92]

In another recent case, the Bureau's press release identified "the potential emergence of competitive alternatives, both from cable companies and from wireless technologies" as an important factor in the Director's decision to not challenge the acquisition by Telus Corporation of Edmonton Telephone Corporation.[93]

While the positions that have been taken by the Bureau and the Tribunal with respect to the role of ease of entry in merger analysis have been very helpful, the time has arguably come for the approach to the analysis of entry to be further refined. Specifically, we suggest that greater consideration be given to embracing the analytical principles used by the U.S. DOJ and FTC in assessing the likelihood and sufficiency of entry. As recognized in the 1992 *Horizontal Merger Guidelines*, a new entrant "will be unable to secure prices at pre-merger levels if its output is too large for the market to absorb without depressing prices further."[94] Therefore, it is necessary to compare minimum viable scale with the sources of sales opportunities available to a new entrant. As the *Horizontal Merger Guidelines* note, the sources of sales opportunities available to new entrants include:

> (a) the output reduction associated with the competitive effect of concern, (b) entrants' ability to capture a share of reasonably expected growth in market demand, (c) entrants' ability securely to divert sales from incumbents, for example, through vertical integration or through forward contracting, and (d) any additional anticipated contraction in incumbents' output in response to entry.[95]

A useful guideline provided in the *Horizontal Merger Guidelines* is that the output reduction associated with the competitive effect of concern is typically assumed to be 5% of total market sales, "because where a monopolist profitably would raise price by five percent or more across the entire relevant market, it is likely that the accompanying reduction in sales would be no less than 5%."[96] In short, holding other factors constant, if it can be determined that a new entrant, or several new entrants in aggregate, likely would gain in excess of five percent of total market sales within two years and maintain profitability at pre-merger prices, this would strongly suggest that a merger of two firms in that market likely would not prevent or lessen competition substantially.

In considering the extent to which new entrants likely would gain sales, the factors that may reduce the sales opportunities available to new entrants also must be taken into account. These include:

> (a) the prospect that an entrant will share in a reasonably expected decline in market demand, (b) the exclusion of an entrant from a portion of the market over the long term because of vertical integration or forward contracting by incumbents, and (c) any anticipated sales expansion by incumbents in reaction to entry, either generalized or targeted at customers approached by the entrant, that utilizes prior irreversible investments in excess production capacity.[97]

Moreover, it must be recognized that "where the competitive effect of concern is not uniform across the relevant market, in order for entry to be sufficient, the character and scope of entrants' products must be responsive to the localized sales opportunities that include the output reduction associated with the competitive effect of concern."[98]

Efficiencies

When the efficiency exception in section 96 was inserted into the Act in 1986, the government of the day had high hopes that it would play a significant role in facilitating efficient restructuring in Canada.[99] These

hopes were shared by the Bureau.[100] Unfortunately, the record to date has been very disappointing. Not a single merger in the ten-year history of section 96 has been permitted to proceed by virtue of having met the requirements of that provision. This may be attributable, at least in part, to the chilling effect of the *Hillsdown* decision on parties contemplating mergers which would have resulted in substantial efficiencies, had they proceeded.[101] In any event, the disappointing record to date suggests that some adjustments are warranted.

The experience with section 96 may have been better if the requirement that efficiencies be proved on the balance of probabilities had not been strictly enforced.[102] It is typically very difficult to prove that efficiencies will *likely* materialize (let alone that they clearly and convincingly will be attained). CEOs and other decision-makers often pursue a merger initiative on the basis of a general sense of the synergies likely to be attained, and of the "fit" between the two firms, without ever having completed a detailed assessment of all or even most of the potential sources of efficiency gains and of the extent to which they are more or less probable. Even when such studies have been performed, there may be other factors that will affect the probability that particular efficiencies will be attained.

If one is truly interested in maximizing total welfare,[103] it is inappropriate to require that efficiencies be strictly proved on the balance of probabilities.[104] This is because: (i) efficiencies ordinarily are the principal source of any increase in total welfare that may be brought about by a merger, (ii) they are inherently uncertain in nature and, most importantly, (iii) over time they are likely to dwarf any static losses in consumers' surplus that may result from the merger (particularly where the efficiencies have a reasonable chance of increasing innovation).[105] Rather, the standard that has been adopted in New Zealand would appear to be better. There, all that must be established is "a tendency or real probability", rather than it being "more probable than not" that claimed public benefits will materialize.[106] In short, we strongly suggest that section 96 be amended to reflect this lower evidentiary threshold and that the Bureau and the Tribunal adopt a more lenient position with respect to the burden imposed on merging parties regarding their efficiency claims.[107]

A second alternative which arguably can be accommodated within the total welfare approach would be to require that the merging parties establish that there is a real probability that the merger will result in "substantial" efficiencies. The principal benefit of this approach would be that it would avoid the need to engage in a full-blown trade-off analysis. However, the downside would be that it would confer upon the Bureau and the Tribunal considerable discretion to decide in any particular case whether the claimed efficiencies are "substantial". This would considerably increase the uncertainty for merging parties, to the point that they likely would not be prepared to incur the substantial costs associated with proceeding with a merger if they had to rely on section 96 alone.

IV. THE PROPOSED AMENDMENTS

The previously mentioned Discussion Paper released by the Director in June 1995 proposes fairly extensive revisions to the pre-merger notification provisions in Part IX of the Act. The proposed revisions relate to (i) the nature of the information required to be filed, (ii) the statutory waiting periods, (iii) the statutory exemptions, and (iv) the application of the merger prenotification provisions to acquisitions of interests in partnerships and joint ventures.

With respect to the information required to be filed, the Discussion Paper noted that "information *essential* to assessing the likely impact of the transaction" is not required under the current merger prenotification provisions of the Act, and that such information "must be obtained either voluntarily from the parties or, increasingly, through the use of formal powers."[108] To "ensure the provision of more relevant information", the Director would seek revisions which would require that formal filings include information "more specifically targeted towards the elements of substantive merger law."[109]

In addition, the Discussion Paper proposed changing the current "short-form" and "long-form" system to a two-step system somewhat similar to the U.S. and E.U. approach. The information which the Discussion Paper contemplated would be required to be provided in the initial filing would not include several of the types of information currently required to be provided in "short-form" filings. However, parties would be required to identify competitive overlaps and provide a list of actual and potential competitors. A second filing could then be required "where the initial examination discloses potential competition issues". The Discussion Paper suggested that this second filing could include significantly more information than is currently required in "long-form" filings, such as information relating to entry conditions, sales revenue and unit sales by geographic area, strategic plans, sales projections, production capacities, estimated market shares, efficiencies, description of pricing policies and documents prepared by corporate officers for the purposes of discussing or analyzing the proposed transaction.[110]

With respect to timing, the Discussion Paper proposed to extend considerably the current waiting periods (seven days for a short form and 21 days for a long form) to a 30-day waiting period for the initial filing and 20 additional days following the submission of the second filing, if a second filing is required.[111]

Regarding statutory exemptions, the Discussion Paper stated that "amendments could be introduced to eliminate the obligation to prenotify for certain classes of transactions having no competitive effect, such as asset securitizations, that trigger the threshold for the acquisition of assets but involve no change of control or are not an acquisition of significant interests in the target firm."[112] It further proposed that the Director "be authorized to waive the obligation to prenotify in circumstances where it is considered unnecessary."[113]

Finally, the Discussion Paper proposed amending the Act to clarify the application of the prenotification provisions to acquisitions of interests in partnerships and other types of entities.[114]

The commentary of the Competition Law Section of the CBA on the Discussion Paper provides a detailed response to the foregoing proposals.[115] For the most part, we are in agreement with the position taken in that response. Therefore, we see no need to repeat in detail the positions set forth therein.

In short, the CBA supported the initiative of broadening the statutory exemptions in Part IX of the Act, but was not supportive of the Bureau's proposals to substantially increase the information requirements or the time periods in Part IX. It was considered that the proposals relating to those matters likely would impose enormous costs upon businesses, which would have to devote substantial management time and resources to complying with "second requests", as well as on taxpayers, who would have to pay for the substantially increased resources that the Bureau would need to devote to staffing and managing the proposed process. In addition, it was not considered that these costs (i.e., Type III costs) would justify the small savings in Type II error costs that would be saved by adopting the proposed system.[116]

This is in part because of the absence of any evidence to suggest that there have been any mergers which have been completed since Part IX came into force which prevented or lessened competition substantially and which could not be effectively addressed through a post-closing remedial order by the Competition Tribunal. Rather than seeking to completely eliminate Type II error costs, the goal of Part IX should be to minimize the sum of Type I, Type II and Type III error costs.[117]

The CBA also did not support the proposal to extend the existing waiting periods in Part IX.

V. CONCLUSION

Over the course of the first ten years with the current merger provisions, successive Directors and Mergers Branch staff have done a fine job in establishing and implementing a first rate merger review process. Some of the key areas in respect of which considerable credit is due include certainty, transparency, accountability, confidentiality, accessibility and the compliance oriented approach. However, there arguably is scope for "fine tuning" with respect to the timing of the merger review process, the manner in which scarce Bureau resources are utilized, the practice that has emerged with respect to ARCs, the streamlining of information requests, case resolution and the Bureau's policy with respect to making market contacts.

With respect to substantive merger standards, some of the key areas in respect of which the analytical approach of both the Bureau and the Tribunal arguably could be refined include theories of anticompetitive effects, the analysis of ease of entry, and the approach to efficiency gains. In addition, we suggest that the Tribunal could significantly further refine its approach to market definition and, in a subtle way, its approach market shares/concentration levels. We also are of the view that there is some scope for further refinement by the Federal Court of Appeal regarding the legal principles applicable to market definition, which it articulated in its recent *Southam* decision.

Finally, we are hopeful that the current process which is underway to develop amendments to the pre-merger notification provisions in Part IX of the Act will not depart significantly from the *status quo* with respect to the nature of the information requirements formally imposed on merging parties and the statutory waiting periods that must be observed.

Notes

[1] In the interests of full disclosure of a possible bias, P. Crampton was a member of the Bureau from mid-1987 to early 1991 and was involved in the development of various aspects of the Bureau's merger review process and enforcement policy, including being the principal drafter of the Bureau's Merger Enforcement Guidelines.

[2] See *Canada (Director of Investigation of Research)* v. *Southam Inc.* (1991), 38 C.P.R. (3d) 68 at 73 (Comp. Trib.). However, the challenge in that case involved not only the acquisition by Southam of the North Shore News, which had been reviewed by the Director, but also the subsequent acquisitions of two other community papers in the lower mainland area of British Columbia.

[3] G.N. Addy, Notes for an Address to the Canadian Bar Association, Competition Law Section, 3rd Annual Competition Law Conference, Aylmer, Quebec, (29 September 1995) at 5. See also (1995) 16:3 Can. Comp. Rec. 1 at 4.

[4] *Ibid.*

[5] This information was conveyed to one of the authors by a representative of the Bureau.

[6] The Bureau's track record in this regard compares favourably with that of the U.S. federal and state antitrust authorities since 1980.

[7] For a detailed discussion of the MEGs, see P. Crampton, "Canada's New Merger Enforcement Guidelines: A 'Nuts and Bolts' Review" (1991) 36 Antit. Bull. 883.

[8] See various quotes and cites in P. Crampton, "The DOJ/FTC 1992 Horizontal Merger Guidelines: A Canadian Perspective" (1993) 38 Antit. Bull. 664 at 670, n.15.

[9] See, for example, R.M. Davidson, "Independence Without Accountability Won't Last", in *Canadian Competition Law and Policy at the Centenary*, R.S. Khemani and W.T. Stanbury, eds. (Halifax: The Institute for Research on Public Policy), at 561-582; R. Davidson, "When Merger Guidelines Fail to Guide" (1991) 12:4 Can. Comp. Pol. Rec. 44; and W.T. Stanbury, "An Assessment of the Merger Review Process Under the Competition Act" (1992) 20 Can. Bus. L.J. 422.

[10] See Addy, *supra*, note 3 at 14: "In the year ahead, in an effort to further increase the transparency of and accountability for the decisions taken, I will launch a quarterly publication ... [that] will provide more timely information to you and your clients on such matters as recent case decisions, interventions that the Bureau made and forthcoming initiatives." See also Can. Comp. Rec., *supra*, note 3 at 9-10. See also the recent, detailed backgrounder, dated February 22, 1996, issued by the Director in respect of his review of the Stentor alliance.

[11] This observation was made at the 1994 University of Toronto Competition Law symposium. See N. Campbell, "Proposals for Reforming the Merger Review System" at 17 and 21; and C. Goldman and P. Crampton, "The Role of the Director and the Process of the Bureau of Competition Policy" at 5 and 8.

[12] See for example, Industry Canada, "Communication of Confidential Information Under the *Competition Act*", May 1995, at 2. See also G.N. Addy, "Private Rights and the Public Interest Under Canada's *Competition Act*: Procedural Guarantees and the Independence of the Director of Investigation and Research" (paper presented to the Fordham Corporate Law Institute, New York, 21-22 October 1993, Speech #S-113403-09) at 10: "...disclosure occurs only on a 'need to know' basis and where other options have been exhausted. Furthermore, the degree of disclosure is limited to the minimum necessary to advance the investigation."

[13] The Director has taken the position that he may exchange information with a foreign law enforcement agency where he "determines that communication of the information to the foreign agency would assist him in advancing his investigation". See Industry Canada, *ibid.* at 4. This position has been widely opposed. See, for example, National Competition Law Section of the Canadian Bar Association, "Commentary on the Draft Information Bulletin of the Director of Investigation and Research Respecting Confidentiality of Information Under the *Competition Act*" (December 1994) [unpublished]. See also C.S. Goldman and J.T. Kissack, "Joint Sovereign Criminal Investigations U.S. and Foreign Governments - Can They Really Do That? A Canadian Perspective" (prepared for the criminal antitrust law and procedure workshop, 23-24 February 1995, Dallas, Texas) [unpublished].

[14] Discussed *infra*.
[15] *Supra*, note 3 at 13. See also Can. Comp. Rec., *supra*, note 3 at 9.
[16] *Ibid.* at 19. See also Can. Comp. Rec., *ibid.* at 13.
[17] Report of the Auditor General of Canada to the House of Commons, 1990 Annual Report, at §16.59.
[18] See Addy, *supra*, note 3 at 11-12. See also Can. Comp. Rec., *supra*, note 3 at 8.
[19] See Goldman and Crampton, *supra*, note 11 at 7; and C.S. Goldman and P.S. Crampton, "Current Priorities of the Bureau, Its Case Selection Criteria, Its Immunity Program, Merger Resolution and Individual Liability" (paper delivered to the Canadian Bar Association's Inaugural Annual Competition Law Conference, 1 October 1993) at 10.
[20] See H. Wetston, Notes for an Address to the Canadian Corporate Counsel Association, Calgary, 19 August 1991, at 6 (Speech #S-104921-15).
[21] At page 10 of that Discussion Paper, readers were requested to identify "classes of transactions that should be exempt from prenotification because they raise no competition issues". In the CBA's November 3, 1995 *Response to Proposed Changes to the Competition Act*, at pages 15-18, a number of classes of transactions were identified as candidates for exemption from the pre-merger notification provisions of the Act.
[22] MEGs at ii.
[23] J.K. Barker, "The Merger Review Process Under the *Competition Act*" (paper presented to the Inaugural Conference of the Competition Law Section of the Canadian Bar Association, 1 October 1993) at 8.
[24] Addy, *supra*, note 3 at 13. See also Can. Comp. Rec., *supra*, note 3 at 9.
[25] See G.N. Addy, Luncheon Address to the Canadian Bar Association, Competition Law Section, 2nd Annual Competition Law Conference, Montreal, Quebec, 30 September 1994, at 10, where reference is made to the adoption of "a general policy that parties are now requested to respond to information requests under oath". It was further noted that third parties "will also be asked to respond to information requests under oath". *Ibid.* at 11.
[26] Type I error costs are those associated with procompetitive mergers which are abandoned, restructured or prevented as a result of government intervention or government policy. Type II error costs are those associated with mergers which prevent or lessen competition substantially.
[27] The Canadian Bar Association has formed a Task Force which, with representatives of the Bureau, will consider the issues associated with the collection and seizure of machine readable information under the Act.
[28] In a 1994 speech, the Director noted that "divestiture resolutions in merger matters have not always been effective, particularly in regard to private undertakings with the Bureau where the parties to the transaction were required to divest after the merger transaction had closed", *supra*, note 25 at 9.
[29] See Addy, *supra*, note 3 at 7. See also Can. Comp. Rec., *supra*, note 3 at 5.
[30] *Canada (Competition Act, Director of Investigation and Research)* v. *Imperial Oil Limited (Reasons for Decision Regarding Jurisdiction Over Undertakings)*, [1994] C.C.T.D. No. 23 (Comp. Trib.).
[31] *Nova Scotia (Attorney General)* v. *Ultramar Canada Inc.*, [1995] F.C.J. No. 1160 (F.C.T.D.) ("Ultramar").
[32] *Ibid.* at para. 59.
[33] *Ibid.* at para. 94.
[34] *Ibid.*
[35] *Alex Couture Inc.* v. *Canada (Attorney General)* (1991), 83 D.L.R. (4th) 577, quoted in Ultramar at para. 68.
[36] However, in a recent speech at 7, the Director noted "as I have stated in the past, I continue to prefer the use of consent orders which allows for greater openness to the public".
[37] *Supra*, note 23 at 3.
[38] *Ibid.* at 4.
[39] Some of the more prominent of these cases include *PWA/Wardair* (two significant firms remained), *Molsons/Carling O'Keefe* (two significant firms remained), *A&P/Steinberg* (two or three significant firms remained in many relevant markets), *Dofasco/Algoma* (two significant firms remained), *Maple Leaf Mills/Ogilvie Mills*, and, in some markets, *Imperial Oil/Texaco* (only three or four firms remained in many retail markets).
[40] See Part 2 of the MEGs.
[41] Footnote 8 of the MEGs quotes passages from the Tribunal's judgments in *DIR* v. *Imperial Oil et al.* (CT-89/3, #390, January 26, 1990, at 36 and 54); and *DIR* v. *Air Canada et al.* (1989), 27 C.P.R. (3d) 476 at 498, respectively, where the Tribunal clearly endorsed the interdependence theory of challenge. The unilateral theory of challenge was the focus of the cases in *DIR* v. *Hillsdown (Holdings) Ltd. et al.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.) and *DIR* v. *Southam Inc. et al.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.).

[42] *Hillsdown, ibid.*

[43] The merged entity was found to have a market share of approximately 62-63%, versus a market share of 12-13% for the next largest competitor. See *ibid.* at 315.

[44] The noteworthy examples are *R.* v. *J.W. Mills & Son Ltd.*, [1968] 2 Ex C.R. 275 at 304 *et seq.*; *R.* v. *Canadian Coat and Apron Supply Ltd.*, [1967] 2 Ex. C.R. 53 at 82; *R.* v. *Hoffmann-La Roche Ltd.* (1982), 125 D.L.R. (3d) 609 at 618 *et seq.* (Ont. C.A.); and *R.* v. *Canadian General Electric Company Ltd.* (1976), 15 O.R. (2d) 360 at 371-72 (H.C.)

[45] See generally, P. Crampton, *Mergers and the Competition Act* (Toronto: Carswell Legal Publications, 1990) at 270, 293 *et seq.*, and 321 *et seq.*

[46] For example, in the Bureau's press release relating to the acquisition by Upper Lakes Shipping Ltd. and Algoma Central Corporation of certain gearless bulker carrier ships from the limited partners of Great Lakes Bulk Carriers Limited Partnership, it was stated that "the relevant market was found to be gearless bulk carrier ships ... on the Great Lakes, the St. Lawrence Seaway, the St. Lawrence River and the Gulf of St. Lawrence". However, the press release then stated:

> [The merged entity] SBC will continue to face competition from other substitute transportation sources, including both Canadian and U.S. railways, direct ocean vessels, self-unloaders and barges. While most customers could not access all these alternative forms of transportation, the vast majority had at least one alternative means by which to ship their product. Evidence received from most customers indicated that they would be willing and able to switch to these alternatives in response to any significant price increase by [the merged entity].

In connection with its review of a proposed joint venture to carry on the plastic pipe manufacturing operations of Canron Inc. and Sceptre Manufacturing Company Limited, the Bureau concluded that "the appropriate product market in this case was plastic pipe for each of the major applications...," notwithstanding that for many end uses other types of pipe (metal or concrete) were effective substitutes. See the *Annual Report of the Director of Investigation and Research for the year ended March 31, 1993*, at 7. It is submitted that the better way to have approached this case would have been the way market definition was approached in connection with the Bureau's review of the acquisition of the assets of Domglass Inc. by Consumers Packaging Inc., where the Bureau defined a broad rigid wall market for some end uses and narrow product markets for other end uses. See Consumer and Corporate Affairs Canada, NR-10188 (News Release and Backgrounder).

[47] *Hillsdown, supra*, note 41 at 297.

[48] *Hillsdown, ibid.* at 310; and *Southam, supra*, note 41 at 178.

[49] *Southam, ibid.* at 177.

[50] *Ibid.* at 299.

[51] *Hillsdown, supra*, note 41 at 329. While the Tribunal suggested in Southam, *supra*, note 41 at 200, that two products would be "close substitutes and therefore in the same market," if "a small change in the price of *either* product will result in a shift of purchases," it did not indicate what it meant by "small" and it did not indicate how large the shift of purchases would have to be.

[52] To its credit, the Tribunal observed that these thresholds "may be useful for enforcement purposes," thereby signalling its recognition of the different functions served by the Tribunal and the Director, and of the role that guidelines can play: (i) in assisting businesspersons to structure their affairs and to identify situations likely to give rise to significant issues under the Act; and (ii) in helping the Director to process the hundreds of transactions that are brought to him each year.

[53] *Supra*, note 41 at 300-301.

[54] *Ibid.* at 314.

[55] As the MEGs recognize there are situations where a departure from the smallest market principle is warranted. For example:

> A larger price increase may be required where rigid application of the 5% threshold would fail to identify an obvious horizontal relationship. Situations where a 5% price increase involving products purchased by consumers would be measured in cents rather than in dollars occasionally fall within this category. Conversely, a lower postulated price increase may be appropriate where the products are particularly good substitutes for one another, relative to other substitutes. (MEGs at §3.1.)

For another situation in which departure from the smallest market principle might be appropriate see G. Werden, "Market Delineation and the Justice Department's Merger Guidelines" [1983] *Duke L.J.* 514 at 532-33. Note that the language in the 1992 U.S. Guidelines appears to be less flexible on this point than either the Director's Guidelines

or the DOJ's 1984 Merger Guidelines. The 1992 version states: "A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test." *Infra*, note 94 at §1.0; see also §1.11.

[56] Cf. Crampton, *supra*, note 7 at 908.

[57] *DIR* v. *Southam et al.* (1995), 127 D.L.R. (4th) 263 at 267 (F.C.A.).

[58] *Ibid.* at 290.

[59] *Ibid.* Four approaches referred to in the Court's decision are the hypothetical monopolist, the cross-elasticity and the reasonable interchangeability approaches, as well as what it characterized as the Tribunal's "practical indicia" approach.

[60] *Ibid.*

[61] *Ibid.* at 302.

[62] *Ibid.* at 317.

[63] *Ibid.* at 325. Cf. MEGs at §3.2.2.3.

[64] *Ibid.* at 324.

[65] *Ibid.*

[66] *Ibid.* at 326.

[67] *Ibid.*

[68] *Ibid.* at 327.

[69] *Ibid.* at 322.

[70] *Ibid.* at 321.

[71] Unreported, Ontario Court (General Division) Court File No. TO-209220, released November 9, 1995, at 41 *et seq.*, (per Moldaver, J.).

[72] These are canvassed in Crampton, *supra*, note 45 at 266 *et seq.* and 311 *et seq.*

[73] See cites in Crampton, *ibid.* at 282.

[74] *DIR* v. *Laidlaw Waste Systems, Ltd.* (1992), 40 C.P.R. (3d) 289 at 320 (Comp. Trib.).

[75] MEGs, at ii.

[76] *Ibid.* at §4.2.1.

[77] Consumer and Corporate Affairs Canada, *Competition Law Amendments - A Guide*, December 1985, at 17.

[78] *Supra*, note 41 at 314.

[79] *Ibid.*

[80] *Ibid.*

[81] [1992] S.C.R. 606 at 652-653.

[82] *Ibid.*

[83] *R.* v. *Canadian General Electric Co. Ltd.* (1976), 15 O.R. (2d) 360 at 372-73 (H.C.). See also *R.* v. *J.J. Beamish Construction Co. Ltd.*, [1968] 2 C.C.C. 5 at 22 (Ont. C.A.) *per* Laskin, J.A. (as he then was), in dissent; and *R.* v. *Clarke Transport Canada Inc. et al.*, *supra*, note 71 at 34.

[84] *Supra*, note 41 at 324.

[85] *Ibid.* at 327.

[86] *Supra*, note 41 at 306.

[87] (Interim Decision) (1989), 45 B.L.R. 1 at 5.

[88] §4.6.1.

[89] See, for example, the press releases and/or backgrounders released by the Bureau in connection with its review of the acquisition of Purolator Courier Inc. by Canada Post Corporation (NR-113343-25, November 26, 1993); the acquisition of Square D Company by Schneider S.A. (NR-105221-33, September 17, 1991); and the acquisition of the Sanitary Tissue Division of E.B. Eddy Forest Products Limited by Scott Paper Limited (NR-1-190, February 10, 1989). Note also that entry facilitating actions by the merging parties played a significant role in the ultimate dispositions of the Director's review of the acquisition by Asea Brown Boveri Inc. of the electronic power transmission and distribution business of Westinghouse Canada Inc. (see *DIR* v. *Asea Brown Boveri Inc. et al.*, Reasons for Consent Order dated June 15, 1989, CT 89/1); the acquisition of the assets of Domglass Inc. by Consumers Packaging Inc. (NR-10188, April 25, 1989); and the merger of the Canadian based brewing operations of The Molson Companies Limited and Elders IXL Limited (NR-10256, July 6, 1989).

[90] Backgrounder attached to the News Release dated March 21, 1995 in respect of the Director's review of SmithBooks' acquisition of Coles Book Stores Limited, at page 6. For a copy of the Backgrounder see (1995) 16:1 Can. Comp. Rec. 25.

[91] *Ibid.* at 5. See also Can. Comp. Rec., *ibid.* at 28.
[92] *Ibid.* at 3. See also Can. Comp. Rec., *ibid.* at 27.
[93] *Ibid.* See also Can. Comp. Rec., *ibid.* at 23.
[94] 62 *Antit. & Trade Reg. Rep.* (BNA) (April 2, 1992) at §3.3.
[95] *Ibid.*
[96] *Ibid.* at n.32.
[97] *Ibid.*
[98] *Ibid.* at §3.4.
[99] For example, in the *Guide, supra,* note 77 at 17, that accompanies the proposals which eventually became the 1986 amendments to the Act, it was observed:

> The new merger law will also provide a defence in situations where the gains in efficiency that would result from the merger would more than offset the costs due to the lessening of competition. It is important for the performance of the economy that significant cost savings brought about by mergers, for example, through scale economies or other efficiencies, be allowed.

[100] See, for example, C. Goldman, "Mergers, Efficiency and the *Competition Act*" (Notes for an Address to the Consumer and Commercial Law Workshop, Faculty of Law, McGill University, Montreal, 15 November 1988) at 8 (Speech # S-1-170); and C. Goldman, Notes for an Address to the Gordon Group Conference on the Competition Act, Toronto, March 31, 1987, at 13-14.
[101] This aspect of the *Hillsdown* decision is discussed in detail in P. Crampton, "The Efficiency Exception for Mergers: An Assessment of Early Signals from the Competition Tribunal" (1993) 21 Can. Bus. L.J. 371. See also C. Goldman and J. Bodrug, "The *Hillsdown* and *Southam* Decisions: The First Round of Contested Mergers Under the *Competition Act*" 38 McGill L.J. 724 at 735-39.
[102] Note that in the *Hillsdown* case, the Tribunal agreed with the Director that "the respondents have the onus of proving the existence of the efficiencies claimed, or the likelihood of their existence ... on the balance of probabilities in the normal way". See *supra*, note 41 at 335.
[103] See the discussion of the MEGs' approach to efficiencies, in Crampton, *supra*, note 7 at 955 *et seq.* See also Crampton, *supra*, note 45 at 520-32; and Crampton, "Alternative Approaches to Competition Law - Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals" (1994), 17 World Competition 55.
[104] The following recommendations are derived from a paper prepared earlier this year by P. Crampton for the Competition Law & Policy Committee of the Business and Industry Advisory Committee to the O.E.C.D.
[105] Brodley has observed: " ... while estimates vary, there is perhaps a consensus that the loss from monopolistic pricing is considerably less than one percent of the gross national product a fraction of the welfare at stake in technological progress and productive efficiency." He adds: "The social trade-off is desirable because the loss of consumer benefit is temporary, but the achievement of production efficiencies frequently has a multiplier effect on the growth of social wealth." Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress" (1987) 62 N.R. Univ. L.R. 1020 at 1027 and 1039. In this regard, Easterbrook adds: "In the long run, a continuous rate of change, compounded, swamps static losses." Easterbrook, "Ignorance and Antitrust", in Jorde and Teece, eds., *Antitrust, Innovation and Competitiveness* (New York: Oxford Univ. Press, 1992) at 122-23. Michael Porter, who has studied a wide range of industries in a wide range of nations, has concluded: "When faced with tradeoffs, we should weigh progressiveness higher than static efficiency or a snapshot of price-cost margins", because "innovativeness is by far the most important source of economic growth and welfare, greatly outweighing price-cost margins (allocative efficiency), or even static efficiency". M. Porter, *The Competitive Advantage of Nations* (New York: The Free Press, 1990) at 5.
[106] *Re Weddel Crown Corporation Ltd. and Ors* (1987), 1 NZBLC 104,200 at 104,213 (Com). Note that in that case the Commerce Commission accepted that private benefits have an element of public benefit even where they are not directly passed on to consumers. See also *Fisher and Paykel Ltd.* v. *Commerce Commission*, [1990] 2 NZLR 731 at 767 (H. Ct.).
[107] It may be noted that if the policy objective is to maximize consumers' surplus, it is much more defensible to require proof on the balance of probabilities, rather than some lower burden, that efficiencies will likely be attained.
[108] *Supra*, note 21 at 7.
[109] *Ibid.*

[110] *Ibid.* at 9.
[111] *Ibid.* at 10
[112] *Ibid.*
[113] *Ibid.* at 7.
[114] *Ibid.* at 8 and 10.
[115] *Supra*, note 21. In the interest of full disclosure, P. Crampton was a member of the CBA's Merger Prenotification Working Group, which drafted the CBA's response to the proposals in the Discussion Paper relating to pre-merger notification.
[116] A Type II error occurs when a merger which is likely to prevent or lessen competition substantially proceeds unchallenged and cannot subsequently be made the subject of an effective remedial order by the Competition Tribunal. By definition, these errors can occur only in respect of the small category of mergers which cannot be effectively addressed through a post-closing divestiture or other post-closing remedy. Stated alternatively, the only mergers which can result in Type II error costs are those few which substantially prevent or lessen competition and result in a "scrambling of the eggs" (or are not challenged for some other reason not relevant to this discussion).
[117] A Type I error results when a merger which does not prevent or lessen competition substantially is abandoned or restructured as a result of a challenge by enforcement authorities or as a result of the prospect of large compliance costs or long delays. It is reasonable to expect that Type I error costs would increase if the proposed changes were implemented, as parties unwilling to be subjected to a "second request" would likely abandon the transaction, restructure it or pursue other alternatives.

THE CHANGE OF PRICE: SOME MODEST PROPOSALS TO AMEND CANADA'S PRICING LAWS

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Introduction

The pricing of products is one of the principal mechanisms by which a market economy functions. The laws dealing with the pricing of products, and possible changes to them, are the topic of this note.

The *Competition Act* (the "Act") has been described on a number of occasions by officials at the Bureau of Competition Policy as the "Charter of the Marketplace". Within the Act there are a number of provisions which affect pricing issues. Other than the conspiracy/bid-rigging provisions, the predation, discrimination and price maintenance provisions have a more direct impact than any other laws on pricing practices in Canada, outside the context of rate regulation.

In its June 1995 Discussion Paper the Bureau has proposed that the price discrimination and discriminatory allowances provisions of the Act be repealed, and that conduct falling within those provisions be dealt with via the existing reviewable conduct provisions. Despite the fact that it is the price discrimination provision which, I venture to suggest, puts more bread on more competition law practitioners' tables than any other, the proposal is to be welcomed. In fact, broader amendments, including the repeal of the regional predation

provisions, and significant amendments to the predatory pricing and price maintenance provisions, should also be undertaken. Such amendments will help to focus the Act, as it should be focused, on anti-competitive conduct, but leave the marketplace to do what it does best: set the appropriate, efficient price for goods and services.

The substantive pricing laws, including a review of the key jurisprudence under the various *Competition Act* provisions, are set out in a paper given September 28, 1995, to the Annual CBA Competition Law Conference.[1] This note does not deal with a review of the law or jurisprudence as it now stands, but focuses on potential amendments to these provisions.

What follows is a brief review of proposals for amendment of the predatory pricing, regional predation, price discrimination, discriminatory allowance and price maintenance provisions. Two of these proposals parallel the proposals contained in the Bureau's June 1995 Discussion Paper. Those proposals are to be applauded and encouraged. The remainder of the proposals contained in this note are, I submit, entirely consistent with the spirit of the Bureau's proposed amendments. They deserve consideration in the present round of amendments.

Predatory Pricing

The predatory pricing provision provides that everyone engaged in business who undertakes a policy of selling products at prices which are unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect, is guilty of an indictable offence.

That means that unreasonably low prices which are likely to lead to a substantially less competitive marketplace can constitute predatory pricing. There is nothing particularly surprising or worrisome about that result.

It also means that low prices that lessen competition or are designed to lessen competition, low prices which eliminate a competitor or low prices designed to eliminate a competitor, can constitute the crime of predatory pricing. On the wording of the statute, low prices designed to lessen competition, but which cannot possibly do so, may be a crime. Low prices designed to eliminate a competitor but which cannot possibly do so, may be a crime. Finally, low prices that will have no effect in creating a less competitive marketplace, which are not even designed to do this, or to injure a competitor, but which in fact drive out an uncompetitive, inefficient competitor, may constitute a crime.

Despite the unfortunate wording of this section, neither the limited jurisprudence nor the Director's stated enforcement perspective as set out in the *Predatory Pricing Enforcement Guidelines*, suggest reason for panic. The approach set out in the Director's *Guidelines* focuses primarily on the word "unreasonably". The Director notes that for a price to be unreasonably low the alleged predator will typically have to have market power.

The Director further notes in the *Guidelines* that the theory of predatory pricing requires that the dominant firm, the predator, set prices low enough for long enough that it deters competitors from vigorously competing, or drives out competitors, and that following the exit of these competitors the dominant firm can then raise its prices. It thereby recoups the losses it suffered during the period of predation and takes back the windfall which consumers enjoyed during the period of low prices.

That is, in order to make economic sense of the legislation, the Director imports into the term "unreasonably low prices," not merely a comparison between the price level and the cost of the product, but also an understanding of the market conditions. A price by a dominant firm — which may have the effect of driving out rivals, particularly in a market in which there are barriers to re-entry by rivals — may be unreasonably low, but the same prices will likely not be found unreasonably low for a new entrant or small firm seeking to get into the marketplace or slightly expand its customer base.

Pursuant to the statute, as noted above, there are four ways in which one can engage in predatory pricing: (1) unreasonably low prices with the intent of substantially lessening competition; (2) with the effect of substantially lessening competition; (3) with the intent of eliminating a competitor; and (4) the effect of eliminating a competitor.

The theory of predatory pricing adopted in the *Guidelines*, which appears to be an unstated premise underlying the limited jurisprudence, addresses only low prices with the effect of substantially lessening competition. The *Guidelines* try to minimize the effect of the statutory language, although of course the Director and the Courts remain bound by the statute as written. This tension between the language of the Act and the enforcement approach of the Director is not a sensible result. It makes for uncertainty in the application of the law and it is inappropriate that the statute should contain an important criminal provision of such uncertainty. It is particularly ironic that insofar as there is uncertainty, cautious businesses will raise prices in order to steer clear of the possibility of offending the predatory pricing provisions in the Act.

In view of the difficulties in the predatory pricing section which the courts and the Director have attempted, to the limited extent they have addressed the issue, to read economic logic into the section via the word "unreasonably," it is appropriate to offer a view as to how, if at all, the provision should be amended. Many argue that predatory pricing is so rarely a problem as to deserve prohibition. The United States does not prohibit predatory pricing explicitly, rather it is an aspect of monopolization. The Dynamic Change Report recommended dealing with both price discrimination and predatory pricing by introducing a reviewable practice aimed at sale prices below the reasonably anticipated long run average cost of production and distribution, where such conduct has an adverse effect on competition. Particularly in the light of the availability of the abuse of dominance provisions and the reasoning of the Tribunal in *NutraSweet*, there is a strong case that the predatory pricing provision ought to be repealed.

Failing repeal, the debate over which might result in missing this round of amendments, a modest fall-back proposal, which is in conformity with the logic of predatory pricing economics and with the Director's *Guidelines*, would be to define predation in a more limited way. Such a change would have the effect,

without significant change to the statutory language, of eliminating many of the difficulties with the section and minimize its application to economically benign conduct. For this reason, it is a change which can and should be made to the Act in the present round of amendments.

The present provision reads:

> 50(1) Every one engaged in a business who:
>
> ...
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

I propose the deletion of ten words, to result in the following predatory pricing provision:

> Every one engaged in a business who:
>
> ...
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

I urge the Bureau to recommend the repeal of the provision, or alternately to recommend the deletion of these ten words in the present round of amendments.

Regional Predation

The regional predation section provides that it is an offence if you engage in a policy of selling products in any area of Canada at prices lower than you sell them elsewhere if that leads to a substantial lessening of competition or the elimination of a competitor, or if it is designed to do either of these things. The offensive conduct in this section, as distinct from that in the predatory pricing provision, is not unreasonably low prices, it is a price differential between one region and another. That is a much broader proposition than in the predatory pricing section. Without the word "unreasonably", by which the Director and the courts (although less explicitly) have imported an economically rational approach to predatory pricing, this section is open to considerable misuse. The very limited jurisprudence has not given rise to any difficulties to date. However, the provision is very broad, and the possibility of abuse and misuse is very real. A low price in one region which drives out an inefficient competitor might be sufficient, on the face of the statute, to constitute an offence. As with the other aspects of section 50(1), there is very little jurisprudence.

The offence is a combination of predatory pricing (i.e. the effect or intent of lessening competition or eliminating a competitor) together with price discrimination. Rather than discrimination as between competitors, however,

it is as between regions. Rather than sales at "unreasonably low" prices, sales need only be at prices lower than those charged elsewhere.

The regional predation provision is not proposed to be repealed, as are the price discrimination provisions, in the Director's recent Discussion Paper on amendments to the Act. Nevertheless, the provision is ripe for repeal. It is hard to understand what of economic value this provision adds, which could not be adequately addressed by the predatory pricing provision, or by abuse of dominance. Therefore, I urge the repeal of this section as part of the present statutory review process.

Price Discrimination

The Bureau's June 1995 discussion paper proposes that the price discrimination provision be repealed. That would mean a repeal of sections 50(1)(a), 50(2) and 50(3) of the Act. It is proposed that such matters be addressed, where appropriate, under the existing reviewable conduct provisions of the Act.

The discussion paper notes that these sections are out of step with current economic thinking, and that they tend to focus on individual competitors rather than on the process of competition. They deny business flexibility in pricing of products and represent a resource burden for government. Threat of governmental and/or private enforcement may chill otherwise benign or pro-competitive pricing behaviour. For these reasons the Bureau proposes that the provisions be repealed.

There is a substantial body of economic opinion which argues that price discrimination prohibitions do not promote the efficiency of the economy as a whole.

In *Canadian Competition Policy: A Legal and Economic Analysis*,[2] the authors note:

> [S]o great and economically costly are the pitfalls likely to be occasioned by unwisely drafted legislation on price discrimination, in relation to likely benefits, that some economists hold that no legislation at all might be the best of all practicable options.

It is generally recognized among competition law practitioners that considerable organizational efforts are made, and expense incurred by businesses, to attempt to conform economically benign distribution and pricing arrangements to the price discrimination provisions. The significant legal and administrative cost to suppliers throughout Canada and the requirements of these provisions can and, at least occasionally, do inhibit economically beneficial price reductions and flexible marketing arrangements.

Further, there is no evidence that the price discrimination laws in the Act protect small or medium-sized enterprises. As the law allows volume discounts, permissible discounts may disadvantage smaller enterprises if sellers wish to grant discounts to larger purchasers. Indeed, the provisions may even harm smaller vigorous enterprises in that discounts they might otherwise be capable of negotiating are rendered effectively

unattainable by virtue of their supplier's obligation not to discriminate. As noted in a recent study of the *Robinson-Patman Act*,[3] the vast majority of proceedings for price discrimination in the United States are brought *against* small firms.

The original price discrimination legislation in Canada was introduced in 1935, arising out of the Royal Commission on Price Spreads and Trade Practices. The Commission was in response to concerns about small traders being unfairly injured by mass retailers. In describing that amendment, the Economic Council of Canada's 1969 *Interim Report on Competition Policy* noted:

> In 1935, Section 498 of the Criminal Code was amended to bring price discrimination within the reach of public policy for the first time. Under the shadow of the Great Depression, there had emerged considerable concern about the large spreads between prices received by producers and those paid by consumers. There was disquiet also about price concessions obtained by large buyers that were deemed to discriminate against small competitors. These considerations were reflected in a new prohibition which banned the granting of discriminatory discounts and predatory price-cutting. (at 52)

The *Dynamic Change Report* of 1976 noted that complaints against the large volume buyers were classified by the 1935 Commission as those dealing with conduct which depressed the prices of manufactured goods and of wages, and of agricultural produce, and which drove independent retailers to the wall. As a result, independent retailers were to be protected because they constituted a valuable social group which communities could not afford to lose; it was feared that they could not defend themselves from unfair competition and that their elimination would result in the growth of monopoly in the retail field. The drafters of the *Dynamic Change Report* stated:

> Indeed, it is one of the basic positions of our report that the price discrimination legislation was the product of a period in our economic history in which policy had as one of its chief aims the discouragement of further price reductions and the protection of certain groups from injury inflicted by deep depression at home and abroad. Although it seems doubtful that those policies were well conceived to protect the public interest, their adoption is understandable in the circumstances of the times. (at 204-205)

The amendments, which included the introduction of the price discrimination provision in the legislation, also empowered the Trade and Industry Commission to approve agreements to lessen competition if it found that wasteful or demoralizing competition existed in an industry. A regime designed to lessen demoralizing competition is not fully in step with the current goals of competition policy.

The Economic Council of Canada in its 1969 *Interim Report on Competition Policy* proposed that price discrimination and discriminatory allowances be made part of the reviewable conduct provisions of the Act. That is, they would not be an offence or be banned, but could be prohibited only when there was injury to competition. In the words of the *Report*,

> [T]he Tribunal, having regard to its general terms of reference, would, above all, be concerned with whether the practice was likely to lessen competition to the detriment of final consumers. Not the interest of particular competitors but the interest of the ultimate purchaser would be paramount. (at 122)

CANADIAN COMPETITION RECORD

The *Skeoch-McDonald Report* of 1976 added significantly to the discussion of price discrimination law in Canada. It stated:

> In the field which more than any other accounted for its [price discrimination legislation's] introduction — food distribution — it is clear that the legislation failed to stem the development of major new systems which have emerged to substantially take over at least the large urban markets from the small operator. (at 201)
>
> ... [T]he resiliency and resourcefulness of the small business sector has been demonstrated by the current high level of its numbers and the economic areas in which it performs effectively. It is very doubtful if the price discrimination legislation has had much to do with that performance.... [P]rohibitions of the legislation have probably given a strong impetus to forms of vertical integration which have been inimical to the interests of the small business sector, and which have contributed a degree of rigidity to the economic structure in some fields whose longer-run significance it is difficult to assess. (at 202)
>
> The central hypothesis of this report is that the role of government policy should be not to direct and manage the economy in detail but to facilitate change and thus release and reinvigorate the dynamic forces that have been responsible for the prodigious economic growth that the market-directed, private enterprise system has demonstrated it is capable of achieving. (at 202)
>
> Our first choice on policy is to eliminate the present section [34] in the legislation prohibiting price discrimination and substitute for it a general section permitting the National Markets Board to prohibit discriminatory pricing behaviour by either buyers or sellers. (at 217)

The legislation proposed by the *Skeoch-McDonald Report* would have encompassed the actions of a seller in selling a product or service at less than the reasonably anticipated long-run average cost of production and distribution, having the effect of adversely affecting competition; or the action of a buyer in requiring or inducing a seller to provide a product or a service at less than the reasonably anticipated long-run cost production and distribution having the effect of adversely affecting competition.

> Secondly, we suggest with some hesitation that the requirement of equal treatment in the sale of goods (and services) of like quality and quantity be retained. (at 222)
>
> Finally, we recommend that section 35 dealing with advertising and promotional allowances be retained in its present form but recast to place it within the jurisdiction of the Board. The basic economic and social considerations that originally warranted the passage of this section retain their validity unimpaired to the present. (at 224)

With respect to the issue of price discrimination, the *Report on Proposals for a New Competition Policy for Canada, Second Stage, Combines Investigation Act Amendments*, March 1977, notes:

> The Advisory Committee stressed the danger of price discrimination legislation preventing competition from eroding price structures in those industries dominated by large buyers and sellers. The committee proposed repeal of the criminal prohibition in section 34(1)(a) and proposed civil review to deal with price discrimination based upon abuse of monopoly power. (at 57)

In *Proposals for Change, Fourteenth Report of the Standing Committee on Finance, Trade and Economic Affairs Respecting Stage II Competition Policy*, the Committee recommended that both the price discrimination and price differentiation provisions be reviewable practices.

In 1992 the Bureau released *Price Discrimination Enforcement Guidelines*. The *Guidelines* indicated that the Director would not be concerned with a variety of pricing approaches which a strict reading of the statute and prior proceedings might otherwise have suggested were problematic. In the preface, the Director states that uncertainty about the law may have inhibited businesses from engaging in healthy beneficial pricing behaviour. Despite the liberal approach of the *Guidelines*, however, price discrimination has continued to be a major concern for businesses and a frequent subject of advisory opinions by the Bureau.

There is no doubt that price discrimination matters have taken up a disproportionate amount of the time of competition law practitioners and business people seeking to conform their pricing practices to the requirements of the law. It is also undoubtedly true that given the various ways in which violation of the provision can be avoided, the section as drafted will not prevent the granting of a better price, one way or another, to a customer. Businesses may have to go through a few more hoops to get there, thereby increasing their legal and administrative costs, but, if planned in advance, it is almost always possible to legally provide a pricing benefit to one customer over that provided to a competitor. Therefore, even if controlling price discrimination were of significant economic merit, the existing provision does not reach that goal. Rather it provides an economic benefit to competition counsel, and poses a trap for the unwary.

To achieve the populist goal of price discrimination legislation — i.e. protecting small retailers or distributors from the buying power of larger competitors — would require an amendment to the section to prohibit volume discounts, which amendment would result in economically inefficient distribution patterns. To require cost justification for discounts to larger purchasers, as the American system purports to do, would involve significant inefficiency, give rise to a huge paper burden, and likely not provide an effective defence in most cases given the difficulty in proving commercial cost justification. Yet, if the statute permits larger purchasers to receive larger discounts, then the fundamental reason for having price discrimination legislation is undermined. This illustrates the economic futility of the section.

In addition to this fundamental issue, the price discrimination provision as written contains many anomalous aspects. There is no particular reason why the price discrimination provisions should only apply to sales rather than leases, licenses or other supply arrangements. There is no reason why they should apply to sales of goods but not services. There is no reason that non-discriminatory prices must be available to competitors under the price discrimination provisions, but the same allowances under the allowance section must be offered to competitors.

For all of these reasons, it is submitted that the current price discrimination provisions are anomalous as drafted and are of limited or no economic benefit.

The price discrimination provisions of the *Competition Act* do not work as their creators intended them to, nor do they represent a useful or economically relevant aspect of competition law. They represent a significant resource burden on government and on businesses in seeking to comply with the technical rules. They also

inhibit flexible and creative pricing and marketing approaches which are unlikely to have an anti-competitive consequence. Any significant anti-competitive result which might flow from discriminatory practices is likely to be caught by the abuse of dominance provisions of the Act. They should be repealed.

As well, section 76(b), which refers to discrimination, may cease to be relevant if the repeal of sections 50(1)(a), 50(2), 50(3) and 51 is undertaken. Evidence that consignment selling had been used to avoid both the price maintenance and price discrimination provisions of the Act led to the introduction of section 76. Section 76(a) deals with price maintenance. If the price discrimination provision is eliminated from the Act it is unclear what remaining value section 76(b) will have.

Discriminatory Allowances

Section 51 of the Act prohibits the granting of any discount, rebate, price concession or other advantage which purports to be offered or granted for advertising or display purposes, is collateral to a sale of products, and is applied directly to the selling price, unless such allowance is offered on proportionate terms to competing purchasers. Proportionate terms, broadly stated, means that if a purchaser who buys $200.00 worth of goods gets a $2.00 allowance, then a competing purchaser who buys $2,000.00 worth of goods should get a $20.00 allowance.

This section permits much less discretion than does the price discrimination provision. It is restricted to sales, rather than leases or consignment arrangements. However, it applies to the sales of products, not merely articles, so the sale of services is included. It does not permit the granting of a larger allowance to a larger volume purchaser except on strictly proportionate terms. It does not simply require that the same allowance be *available* to competing purchasers, it must be *offered* to competing purchasers. Section 51, unlike the price discrimination provisions, does not require that there be a *practice* of discrimination in order for there to be an offence. One instance of a discriminatory allowance may be sufficient.

Despite this more restrictive language, there remains some discretion for suppliers to offer allowances that are not strictly proportionate. They may do so as long as the allowance is not for advertising or display purposes. There is nothing, other than the commercial arrangement between the parties, which dictates that allowances need be for advertising or display purposes. If they are not required to be used for such purposes, then allowances should not fall within the section. Very often payments are made which are called cooperative advertising payments, but there is no requirement that they be used for advertising or display purposes. In those circumstances, an argument would be available that they are not allowances within the meaning of section 51.

Secondly, if the allowance is not collateral to the sale of a product it will not be caught by this section. If allowances are paid by way of some separate inducement to encourage the purchase, but not tied to the purchase of any particular product, they are probably not collateral to the sale of a product.

A third approach to avoid the application of the section is to apply the discount directly to the selling price by way of a price reduction.

The advertising allowances provision was introduced in 1960, partly as a result of the report of the Restrictive Trade Practice Commission on Discriminatory Pricing Practices in the Grocery Trade.[4] This amendment was described, in the Economic Council of Canada's 1969 *Interim Report on Competition Policy*, as follows:

> Another new prohibition [in 1960] banned discriminatory promotional allowances. This latter provision had the two-fold purpose of preventing discrimination in distribution and of limiting promotional expenditures. (at 62)

It is further submitted that a provision introduced with the intent of limiting promotional expenditures appears to be out of step with current economic thinking.

It is submitted that, for precisely the same reasons that the price discrimination provisions ought to be repealed, the discriminatory allowances provision should also be repealed. In addition to the difficulties related to the economic rationale for price discrimination legislation, there are the anomalies noted as between the price discrimination and discriminatory allowances provisions. There are no particular reasons for these anomalies as between section 50(1) and section 51. More fundamentally, the economic basis for price discrimination prohibitions is, as noted above, highly questionable. On balance, the repeal of the provision is appropriate. The Bureau's discussion paper proposes the repeal of section 51, and that proposal should be supported.

Price Maintenance

Price maintenance is the most important aspect of the Act governing vertical distribution arrangements. Other than the misleading advertising provisions, it is the section of the Act under which most cases have been prosecuted. Unlike the conspiracy provision, this is a *per se* offence — the Crown need prove no effect on competition.

The provision began its life as a prohibition against *resale* of price maintenance, that is, it only applied in respect of suppliers and their customers. In the 1976 amendments to the Act the prohibition was broadened to cover price maintenance generally. A number of cases[5] have illustrated an increasing use of the price maintenance provision in a horizontal context.[6]

The price maintenance provision prohibits attempts by agreement, threat, promise or other like means to influence upward or discourage the reduction of price at which persons supply or advertise a product. It also prohibits refusal to supply a product to someone because of their low pricing policy, discrimination against someone because of their low pricing policy, and attempts to induce a supplier by threat, promise or other like means, as a condition of doing business with the supplier, to refuse to supply a product to someone else because of that other person's low pricing policy.

Those propositions have given rise to a significant volume of jurisprudence, perhaps because, in the words of one judge, "I think we would be appalled if we were to have any statistics on how many times during each business day [the price maintenance provision] is probably breached by persons quite unconscious of the fact that they were breaching it."[7]

Many suppliers have an interest in ensuring that their products are not discounted, so that they are not perceived as second rate, or do not become devalued to the distributor or retailer because there is no profit in handling them.[8] Often executives do not think that there is anything problematic about the attempt to maintain prices. It seems to them to be reasonable business conduct. In fact, many economists[9] argue that prohibiting price maintenance may be economically misguided. The U.S. law in this area permits more flexibility in respect of a manufacturer's ability to announce a minimum resale price and not deal with those who sell below that price.[10] However, U.S. law prohibits manufacturers from agreeing with their customers on a maximum resale price, whereas Canadian price maintenance laws do not prohibit maximum price agreements.

Opinions vary widely as to the appropriate approach to price maintenance laws, both in Canada and the United States. For a number of years, particularly through the late 1980s, there were attempts in the United States to legislatively reverse the *Monsanto* and *Business Electronics* cases, and develop a law closer to Canada's *per se* prohibition on vertical agreements to maintain prices. In Canada, no significant legislative changes have been made, or seriously attempted, since 1976.

The price maintenance provisions were introduced following the *Interim Report of the Committee to Study Combines Legislation (the MacQuarrie Commission)* in October 1951. The MacQuarrie Commission concluded that such legislation was appropriate as a result of the desirability of a free economy and the need for economic efficiency. The Commission concluded that price maintenance represented an undesirable restriction on competition by private agreement, and had a tendency to discourage economic efficiency.

Many economists argue[11] that the conclusion reached by the MacQuarrie Commission is not economically valid. They conclude that price maintenance, at least in its vertical application, is simply one of a number of generally benign vertical restrictions. It typically represents an efficient way to distribute products; it is a substitute for more restrictive vertical integration; it discourages free-riding and encourages non-price and inter-brand competition; it is an efficient way to ensure appropriate product service and display arrangements; and it discourages bait-and-switch practices. Consequently, it is argued, price maintenance should be, if not lawful, at least subject to the same regime of review as other vertical practices such as exclusive dealing, tied selling and market restriction. Mathewson and Winter argue that "RPM should be legal unless conclusive evidence is entered that the price floor supports a producer cartel or protects a cartel of established retailers against entry by more efficient (discount) retailers."

Their view is not universal,[12] but it is the prevailing view, and it is difficult to understand why, in principle, price maintenance should be treated differently than other vertical restrictions. Consequently, as a matter of logic, price maintenance should be made an aspect of section 77, with the requirement that, to be subject to Tribunal order, the conduct must be likely to substantially lessen competition. Such treatment would ensure that price maintenance, which is conceptually equivalent to other vertical practices, is treated similarly. Such an amendment would decriminalize conduct which ought not to be prohibited unless it has a negative effect on competition, and would confirm that the key focus of competition law is to ensure vigorous interbrand competition, rather than police the distribution chain.

Having set out the conceptually preferable route, however, I am realistic enough to doubt that such a wholesale change is in the cards for the present round of amendments. If the provision is not to be placed within section 77, then there are nevertheless some less dramatic but still useful amendments which can and should be made at this time.

Firstly, the section should not be available to be employed as an alternate tool to get at horizontal conspiracy without the awkwardness of the "undueness" test, or to attack bid-rigging without the availability of the "made known" defence. Such use of section 61 is improper given both legislative history and approaches to statutory interpretation.[13] If the government wishes to attack horizontal agreements on a purely *per se* basis, such an approach should be based upon an amendment to section 45, not through the back door of section 61.

Secondly, the recent real estate cases[14] have suggested that even if a secondary reason leading to the refusal to supply or discrimination is a low pricing policy, that may be sufficient to found a prosecution. I say "may" because in those cases it was clear that the low prices were the primary reason for the discrimination, so the reasoning of those cases is *obiter*. Nevertheless, it is submitted that the approach is wrong in principle and practice. In principle, because the goal is to stop conduct aimed at discounts as discounters, not conduct aimed at persons primarily for other reasons. In practice, it is even more problematic. If a firm is a discounter there is *inevitably* some concern about that amongst its suppliers. As a practical matter, therefore, such discounters cannot be terminated at all if the principle stated in the real estate cases is maintained. That cannot be correct.

Thirdly, sections 61(1)(b) and 61(6) should be amended to make it clear that the sections protect only those with a low pricing policy *in Canada*. Section 61(1)(a) already contains that limitation, and it is consistent with the presumed goal of the section to seek to protect low prices to Canadian customers.

Fourthly, the defence in section 61(10) should be amended to expressly apply to both a prosecution and a civil claim.

Finally, the defences in section 61(10) should be made to be express defences, not merely facts from which no adverse inferences should be drawn. The language of the existing provision is opaque. If the matters listed are appropriate as defences at all, then they should be expressed to be true defences. As well, the distinction between sections 61(1)(a) and 61(1)(b) as to the availability of the defence should be abolished. There is no reason why 61(10) should provide a defence to refusal to supply or discrimination, but not a defence to an agreement, for instance, not to engage in loss leadering, or a defence to a "threat" that loss leadering will result in termination.

In summary, these changes would: eliminate the anomaly of horizontal conduct without any "undue" effect being subject to challenge; exclude issues dealing with bid-rigging (which enjoys its own statutory regime); make it clear that only conduct aimed against a discounter primarily because it is a discounter is subject to the section; remove the anomaly which may exist between sections 61(1)(a) and 61(6)/61(b) that discrimination or refusals to supply aimed at discounters outside of Canada may be caught while attempts to force suppliers outside of Canada to raise prices are not; make it clear the section 61(10) defences are available in both prosecutions and civil actions; and create a genuine defence for loss leadering and the other section 61(10) items.

Conclusion

As noted at the outset, pricing is a key, if not the key, mechanism in the economy to achieve efficient distribution of goods and services. The *Competition Act* has a central role to play in ensuring a free competitive marketplace. It is largely unsuccessful, however, when it seeks to regulate prices rather than maximizing the opportunities for competitive pricing. For these reasons, the Bureau's proposals contained in the recent discussion paper with respect to price discrimination and discriminatory allowances are welcome. In addition, other pricing provisions of the Act ought to be amended or repealed, to permit the economy to function efficiently, free of artificial restraints. By way of summary, therefore, the following amendments are suggested:

Price Discrimination:
Repeal sections 50(1)(a), 50(2), 50(3) and 76(b).

Discriminatory Allowances:
Repeal section 51.

Regional Predation:
Repeal section 50(1)(b).

Predatory Pricing:
Repeal Section 50(1)(c). Alternatively, delete the words "or eliminating a competitor, or designed to have that effect" from section 50(1)(c).

Price Maintenance:
This is likely to be the most controversial amendment. Conceptually, as a vertical restraint, the provision should be incorporated in Part VIII, as an aspect of section 77, and include a substantial lessening of competition test.

Failing such a move, the provision should be amended to:

(i) limit its application to vertical conduct, or include an "undueness" test;

(ii) exclude responses to calls or requests for bids and tenders from the application of the section;

(iii) add the word "primarily" before the word "because" in section 61(1)(b);

(iv) add the word "primarily" before the word "because" in section 61(6);

(v) add the words "in Canada" to the end of section 61(1)(b);

(vi) add the words "in Canada" to the end of section 61(6);

(vii) add the words "or proceeding" after "prosecution" and the words "or the defendant" after "charged" in section 61(10);

(viii) delete "(b)" and delete the words "it is proved that" from the second line of section 61(10), and delete the words "refused or counseled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from the evidence if he" from section 61(10);

(ix) add, after paragraph 61(10)(d), the phrase "The Court shall not find that the person charged or the defendant has contravened section 61(1)."

With the above suggested changes, section 61(10) would read:

> Where, in a prosecution or proceeding under paragraph 61(1), the person charged, or the defendant, satisfies the Court that he or she, and any one on whose report he or she depended believed on reasonable grounds:
>
> (a) [unchanged];
> (b) [unchanged];
> (c) [unchanged];
> (d) [unchanged]
>
> the Court shall not find that the person charged or the defendant has contravened section 61(1).

The above suggestions are submitted as amendments to the pricing provisions of the *Competition Act*, which can and should be enacted in the current round of amendments.

Notes

[1] See S. Boughs and J. Musgrove, "Sections 50 and 51 of the *Competition Act*: Predation, Discrimination and Competition" (Canadian Bar Association, Competition Law Section Conference, 28-29 September 1995).

[2] B.J. Dunlop, D. McQueen and Michael Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 220.

[3] See F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* (Boston: Houghten Mifflin, 1990) at 156.

[4] Restrictive Trade Practice Commission on Discriminatory Pricing Practices in the Grocery Trade, *Report* (Ottawa: Department of Justice, 1958).

[5] See *R.* v. *418130 Alberta Limited (c.o.b. as Roberts Real Estate)* (25 June 1994), (Alberta Q.B.) [unreported]; *R.* v. *Royal LePage Real Estate Services Ltd.* (28 October 1994), (Alberta Q.B.) [unreported]; *R* v. *Mr. Gas Limited* (11 August 1995), (Ont. Prov. Div.) [unreported]; *R.* v. *Schelew* (1982), 38 NBR (2d) 340, 63 C.P.R. (2d) 140 (N.B.Q.B.), aff'd (1984), 52 N.B.R. (2d) 142, 78 C.P.R. (2d) 102 (C.A.) [hereinafter *Schelew*]; *R.* v. *Campbell* (1979), 51 C.P.R. (2d) 284 at 286 (B.C. Co.Ct.).

[6] For review of this issue see J. B. Musgrove, "Price Maintenance: A Slumbering Giant?" (Canadian Institute Seminar, 17 June 1994). See also S. Wong, "The Law of Price Maintenance in Canada: Review and Assessment" in R.S. Khemani and W. T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: The Institute for Research on Public Policy, 1991) 349.

[7] *R.* v. *Campbell* (1979), 51 C.P.R. (2d) 284 at 286 (B.C. Co.Ct.).

[8] See *R.* v. *Multitech Warehouse (Manitoba) Direct Inc.* (1993), 89 Man.R. (2d) 115, 51 C.P.R. (3d) 195 (Man. Q.B.); aff'd (6 July 1995) (Man. C.A.) [unreported], for a classic example of the dangers of loss-leadering/bait and switch selling, against which manufacturers seek to guard themselves via price maintenance.

[9] G.F. Matthewson and R.A. Winter, *Competition Policy and Vertical Exchange* (Toronto: University of Toronto Press, 1985), and G. Lermer, "Vertical and Horizontal Arrangements: Is a Counter Revolution Underway?" (Canadian Bar Association, Competition Law Section Annual Conference, 29 September 1995).

[10] *U.S.* v. *Colgate & Co.* 250 U.S. 300 (1919). See also *Business Electronics* v. *Sharp Electronics Corp.* 485 U.S. 717 [hereinafter *Business Electronics*]; *Monsanto Co.* v. *Spray Rite Service Corp.* 465 U.S. 763 [hereinafter *Monsanto*].

[11] See Mathewson and Winter, and Lermer, *supra,* note 9.

[12] For a summary of the arguments in favour of prohibiting price maintenance see E. Iacobucci, "The Case for Prohibiting Resale Price Maintenance" (University of Toronto, Faculty of Law, Law and Economics Discussion Paper Series, 30 May 1995).

[13] See B. M. Graham, "Horizontal Restraints: Canada and the United States" (Insight Conference, 10 March 1994) at 4.

[14] See *R.* v. *418130 Alberta Limited (c.o.b. as Roberts Real Estate)*; *R.* v. *Royal LePage Real Estate Services Ltd.; R.* v. *418130 Alberta Limited (c.o.b. as Roberts Real Estate), supra*, note 5.

CURRENT ISSUES IN CROSS-BORDER CRIMINAL INVESTIGATIONS: A CANADIAN PERSPECTIVE

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Introduction

The increasing emergence of a North American economy brings with it not only economic benefits but also an increased risk of anti-competitive conduct that spans borders. In the last few years, senior government officials in both Canada and the United States have indicated that the number of cross-border investigations is increasing,[1] and that information sharing and cooperation are accordingly becoming more important.

In this context, the Governments of both Canada and the United States have taken steps to increase the extent of cooperation and information sharing between them. These steps recently have included:

- the signing on August 3, 1995, of an agreement between Canada and the United States regarding the application of their competition and deceptive marketing practices laws (the "1995 Agreement");[2]

- the issuance in June 1995 by the Canadian government of a Discussion Paper[3] (the "Discussion Paper") concerning proposals to amend the *Competition Act*[4] (the "Act"), among other things to permit greater cooperation and information sharing between Canadian and foreign antitrust agencies;

- the passage in the United States of the *International Antitrust Enforcement Assistance Act* (the "IAEAA");

- the extension in 1991 of the *Extradition Treaty* between Canada and the United States to offences punishable by the laws of both countries by imprisonment for a term exceeding one year or any greater punishment (which includes antitrust offences);[5] and

- the signing, on March 18, 1985, of the *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* (the "MLAT"), which came into force January 14, 1990.[6]

These steps mean significant changes to the landscape. For example, the 1995 Agreement is much more extensive and important than the *1984 Memorandum of Understanding* (the "MOU")[7] it supersedes. First, it is a binding agreement — the MOU was not. Second, much greater detail is provided with respect to

the extent of coordination between the two governments and, for the first time, comity considerations are included to assist in avoiding conflicts in investigations.[8]

These steps enhance enforcement and therefore are beneficial in many respects to both countries. At the same time, they raise significant and novel issues respecting the extent of protection for corporate and individual confidential information and the extent to which immunity is provided for witnesses who cooperate with both governments or who are compelled to provide evidence in connection with a cross-border investigation.

These issues are undoubtedly of concern to businesses in both Canada and the United States. However, it should be noted that Canadian businesses and their advisors generally approach these issues from a somewhat different perspective than their counterparts in the United States, which serves to heighten the degree of interest and anxiety that accompanies their analysis of these issues.

Canadians have historically been anxious about the "long arm" of U.S. antitrust enforcement, both public and private. Cases like *Alcoa*,[9] the uranium cartel litigation[10] and *Institut Merieux*[11] occurred in the not-too-distant past.[12] The response to these concerns was a number of legislative measures designed to overcome the effects of extra-territoriality by the United States. For example, blocking statutes, so-called because they can be used to prohibit Canadian firms and persons from supplying information to foreign authorities,[13] were put in place. In addition, the 1976 amendments to the predecessor of the Act included, *inter alia*, provisions which made implementation of foreign judgments and laws reviewable by an administrative agency in Canada.[14]

In contrast to the United States, Canada has a long history of a voluntary, compliance-oriented and less litigious enforcement approach to its competition laws. There have been proportionately fewer public and private proceedings, no class action suits or treble damages and, with very few notable exceptions, no one has gone to jail for a competition offence.[15] However, recently the Bureau of Competition Policy (the "Bureau") has indicated there will be more recommendations for jail sentences in competition cases.[16] The Bureau also is making much greater use of formal powers,[17] and the current proposals to amend the Act include revisions which seem to contemplate adopting more of a U.S. enforcement process.[18]

When the Act was amended in 1986, the former monopoly and merger provisions, which were virtually unenforceable, were replaced with new provisions respecting abuse of dominance and mergers. These revisions have led to substantially greater use of these provisions. The same 1986 amendments increased the maximum fine for conspiracy from $1 million to $10 million.

These developments have increased the awareness of Canadian businesses of the importance and effects of competition law. At the same time, as cross-border and global markets have developed, aspects of the concerns over the extra-territorial application of U.S. laws may have partially diminished because some

businesses likely have recognized there is a need for a realistic and balanced approach to international enforcement of competition laws in order to keep pace with economic developments. Other businesses in Canada are no doubt still as concerned as ever about any possible extension of U.S. antitrust enforcement into Canada.

In this context, the issue is one of balance — how to balance the needs of effective enforcement on the one hand with adequate safeguards respecting confidentiality and the rights of individuals and corporations in Canada on the other. Given their historical perspective, Canadian businesses likely will approach these issues in a more anxious and cautious manner than their U.S. counterparts. For example, while certain features of the IAEAA, such as the lack of notice when information is transmitted, did not draw uniform criticism in the United States, it is by no means clear that the U.S. model is workable for Canada. In the perception of many in the business and legal communities in Canada, what is at risk is not only the encroachment of U.S. "long arm" antitrust laws, with all the consequences that that entails, but also the voluntary, compliance-oriented approach to Canada's competition laws which historically has allowed effective enforcement while minimizing the public and private costs of enforcement.[19]

With this background, our paper considers the current enforcement mechanism in criminal antitrust matters[20] between Canada and the United States, the legal and practical issues that have arisen, and what considerations ought to be reflected in amending the Act and in agreements between Canada and the U.S. Although the focus of this paper is on the Canada/U.S. experience, the issues are generic to the question of cooperation between antitrust authorities on a bilateral or multilateral basis. The Canada/U.S. experience, therefore, provides a useful laboratory in which to study the resolution of these issues.

The Current Regime — Legal and Practical Elements

Introduction

The Director of Investigation and Research (the "Director"), who is the head of the Bureau, has primary responsibility for enforcing the Act.[21] Unlike in the U.S., where the Antitrust Division both investigates and prosecutes conspiracy and other criminal matters, the Bureau investigates but does not prosecute such matters. If it finds sufficient evidence of criminal conduct, the Director may refer the matter to the Attorney General of Canada for prosecution.[22] Similarly, just as the Bureau does not prosecute criminal offenses, the Director does not grant immunity from prosecution — only the Attorney General of Canada can do so. The Director may, however, recommend that immunity be granted and the Director's recommendations are afforded significant weight by the Attorney General.[23]

The Director has the power under the Act to authorize officers of the Bureau to apply to a court, on the basis of a sworn affidavit, for an order allowing for search and seizure (i.e. an order under section 15 of

the Act) and/or a subpoena (i.e. an order under section 11 of the Act)[24] requiring written or oral evidence or both.

There are a number of substantive differences between the competition laws of Canada and the United States. These differences raise the possibility, for example, that conduct which is illegal in the United States may be legal in Canada, and vice versa.[25] There may also be different bases for claiming jurisdiction.[26] There are also a number of procedural differences, some of which may be quite important in the context of cross-border investigations.[27] Finally, while the Act permits private lawsuits to recover damages for harm suffered from criminal conduct, recoveries are limited to single damages only plus the costs of investigation.[28]

In the historical context described earlier, these and other differences[29] between the laws of the two countries have generated significant concern among Canadian firms about the prospect of greater information sharing between the two countries. These concerns are exacerbated by the complexity of the current regime for cross-border information sharing, to which we now turn.

Information Sharing

Information sharing in criminal investigations between Canada and the U.S. can occur pursuant to the MLAT,[30] the 1995 Agreement and informal exchanges,[31] although there are some unresolved issues associated with information sharing generally. This section addresses information sharing, while Section C below discusses some additional concerns that arise in the context of sharing compelled testimony between the two countries.

1. The MLAT

Briefly, the MLAT provides that Canada and the U.S. will provide assistance to each other in "all matters relating to the investigation, prosecution and suppression of offenses."[32] It applies in Canada in respect of all indictable criminal offenses, including those under the Act, such as conspiracy and bid-rigging. The MLAT is implemented in Canada by a specific statute — the *Mutual Legal Assistance in Criminal Matters Act* (the "MLAA"),[33] which sets out among other things the procedure for granting assistance under a treaty such as the MLAT.

The MLAT requires the country requesting assistance to provide a significant amount of information to the other country as part of making a request,[34] and specifies the types of assistance that can be provided.[35] Requests are made directly by the "Central Authority" of one country to the Central Authority of the other. In Canada, the Central Authority is the Minister of Justice or officials designated by him.[36] Exchanging information, providing documents and records, executing searches and obtaining testimony under oath are examples of the assistance that can be provided under the MLAT.

Information gathered by the Bureau in Canada might be provided to the U.S. pursuant to the MLAT in two circumstances:

(i) to support a Canadian request for assistance in the U.S. under the MLAT; specifically, to provide the U.S. with sufficient grounds upon which to execute its process;[37] and

(ii) in response to a request from the U.S. for assistance under the MLAT.[38]

Conversely, information might be provided to Canada from the U.S. under the MLAT either to support a U.S. request for assistance or in response to an MLAT request from Canada. With respect to the latter, it appears that a grand jury may be used to provide assistance, especially in cases where there is a concurrent U.S. investigation, although even absent a concurrent U.S. investigation there are other procedures available to assist a Canadian investigation.[39]

The MLAA provides that its provisions override those of any other statute, "other than the provisions of an Act prohibiting the disclosure of information or prohibiting its disclosure except under certain conditions."[40] In the competition context, the most important statutory restriction is section 29 of the Act, which provides a general prohibition on providing certain types of information, including information gathered using compulsory processes, to any person "other than to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act."[41] There is a very significant issue currently at hand under Canadian law as to whether information protected by section 29 may be provided under the MLAT to the U.S., whether in connection with a Canadian request for assistance or in response to a U.S. request. The Director has publicly stated that, in his view, the phrase "administration or enforcement of this Act" permits disclosure to a foreign agency "where the proposed communication is for the purpose of receiving the assistance or cooperation of that agency regarding a Canadian investigation."[42] The National Competition Law Section of the Canadian Bar Association has indicated it disagrees with the Director's interpretation of section 29, and has stated that section 29 prohibits the Director from sharing information protected by section 29 with foreign agencies under any circumstances.[43] Thus, it is still an open issue as to whether the Director is legally entitled to provide information protected by section 29 to the U.S. under the MLAT. At the same time, the Director has repeatedly stated that exchanges of confidential information are very rare and the Bureau is exceptionally sensitive to confidentiality concerns.[44] With the support of the Ministry of Industry, in June 1995 the Director proceeded to engage in a consultative process, through the release of his Discussion Paper, to develop an amendment to the Act to resolve these issues — which is a step encouraged by the Canadian Bar. What the amendments will say, obviously, remains to be determined.

An important limitation on section 29 is that it does not apply to information provided voluntarily to the Bureau. Accordingly, in the past, private parties have obtained undertakings from the Bureau not to disclose such information to foreign agencies. Recently, however, the Bureau has been refusing to provide such undertakings,[45] but has been willing to indicate that such information would be treated as if it were

obtained under section 29.[46] Given the fundamental uncertainty respecting the interpretation of section 29, such assurances have provided little comfort. As a result, parties making voluntary submissions to the Bureau to resolve an investigation or pursue immunity or leniency should be alert to the fact that if there is a U.S. investigation, there is a risk that their information will be supplied to the U.S.[47] Such disclosure might occur under the MLAT, as described above. Given the Director's interpretation of the statutory restrictions in the Act, it may also occur under the 1995 Agreement, to which we now turn.

2. The 1995 Agreement

The 1995 Agreement replaces and significantly expands upon the 1984 MOU. The MOU was not binding on, or governed by, either domestic or international law. Given the mandatory language used in some parts of the 1995 Agreement, it is clearly intended to be a binding international agreement.[48] The 1995 Agreement has not been ratified or implemented by legislation and, as such, does not have the force of law and cannot alter existing domestic law in Canada, including the provisions of the Act and the MLAA respecting confidentiality.[49] From the U.S. perspective, the 1995 Agreement is not an antitrust mutual legal assistance agreement of the type contemplated by the IAEAA.[50]

The 1995 Agreement expands the MOU by providing detailed notification procedures in a number of circumstances where the interests of one country may be affected by the enforcement activities of the other. More importantly, the 1995 Agreement provides, in article VI, for a number of comity considerations which each government is required to consider in order to avoid or minimize conflicts in enforcement.[51] By way of example, these include "the extent to which the enforcement activities of the other party with respect to the same persons would be affected."[52] This provision appears to contemplate that Canada would need to consider the effect of any proceedings it might bring on a concurrent proceeding or resolution in the United States, and vice versa.[53]

Among other things, the 1995 Agreement provides that each of the competition authorities will, "to the extent compatible with [its] laws, enforcement policies and other enforcement interests," assist the other party in locating and securing evidence and witnesses, as well as providing information, in each case upon request.[54] This arrangement, which imposes with few exceptions positive obligations to communicate information directly between agencies upon request, is a significant change from the past. It is our understanding that, while it is possible that it could occur, currently MLAT requests are not made directly between agencies but routed through, in Canada, the Minister of Justice. Further, unlike the MLAT, the 1995 Agreement contemplates the possibility of seeking the consent of the person who provided the information prior to its transmission to the other country.[55]

Thus, pursuant to the 1995 Agreement, the U.S. could ask the Bureau for information and the Bureau would be required to supply the information, unless one of the few exceptions apply. In that regard, it is important to note that the 1995 Agreement provides that neither party is required to communicate information if such communication is prohibited by its laws or would be incompatible with its important interests.

However, it may be recalled that, in the Director's view, the restrictions in the Act do not preclude him from providing information to the U.S. where to do so advances a specific Bureau investigation. Under the 1995 Agreement, there is therefore the possibility of disclosure by the Director to the U.S. of information gathered using compulsory process, if the Director determines that doing so will advance a specific Bureau investigation.[56] Further, it must be remembered that section 29 does not on its face apply to information voluntarily supplied to the Bureau. Accordingly, given Canada's obligations under the 1995 Agreement, it is now more important than ever for private parties to consider carefully the risks of providing information voluntarily to the Bureau.

The 1995 Agreement provides reciprocal obligations on the U.S. to supply information to the Bureau upon request. U.S. law allows for the possibility of documents and information obtained using the grand jury process to be provided to Canada outside the MLAT procedures, if an order can be obtained from a U.S. court authorizing such disclosure.[57] As the 1995 Agreement does not override domestic confidentiality laws, such a court order would still be required. However, subject to that condition, it appears possible that such information could be provided to Canada under the 1995 Agreement without notice to the party producing the information.[58] The IAEAA will not change this, and we understand that the IAEAA in fact will make it easier for information obtained under grand jury subpoena to be provided to Canada.[59]

3. Other Disclosure by the Director

Both the MLAT and the 1995 Agreement contemplate there may be other forms of cooperation between Canada and the U.S.[60] In that regard, even before the 1995 Agreement was signed, the Director had indicated he would share information on his own initiative with a foreign agency where to do so advances an investigation under the Act.[61] As noted earlier, the National Competition Law Section of the Canadian Bar Association has expressed the view that such disclosure of information gathered using compulsory process is not permitted under section 29 of the Act.

4. Downstream Disclosure

As we have noted, it appears there are a number of ways in which information obtained by the Bureau might be provided to the U.S., and vice versa. In this section, we discuss the restrictions against downstream disclosure in Canada and the U.S. and the circumstances in which such disclosure might occur.

From the Canadian perspective, once information has been provided to the U.S., the extent to which further dissemination is precluded is not clear. For Canadian businesses, uncertainty about the extent of downstream disclosure, especially where it could occur without notice to them, is likely one of the most important concerns associated with greater information sharing with the U.S. The risk of treble damage class action lawsuits is the basis for this concern.

CANADIAN COMPETITION RECORD

The 1995 Agreement imposes significant obligations on each of the parties to maintain the confidentiality of information communicated to it under the agreement.[62] For example, information obtained from the other government is not to be communicated to third parties or other agencies of the receiving party's government without the consent of the competition authorities that provided the information.[63] This provides some element of downstream protection with respect to information that may be transmitted between agencies. The MLAT also provides for confidentiality of information exchanged between countries.[64] The IAEAA contemplates similar provisions for agreements executed under its authority, but goes one step further by contemplating notice to the person who provided the information if there are breaches of the confidentiality provisions of the mutual assistance agreement.[65] Even with that provision, it is likely that Canadian businesses would still be concerned that the U.S. authorities to which their information is provided may be unwilling (or even unable) to preclude disclosure to other parties in the United States.[66]

From the U.S. perspective, there are similar issues respecting downstream disclosure in Canada. At the outset, it may be noted that the Director has indicated that the 1995 Agreement is subject to and does not override the confidentiality provisions of the Act,[67] but that still leaves the issue of whether his interpretation of those provisions is correct. It also may be noted that the extent of the prohibitions on downstream disclosure depend upon the manner in which the information was obtained. Specifically, certain information obtained under the MLAT may enjoy superior protection to information obtained otherwise. The MLAA provides that a "record"[68] sent by a foreign state is

> privileged and no person shall disclose to anyone the record or its purport or the contents of the record or any part thereof before the record, in compliance with the conditions on which it was so sent, is made public or disclosed in the course or for the purpose of giving evidence.[69]

Information provided otherwise than under the MLAT[70] does not benefit from this provision, although it would benefit from the terms of the 1995 Agreement that stipulate shared information is to be maintained in confidence.[71] However, disclosure can still occur. First, it should be noted the confidentiality provisions of the 1995 Agreement can be waived.[72] Such waivers might be forthcoming in order to permit the Director, for example, to discuss information he receives from the U.S. with industry participants in Canada.[73] Further, the Director has indicated a willingness to provide confidential information he has gathered in Canada to other Canadian law enforcement agencies[74] and, while it appears unlikely, he might wish to make similar disclosure of information gathered from the U.S. The Director also may wish to make disclosure to a Canadian court, in support of an application by the Director for a search warrant, which can result in disclosure to the person searched.[75] In summary, while the 1995 Agreement provides that disclosure cannot occur without the consent of the U.S., it appears now more likely than in the past that the Director would seek such consent.

Apart from the Director's own initiative in making disclosure, generally the Director has many tools at his disposal to resist disclosure to third parties. Specifically, public interest and other privileges[76] and the provisions of Canadian access to information legislation[77] are in our view generally adequate to ensure that

information cannot be wrested from the Director without his consent, with two important exceptions, both of which arise by virtue of the *Canadian Charter of Rights and Freedoms* (the "Charter").[78] In addition to its application to information sharing generally, the Charter has important implications for situations where compelled testimony is exchanged between agencies.

Compelled Testimony and Immunity

1. How Compelled Testimony is Gathered and Shared

Section 11 of the Act allows a Canadian court to order the interviews of persons under oath. It may be noted that Canada does not have a rule against self-incrimination analogous to the U.S. Fifth Amendment.[79] Thus, a person may not refuse to answer a question pursuant to an order issued under section 11. However, the Act also provides a form of "use immunity" by stipulating that no testimony given by him will be used or received against him in any criminal proceedings thereafter instituted against him, other than in a prosecution for perjury or for giving contradictory evidence. Recent decisions by the Supreme Court of Canada have indicated that a derivative use immunity also applies in respect of compelled testimony.[80] It would appear that similar protections are available for testimony provided on a voluntary basis to the Bureau.[81]

Testimony obtained under section 11 is subject to the protections of section 29. It may be recalled that, in the Director's view, he is entitled to provide information otherwise protected by section 29 to a foreign agency where to do so assists a Bureau investigation. As discussed earlier, the National Competition Law Section of the Canadian Bar Association has publicly expressed its disagreement with the Director's views. However, in light of the Director's interpretation of section 29, parties should be aware that the Director takes the position that, like information sharing generally, he is entitled to provide compelled testimony to the United States either under the MLAT, the 1995 Agreement or on his own initiative where to do so would advance an investigation under the Act. As with information sharing generally, such disclosure could occur without notice to the person who gave the testimony.

Compelled testimony can be gathered in the U.S. using the grand jury process. Like other information, it might be supplied to Canada either under the MLAT or pursuant to the 1995 Agreement.[82] It appears that disclosure under either mechanism can occur without prior notice to the person whose testimony was so provided.[83] Thus, the possibility still exists that a person who is unaware that an investigation is occurring in Canada may testify before the grand jury and his testimony may be provided to Canada without notice to him.[84]

2. Immunity[85] When Compelled Testimony is Shared

The MLAA provides a mechanism to obtain compelled testimony in response to an MLAT request. This includes the power of the judge ordering the testimony to impose such terms and conditions on the transmission of the testimony as the judge considers desirable after hearing representations from various parties.[86] The MLAA also contemplates that, before compelled testimony can be transmitted to the U.S., the Minister of Justice must be satisfied that the foreign agency will comply with any terms and conditions imposed by the judge.[87] These measures permit a person who provides compelled testimony the opportunity to request that immunity comparable to that in Canada be obtained in the U.S. before his testimony is provided to the U.S. Further, it would appear that, generally speaking, reciprocal grants of immunity are available where testimony is given to the Bureau voluntarily in circumstances where it will be provided to the U.S.[88]

In contrast, given the Director's view that he is entitled to provide testimony gathered under section 11 to the U.S. in order to assist a Bureau investigation, parties should be aware that testimony obtained under section 11 may be provided to the U.S. without notice and without any assurance that they will receive the same protections in the U.S. as are provided in Canada by section 11 of the Act and recent decisions of the Supreme Court of Canada.[89]

From the U.S. perspective, our understanding is that there is no legal requirement for reciprocal immunity before testimony gathered under the grand jury process can be provided to Canada.[90] However, if a U.S. citizen is aware that a criminal investigation is underway in Canada, it appears he may be able to successfully invoke the Fifth Amendment privilege to resist testifying before the grand jury if no immunity were provided from the Canadian government.[91] At the same time, we understand that the Canadian government has been willing to provide use immunity to persons who are testifying before a U.S. grand jury in circumstances where their actions are under investigation in Canada and their testimony will be provided to the Bureau.

Conclusion on Current Regime

In summary, extensive cooperation and information sharing now goes on between Canada and the United States under a complex set of rules which govern confidentiality of information gathered in both countries. While this may not necessarily be a bad situation — given the emergence of cross-border and global markets, cooperation between agencies is desirable — the rules are not well understood by the private sector. Moreover, the regime in Canada is not designed to operate in a cross-border era and is not up to the challenge of current realities; there is accordingly significant uncertainty and inadequate protection for confidential information and testimony. The history of concerns about U.S. extraterritoriality has meant that while some Canadian businesses may view increased cooperation favourably, there are important and pressing concerns to be addressed as the two governments go forward. In the next portion of our paper, we discuss the considerations that could be brought to bear in amending the Act and implementing arrangements between Canada and the U.S. to address these concerns.

Considerations for the Future

Information Sharing

In the Bureau's Discussion Paper respecting the proposed amendments to the Act, the Director proposes that the Act would be amended to permit communication of confidential information pursuant to mutual assistance agreements negotiated with foreign governments willing to reciprocate. At the same time, the Discussion Paper recognizes there are conflicting public policy interests involved in any decision to communicate confidential information to foreign agencies, including

(i) the privacy interests of Canadian firms;

(ii) the potential harm to competitive markets arising from disclosure of competitive information, however inadvertent;

(iii) different views as to appropriate conduct or remedies in other jurisdictions; and

(iv) effective competition law enforcement, which benefits the Canadian economy.

It is generally acknowledged among members of the Canadian Bar practising in this area that the present provisions in the Act, especially section 29, are no longer workable. For example, the disagreement between the Bureau and the National Competition Law Section of the Canadian Bar Association respecting so fundamental an issue as whether the Director is legally entitled to provide protected information to foreign agencies reflects undesirable uncertainty. For Canadian businesses, uncertainty about when the Director will provide information, whom he will provide it to and what recepients might do with it are exacerbated by the increasing frequency with which Canada and the U.S. engage in information sharing in the context of concurrent transborder investigations. We believe this uncertainty has affected the amount of information that parties have been willing to provide to the Bureau voluntarily. Indeed, the Director has acknowledged making greater use of formal powers recently, indicating that he has done so because the Bureau believes that the information it is obtaining on a voluntary basis is lagging.[92]

The Discussion Paper suggests that all information received by the Director should be treated the same, regardless of whether it was provided voluntarily to the Bureau or gathered using compulsory processes. Given the problems that have arisen in the current regime, we believe that such a provision is essential in the context of amending the Act to permit further information sharing and cooperation with foreign agencies. It would also conform to the Bureau's current practice.[93]

In amending the Act, we believe it is important to keep in mind not only the benefits for Canada in allowing exchanges of information, but also the Canadian perspective on these issues. Specifically, information sharing between Canada and the U.S. should be accompanied by safeguards that ensure:

- reciprocity between Canada and the foreign government;
- with very limited exceptions, notice to the party whose information is being transmitted; and
- with very limited exceptions, consent of the party to the transmittal of its information, or failing that, court approval.

Dealing first with reciprocity, the Discussion Paper proposes that consideration of any mutual assistance agreement should address:

- the degree of similarity between Canada's and the foreign country's competition laws;
- the ability of the receiving agency to provide reciprocal assistance; and
- whether the receiving authority is subject to laws and procedures that are adequate to maintain the confidentiality of the information received.

All these factors we would put under the rubric of "reciprocity," but there are others worthy of consideration. First, Canada should not be in the position of providing information to a foreign agency unless the agency is not only able but commits to provide assistance in circumstances where the Director provides assistance. This would include providing information to assist a solely Canadian investigation. It also would include recognition that certain types of information not provided to Canada will similarly not be provided to the foreign government. For example, since *Hart-Scott-Rodino* filings are exempt from disclosure under the IAEAA, pre-merger notifications filed under the Act should not be provided to the U.S. In addition, there should be assurances that the foreign agency has powers similar to those which it might request be used in Canada.

Any proposal also should include a requirement that the conduct be subject to the same treatment in both countries. Canada should not be assisting the United States to prosecute Canadians for conduct which, in Canada, is non-criminal.[94]

As reflected in the 1995 Agreement, safeguards should include a commitment by both governments to resist attempts by third parties to obtain information from them, including by invoking all available privileges and exercising any prerogatives under freedom of information legislation. To that end, consideration should be given to a provision which requires that the foreign agency not be compellable by third parties to produce information provided by the Bureau. Safeguards also should preclude providing information to other agencies of the foreign government under any circumstances. While information sharing is desirable to assist in the public enforcement of competition laws, it should not be used to facilitate information gathering for other

purposes, including by foreign agencies not involved in enforcing competition law. We also believe that simply requiring a commitment from the foreign antitrust agency not to convey information to other government agencies without the consent of the Bureau is inadequate.[95]

Given that the IAEAA allows for a "public interest override" in respect of information sharing and cooperation, there should be such a provision in Canada's laws to allow both governments to respond flexibly to developments and their own experience in this area.[96] Similarly, many of the other protections contemplated by the IAEAA are worthwhile and should be incorporated in the Act as well.[97] There are no doubt other safeguards that will arise upon further detailed consideration of these issues. The amendments process in Canada will likely generate further discussion of all these points.

Turning to our suggestion respecting notice, it may be recalled that under the MLAA, the subject party is made aware that information is to be provided to a foreign agency, and given the opportunity to make submissions respecting the terms and conditions upon which the information will be provided. A number of constituencies urged the adoption of a provision allowing notice (sometimes, together with a suggestion for expedited judicial review before disclosure was made) when commenting on the draft IAEAA.[98] Providing notice should not prejudice an investigation if the person is already aware of the presence of an investigation in the other country. This would often be the case where the person has been subjected to a search warrant or a request for testimony, especially if the information was being gathered using MLAA procedures. In such cases, there is no issue associated with "tipping" a person under inquiry and the risk of document destruction, etc. Notice would permit Canadian businesses the opportunity to identify information that is particularly sensitive, to raise any concerns about the extent of the confidentiality protections afforded in the other country, to raise concerns, if any, about the scope and necessity of the information sought, and raise procedural issues that protect their rights under the Charter.[99] To address circumstances where notice truly might prejudice an investigation, consideration should be given to allowing the Director in quite exceptional circumstances, if he satisfies an onus placed on him in that regard, to convince a court that no notice should be required. This *ex parte* right should be subject to a full hearing on notice once the person is aware of the compulsory process.

Finally, we also believe there is merit in providing that information be shared only with the consent of the person from whom the information was obtained or with the prior authorization of a court, following an opportunity for the affected person to make representations to the court. Like notice, this proposal was raised by some industry participants with respect to the IAEAA,[100] and is an approach reflected in the MLAA. Further, like notice, it is unlikely in most cases that requiring consent or judicial review (which can be expedited) will prejudice an investigation. In fact, any amendments to the Act that do not contemplate judicial review before documentation obtained using a search warrant is provided to a foreign agency would raise significant issues under the Charter.[101] In our view, such judicial review ought to preclude the possibility of "fishing expeditions" in Canada and should include a determination by the court that the information

cannot be effectively obtained through other means. Other suggestions will undoubtedly arise during the course of the amendments process. We would note that requiring consent or judicial review does not question the good faith of the Director; rather it is a recognition that Canadian public policy, as reflected in the MLAA and the Charter, may differ from the U.S. in this regard. It also is a recognition that the Director is sworn to uphold the Act, not balance enforcement interests against the privacy and other rights of Canadians.

Testimony and Immunity

Each of the above considerations is equally applicable to testimony that is provided voluntarily or gathered using compulsory process. This would include the importance of ensuring there is no downstream disclosure of such testimony to private parties or other agencies of the foreign government. However, the lack of a statutory requirement for reciprocal grants of immunity raises additional concerns.[102]

When commenting on the draft IAEAA, a number of U.S. commentators recommended that the Act require reciprocal grants of immunity.[103] It is difficult to see the adverse effect on enforcement of requiring that immunity no less favourable than that in Canada be granted by the foreign jurisdiction before testimony is transmitted. Further, as a matter of fairness, we believe that the grant of reciprocal immunity should not be determined by whether it is likely a person will be prosecuted in the foreign country. As a matter of fairness, Canadian citizens providing testimony should not be in a worse position simply because their testimony will be shared with the U.S.

Conclusion

Times have changed from a decade ago. There is a clear and dynamic trend to greater cooperation between Canadian and U.S. antitrust agencies, and increasing recognition of the need for it. So far, the Canada/U.S. model has led to extensive cooperation in a number of cases, with beneficial results to both countries. Yet, the increasing cooperation has exposed serious weaknesses in the current law, whether viewed from the government or business perspective. There are too many unresolved issues, which have generated significant uncertainty in this area. There also are inadequate protections for corporate and individual rights. In amending the Act to address these weaknesses, there are important historical perspectives to keep in mind, which distinguish the Canadian situation from that in the United States. If these perspectives are not considered, Canadians and Canadian competition law enforcement will suffer. If, as we believe is possible, these perspectives are respected at the same time the law is changed to allow greater cooperation between Canada and the U.S., the Canada/U.S. model will be worth examining in the context of other arrangements.

Notes

[1] The Canadian Director of Investigation and Research recently commented that:
The evidence clearly supports the fact that there is a need for this increased cooperation. For example, in

1994-95 my office has received almost twice as many formal notifications under the provisions of bilateral agreements, than it did in the previous year. There has also been a noticeable increase in the number of notifications that we have sent to foreign jurisdictions.

George Addy, Address (Canadian Bar Association, National Competition Law Section, Aylmer, Quebec, 29 September 1995) ("Addy September 1995 Speech") at 17.

Similarly, commenting on the then draft *International Antitrust Enforcement Assistance Act* before the Committee of the Judiciary of the U.S. Senate, Anne Bingaman commented:

> Today, international considerations in antitrust enforcement are in the mainstream of our enforcement activity. The Antitrust Division currently has some thirty active *Sherman Act* matters with major international aspects — nearly *double* the number that were ongoing just one year ago. And the number that were ongoing a year ago was itself high by historical standards, reflecting the renewed emphasis on international enforcement that Jim Rill, my predecessor under President Bush, had already begun. (emphasis in original) (at 2)

[2] *Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws*, 3 August 1995.

[3] Industry Canada, *Competition Act Amendments* (Discussion Paper, June 1995).

[4] R.S.C. 1985, c. C-34 (1985) (amended 1990, 1991, 1992, 1993, 1995).

[5] *Treaty of Extradition*, 22 March 1976, United States-Canada, Can. T.S. 1976, No. 3 (as amended by an exchange of Notes, 28 June and 29 July 1974, and a Protocol, 11 January 1988). Extradition is accordingly possible in respect of a number of criminal matters under the Act.

[6] Can. T.S. 1990, No. 19.

[7] *Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws*, 9 March 1984.

[8] *Supra*, note 2, article VI(5).

[9] *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). In this case, the United States was successful in its action to prevent Alcoa and a number of foreign companies from agreeing to restrict aluminum imports to the United States.

[10] *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979).

[11] *In the Matter of Institut Merieux S.A.* (23 August 1990), Docket No. C-3301 (Federal Trade Commission Consent Order) (1900 FTC Lexis 291). In this case, a consent order was imposed in connection with the acquisition of a Canadian firm by a French company.

[12] The new International Guidelines issued by the Department of Justice and the Federal Trade Commission in the United States have to some extent raised these concerns afresh.

[13] Blocking statutes exist at the federal as well as the provincial level. The federal statute, the *Foreign Extraterritorial Measures Act*, S.C. 1984, c. 49, was proclaimed in force in 1985. It permits the Attorney General of Canada to prohibit a person from providing records to foreign agencies or complying with the orders of foreign agencies. In Ontario, the relevant statute is the *Business Records Protection Act*, R.S.O. 1990, c. B.19. It provides that no person shall, under the authority or in compliance with an order of a foreign judicial or administrative authority, send or cause to be sent to a point outside of Ontario "any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report or material in any way relating to a business carried on in Ontario" unless certain exceptions apply. For a further discussion of blocking statutes, see C.S. Goldman and J.T. Kissack, "Joint Sovereign Criminal Investigations, U.S. and Foreign Governments — Can They Really Do That? — A Canadian Perspective" (Paper presented to the Criminal Antitrust Law and Procedure Workshop of the American Bar Association Section of Antitrust Law, Dallas, Texas, 23-24 February 1995) ("ABA Dallas Paper") at 19. Also see C.S. Goldman and J.D. Bodrug, eds., *Competition Law of Canada* (Matthew Bender & Co. Inc.) at §§5.07 and 13.02.

[14] See sections 82 and 83 of the Act, which allows the Competition Tribunal (a quasi-judicial tribunal) on application by the Director to make orders prohibiting Canadian firms from complying with or implementing foreign judgments or laws where the implementation would affect competition, foreign trade, the efficiency of trade or industry in Canada, or commerce generally. For further discussion, see *Competition Law of Canada*, *ibid.*, at §13.02.

[15] There have been a number of individuals convicted on indictments over the years, but they only paid fines. In only one case did an individual go to jail for bid-rigging, and in another, an individual went to jail for misleading advertising.

[16] See H.S. Chandler, "Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada" (Remarks delivered to an Insight and Globe & Mail Conference, 20 March 1994) at 14 and George Addy,

Address (Canadian Bar Association National Competition Law Conference, 30 September 1994) at 8. Also see *R.* v. *Royal LePage Real Estate Services Ltd. et al.* (20 December 1994), No. 9201-14125 (Alta. Q.B.), in which the Government recommended a jail term, of less than one month, following a conviction for price maintenance.

[17] See Addy September 1995 Speech, *supra*, note 1 at 14.

[18] For example, the proposals to amend the pre-merger notification provisions contemplate adopting a process very similar to that under the *Hart-Scott-Rodino Antitrust Improvements Act.*

[19] See the December 1994 *Commentary of the National Competition Law Section of the Canadian Bar Association* referred to *infra*, note 43. Also see J. Kazanjian, "My Goodness George, What are You Telling the Neighbors?" (Paper presented to the Canadian Institute Conference, March 1995).

[20] Although cross-border information sharing and cooperation also can occur in the context of civil matters, such cooperation is beyond the scope of this paper.

[21] For a concise summary of Canada's competition laws, including further discussions of the role of the Director and other persons in the enforcement of the Act, see chapter 2 of the *Report of the Task Force of the Antitrust Section of the American Bar Association on the Competition Dimension of the North American Free Trade Agreement.* Also see *Competition Law of Canada*, *supra*, note 13.

[22] The Bureau and the Department of Justice have a close working relationship, and lawyers from the Department of Justice are often involved at the early stages of a Bureau investigation. Similarly, Bureau officers provide support in prosecutions conducted by counsel from the Department of Justice.

[23] For a recitation and discussion of the Director's conditions for recommending immunity in Canada, see H.I. Wetston, Notes for an Address (Canadian Corporate Counsel Association, 19 August 1991) at 4-6 and H.S. Chandler, "Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada," *supra*, note 16 at 9-11 and Appendix III.

[24] Section 11 of the Act provides, in part:

> 11(1) Where, on the *ex parte* application of the Director or the authorized representative of the Director, a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that any person has or is likely to have information that is relevant to the inquiry, the judge may order that person to
>
> (a) attend as specified in the order and be examined on oath or solemn affirmation by the Director or the authorized representative of the Director on any matter that is relevant to the inquiry...;
>
> (b) produce a record, or any other thing, specified in the order to the Director or the authorized representative of the Director within a time and at a place specified in the order; or
>
> (c) make and deliver to the Director or the authorized representative of the Director, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

[25] For example, the requirement to satisfy the undueness element in a Canadian price-fixing case. For further discussion, see the ABA Dallas Paper, *supra*, note 13 at 15. For a more general discussion of Canada's conspiracy law, see P.S. Crampton and J.T. Kissack, "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities" (1993) 38 McGill L. J. 569 and chapter 8 of *Competition Law of Canada*, *supra*, note 13.

[26] Specifically, in the absence of case law in the competition context, it is not clear that Canadian cases adopting the "effects test" in other areas of law would be followed in respect of offenses under the Act. See in this regard C.S. Goldman, G.P. Cornish and R.F.D. Corley, "International Mergers and the Canadian Competition Act" (Paper presented to the Fordham Corporate Law Institute, 1992).

[27] Specifically, section 69 of the Act provides for a presumption that acts done or records created by employees or other agents of a person are deemed, in the absence of evidence to the contrary, to have been said or created with the authority of the person. It further provides that a record proved to have been in the possession of a person is *prima facie* proof that the person had knowledge of its contents, and that it accurately reflects things done, said or agreed to by that person. Thus, evidence obtained from a U.S. firm may, if proper continuity is proved by the Bureau officer, be admitted in court at trial in Canada to prove an offence without contravening the hearsay rule. In this fashion, evidence from the U.S. may be introduced into the public record in Canada. This evidence is subject to rebuttal by other written or verbal testimony. However, it allows the prosecution to get past the need for live witnesses in some instances.

It may also be noted that, in Canada, a conviction for criminal conduct can be used as evidence in private lawsuits.

[28] See section 36 of the Act.

[29] Additional differences may include the level of disclosure to an accused. As a result of the decision of the Supreme Court of Canada in *Stinchcombe* v. *The Queen* (1991), 68 C.C.C. (3d) 1, the Crown has a duty to disclose all material it proposes to use at trial and all evidence which may assist the accused in making its defence, even if the Crown does not propose to adduce it. This information is not available until formal charges are laid after an inquiry is referred by the Director; however, the information might include information obtained from the United States government and from complainants. Further, resolution of criminal cases in Canada may involve the preparation of an agreed statement of facts which is filed on the public record and would therefore be available to private litigants in the United States or federal or state governments. For a further discussion in this regard, see C.S. Goldman and J.T. Kissack, "Cooperative Antitrust Enforcement Efforts between Canada and the United States: Investigations, Information Sharing and Confidentiality in Criminal Proceedings" (Paper presented to the American Bar Association of Antitrust Law Annual Meeting, 6 August 1995).

[30] *Supra*, note 6.

[31] The Director recently remarked that "there are ample opportunities for increased cooperation between competition authorities by way of informal contacts to discuss common issues at a more general level — and we do take advantage of those opportunities." See George Addy, Address (American Bar Association Section of Antitrust Law, Chicago, 6 August 1995) ("Addy ABA Speech") at 2. Other commentators have suggested that cooperation between the Bureau and U.S. agencies could be increased primarily by the provision of public information between the two countries. For a discussion in this regard, see J.F. Rill and V.R. Metallo, "Trans-border Enforcement of Competition Law: A Perspective from the United States" (Paper presented to the Annual Competition Law Conference of the Canadian Bar Association National Competition Law Section, September 1995) at 25.

[32] Article II(1). It may be noted that the Director recently indicated that "there have been 11 MLAT requests in competition law matters to date (5 by Canada and 6 by the U.S)". See Addy ABA Speech, *ibid.*, at 12. For further discussion of the MLAT, see R. Lusk and D. Steiner, "Transborder Enforcement of Competition Law: Balancing Co-operation with Confidentiality" (Paper presented to the Annual Competition Law Conference of the Canadian Bar Association National Competition Law Section, September 1995) ("Lusk & Steiner Paper"). Also see J.F. Rill and C.S. Goldman, "Confidentiality in the Era of Increased Co-operation between Antitrust Authorities" (Paper presented to the Project on Competition Policy in a Global Economy, June 1995) ("Rill & Goldman Paper"), and the ABA Dallas Paper, *supra*, note 13.

[33] R.S.C. 1985, c. C-30 (4th Supp.).

[34] The MLAT provides, in article VI(3), that a "request shall contain such information as the Requested State requires to execute the request", and provides a non-exhaustive list of such information, which includes "the subject matter and nature of the investigation or proceeding to which the request relates."

[35] For example, we are aware of a situation in which a request was made by Canada under the MLAT for transcripts of testimony and documents subpoenaed by the grand jury. It should be noted that individual states in the U.S. probably cannot make use of the MLAT in order to obtain information directly from Canada. This is because the MLAT contemplates that requests are made by, in the U.S., the Attorney-General or officials designated by her, which are assumed to be U.S. federal authorities investigating federal offenses. However, since the MLAT does not preclude other forms of cooperation, a state could ask the Bureau to provide the information voluntarily.

[36] We understand that the Director has not been so designated. In the U.S., the Central Authority is the Attorney General or officials designated by her.

[37] Such a requirement would be analogous to the requirement under the MLAA that, before invoking compulsory processes under the MLAA in response to a request, a Canadian judge must be satisfied among other things that there are reasonable grounds to believe that an offence has been committed with respect to which the foreign state has jurisdiction. See, for example, sections 12(1) and 18(1) of the MLAA.

It may be noted that providing this required information can have the result of triggering an investigation in the other country. For example, we are aware of one case where an independent investigation was commenced in the United States as a result of a request for assistance by Canada under the MLAT.

[38] As noted earlier, the MLAA provides procedures for responding to requests, including the use of search warrants and orders to compel testimony under oath. It may be noted that a search warrant under the MLAA would be issued under the Canadian Criminal Code and not the Act.

In addition, it may be noted that article XIII(2) of the MLAT provides that the country whose assistance is requested "may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities." As noted below, the Director has publicly indicated that he will provide

confidential information to a foreign agency where to do so advances a Bureau investigation. Thus, it may be that in the case of documents already in the Bureau's possession, disclosure of them may occur pursuant to article XIII of the MLAT if the Director is satisfied that doing so will advance a Bureau investigation. This issue also arises under the 1995 Agreement, as discussed below.

[39] For a discussion of the procedures that might be involved in the U.S., see R. Donovan, "International Criminal Antitrust Investigations: Practical Considerations for U.S. Defense Counsel" (Paper presented to the Criminal Antitrust Law and Procedure Workshop of the American Bar Association Section of Antitrust Law, Dallas, Texas, 23-24 February 1995) (the "Donovan Paper"). We are aware of an instance where a U.S. District Court, relying on its authority to respond to letters rogatory and its inherent jurisdiction, issued an order granting an Assistant United States Attorney the power to take whatever steps were necessary to respond to a request from Canada under the MLAT. The Assistant Attorney subsequently issued a subpoena to compel the production of documents relevant to the Canadian inquiry. This occurred in the context of no U.S. investigation.

[40] Subsection 3(1) of the MLAA.

[41] 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, 15, 16 or 114 [i.e. pursuant to the search and subpoena powers or under the pre-merger notification procedures];
>
> (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 [i.e. requesting an Advance Ruling Certificate in respect of a merger, in which the Director certifies he does not have grounds to challenge the merger].

For a further discussion of section 29(1), see the Lusk & Steiner Paper and the Rill & Goldman Paper, *supra*, note 32. Subsection 10(3) of the Act also imposes some restrictions. It provides that all inquiries under the Act "shall be conducted in private." The presence of this provision has not affected the Director's view that he is entitled to provide information to a foreign agency where to do so assists a Bureau investigation. See Director of Investigation and Research, "Confidentiality of Information Under the *Competition Act*" (Draft Information Bulletin, July 1994) ("Draft Information Bulletin") at 14, 18. Also see Director of Investigation and Research, "Communication of Confidential Information under the *Competition Act*" (Information Statement, May 1995) ("May 1995 Statement") at 3.

[42] Draft Information Bulletin, *ibid.* Also see the May 1995 Statement, *ibid.*

[43] *National Competition Law Section of the Canadian Bar Association, Commentary on the Draft Information Bulletin of the Director of Investigation and Research Respecting Confidentiality of Information under the* Competition Act, December 1994 ("December 1994 Commentary") at 29 *et seq.* In the December 1994 Commentary, the National Competition Law Section noted:

> ... the ability of the Director to share information with his foreign counterparts under the MLAT is subject to ss. 10(3) and s. 29 of the Act [and] disclosure is confined, under current law, to publicly available and non-section 29 information [i.e. information not protected by s. 29]... Indeed ... we would argue that the Director is not permitted to disclose *any* non-public information to a foreign law enforcement agency without express legislative approval. (at 36)

[44] In the May 1995 Statement, *supra*, note 42, the Director noted:

> The policy of the [Director] is one of minimizing the extent to which confidential information is communicated... Communication of confidential information is *not* the rule; it is the exception.
>
> ... In conducting his inquiries, the Director carries out his mandate in as private a manner as circumstances permit...
>
> ... Customers, competitors or suppliers are often contacted to provide information on such subjects as the definition of relevant markets, the nature and extent of barriers to entry and the role and significance in the market of individual competitors. All this is routinely done by the Bureau without communicating confidential information to those third parties. (at 1-2)

Further, in his August 1995 Speech, the Director noted:

> I stress, however, that the need for greater cooperation does not mean that antitrust agencies are proceeding without regard for statutory requirements and safeguards. Moreover, the mere fact that a particular matter

has international elements does not necessarily mean that it will lead to extensive cooperation or parallel enforcement of the kind we undertook in Fax Paper. In the vast majority of cases, including those with cross-border elements, Canadian and U.S. competition authorities continue to pursue their own independent investigations without the need for extensive cooperation. (at 1-2)

[45] The May 1995 Statement, indicates that undertakings are not likely to be given as they are considered to impede the Director's ability to administer or enforce the Act. See the May 1995 Statement, *supra*, note 42 at 3.

[46] This policy is reflected in the Director's May 1995 Statement, *ibid.* at 2.

[47] Even if undertakings are provided, they may not be adequate to protect the information. Specifically, if a formal MLAT request is made, the determination of whether to comply with the request is made by the Minister of Justice, not the Director, and undertakings by the Director likely do not bind the Minister. In addition, a U.S. court may issue letters rogatory to a Canadian court to order the production of information provided to the Bureau. Once again, the decision whether to respond to the letters rogatory would be made by someone other than the Director, in this case a Canadian court.

[48] The Director recently commented that:

The 1984 MOU was essentially an informal political arrangement between our governments. It expressly stated that it was not an international agreement. By contrast, the 1995 Agreement is a binding international agreement under international law. This change in status serves to underscore the Parties' commitments to the avoidance of disputes and closer cooperation in application of their competition laws. (Addy ABA Speech, *supra*, note 31, at 4.)

We understand, based on discussion with the Canadian Office of the Treaty Custodian, that the term "agreement", rather than "treaty", was adopted for the 1995 Agreement because, for the purposes of U.S. law, it is an executive agreement executed under Presidential authority, as opposed to a treaty which requires confirmation by the Senate.

[49] In a recent speech, the Director noted that the 1995 Agreement:

expressly provides that neither Party is required to communicate information to the other where prohibited by its laws. The [1995 Agreement] is not intended to change the Parties' laws in this regard. (Addy ABA Speech, *supra*, note 31 at 10-11)

[50] U.S. Department of Justice, Press Release, "New Antitrust Cooperation Agreement Signed Between the United States and Canada" (4 August 1995).

[51] These are somewhat similar but not identical to the comity considerations articulated in the Antitrust Enforcement Guidelines for International Operations issued in April 1995 by the U.S. Department of Justice and the Federal Trade Commission. In the Addy ABA Speech, *supra*, note 31, the Director indicated, at 7-8, that the comity factors were adapted from several sources, including the Bureau's experience under the MOU, Canadian and U.S. jurisprudence and the 1991 Agreement between the Commission of the European communities and the government of the United States of America regarding the application of their competition laws (23 September 1991).

[52] See article V(5)(ix). The presence of these factors, and the requirement that they be considered by agencies in both countries, marks a fundamental change from the MOU.

[53] Similarly, article VI(1) of the 1995 Agreement provides that

each party shall, having regard to the purpose of this Agreement as set out in article I, give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation and the nature of the remedies or penalties sought in each case.

[54] Article III(3). In addition to assisting the U.S. enforcement efforts, the 1995 Agreement also includes for the first time the concept of "positive comity" between the two countries. The 1995 Agreement contemplates that if one country believes that anti-competitive activities carried out in the other are affecting its important interests, it may require the other party's competition authorities to initiate enforcement activities. In turn, the requested party's competition authorities "shall carefully consider whether to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anti-competitive activities identified in the request." See article V(3).

[55] Article IV(4) provides:

In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Party's competition authorities.

In the Addy ABA Speech, the Director commented on this provision as follows:

> This provision is intended to facilitate cooperation. It does not, however, override my discretion to communicate information without consent for the purpose of enforcement or administration of the *Competition Act*. (*supra*, note 31, at 9)

[56] While this disclosure occurred prior to the signing of the 1995 Agreement, we are aware of one case involving a concurrent investigation where the Bureau provided documents seized from a Canadian firm under a search warrant to U.S. authorities for use in grand jury proceedings. This was done without notice to the party and without invoking the procedures contemplated by the MLAA. This appears to have been an example of where the Director made disclosure in order to advance a Bureau investigation and may demonstrate that disclosure other than through the MLAT process, such as under the 1995 Agreement, might occur.

It may be noted that there are additional restrictions imposed by the common law that would apply to exchanges under the 1995 Agreement. For further discussion, see the Lusk & Steiner Paper, *supra*, note 32. Also see the Rill & Goldman Paper, *supra*, note 32, and the December 1994 Commentary, *supra*, note 43.

[57] We understand this disclosure is made under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure. For a discussion of the application of the grand jury secrecy rules, see the Donovan Paper, *supra*, note 39 at 36 *et seq.* Also see the Rill & Goldman Paper, *supra*, note 32.

[58] This has implications not only in respect of parties producing documents but also in respect of individuals providing testimony. The additional issues that arise with respect to testimony are discussed in the next section of this paper.

[59] Specifically, we understand that by treating foreign agencies as analogous to state agencies (as to which, see section 5 of the IAEAA), information may be provided to Canada sooner than previously under Rule 6(e)(3)(C)(i). The House of Representatives Report on the IAEAA, Report No. 103-772 (3 October 1994) stated that the exception for communication to state agencies was added:

> In order to overcome two impediments to disclosing grand jury evidence to State officials under ... rule 6(e)(3)(C)(i). The first impediment was that clause (i) requires the State official to show that the disclosure would be "preliminary to or in connection with a judicial proceeding." Law enforcement officials, however, typically conduct the bulk of an investigation before bringing a case or indictment.

We also understand that there was some uncertainty as to whether a foreign judicial proceeding was included in the exception in (C)(i). See the Donovan Paper, *supra*, note 39 at 34-35.

[60] See article III(2) of the 1995 Agreement, article III(1) of the MLAT, *supra*, note 6, and section 3(2) of the MLAA, *supra*, note 33.

[61] See text accompanying notes 32-47. As reflected in note 56, we are aware of a situation where it appeared such disclosure had taken place.

[62] Article X(2) provides:

> Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

As noted earlier, there is a significant amount of uncertainty respecting the scope and application of the confidentiality provisions of the Act.

[63] Article X(5).

[64] See article IX.

[65] It might be agreed that it is not adequate to provide notice to a party only after its information has been disclosed in breach of an agreement, since by then the damage may well have been done.

[66] For example, a Canadian firm might be concerned about disclosure by U.S. authorities to third parties charged with criminal offences in the United States. As mentioned earlier, in Canada the decision of the Supreme Court of Canada in *Stinchcombe*, *supra*, note 29, would probably require disclosure to an accused in Canada of information received from the United States. Similar obligations may exist in the U.S.

Special concerns also may arise for information provided voluntarily to the Government. U.S. plaintiffs may seek to obtain such information not only from the Government, but also from the parties who provided it to the Government. It has been our experience that agencies are unwilling to commit to intervening in any civil proceedings in order to assist a person in resisting discovery of such information by asserting that such information ought not to be disclosed on the basis of public interest privilege or otherwise.

[67] In the Addy ABA Speech, the Director stated:

> Article X of the Agreement acknowledges the importance of confidentiality in several respects. First, as I

noted earlier, it expressly provides that neither Party is required to communicate information to the other where prohibited by its laws. The Agreement is not intended to change the Parties' laws in this regard. Second, the Parties have agreed to maintain the confidentiality of information communicated in confidence to the fullest extent possible. (*supra*, note 31 at 10-11)

When commenting on the provisions of the 1995 Agreement that impose obligations to maintain the confidentiality of shared information, the Director recently stated:

> The Parties also agree [in the 1995 Agreement] to oppose, to the fullest extent possible consistent with their laws, any application for disclosure of confidential information by a third party. Thus, the Parties would generally invoke any applicable legal arguments or privileges to prevent disclosure of confidential information. Where appropriate, we would consider seeking protective orders with respect to information that may be introduced in evidence in judicial or administrative proceedings. (Addy ABA Speech, *supra*, note 31 at 11.)

Further, in the May 1995 Statement, *supra*, note 42, the Director stated:

> To preserve the independence necessary to carry out his mandate effectively and to protect the integrity of the investigative process under the Act, the Director would not voluntarily provide information to persons contemplating or initiating a private action...
>
> The Director would oppose compliance with subpoenas for production of documents while an investigation is on-going if compliance would have a potential to impede his investigation or otherwise undermine his ability to enforce the Act. Should the Director's opposition be unsuccessful, protective orders would be sought. Should a subpoena be served upon the Director after the investigation has been completed, it may be complied with once the action has been initiated and the information provider has been apprised of the request. Whether the Director would seek to invoke available privileges would be considered on a case-by-case basis. (at 4)

[68] Subsection 2(1) of the MLAA, *supra*, note 33, defines a record as "any material in which data are recorded or marked and which is capable of being read or understood by a person or a computer system or other device."

[69] Section 44.

[70] For example, information provided pursuant to a court order under Rule 6(e)(3)(C)(i) following a Bureau request under the 1995 Agreement. The MLAA would not apply to any information so provided.

[71] Article X(5) of the 1995 Agreement provides that unless otherwise agreed by the parties, information is to be maintained in confidence, although it may be communicated to a party's law enforcement officials for the purpose of competition law enforcement. The 1995 Agreement also contemplates the possibility of a party invoking applicable privileges to resist disclosure. See article X(2).

[72] Article X(2) provides that the confidentiality restrictions apply "unless otherwise agreed by the Parties". Further, the obligation in article X(5) not to communicate information to third parties or other agencies of the receiving competition authority's government is expressly made "subject to paragraph 2", which would appear to permit the possibility that the parties can agree in a particular case that the confidentiality restrictions will not apply.

[73] We are aware of at least one case where it appeared that documents seized from a firm in Canada were shown to another firm under investigation for the purposes of assisting the Director's investigation. Further, in *Re: A Merger Inquiry under s. 10 of the Competition Act re: CP Containers (Bermuda) Ltd. and Cast Group Ltd.* (1995), 61 C.P.R. (3d) 219, the examining officer noted, in excluding counsel to one of the parties to a merger from the examination under section 11 of the Act of representatives of the other party to the merger, that the examination: "would reveal the identity of third parties who had been interviewed by the Bureau and supplied information. The concern was with respect to both the identity of the informants and the substance of some of the information" (at 239). Thus, it appears that information gathered by the Director both voluntarily and using compulsory process may be disclosed to industry participants, although we are not aware of a case where this has been done in respect of information obtained from the U.S.

[74] It may be recalled that the prohibition in section 29 has an exception for disclosure to a "Canadian law enforcement agency" — an undefined term. In the May 1995 Statement, the Director noted that:

> ... communication permissible under section 29 need not necessarily occur to advance any particular matter under the Act, and may be done for the express purpose of assisting the Canadian law enforcement agency in carrying out its duties. (*supra*, note 42 at 3).

Further, the Discussion Paper states that:

> Another exception under the new regime would relate to communications to Canadian law enforcement agencies. Many would argue from a public policy standpoint that communicating information in the Director's position to assist Canadian law enforcement agencies in carrying out *their* duties is in the public interest. (at 12)

[75] We are aware of one instance where affidavits and other documents obtained voluntarily from a U.S. firm seeking leniency were attached to an application for a search warrant in Canada. These documents were obtained under a court order, after a hearing, by a Canadian firm that was subjected to the search by arguing an entitlement to such information under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter").

[76] For a discussion of these privileges, see Y. Bériault and M. Renaud, "Information Provided to the Director of Investigation and Research: To What Extent Should It be Kept Confidential?" (Paper presented to an Insight and Globe and Mail conference, March 1994) at 13 *et seq*. Also see the *D&B Companies of Canada Ltd.* v. *The Director of Investigation and Research* (7 November 1994), No. A-505-94 (F.C.A.). The 1995 Agreement specifically contemplates the possibility of a party invoking applicable privileges to resist disclosure. See article X(2) of the 1995 Agreement. Further, we are aware of cases in which the Director has agreed to invoke the public interest privilege to resist attempts by third parties to obtain disclosure from the Director of information in his possession and in which the Director and Attorney-General have indicated a willingness to consider requests by the person who has provided information to the Bureau that the Director or the Attorney-General or both would consider steps such as intervening in any civil action to suggest that discovery of the information from the party supplying information to the Bureau should not occur as it might violate applicable privileges of the Director or the Attorney-General.

[77] For a discussion of these provisions, see the Rill & Goldman Paper, *supra*, note 32.

[78] See the discussion in *supra*, note 75. The first exception relates to disclosure of information used to support an application for a search warrant in Canada.

The second exception relates to required disclosure under *Stinchcombe*, which occurs by virtue of section 7 of the Charter. Specifically, following the laying of charges, it is entirely possible that information obtained from the U.S. would be disclosed to an accused. To our knowledge, there is no obligation on the person receiving such information not to make use of it or otherwise disclose it. The Director referred to this possibility in the Addy ABA Speech where, after summarizing the requirements under the 1995 Agreement to resist disclosure and invoke applicable privileges for that purpose, he added:

> At the same time, we recognize that the competition authorities are subject to legal — and constitutional — obligations to disclose certain information to defendants and legal proceedings. These obligations would be a factor to consider in the course of a decision to communicate information. (*supra*, note 31 at 11)

[79] However, a recent decision of the Supreme Court of Canada suggests that a person under investigation may be non-compellable if the predominant purpose of the testimony is the collection of self-incriminating evidence. The limitations placed on this right by the Supreme Court of Canada make it extremely unlikely that a person could successfully resist a section 11 order on this basis. See *Branch*, cited *infra*, note 80. For further discussion, see C.S. Goldman and D. Brooker, "Supreme Court of Canada Clarifies Right against Self-Incrimination" (1995) 14:4 Legal Alert 1 at 1.

[80] These decisions suggest that if, in a subsequent proceeding an accused shows a plausible connection between the evidence and the earlier compelled testimony, the evidence may not be admitted unless the Government can prove, on a balance of probabilities, that the impugned evidence would have been discovered without the compelled testimony. See *R.* v. *S. (R.J.)*, [1995] 1 S.C.R. 451 and *British Columbia (Securities Commission)* v. *Branch*, [1995] 2 S.C.R. 3.

[81] We are aware of one situation in which, after the commencement of an investigation, the Canadian Government was willing to offer assurances similar to "use immunity" available in the U.S. to a person who would be interviewed by the Bureau voluntarily. In such a case, counsel may want to ensure that similar letters are forthcoming from the U.S. Department of Justice to ensure that information gathered voluntarily in Canada is not used in the United States against the person. As previously discussed, in the context of the 1995 Agreement, the past practice in Canada of obtaining assurances from the Bureau not to communicate information to foreign authorities would be inadequate to protect the information.

[82] See text accompanying notes 48-59.

[83] As mentioned earlier, we are aware of a situation in which a request was made by Canada under the MLAT for a transcript of testimony and for documents subpoenaed by the grand jury. The grand jury testimony was provided to the Bureau without prior notice to the person who testified.

[84] This may be a reason why a person required to testify before the grand jury should inquire as to whether there is an inquiry in Canada, although it is not clear whether this would be an adequate basis upon which to invoke the Fifth Amendment privilege. In any event, we understand that the Canadian Department of Justice has in the past been willing to consider a grant of immunity similar to that under section 11 of the Act (i.e. use immunity) to persons testifying before the grand jury where there is an expectation that the Bureau will be provided with the testimony.

[85] It is important to recall that, in this context, we are discussing "use immunity." The Act does not provide amnesty (sometimes called substantive immunity) in respect of compelled testimony.

[86] Subsection 20(2) of the MLAA, *supra*, note 33, contemplates that representations may be made by among others the Minister of Justice and the person who produced a record or thing pursuant to an order obtained under the MLAA. Thus, if a person providing compelled testimony under the MLAA was also compelled to produce records or things, he would have an opportunity to make representations.

[87] See sections 20 and 21 of the MLAA, *supra*, note 33.

[88] We are aware of a circumstance where a U.S. resident who had already testified before a grand jury was going to provide information to the Bureau on a voluntary basis. A letter granting use immunity was offered by the U.S. However, it appeared the U.S. Department of Justice was unwilling to provide the witness with a copy of his prior grand jury testimony to permit him to refresh his memory before attending the interview with the Bureau. Yet, we understand that it would not be unusual in a grand jury proceeding, if a person were recalled, for that person to be provided with a copy of his prior testimony in order to refresh his memory and avoid inadvertent inconsistent statements. See, for example, *In The Matter of Fred Ferris, a Witness Before the Special Grand Jury*, 12 F. Supp. 91 (Nevada 1981).

[89] See the discussion in note 79. Further, while there have been no decisions made in the context of a U.S. antitrust investigation, it may be noted that the possibility of a Canadian citizen being subjected to criminal prosecution in the U.S. as a result of compelled testimony in Canada has been raised in another context. In *Somerset Pharmaceuticals Inc.* v. *Interpharm Inc.* (1994), 25 C.P.C. (3d) 12 (Ont. Gen. Div.), the Court considered an application for an order to compel testimony sought pursuant to letters rogatory issued by a U.S. Federal District Court in the context of a civil suit in the U.S. The persons who were to be deposed in Canada resisted the request for a court order on the basis that compelling their testimony violated their rights under the Charter. There had been media reports of an FBI investigation of the respondents that suggested criminal charges might be laid in the U.S. In that context, they argued that to compel them to give testimony that might be used against them in criminal proceedings in the U.S. would violate their rights under sections 7, 8 and 13 of the Charter. The Court held that the Charter did not apply in the context of a civil suit between the parties but that, even if it did apply, the newspaper articles "cannot be treated as evidence which would expose the respondents to criminal prosecution". On the basis of *Somerset*, it might be argued that if a person is able to provide evidence that the compelled testimony would expose him to criminal prosecution in the U.S., he might be able to avoid giving evidence.

[90] We understand that, in commenting on the draft IAEAA, the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association suggested that the IAEAA should contemplate a requirement that there be reciprocal grants of immunity before compelled testimony could be provided to a foreign agency. See the *Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the proposed International Antitrust Enforcement Assistance Act* (1 August 1994) at 22.

[91] See *United States* v. *Gecas*, 50 F.3d 1549 (11th Cir. 1995). In this case, a resident alien in the United States successfully invoked the Fifth Amendment to resist testifying before the Office of Special Investigations in the U.S. in circumstances where the witness had a "real and substantial fear" of prosecution by Israel and Lithuania in respect of his conduct during the Second World War.

[92] See Addy September 1995 Speech, *supra*, note 1 at 14.

[93] See the May 1995 Statement, *supra*, note 41 at 2.

[94] We understand that a similar concern was expressed in the U.S. in connection with the passage of the IAEAA by the National Association of Manufacturers and the U.S. Chamber of Commerce. See testimony of the National Association of Manufacturers (Richard Rogers, Chairman, Competition Subcommittee) to the Subcommittee on Antitrust, Monopolies and Business Rights of the Committee of the Judiciary (4 August 1994) and the letter of the U.S. Chamber of Commerce to Senator Brooks (8 August 1994). A related topic is the question of ensuring immunity is available in both countries. This is discussed in the next section of this paper.

[95] We understand that a similar view was expressed by a number of commentators on the IAEAA, although we also understand this view was not uniformly endorsed in the U.S. Given the unique concerns of Canadian business, however, that does not mean Canada should permit such a disclosure.

[96] However, unlike the Report of the House, *supra*, note 59, which suggests that this approach could be used to address issues of immunity, as discussed in the next section, we believe that reciprocal immunity should be part of the amendments to the Act.

[97] This would include a commitment to return copies of documentation following the conclusion of the investigation, providing notice of any breaches of the agreement to the person whose information was provided, publishing draft

agreements and amendments for comments and citations and brief descriptions of the laws that protect the confidentiality of information in the hands of the foreign government, so that persons reviewing the published draft of the agreement will be able to familiarize themselves with the extent of the risk of downstream disclosure.

[98] For example, similar concerns were expressed in the Statement of the U.S. Council for International Business on the draft IAEAA (2 August 1994), at 2. However, in the House Report, *supra*, note 59, the House Committee indicates that it:

> determined that notice to affected parties should not be mandatory, because it would not be advisable in some instances. For example, notice to an affected party would not be appropriate if the party is a target or subject in a criminal investigation being conducted by the foreign antitrust authority.

However, the Committee also seemed to contemplate that the Attorney-General and the Federal Trade Commission give consideration to giving notice in certain circumstances.

[99] For example, if a party intends to challenge the validity of a search in Canada, receiving notice will allow the party to ensure that a challenge was brought as quickly as possible. Otherwise, a party might be faced with the situation where a search warrant is successfully quashed in Canada, but the party has no remedy vis-a-vis the U.S. because the information or documents were previously provided to the U.S. and there is no means in Canada of compelling their return. Finally, it may be noted that there is an argument under the Charter that, outside of following the procedures in the MLAA, documents seized in Canada for one purpose may not be used for another purpose. Thus, the party may wish to raise arguments under the Charter that information sharing is unconstitutional in the circumstances. See, for example, *R.* v. *Borden* (1994), 119 D.L.R. (4th) 74 (S.C.C.) and *Colarusso* v. *The Queen* (1994), 87 C.C.C. (3d) 193 (S.C.C.).

[100] See, for example, the Statement of the U.S. Council for International Business, *supra*, note 98, and the Testimony of the National Association of Manufacturers, *supra*, note 94.

[101] See the discussion in note 99.

[102] It may be recalled that we are here discussing the use immunity provided pursuant to section 11 of the Act in respect of compelled testimony and not amnesty (sometimes called substantive immunity).

[103] See, for example, the *Report of the Section of Antitrust Law*, *supra*, note 90 at 22. In contrast, in the House Report, cited in *supra*, note 59, the Committee commented that:

> The Committee believes that in most instances, the foreign antitrust authority will be seeking the information from the testimony and related documents and will not be seeking to prosecute the individuals. Immunity that is comparable in scope to that already granted by U.S. antitrust officials could be sought as a condition of disclosure.