

## CANADIAN COMPETITION RECORD

# CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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## NEW DIRECTOR OF INVESTIGATION AND RESEARCH APPOINTED

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Industry Minister John Manley announced today the appointment of Konrad von Finckenstein, Q.C., as Director of Investigation and Research under the *Competition Act*, effective February 4, 1997.

"I am confident that Mr. von Finckenstein brings to his new position the experience required to ensure that Canada stays at the leading edge of competition law and policy, which is of vital importance to Canadian markets and to the competitiveness of Canadian business," the Minister said.

Mr. von Finckenstein has served as Assistant Deputy Minister, Free Trade Policy and Operations, at the Department of Foreign Affairs and International Trade, and as Assistant Deputy Attorney General, Tax Law, and Coordinator for the Implementation of NAFTA, for the Department of Justice. He was most recently Assistant Deputy Minister, Business Law, at Industry Canada and Justice Canada.

Mr. Manley expressed his deep appreciation for the contribution of Francine Matte, Q.C., Senior Deputy Director of Investigation and Research, who has been acting as Director since June 1996. "I want to express to Ms. Matte my heartfelt thanks for her work in the past few months, and I look forward to her continuing contribution to the Bureau and the public service," Mr. Manley said.

The Competition Bureau is the federal government agency responsible for enforcing the *Competition Act*. The Act's purpose is to maintain and encourage competition in Canada by ensuring that firms compete with one another on a fair basis and that markets operate efficiently.

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## COMPETITION LAW AMENDMENTS INTRODUCED INTO PARLIAMENT

### Introduction

Previous editions of the Record have reported on the progress of proposed amendments to the *Competition Act*.<sup>1</sup> On November 7, 1996, the Government introduced Bill C-67 - *An Act to Amend the Competition Act and Another Act in*

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*Consequence.* The Bill contains significant changes in a number of areas, including merger prenotification; interim injunctions; misleading advertising and deceptive marketing practices; deceptive telemarketing; regular price claims; and prohibition orders. As well, there are a variety of procedural or housekeeping amendments contained in the Bill.

Those who have followed the progress of the *Competition Act* amendments will note that the above list does not contain amendments with respect to the confidentiality regime under the *Competition Act*; with respect to price discrimination; or with respect to private access to the Competition Tribunal. Amendments in those three areas were, for a variety of reasons, controversial, and have been dropped from the present round of amendments. Nevertheless, amendments with respect to private access to the Tribunal may well be revived in a subsequent round of amendments, and an amendment to repeal the price discrimination provision will, it is hoped, also form part of a subsequent round of amendments. However, no such amendments can be expected before the next federal election.

### *Amendments Respecting Premerger Notification*

Significant amendments have been introduced with respect to merger prenotification. The concept of short form and long form filings, with the option on the filing parties to provide either the short form filing or long form filing, and the option on the Director to require a long form filing where the parties submit a short form, has been maintained. However, the waiting periods after filing, before the expiry of which closing may not occur, are extended from 7 to 14 days in respect of short form filings, and from 21 to 42 days in respect of long form filings.

There is an exception for the acquisition of voting shares through the facility of a stock exchange, in which case, if a long form filing is made, the waiting period will be reduced to 21 trading days, or such longer period of time, not exceeding 42 days, as may be allowed by the rules of the stock exchange before the shares must be taken up. As well, the Director, and now also a person authorized by the Director, has the ability to shorten the waiting periods by informing the parties that she or he does not intend to challenge the transaction.

An exemption from prenotification has been added in respect of transactions for which the Director has waived the obligation to notify because substantially similar information was previously supplied to the Director in relation to a request for an Advance Ruling Certificate. As well, a partial exemption has been added in respect of information which has previously been provided to the Director, although the Director may require that such information be supplied again.

The prenotification regime will now expressly apply to acquisitions of an interest in combinations, as well as to share acquisitions, asset acquisitions, amalgamations and the formation of a combination.

The obligation to prenotify, which was previously on "the person or persons who are proposing the transaction" is now placed on "the parties to the transaction". In respect of a share acquisition, however, if the purchaser alone provides the prescribed information to the Director, the Director shall immediately notify the corporation, whose shares are to be acquired, that the corporation must supply either long or short form information to the Director within 10 or 20 days, as the case may be. This mechanism, which is designed primarily to deal

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with hostile bid situations, will be interesting. The "target" of such bids will now have to respond within a short time period during a hostile takeover battle to an information notice from the Director. Such targets will have to make interesting decisions as to how to respond, in fairly short order.

The existing practice of giving information on behalf or in lieu of other parties to the transaction, or of supplying information jointly with others, is regularized by the proposed amendments.

Finally, and of the greatest interest, the list of information which must be provided by way of short form and long form filings will be changed. The changes, which are expected to include a requirement to list production facilities; production capacity; cost of transportation; geographic area of sales, and various internal studies, surveys, reports and plans, will be made by regulation. The draft regulation is not yet available.

#### **Interim Orders to Prevent Mergers**

The provisions related to the ability of the Competition Tribunal to grant an interim injunction to prevent a merger from being concluded have been changed significantly. Previously, in order to grant an interim order, the Tribunal had to determine that the proposed merger was reasonably likely to prevent or lessen competition substantially. The amendment would permit the granting of the order requested by the Director where he or she certifies that an inquiry is being made, and that in the Director's opinion more time is required to complete the inquiry. That is a much lower test. The existing requirement that the Tribunal must find that, in the absence of an interim order, action would likely be taken that would

substantially impair the ability of the Tribunal to remedy the effect of the proposed merger because the action would be difficult to reverse, remains unchanged.

The duration of the various interim orders to prevent mergers will be longer than the *Competition Act* presently permits. The key revision in this regard is that the 21 day limit on such orders is extended, as a general rule, to 30 days. Further, it may be extended to not more than 60 days if the Tribunal finds that the Director is unable to complete the inquiry within the period originally specified in the order because of circumstances beyond his or her control.

This change may have a significant impact on the Director's negotiating position with merging parties. Typically, merging firms, even under the existing regime, will agree to delay closing, or at least hold separate the operations, pending the Director's review. However, the Director's ability to obtain an injunction to prevent closing was dependent on making a showing of a likely substantial prevention or lessening of competition. Now all the Director will have to show is that he or she needs more time to review the matter. As a practical matter, that will probably lead to more negotiated closing delays, or hold-separate regimes.

#### **New Reviewable Practice — Deceptive Marketing Practices**

The current criminal advertising and marketing practices provisions contained in Sections 52 to 59 of the Act, with the exceptions noted below, will be repealed by the amending Act and are substantially repeated as reviewable conduct in Sections 74.01 to 74.08 of the amended Act (Part VII.1).

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The provisions with respect to false or misleading representations, warranties and ordinary price claims (all now in s. 52 of the Act), reasonable tests and testimonials (now in s. 53), bargain price and bait and switch selling (now in s. 57), sale above advertised price (now in s. 58) and promotional contests (now in s. 59), are reproduced in the new reviewable practice section. The provisions with respect to double ticketing (s. 54) and referral selling (s. 56), however, are repealed and not reenacted as reviewable practices.

Pursuant to the new reviewable conduct regime in Part VII.1 of the Act the Director (but only the Director) can apply to the Competition Tribunal, the Federal Court-Trial Division or a superior court of a province, for a determination of whether a person is engaging in conduct contrary to these provisions. Section 9(3) of the *Competition Tribunal Act* will be amended to provide that the right of intervention before the Tribunal, contained therein, will not apply in respect of proceedings under Part VII.1.

Pursuant to the new reviewable conduct regime for misleading advertising, the Tribunal or court will have a number of possible remedies:

- (1) Final cease and desist orders;
- (2) Interim cease and desist orders;
- (3) Orders requiring the advertisers to publish corrective notices; and
- (4) Orders requiring the advertisers to pay an "administrative monetary penalty". The penalty is not to exceed \$50,000 for an individual for a first "offence" or order, and \$100,000 maximum for each subsequent order. In the case of a

corporation the penalty is up to a maximum of \$100,000 for the first order, and \$200,000 maximum for each subsequent order.

The size of such administrative monetary penalties will be affected by, amongst other things, the reach of the advertising, its frequency and duration, the vulnerability of those likely to be affected, the materiality of the representation, the likelihood of self correction in the market, the injury to competition, and the history of non-compliance with the Act. The Bureau has been adamant that these "administrative monetary penalties" are not fines. Any unpaid administrative monetary penalties are treated as debts to Her Majesty, rather than as contempt of court. That said, a \$100,000 administrative penalty may well feel very much like a fine.

There is a due diligence defence to proceedings seeking civil monetary penalties or seeking the publication of a corrective notice. However, this defence does not apply to prevent the issuance of a pure cease and desist order. Cease and desist orders made under these provisions apply for a period of 10 years, or such shorter period as determined by the court or the Tribunal. Orders made under this Part are subject to variation or rescission by further order, in changed circumstances.

As noted above, there is the possibility of interim cease and desist orders. The court may, on application by the Director, make a temporary order prohibiting a party from engaging in conduct in violation of advertising and marketing provisions, if there is a strong *prima facie* case, serious harm is likely to ensue without the order, and the balance of convenience favours issuing the order. Such orders are to have a maximum life of 14 days, unless the

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party subject to the order consents, or the court on further application extends the order. These orders shall be sought on at least 48 hours notice to the person against whom the order is sought. The court may proceed without notice if the Director can show urgency, or that "service of notice in accordance [with the Act] would not be in the public interest". An *ex parte* order shall have a maximum term of 7 days.

Interim orders are an important issue in advertising matters, as they will typically determine whether an advertising campaign will live or die. The explicit importation of the strong *prima facie* case test is therefore appropriate in respect of interim cease and desist orders related to advertising.

Part VII.1 also provides for resolution of disputes via consent orders. Where the Director and the party consent, the Tribunal or court may register a consent order, and it shall become effective as if it were an order of the Tribunal or court, whether or not the Tribunal or court would have had the power to make an order on such terms as agreed if the matter had been contested.

Section 74.08 of the revised Act states that the new Part VII.1 shall not be construed as "depriving any person of a civil right of action". It is unclear what this may mean. As noted below, the decriminalization of various aspects of misleading advertising may well have a significant impact on civil damages actions under Section 36 of the *Competition Act*, or on unlawful interference with economic interests tort actions which allege as the unlawful conduct a breach of the *Competition Act*. New Section 74.08 is parallel to section 62 in the existing Act, which applies to offences under Part VI of the Act. We have previously discussed the effect of Section 62.<sup>2</sup>

### The Remaining Criminal Misleading Advertising Rules

While the majority of the existing rules related to misleading advertising will be decriminalized and dealt with, as noted above, as reviewable conduct, there will remain some criminal prohibitions. The pyramid selling and multi-level marketing regime remains criminal, and the summary conviction fine for those offences is increased from \$25,000 to a maximum of \$200,000.

As well, the fundamental misleading advertising offence, now found in section 52(1)(a) of the Act - the making of a representation to the public that is false or misleading in a material respect - remains a criminal offence. It is amended, however, in that there will now be a subjective mental element. The offence will not be committed unless the Crown proves that the conduct was engaged in "knowingly" or "recklessly". However, it will not be necessary to prove that there was an intent to deceive or mislead any person, or that there was recklessness as to whether any person was deceived or mislead. Therefore, while there is now an express subjective mental element imported into the offence, as a practical matter the difference may not be as significant as all that. Due diligence was always a defence to a misleading advertising charge. Advertising is always published knowingly, so the issue will be how being "reckless" as to the misleading aspect of an advertisement differs from an absence of due diligence in ensuring the accuracy of the advertising. The summary conviction fine for this offence has been increased from \$25,000 to \$200,000.

The remaining section 52 offence is expressly stated to be applicable to representations that constitute reviewable conduct within the meaning of Part VII.1

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of the Act, although no proceedings may be commenced under the criminal provision against a person against whom an order is sought under Part VII.1, on the basis of the same or substantially the same facts.

Many observers have noted that a particular difficulty with the dichotomy between criminal and civil treatment for misleading advertising is that there is a danger of making disclosure to the Director, in an attempt to negotiate an appropriate civil resolution of the problem, only to face criminal charges and use of such disclosure by the Director in criminal proceedings. Once the Director opts to proceed civilly or criminally, she or he may not take the other route, but until the selection is made there is a real risk to the potential accused. As a practical matter, however, persons subject to a misleading advertising inquiry under the current Act already face the same dilemma in determining how to deal with the Director, so the real world implications of the issue are likely not as significant as the theoretical problem might suggest.

A somewhat less obvious, but perhaps more significant consequence of the removal of most of the misleading advertising provisions from the criminal sections of the Act, and the increased onus on the Crown to prove a mental element in respect of the remaining provision, may be to undermine civil damages actions for misleading advertising. Such actions have been on the rise over the last few years. Typically actions under section 36 of the *Competition Act*, alleging breach of sections 52 through 59 of the Act, also allege defamation, breach of the *Trade-marks Act*, and unlawful interference with economic interest. The section 36 cause of action is not available if the conduct under attack ceases to be prohibited by the criminal provisions of the

*Competition Act*. As well, causes of action alleging unlawful interference with economic interests, and alleging as the unlawful conduct, conduct contrary to the reviewable matters provisions of the *Competition Act*, are likely to be successfully struck out. Thus, as noted above, despite the fact that section 74.08 will provide that “[e]xcept as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action”, the scope of civil misleading advertising litigation may be reduced by these amendments.

### Ordinary Price Claims

The specific provisions related to misleading ordinary price claims, formerly found in section 52(1)(d), will now be found in the reviewable conduct provisions in Part VII.1 of the Act.

A significant issue in respect of the ordinary price claim provision over the last few years had been whether, in determining what the ordinary or regular price is or was, one most appropriately looked to a test based on the length of time the product was offered for sale at a given price, or at the number of sales at a given price, or to some other standard. It had been the Competition Bureau's position that the appropriate comparison was to the price at which a substantial number of articles had been sold. Many private sector participants, particularly retailers, had argued that a percentage of articles sold test was unworkable, and that a length of time offered for sale test would be a better approach to ordinary price comparisons.

The amendments now specifically provide that a person will engage in reviewable conduct when they make a representation to the public as to price at which products have been, are or will be ordinarily

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supplied, when they, or other suppliers in the markets generally have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, or have not offered the product at that price or a higher price in good faith for a substantial period of time, either recently before or immediately after the making of the representation. That is, the statute will now permit ordinary price comparisons justified either by a test based on a substantial period of time offered for sale, or a test based on a substantial volume of product sold.

A couple of interesting notes arise from this provision. The first is simply the observation that when considering the volume of sales test, the time period one looks to is "a reasonable period of time before or after the making of the representation". When considering the time offered for sale test, the relevant time period is defined as "a substantial period of time recently before or immediately after the making of the representation". A "reasonable" time suggests a lesser period than a "substantial" time, although that may be appropriate given that during the "reasonable" time a substantial volume of product must be sold. The second note is that for both the volume and time tests, the period after the making of the representation will be considered. This should not be problematic in respect of the time one offers one's own products for sale, as that is within a retailer's control. There is no way, however, to guarantee how long others may offer a product at a given price in the future. Similarly, there is also no way to know, with confidence, what volume of product you or other suppliers may supply during a given period in the future. Therefore, while representations may be justified by future events, it may not be practical to advertise based on an assumption as to future events when such events are beyond the advertiser's control.

This section also contains a provision which states that the ordinary price representation prohibitions do not apply to a person who establishes that the representation made by them is not false or misleading in a material respect. That is a seemingly obvious qualification, but a useful one given that the cases had suggested some confusion on the point.

### **Deceptive Telemarketing**

Bill C-67 adds a new substantive criminal provision to the *Competition Act* dealing specifically with telemarketing. Telemarketing is defined as the use of interactive telephone communications for the purpose of promoting the supply or use of a product or promoting any business interest. Given the definition, while telephone sales arrangements will be captured, an automated calling and messaging system, which does not provide for responses from the recipient of the call, but rather invites them to initiate a separate communication to get more information, or a system which records who stays on the line, for the purpose of follow-up marketing efforts, are likely outside the provision.

The section has been added in response to a perception that there is a growing problem of deceptive telephone sales, particularly targeting vulnerable groups including the elderly. This new criminal provision, which carries with it a maximum of five years imprisonment or an indeterminate fine, has a number of components.

It firstly prohibits telemarketing unless there is disclosure in a "fair and reasonable manner at the beginning of each telephone communication" of the identity of the person on behalf of whom the communication is made, the nature of product or business interest being promoted, and the purpose

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of the communication. As well, fair, reasonable and timely disclosure must be made of the price of the product being promoted, and of any material restrictions, terms or conditions applicable to its delivery, and of any other information as may be prescribed by regulation. There is a simple prohibition on making telemarketing representations that are false or misleading in a material respect.

There is also a prohibition on offering a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of any restrictions, terms or conditions applicable to its supply or purchase, and of the fair market value of the first product. As well, there is a prohibition on offering a product for sale at a price grossly in excess of its fair market value, where delivery of the product is or is represented to be conditional upon prior payment by the purchaser.

These last two provisions are designed to combat the "diamond ring" scams, whereby people are promised a "free" or inexpensive diamond ring if they buy another product - not realizing that what will be provided is an industrial diamond chip of little value; or where they are offered a diamond ring at what sounds to be an attractive price, but which is much more than the "diamond ring" is actually worth.

While the goal of these telemarketing provisions is laudable, legitimate marketers may be caught in the broad net of these rules, particularly the two-for-one/bundled product offering provision. Telephone sales scripts will have to carefully structured and reviewed, and bundled offerings will present particular disclosure difficulties.

There is also a new provision prohibiting telemarketing involving a contest, lottery or game of chance, skill or mixed chance and skill, where the benefit is conditional on prior payment of an amount by the participant, or where adequate and fair disclosure is not made of the number and approximate value of the prizes, or the areas to which they relate, or any fact within the person's knowledge that affects materially the chances of winning. This is an interesting provision, in that it combines aspects of the old section 59, dealing with promotional contests (which is now dealt with as reviewable conduct), and also rolls in some of the traditional *Criminal Code* lottery rules with respect to payment of money for participation in a game of chance or skill, or mixed chance and skill. These rules are, however, expressly limited to telemarketing situations. The section appears to be aimed at perceived abuses in "1-900" promotions.

There is an express due diligence defence available in respect of the telephone solicitation provisions. There is also an express provision that any officer or director of a corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by the section is a party to and guilty of the offence, and is liable to the punishment provided for in the offence, whether or not the corporation has been prosecuted and convicted, unless the officer or director establishes that he or she exercised due diligence to prevent the commission of the offence. Finally, there is a specific provision that when sentencing, the Court may take into account aggregating factors, including use of lists of persons previously deceived by telemarketing; the targeting of classes of persons who are especially vulnerable to such tactics; the amount of the proceeds realized from the telemarketing; and the use of "abusive tactics".

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The amendments also provide for a specific interim remedy in respect of deceptive telemarketing. The new provision will allow the Attorney General of Canada or of a province to apply to a court for an injunction to forbid persons from doing things directed toward the commission of an offence pending the commencement or completion of a proceeding under section 34, or pending a prosecution, if the person has done, or is about to do, or is likely to do, any act or thing constituting or directed towards the commission of the offence. Specifically in relation to the telemarketing provision, such an injunction may be granted where, if the offence is committed or continued, injury to competition will result, or where one or more persons are likely to suffer damages from the commission of the offence that would be substantially greater than any damage that the persons named in the application are likely to suffer from an injunction.

Further, an injunction issued in respect of the telemarketing provision may forbid any person from supplying another person with a product that is or is likely to be used for the commission or continuation of such an offence, where the person being supplied, or any of its officers or directors, was previously convicted of a similar offence or has contravened a prohibition order in respect of a similar offence. That is, a prohibition order remedy has been specifically tailored to cutting off telephone service to deceptive telemarketers.

### Prohibition Orders

Section 34 of the *Competition Act*, which governs prohibition orders, is to be substantially amended. The amendments are designed to allow for consent orders, and to give the court greater latitude. A conviction is not a prerequisite to the granting of a

Prohibition Order, either contested or on consent. However, the Attorney General may not charge a person with an offence after proceeding for a Prohibition Order on a contested basis. Under the amended provision, the court will have the explicit power to prohibit a party from doing certain acts, or order that the party carry out certain acts to prevent the commission, continuation or repetition of an offence. On consent, the Court may order the person to undertake any acts agreed to by the person and the Attorney General. If the matter is contested, the Court can only order prescriptively to prevent the continuation/repetition of the offence.

The amended provision allows for prohibition orders to last for up to 10 years, rather than the indefinite time period that is currently the norm. Also, a procedure for varying or rescinding orders as circumstances warrant is provided.<sup>3</sup>

### Miscellaneous Amendments

In addition to the above principal amendments, Bill C-67 contains a number of miscellaneous housekeeping matters. The familiar, if somewhat convoluted title, "Director of Investigation and Research", will be replaced by the title "Director". This parallels the earlier administrative change in the name of the Director's fiefdom, the "Bureau of Competition Policy" to the "Competition Bureau". The fine in respect of failure to prenotify merger transactions is increased from \$5,000 to \$50,000, although the possibility of imprisonment has been removed.

Finally, the section dealing with exclusive dealing and tied selling is amended to provide that so long as there is an exclusionary effect in a market the Tribunal may make an order. Previously, the

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exclusionary effect had to occur in *the* market in which the exclusive dealing or tied selling was ongoing.

### Conclusion

The amendments to the *Competition Act* provided in Bill C-67, while not representing wholesale changes to the Act, are the most significant amendments in more than a decade. Further proposals for amendment, specifically with regard to price discrimination, access to the Tribunal, and confidentiality, may be expected to be advanced much more quickly than ten years from now. Bill C-67 is likely to be enacted early in 1997. The next round of proposed amendments to the *Competition Act* can be reasonably anticipated to be seriously debated soon after the next federal election. It is not too early for firms and individuals interested in competition law and policy to start their efforts to influence the agenda for the next round of changes.

J.M. and D.E.

### Notes

<sup>1</sup> See P. Glossop, "Major Changes Proposed to *Competition Act*" (1995) 16:2 Can. Comp. Rec. 1; G.N. Addy, "Address by the Director to the CBA Competition Law Section" (1995) 16:3 Can. Comp. Rec. 1 at 10-11; and J. Musgrove, "The Change of Price: Some Modest Proposals to Amend Canada's Pricing Laws" (1995-1996) 16:4 Can. Comp. Rec. 66. For copies of the related News Release and Information Backgrounder issued by the Competition Bureau, see "*Competition Act* Amendments Introduced" and "Proposed Amendments to the *Competition Act*", *infra*, at 17 and 18, respectively.

<sup>2</sup> See J.B. Musgrove, "Civil Actions and the *Competition Act*" (1994) 16:1 Advocates' Q. 94.

<sup>3</sup> For commentary on proposed amendments to the Act regarding prohibition and prescriptive orders, see *infra*.

## THE POWER TO MAKE PRESCRIPTIVE ORDERS: QUESTIONS OF EXPERTISE AND ENFORCEMENT

### Prohibition Orders Under the *Competition Act*

Currently, section 34 of the *Competition Act* provides the Federal Court or a superior court of criminal jurisdiction (as the case may be) with the power to issue an order prohibiting the continuation or repetition of an offence under Part VI of the Act. The court may issue such an order pursuant to subsection 34(1) upon conviction of a person, in addition to any other penalty imposed, or as a "stand alone" order<sup>1</sup> pursuant to subsection 34(2), without a conviction. Whether or not to issue such an order is a decision at the discretion of the court. Pursuant to subsection 35(1), the court may also require a person convicted of an offence to report to the court on that person's business operations for up to three years after the conviction. Where a person against whom an order is made fails to comply with the order, the court may impose a fine or term of imprisonment not exceeding two years (ss. 34(6)).

In practice, the courts have often attached comprehensive prohibition orders to the penalties imposed on conviction<sup>2</sup> or issued them as stand alone orders,<sup>3</sup> either in contested or consent proceedings. At times, these prohibition orders have included prescriptive elements such as the obligation to conduct company-wide internal education and compliance programs or the obligation to report beyond the three-year period specified in the Act. In addition, many of the "prohibitive" statements within an order have had prescriptive effects. For example, in *R. v. Chambre d'Immeuble du Saguenay-Lac St. Jean Inc.*, the court prohibited the local real

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estate boards and the Canadian Real Estate Association from refusing membership to any broker or sales person except on limited grounds. Effectively, if those grounds for refusal were not met, the boards or Association were required to grant membership. Similarly, the boards and Association were prohibited, when acting as a publisher, from refusing advertising or discriminating in the acceptance of advertising on the basis of rates or fees contained in the advertising. Unless there is a legitimate legal reason for refusing to publish advertising, it is suggested that the effect of this prohibition is to require the boards and Association to publish the advertising or risk the allegation that they have contravened the order.<sup>4</sup> While these types of orders have been upheld,<sup>5</sup> there has remained considerable uncertainty as to the appropriate scope and degree of enforceability of such wide-reaching "prohibition" orders.

#### Discussion Paper, June 1995

In the Director of Investigation and Research's Discussion Paper released in June 1995, the Director suggested that:

While prohibition orders can be very useful in prohibiting certain conduct, it is also desirable in some instances to require an accused to *engage* in certain conduct. Some prohibition orders in the past have contained prescriptive terms. However, such instances have been exceptional and no longer reflect current policy in light of uncertain enforceability.<sup>6</sup> [emphasis in text]

The Director suggested that amending the Act to permit the courts to issue prescriptive orders in certain circumstances would: i) permit the courts to reduce the impact of anti-competitive conduct by enabling them to require a party to engage in positive

acts to restore the marketplace; ii) provide an effective enforcement mechanism, short of full criminal prosecution (if the order is made under s. 34(2)), thus saving court time and expense; and iii) provide a "more effective, enforceable instrument"<sup>7</sup> than a prohibition order on its own. In the Discussion Paper, the Director sought input on the possible scope of potential prescriptive orders and thresholds for their availability. In particular, the Director asked for input on the question of whether or not the court should be provided with an exhaustive list of permitted prescriptive terms or a list of criteria which any prescriptive term must meet.

#### Panel Report, March 1996

The Panel of experts which advised the Director on amendments to the Act noted that, overall, most of the responses to the Discussion Paper favoured the inclusion of prescriptive terms in an order where the parties to the order consent. As such, the Panel recommended that prescriptive terms be permitted in an order under subsections 34(1) or (2) on the consent of all parties and that in all other cases, prescriptive terms should be limited to preventing the continuation or repetition of an offence or enhancing compliance with the order. The Panel did not believe that it was necessary to provide the court with an illustrative list of possible prescriptive terms suggesting that if such a list might be useful, it could be provided in the form of Bureau guidelines. The Panel did not address the issue of criteria which any prescriptive term must meet. The Panel also recommended that, if the Attorney General proceeds by way of an application under subsection 34(2) (application for an order without a conviction), the Attorney General should not be permitted to subsequently lay charges against the same party in respect of substantially the same facts. In addition, the

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Panel recommended that the courts be provided with the power to vary, rescind or interpret orders under certain circumstances and that any order issued should have a maximum duration of ten years.

### Bill C-67

The amendments tabled in Bill C-67 on November 7, 1996, incorporate each of these recommendations.<sup>8</sup> However, this article will focus solely on proposed subsection 34(2.1). This subsection would permit the courts to issue an order, in all cases, which requires a party "to take such steps as the court considers necessary to prevent the commission, continuation or repetition of the offence" and, on the consent of the party and the Attorney General, to issue an order which requires the party to take any [additional] steps agreed upon. Thus, the proposed amendments clarify that contested orders may contain prescriptive elements, limited to actions which will prevent the commission, continuation or repetition of an offense, and consent orders can have unlimited prescriptive elements. Given the scope of the proposed amendments, have the Director's objectives, as outlined in his Discussion Paper, been achieved?

### Restoring the Marketplace

The Director's first objective was to provide the courts with the ability to reduce the impact of anti-competitive conduct by enabling a judge(s) to require a party to engage in positive acts to restore the marketplace. Clearly, the amendments will permit the court to make such an order, on the consent of the parties. From the authors' perspective, the crucial issue is whether, when presented with a draft consent order, the courts are well-positioned to provide an independent third party review of the

proposed consent order. Unlike the Competition Tribunal, which has experience evaluating and issuing prescriptive orders, *e.g.* under subsection 79(2) of the Act, the courts may not have sufficient expertise to evaluate the likely effectiveness of the order. Moreover, the courts have been given no guidance as to what is an acceptable range of objectives for a consent order. Is "restoring the marketplace" a legitimate objective for an order which relates to criminal conduct and forms part of a criminal sanction? While the courts have set a high threshold for the granting of a contested prohibition orders,<sup>9</sup> judging from past experience<sup>10</sup> it is unlikely that the courts will interfere with the Director's proposal for a consent order. If this proposition is correct, the proposed amendments effectively amount to the grant of the power to rubber stamp an aspect of a plea bargain. While this achieves the Director's purpose, it also significantly increases the Director's ability to compel behaviour. Critics may, reasonably in our view, suggest that, absent an effective independent third party review of a consent order, the proposed addition of ss. 34(2.1) may result in an excessive transfer of power. Is the fact that an order is made with the consent of all parties sufficient reason to dispense with critical and effective third party scrutiny?

### Criminal v. Regulatory Sanction

The Director's second aim was to provide an effective enforcement mechanism, short of full criminal prosecution, in order to save court time and expense. Again, permitting the issuance of a prescriptive consent order either with or without a conviction achieves that result, at least in respect of obtaining the initial order. However, concerns may again be raised that it is the courts and not a specialized tribunal which are tasked with supervising this process.

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The Director suggests that the amendments address those circumstances in which there is no need for criminal prosecution. If there is no need for criminal prosecution, one might argue that the proceeding should be taken out of the criminal process and placed in the regulatory process, dealing with the conduct as a reviewable practice under the Act.

Another possible criticism is that the proposed amendments overreach. A person who fails to comply with a prescriptive order may be subject to a fine or imprisonment. Thus, a situation may arise where a party is not convicted of any offence, consents to a prescriptive order requiring positive action by the party and then faces a jail term for failure to effectively complete the action.<sup>11</sup> In such a case, conduct which may not even be related to a criminal act could<sup>12</sup> result in criminal sanction.

#### **“More Effective, Enforceable Instrument”**

Finally, the amendments clearly place the past practice of the courts and the Director's intended practice in respect of prescriptive orders on firmer legislative ground. However, the effectiveness and enforceability of the order remains limited by the constraints of the court's structures and expertise. Courts may not have the necessary expertise to evaluate whether or not a prescriptive order dealing with complex economic and competitive issues is being effectively complied with. Courts, most certainly, do not have the necessary structures to enquire into or supervise a party's actions. Admittedly, the amendments provide the courts with the power to vary or rescind an order on consent or on application by the Attorney General or the person subject to the order. However, more extensive evaluation and oversight should, arguably, be required when dealing with prescriptive orders. Such an

evaluation may, we suggest, more appropriately be dealt with by a regulatory body like the Competition Tribunal, in conjunction with the Director.

#### **Conclusion**

While empowering the courts to issue prescriptive orders enhances the flexibility and, hopefully, effectiveness of the court's orders, we suggest that the amendments - particularly in the (intended) context of an order issued without a criminal conviction - may be approaching, indirectly, an issue which is more appropriately remedied by a direct approach. The answer may not be to give the courts more “regulatory-like” powers if they are not equipped to deal with such powers. A more direct, and conceivably effective approach may be to transfer regulatory issues to the regulatory body, the Competition Tribunal. How the courts choose to exercise their new authority under subsection 34(2.1) will ultimately prove “right or wrong” the authors' suggestions.

T.A.A. and R.J.H.

#### **Notes**

<sup>1</sup> An order pursuant to subsection 34(2) is described in these terms by the Consultative Panel on Amendments to the *Competition Act*, *Report of the Consultative Panel on Amendments to the Competition Act* (6 March 1996) at 35. The Consultative Panel will hereinafter be referred to as the “Panel” and its report as the “Panel Report”.

<sup>2</sup> For example, prohibition orders were issued in *R. v. Rolex Watch Company of Canada Limited* (1981), 50 C.P.R. (2d) 222 (Ont. C.A.); and *Canada v. R.L. Crain Inc.* (1988), 22 C.P.R. (3d) 462 (N.S.S.C.).

<sup>3</sup> For example, prohibition orders were issued in *R. v. Alltrans Express Ltd.* (29 March 1988), (Alta. Q.B.) [unreported]; and *R. v. Chambre d'Immeuble du Saguenay-Lac St. Jean Inc.* (1988), 23 C.P.R. (3d) 204 (F.C.T.D.).

<sup>4</sup> *Ibid.* at 209.

<sup>5</sup> *R. v. Sunbeam Corporation (Canada) Ltd.*, [1969] S.C.R. 221.

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<sup>6</sup> Bureau of Competition Policy *Competition Act Amendments* Discussion Paper (Ottawa: Industry Canada, 1995) at 24. For a summary of the Discussion Paper, see P. Glossop, "Major Changes Proposed to *Competition Act*", (1995) 16:2 Can. Comp. Rec. 1.

<sup>7</sup> *Ibid.* at 25.

<sup>8</sup> For a general commentary on Bill C-67 and the proposed amendments to the *Competition Act*, see *supra* at 1. For copies of the related News Release and Information Backgrounder issued by the Competition Bureau, see "*Competition Act Amendments Introduced*" and "*Proposed Amendments to the Competition Act*", *infra*, at 17 and 18, respectively.

<sup>9</sup> See *R. v. F.W. Woolworth Co.* (1974), 16 C.P.R. (2d) 272 (Ont. C.A.) where the court stated that a prohibition order is an extraordinary remedy which should be invoked only where no other adequate remedy exists (at 284-5).

<sup>10</sup> For example, see *R. v. Hemlock Part Cooperative Farm Ltd.* (1972), 6 C.C.C. (2d) 189 at 194 (S.C.C.).

<sup>11</sup> Arguably, under the current Act, where the orders were limited to prohibiting the continuation or repetition of an offence, a violation of the order would also be a violation of a criminal provision of the Act. However, given the broad scope given to many prohibition orders, it is suggested that the same criticism can be levied against those orders.

<sup>12</sup> For example, if the order required a party to make certain information available to the market and the party failed to do so. Clearly, absent a consent order, keeping secrets is not a criminal offence nor is it an element of one of the offences under the Act.

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### NEW WEB PAGE DEVOTED TO CANADIAN COMPETITION POLICY

A new World Wide Web page devoted to Canadian Competition Policy has been created at the University of British Columbia. Edited by Tom Ross of the Faculty of Commerce and Business Administration, the *Canadian Competition Policy Page* ("CCPP") is intended as a vehicle for disseminating information about competition law and economics in Canada and elsewhere. Available from the CCPP are a number of downloadable documents such as the *Competition Act* and the Competition Tribunal Rules; information about conferences and

seminars; the organizational chart of the Competition Bureau and profiles of the Director and the T.D. MacDonald Chair holder; and a set of links to related web pages in Canada, the United States and elsewhere. The CCPP will also feature information on current developments in Canadian competition policy and identify recently published articles of interest. In order to help people in the field find each other, the CCPP has added a Directory section which gives names and addresses of lawyers, economists, government officials and others working in the competition policy area. Anyone wishing to have a name added to the Directory can do so directly from the page itself, or by faxing the relevant information to the Editor at (604) 822-8477 or e-mail at [editor.ccpp@commerce.ubc.ca](mailto:editor.ccpp@commerce.ubc.ca). Check out the CCPP at: <http://pacific.commerce.ubc.ca/ccpp/> and send any comments or questions to the CCPP Editor. In the future, the table of contents for upcoming issues of the *Record* will be available on the CCPP as well.

Staff

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### PRISON TERM IMPOSED UNDER THE *COMPETITION ACT* FOLLOWING JURY TRIAL

*The following is a News Release issued by the Competition Bureau on September 9, 1996, and is reproduced with permission.*

Francine Matte, Q.C., Acting Director of Investigation and Research under the *Competition Act*, announced today that a sentence has been handed down against the accused in the Sherbrooke and Magog Driving Schools case in Quebec. The accused, Mr. Jacques Perreault, who had exercised his right to a trial by jury, has been found guilty on each of the six counts charged against him on June 15, 1996.

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Mr. Justice Paul-Marcel Bellavance of the Quebec Superior Court in Sherbrooke sentenced Mr. Perreault to a jail term of one year for his part in the offences committed.

The conviction in this case was for a number of offences under the criminal provisions of the Act, including conspiracy to fix prices. The case was the first trial by jury ever held with respect to a *Competition Act* offence.

"It is a very serious matter when competitors agree to set prices and engage in anti-competitive criminal activities to deny consumers the benefits which might normally result from competitive markets," said Ms. Matte. "The jury conviction and the sentence handed down by the Court against the individual in this case are very significant precedents under the *Competition Act*."

After an extensive criminal investigation, it was concluded that a number of sections of the *Competition Act* had been breached in the Sherbrooke and Magog driving school markets in Quebec. The charges included conspiracy to set prices, engaging in price maintenance, predatory pricing and regional predatory pricing policies in the Sherbrooke market during 1987. The accused was also charged for his role in engaging in predatory pricing and regional predatory pricing policies in the adjoining Magog market during the 1988-1991 period.

This case is part of an ongoing criminal prosecution that will involve further court proceedings against other driving schools and individuals this fall in Sherbrooke.

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**SENTENCE IMPOSED IN  
COMPRESSED GAS CONSPIRACY  
BRINGS TOTAL FINES TO RECORD  
\$6.46 MILLION**

*The following is a News Release issued by the Competition Bureau on October 10, 1996, and is reproduced with permission.*

The Acting Director of Investigation and Research under the *Competition Act*, Francine Matte, Q.C., announced today that a total of \$6.46 million in fines has been imposed in the compressed gas conspiracy case.

The accused, Mr. John T. Tindale, the last of seven executives charged in this case, was found guilty yesterday by Mr. Justice Matlow of the Ontario Court (General Division) of having entered into an agreement to set prices in the compressed gas industry and fined \$35,000.

After six years of proceedings, this very significant conspiracy case has been brought to a successful conclusion by the Competition Bureau and the Attorney General.

The sentence was imposed against Mr. Tindale, the former President of Canadian Oxygen Limited (Canox), at the conclusion of his trial. The fine came as a result of charges being laid against the individual under s. 45(1)(c) of the *Competition Act*.

"The record fines and the fact that seven executives have been convicted for their roles in the conspiracy demonstrate that executives must take responsibility for their decisions when operating outside the

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*Competition Act*," stated Ms. Matte. "Consumers need to know that competition has been restored in this market as a result of this case."

This inquiry began on May 10, 1990 after the Director had examined a market-sharing and price-fixing arrangement among the five major suppliers of bulk liquid oxygen in Canada. On May 23, 1990 the inquiry was expanded to include nitrogen, carbon dioxide and hydrogen. The conspiracy took place between June 1, 1989 and May 31, 1990.

Compressed gases are widely used for medical purposes as well as industrial applications.

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### **FINES AND COMMUNITY SERVICE IMPOSED FOR PRICING OFFENCES UNDER THE COMPETITION ACT**

*The following is a News Release issued by the Competition Bureau on November 6, 1996, and is reproduced with permission.*

Francine Matte, Q.C., Acting Director of Investigation and Research under the *Competition Act*, announced today that sentences were imposed against another principal accused in the Sherbrooke Québec Driving Schools case. The announcement follows the Quebec Superior Court's decision to accept guilty pleas on November 1, 1996 and to issue reasons in the case today.

Mr. Yves Aubé and his companies, École de conduite Tecnic Aubé Inc., 2172-3572 Québec Inc. and École de conduite Tecnic Estrie Inc., pleaded guilty to all three counts involving price-fixing, predatory pricing and regional predatory pricing offences under the Act. Groupe Lauzon Inc. also pleaded guilty to the offence

of price-fixing. These pleas were entered at the end of the first week of their trial.

Mr. Justice Réjean Paul sentenced Mr. Aubé to 100 hours of community service and imposed a fine of \$10,000 payable within 30 days. In default of payment, Mr. Aubé would be subject to a prison term of four months. His companies were also fined \$40,000, payable within 30 days.

The Court imposed prohibition orders lasting 15 years against repetition of the offences on the above accused and also on École de conduite Asbesterie Inc. and Mr. André Comeau of Groupe Lauzon Inc.

"This resolution demonstrates that owners or managers of businesses can be personally held accountable for offences committed under the *Competition Act*", said Ms. Matte. "This is the first time that an individual has been sentenced to community service by the Court for price-fixing and predatory pricing offences under the Act".

After an extensive criminal investigation, it was concluded that a number of sections of the *Competition Act* had been breached in the Sherbrooke driving school market. The charges against the above accused cover activity contrary to the *Competition Act* in the Sherbrooke area during 1987.

This conviction is part of an ongoing criminal prosecution which included a jury conviction and a one-year prison sentence handed down by the Court against Mr. Jacques Perreault, on September 9, 1996.<sup>1</sup>

#### **Note**

<sup>1</sup> See "Prison Term Imposed under the *Competition Act* following Jury Trial", *supra*, at 14.

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### **COMPETITION ACT AMENDMENTS INTRODUCED**

*The following is a News Release issued by the Competition Bureau on November 7, 1996, and is reproduced with permission.*

Amendments to the *Competition Act* were introduced today in the House of Commons by Industry Minister John Manley. This initiative will help to promote a healthier marketplace, one of the key features of the government's jobs and growth agenda, by providing more effective tools for competition law enforcement.

"The amendments provide improved enforcement tools that are tailored to the reality of today's marketplace," said Mr. Manley. "Consumers will benefit from proposed changes relating to telemarketing fraud and misleading advertising. Mr. Martin Cauchon, Secretary of State (Federal Office of Regional Development Quebec), has been given delegated authority to carry the bill through the House."

These amendments are intended to provide significant benefits to consumers and businesses. The changes will:

- provide quicker and more effective resolution of misleading advertising and deceptive marketing practices;
- address the recent proliferation of deceptive telemarketing practices that prey upon consumers and erode the value of telemarketing as a legitimate marketing tool;
- improve the administration of the merger prenotification process, while reducing the regulatory burden on business;

- revise and clarify the law regarding comparative price advertising by retailers; and
- expand the tools available to the courts to address criminal conduct through consent resolutions and directive orders following conviction.

The proposed amendments have been developed in close consultation with a broad cross-section of marketplace stakeholders, including businesses, associations, consumers, and members of the legal, law enforcement and academic communities. Their views were sought through the circulation of a discussion paper and the creation of a consultative panel.

Background material will be available on the Internet at: <http://strategis.ic.gc.ca/competition>

Information may also be obtained by calling the Complaints and Public Enquiries Centre:

Toll free: 1-800-348-5358

National Capital Region: (819) 997-4282

Fax-on-Demand: (819) 997-2869

Written requests can be sent to:

Bernard Chénier  
Complaints and Public Enquiries Centre  
Competition Bureau  
Industry Canada  
50 Victoria Street  
Hull, Quebec  
K1A 0C9

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## CANADIAN COMPETITION RECORD

### **PROPOSED AMENDMENTS TO THE COMPETITION ACT**

*The following is an Information Backgrounder prepared by the Competition Bureau and is reproduced with permission.*

#### **Overview of the Competition Act**

The *Competition Act* is designed to promote competition and efficiency in the Canadian marketplace. Some of the benefits of a healthy competition marketplace provided by competition law enforcement are better-quality goods and services, competitive prices, and a wider variety of consumer choice.

The Act contains both criminal and non-criminal provisions referred to as reviewable matters.

Criminal offences include conspiracy, bid-rigging, discriminatory and predatory pricing, price maintenance, misleading advertising and deceptive marketing practices.

Non-criminal reviewable matters include mergers, abuse of dominant position, refusal to deal, exclusive dealing and tied selling. In the case of large merger transactions, the parties are required to provide the Competition Bureau with advance notification of the proposed transaction, and wait a prescribed period of time before completing it, thereby giving the Bureau an opportunity to examine the transaction and determine whether it will have a harmful impact on competition. Non-criminal reviewable matters are resolved by an application to the Competition Tribunal for an order directing or forbidding certain conduct.

The Director of Investigation and Research, who is the head of the Competition Bureau at Industry Canada, is responsible for the administration and enforcement of the *Competition Act*.

#### **The Consultation Process**

On June 28, 1995, the Director released a discussion paper inviting comments on the approach that should be taken in amending the Act.<sup>1</sup> Following the comment period, the Director established a Consultative Panel that reviewed the responses to the discussion paper and advised on the suitability of the proposals and alternatives.

The Panel released its report on April 10, 1996, outlining its recommendations to the Director. The report provided the basis for the Government to move ahead with amendments. Changes are proposed in the following areas: misleading advertising, regular price claims, notifiable transactions, deceptive telemarketing and prohibition orders.

#### **Proposed Amendments Relating to Misleading Advertising and Deceptive Marketing Practices**

Misleading advertising and deceptive marketing practices can have serious economic consequences, especially when directed towards large groups or when taking place over long periods of time. This costs both competitors engaging in honest promotional efforts and consumers.

Studies since the mid-1970s have concluded that criminal sanctions are an incomplete response to the problem of misleading advertising. Criminal prosecution has a number of drawbacks: the severe stigma associated with criminal sanctions, the inability to stop misleading advertising quickly, and

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the expensive, time- and resource-intensive nature of the criminal law process.

Proposed amendments will change the focus of the misleading advertising and deceptive marketing practices provisions, from punishment to quick and efficient compliance, through the creation of a criminal/civil regime with the following features.

- A criminal sanction, with a subjective mental element, will remain in place to deal with the most serious cases of misleading advertising.
- A new civil regime will be created. Most of the existing misleading advertising and deceptive marketing practices provisions will be enacted as reviewable matters.
- The Director could apply to: a single judicial member of the Competition Tribunal, the Federal Court of Canada - Trial Division, or a provincial superior court.
- Remedies available to the adjudicator will include: cease and desist orders, interim cease and desist orders, administrative monetary penalties, information notices and consent orders.

### **Proposed Amendments Relating to Deceptive Telemarketing**

Approximately \$60 million was lost in Canada last year as a result of fraudulent telemarketing activity. Although deceptive telemarketers target all groups in society, they tend to focus on those which are the most vulnerable, such as senior citizens.

Public education and industry initiatives have had some impact in addressing this problem. With diminishing resources available to law enforcement agencies, new statutory provisions that provide tools to deal with deceptive telemarketing practices could facilitate more effective enforcement.

A new criminal offence provision will be introduced under the Act to deal with deceptive telemarketing. It will contain the following features:

- The new provision will apply to situations involving the practice of using interactive telephone communications for the purpose of promoting the supply of a product or a business interest.
- A person engaging in telemarketing will be required to disclose certain types of information during the telephone call. The law will prohibit a number of other deceptive practices.
- Special provisions will be enacted to expand the responsibility of corporations, and their officers and directors, for ensuring compliance with the law.
- The law will also be amended to make it easier for courts to issue interim injunctions to stop the operations of alleged fraudulent telemarketers.

### **Proposed Amendments Relating to Notifiable Transactions**

An effective merger review process benefits society because it helps maintain the competitive playing field that provides businesses and consumers with

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a choice of products at the best possible prices. The notifiable transaction provisions preserve the effectiveness of the review process because they allow for an assessment of the impact of large mergers on competition before the merger is completed.

Experience with these current provisions has identified a number of issues:

- information required under long and short forms is not always sufficient and relevant;
- waiting periods are sometimes too short to allow full assessment of transactions; and
- existing mechanisms to prevent completion of transactions are ineffective unless the Director is prepared to challenge the transaction before the Competition Tribunal.

Proposed amendments will address these issues and clarify some ambiguities in the current law.

- Parties required to prenotify and supply information will be more clearly identified.
- The amendments will clarify when the acquisition of interests in a combination will be subject to prenotification.
- Information to be submitted will be outlined in the regulations and be more relevant.
- Applicable waiting periods will be lengthened. Authority to shorten the waiting periods will be delegated to a person authorized by the Director.

- Conditions for obtaining interim orders will be relaxed so that the Director may, while conducting reviews, delay the closing of a merger that gives rise to serious concerns.
- Failure to prenotify will no longer be punishable by imprisonment, but the fine will be raised to a maximum of \$50,000.

### **Proposed Amendments Relating to Regular Price Claims**

Consumers often shop around or wait for products to go on sale rather than buy at the "regular" price. Regular price representations and related savings claims can, therefore, be powerful marketing tools.

Members of the retail industry as well as some consumer groups have expressed concern that the existing law lacks sufficient clarity to determine under what circumstances ordinary price claims may be made. The following specific amendments are proposed:

- Misleading regular price representations will be made reviewable matters under the Act.
- The legitimacy of regular price claims will be determined having regard to two alternative tests:
  - the price or prices at which a substantial volume of recent sales has occurred; and
  - the price or prices at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

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- These tests will also apply to comparisons regarding the regular selling prices of like products and claims as to future regular selling prices.
- Where a regular price representation that fails to meet either test is shown by the advertiser not to be misleading, the court will not make an order.

### Proposed Amendments Relating To Prohibition Orders

Section 34 of the *Competition Act* provides that a court may issue an order prohibiting a person from continuing or repeating an offence, or from doing any act or thing directed toward the continuation or repetition of an offence. These orders may also be obtained without securing a conviction.

Although prohibition orders have been widely used and are very useful in prohibiting certain conduct, they do not authorize the issuance of prescriptive terms which would require that the accused take positive steps or engage in certain conduct. Currently, there are no provisions in the Act that allow for a prohibition order to be varied or rescinded. Proposed amendments will make this a more effective enforcement tool.<sup>2</sup> The following changes are proposed:

- A prescriptive term may be included in an order if all parties to the order consent.
- In the case of a contested application, a court will be able to make an order containing prescriptive terms, but these will be limited to preventing the continuation or repetition of the offence.

- If the Attorney General proceeds on a contested basis, the right to lay any charges with regard to substantially the same facts shall be forfeited.
- A maximum statutory time limit of ten years will apply.
- The Act will provide the courts with the power to vary or rescind any order.

### Notes

<sup>1</sup> For a summary of the Discussion Paper, see "Major Changes Proposed to *Competition Act*", (1995) 16:2 Can. Comp. Rec. 1. For an analysis of the proposed amendments to the Act, see *supra*, at 1.

<sup>2</sup> For an analysis of the proposed amendments relating to prohibition and prescriptive orders, see *supra*, at 10.

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### ACQUISITION OF CAST NORTH AMERICA INC. BY CANADIAN PACIFIC LIMITED CHALLENGED BEFORE THE COMPETITION TRIBUNAL

*The following is a News Release issued by the Competition Bureau on December 20, 1996, and is reproduced with permission.*

Francine Matte, Q.C., Acting Director of Investigation and Research under the *Competition Act*, announced today that an application has been filed with the Competition Tribunal with respect to a merger in the intermodal containerized shipping industry.

The application opposes the March 31, 1995 acquisition of Cast North America Inc. and related companies by Canadian Pacific Limited, its affiliates and subsidiaries.

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The application alleges that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in the North Atlantic intermodal containerized shipping industry involving carriers operating between the Port of Montreal and Northern Continental Europe and the United Kingdom. The merged entities operate fully integrated intermodal container shipping services companies known as Cast and Canada Maritime.

"An efficient and competitive transportation network is essential to the competitiveness of the Canadian economy. The Port of Montreal, as the gateway for billions of dollars in international trade, is an important part of this network," said Ms. Matte. "Preserving competition in this sector will ensure that consumers, shippers and businesses will not face the prospect of paying higher prices for goods and services."

The *Competition Act* allows for an application to be filed with the Tribunal within three years of the date of the completion of a transaction.

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### CONSENT ORDER SOUGHT FROM COMPETITION TRIBUNAL IN B.C. SHIP BERTHING AND BARGING CASE

*The following is a News Release issued by the Competition Bureau on January 13, 1997, and is reproduced with permission.*

Francine Matte, Q.C., Acting Director of Investigation and Research under the *Competition Act*, filed an application today for a Consent Order with the Competition Tribunal with respect to ship berthing and wood chip and covered barging in British Columbia.

This case concerns the provision of ship berthing services at Burrard Inlet and Roberts Bank, and the provision of wood chip and covered barging services in B.C. coastal waters. Covered barging involves the marine movement of pulp and paper, and newsprint.

An application had been filed with the Tribunal on March 1, 1996 opposing the October 13, 1994 merger whereby Mr. Dennis Washington, the owner of C.H. Cates & Sons Ltd., indirectly acquired a significant interest in Seaspan International Ltd. and Mr. Washington's further acquisition of control of Seaspan in June 1996. The application also opposed the June 30, 1995 acquisition by Mr. Washington of Norsk Pacific Steamship Company, Limited.

The 1996 application alleged that the mergers prevented or lessened, or were likely to prevent or lessen, competition substantially in the provision of tug boat services used to berth ships in the Port of Vancouver, and in the provision of wood chip and covered barging services in and around B.C.'s coastal waters.

The terms of the proposed Consent Order, which were agreed to by Mr. Washington and the Acting Director and which are subject to approval by the Tribunal, involve the divestiture of certain ship berthing and barging assets.

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**RECORD FINE OF \$550,000  
IMPOSED ON INDIVIDUAL FOR  
CONSPIRACY OFFENCE UNDER  
THE COMPETITION ACT**

*The following is a News Release issued by the Competition Bureau on January 29, 1997, and is reproduced with permission.*

The Acting Director of Investigation and Research under the *Competition Act*, Francine Matte, Q.C., announced today that Mr. Pierre Paré, a former senior official with Gestion des Rebuts DMP Inc., has pleaded guilty to one count of conspiracy to unduly lessen competition, and must pay a record fine of \$550,000 under the *Competition Act*.

The Court also imposed a one year jail sentence to be served in the community on Mr. Serge Brière and Mr. Robert Caron, both formerly with Gestion des Rebuts DMP Inc.

This matter follows the guilty plea by Gestion des Rebuts DMP Inc., in April 1996 for a related conspiracy offence; the company was fined \$1,950,000.

The offence involved an agreement between competitors to share the market for the hauling and disposal of commercial waste in the Mauricie region of Québec between 1989 and 1992. The victims of this conspiracy were businesses such as restaurants, corner stores, garages and shopping centres, which lease commercial waste containers.

Mr. Justice Lévesque of the Québec Superior Court also sentenced Mr. Paré to perform 100 hours of community service. In addition, a Prohibition Order was imposed on the three individuals which requires them to comply with the Act for a period of 10 years.

"Small businesses were denied competition in the commercial waste market because of an agreement that existed among the competitors," said Ms. Matte. "This guilty plea sends a strong warning to individuals who seek to avoid liability for *Competition Act* offences. Individuals cannot promote price fixing and then seek refuge behind a corporation."

The inquiry began in 1992 with the cooperation of certain individuals involved in the conspiracy.

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**THE CANADIAN BAR ASSOCIATION  
FIFTH ANNUAL COMPETITION LAW  
CONFERENCE**

For the fifth consecutive year, The Canadian Bar Association is pleased to present Canada's premiere Competition Law Conference. This year the conference will explore various issues which will influence the development of Competition Law in the next century.

The plenary sessions will address the following topics:

- The Future of Private Competition Law Enforcement
- The Future of International Antitrust: The 21<sup>ST</sup> Century Belongs to the World
- Key Developments in Marketing Law

Mark your calendars now for September 18 and 19, 1997. The conference will be held at The Château Cartier Hotel in Aylmer, Quebec (just across the Ottawa River from the Nation's Capital).

For more information, or to register, please contact the Canadian Bar Association, Continuing Legal Education Department, 902-50 O'Connor Street, Ottawa, Ontario, K1P 6L2, or phone (613) 237-2925 (toll free 1-800-267-8860) or fax (613) 237-0185 or e-mail [info@cba.org](mailto:info@cba.org)

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Staff