COMMENT & ANALYSIS

COMPETITION TRIBUNAL EFFICIENCY PLACES ONUS ON COUNSEL

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In a recent pre-hearing decision relating to a contested application before the Competition Tribunal, Mr. Justice McKeown opened the door to the possibility of the parties tendering the evidence in chief of certain of their non-expert witnesses in written form. How Mr. Justice McKeown's order would have been implemented in practice is not known as the application was ultimately resolved by way of a consent order. However, given the increased use of sworn witness statements to replace most, if not all, of a witness' examination in chief in other judicial and quasi-judicial forums, as well as in private commercial arbitrations, it is likely only a matter of time before this procedure is followed routinely in hearings before the Competition Tribunal. Counsel and their clients need to be prepared for this eventuality by recognizing the "upfront" burden the early preparation of witness statements will impose and by being able to present to the Tribunal practical suggestions to facilitate the use of such statements.

Mr. Justice McKeown's Decision in *Canada (Director of Investigation and Research)* v. *Dennis Washington et al.*[1]

The Director of Investigation and Research filed a notice of application against Dennis Washington and others under the merger provisions of the *Competition Act*. The application challenged Mr. Washington's acquisition of Seaspan International, a provider of ship berthing and certain types of barging services and of Norsk Pacific Steamship, a tug and barge operator. The Director alleged a substantial prevention and lessening of competition in the provision of ship berthing services at Burrard Inlet and Roberts Bank in the Port of Vancouver and barging services in British Columbia.

At a pre-hearing conference held two months before the scheduled hearing of the application, the parties raised a number of matters regarding the conduct of the hearing. The most contentious issue was the proposal by the Director that any party have the option of presenting its evidence in chief at the hearing by means of affidavit, sworn statement or, in the case of the Director, by submitting excerpts from examinations conducted pursuant to section 11 of the *Competition Act*. The Director's proposal envisioned that a party would provide the sworn statement to the other parties in advance of the hearing. If an opposing party wished to cross-examine the deponent, or if the Tribunal wished to question that person, the party tendering the sworn statement would bring the witness before the Tribunal. Counsel for the Director did not anticipate that lengthy affidavits would be involved.

The Director's proposal was strenuously opposed by Washington's counsel. While not opposing the use of affidavit evidence in areas that were either non-contentious or where the nature of the dispute was restricted, for example in relation to a specific fact, counsel argued that it would not be appropriate or fair to deviate from the traditional approach of oral evidence on the broader contentious issues. These included determinations of the degree of market power of one of the respondents at a particular point in time, whether the markets were contestable, when market participants would react to a price increase or service decline and their ability to stem market power. Counsel submitted that the evidence to be presented would raise real issues of credibility, requiring explanation and clarification. It was argued that only oral testimony would give the Tribunal the advantage of being able to compare the witnesses' demeanour in chief with that in cross-examination and also, of being able to compare witnesses.

In his reasons, Mr. Justice McKeown noted[2] the novelty of the Director's proposal and the fact that neither party was able to produce authority dealing with a situation where a proposal such as the one before him was advanced by one party and opposed by another. In the result, Mr. Justice McKeown held that the Director's proposal was to be implemented on a limited basis only: both the Director and the respondents had to agree that the evidence in chief of a particular witness could be adduced in written form. The Director was to provide to the respondents all affidavits, sworn statements and excerpts from section 11 examinations intended to be adduced at the hearing by a specified date, which was approximately three weeks before the hearing. Objections by the respondents were to be made within two weeks thereafter. If the objection was on the basis that the evidence raised issues of credibility or on the basis that the panel at the hearing should have the opportunity of comparing the views of witnesses on market power, the evidence was to be presented orally. If there were objections based on other grounds, the Director would be entitled to seek a determination by the Tribunal on that issue.

In concluding that the Director's proposal was to be implemented on a limited basis only, Mr. Justice McKeown was mindful of the arguments made by Washington's counsel relating to issues of credibility, noting that if the Director's proposed procedure were adopted without restriction, the respondents might have an argument that they were unable to advance these arguments at all because of the particular procedure adopted. Mr. Justice McKeown did state,[3] however, that to date, credibility has not been a critical issue in Tribunal proceedings and that market power is a question of fact, to be determined by the Tribunal on the totality of the evidence.

While not referred to expressly in his reasons, concerns relating to timing and, in particular, the late stage at which this proposal was first put forward by the Director, also may have factored into Mr. Justice McKeown's decision to implement the Director's proposal on a limited basis only. Noting the possible savings in costs and hearing time, both for witnesses and the parties themselves, Mr. Justice McKeown observed that the "real" savings in costs will arise only when the parties can agree on the evidence to be adduced by affidavit. If counsel are in the position of having to review affidavits and excerpts from section 11 examinations received on the eve of a hearing and then having to determine whether agreement can be

reached, while, at the same time, having to attend to the myriad of other preparatory matters, agreement is unlikely. In these circumstances, the approach of counsel is likely to be "if in doubt, object".

In his reasons, Mr. Justice McKeown also referred to the fact that if witness statements were intended to be adduced, the Tribunal would require some time immediately before the attendance of the witness to review their contents. The burden imposed on the trier of fact by the use of such statements has been noted elsewhere.[4] Mr. Justice McKeown did not address how, on an institutional level, such review was to be handled by the Tribunal; given that his Lordship had no specifics regarding the amount of material involved, or the types of issues to be addressed, it is hardly surprising that he did not do so.

The Practice in Other Forums

For counsel who practise in Ontario, perhaps the best known example of the use of sworn witness statements in lieu of examinations in chief is in matters on the Commercial List of the Ontario Court of Justice (General Division). Paragraph 50 of the Practice Direction governing such matters provides:

> For trials, the Court encourages the use of sworn witness statements to replace examinations in chief, in whole or in part. All such witness statements must be exchanged with all other parties and counsel well in advance of the hearing and, unless a prior order is made, the witness should be available for cross-examination at the trial.

Mr. Justice Farley of the Ontario Court (General Division) has observed[5] that the use of such statements is to become the norm with counsel having to advise the court as to why it would *not* be in the interests of justice to proceed in this fashion for most if not all of the testimony of witnesses. At the same time, Mr. Justice Farley noted that this is the procedure followed in the commercial courts of England and New South Wales as well as in various Canadian tribunals.[6]

Mr. Justice McKeown's reasons also refer to the use of this type of procedure by the British Restrictive Practices Court and the Australian Competition Tribunal. Rule 35 of the British *Restrictive Practices Court Rules 1976* states:

> The Court may, on the hearing or adjourned hearing of the application for directions or at the final hearing, order that all or any of the evidence at the final hearing shall be given by affidavit, and may make such order on such terms as to the filing and giving of copies of the affidavits or proposed affidavits and as to the production of the deponents for cross-examination as the Court may think fit.

The provisions governing the procedure and how evidence is to be presented before the Australian Competition Tribunal provide that:

> The Tribunal may permit a person appearing as a witness before the Tribunal to give evidence by tendering, and, if the Tribunal thinks fit, verifying by oath or affirmation, a written statement, which shall be filed with the Registrar.[7]

The use of sworn witness statements to replace in whole or in part, a witness' oral examination in chief, is becoming routine in matters before various regulatory tribunals, including the CRTC and the National Energy Board. The use of sworn witness statements is also increasing in private arbitrations in which the parties are at liberty to fashion their own governing procedures. Consistent with the probable rationale behind the parties' decision to proceed by way of arbitration as opposed to traditional court process, parties in a complex commercial arbitration recognize that a judicious use of sworn statements to present at least some of the witness' evidence in chief can result in significant savings in terms of both time and costs.

The Implications for Counsel

Given the awareness by the Tribunal, counsel and parties of the need to conduct proceedings more efficiently and expeditiously in an era of limited resources, and the movement in other forums toward the use of sworn statements to shorten or eliminate examinations in chief of non-expert witnesses, it is likely only a matter of time before this procedure or some version of it emerges as the standard in hearings before the Tribunal. Counsel need to recognize the implications the use of such statements will have on the manner in which they prepare their case and the fact that the benefits of an overall savings in time and costs will emerge only if sworn statements are provided at an early stage in the pre-hearing process and are sufficiently detailed so as to necessitate no more than an overview of the witness' evidence in chief at the hearing itself.

The early exchange of sworn statements will allow opposing counsel an opportunity to review and assess the statements in light of his or her own client's case in order to determine whether cross-examination of the witness is really necessary. In order to make this determination and, as well, in order to be in a position to draft sufficiently detailed and meaningful statements, counsel will be required to understand fully the nature of their client's case from the outset. Respondents who would otherwise have been inclined to adopt a "reactive" mode may find themselves unable to do so. A "proactive" strategy will be required. Witness interviews, strategic decision-making as to whose evidence will be required at the hearing, in what form and on what issues, will have to begin much earlier. Counsel will need to have total familiarity with the relevant documents as soon as there is any indication that the Director may launch an application under the *Competition Act.*

Counsel involved in proceedings before the Tribunal are familiar with the short time limits required to fulfil procedural steps and the fact that extensions of time to comply are not granted lightly. The timely preparation of an affidavit of documents which may contain hundreds if not thousands of documents and the determination of whether to seek a confidentiality order in respect of some or all of the documents listed in a party's affidavit of documents already require substantial investments of time. The creation of meaningful witness statements will also impose a burden on counsel and the parties, the latter of whom will be called on for their insight into issues relating to, for example, the relevant product and geographic markets, competitors, relevant market shares, their assistance in locating witnesses and the like. Nevertheless, the investment of time at an early stage may well save a substantial amount of time in relation to a particular witness at the hearing itself.

Pursuant to Rule 18 of the *Competition Tribunal Rules*, the Director is required to circulate to the other parties a proposed schedule for the disposition of the application. Responding counsel have seven days in which to serve comments regarding the proposed schedule[8] and then the Chairman, after consultation with the parties, is required to establish a schedule.[9] The intended use of sworn statements and the timing for their exchange and provision for resolving issues related thereto could be incorporated into this schedule, just as the schedules typically contemplate the timing for the exchange of experts' affidavits. If there are significant concerns as to the overall appropriateness of sworn statements in a particular case, these concerns can be addressed in the comments and in the consultation process with the Chairman prior to the schedule being set. Again, however, in order to be in a position to articulate specifically why sworn statements should or should not be used, all counsel will need to be fully versed in their case and have the "legwork" substantially underway.

To address potential concerns regarding issues of credibility, including the "demeanour" issue raised by counsel for the Washington respondents, the use of sworn witness statements ought not to preclude entirely the presentation of some of the witness' evidence in chief by *viva voce* testimony. As has been suggested elsewhere,[10] the witness' oral evidence in chief could take the form of an outline or overview of his or her more detailed evidence so as to give the trier of fact the opportunity of assessing the witness prior to cross-examination. In other circumstances, a brief examination in chief might be warranted to clarify certain issues, place certain matters in context or diffuse a potentially hostile cross-examination.

Given the trend in other forums in favour of using sworn statements to replace examinations in chief, in whole or in part, counsel cannot afford to ignore the signal sent by Mr. Justice McKeown in this case. It is an indication of what the not too distant future is likely to hold, and counsel will need to be proactive in all aspects of preparing their case to address this development as the onus may well be on those advocating against the use of such statements.

Notes

1 (December 2, 1996), [1996] C.C.T.D. No. 28 (QL) (Comp. Trib.).
2 *Ibid.* at para. 7.
3 *Ibid.* at para. 9.
4 B. Morgan, "Ontario's Commercial List May Represent Procedural Future of Commercial Litigation" (1993) 1:1 Comm. Lit. 3 at 4-5.
5 The Honourable Mr. Justice J. Farley, "The Commercial List" (1993) 12:3 Advocates' Soc. J. 4 at 6.
6 *Ibid.*
7 *Trade Practices Act, 1974* (Australia), as amended, s. 107.
8 *Competition Tribunal Rules*, Rule 19.
9 *Ibid.* at Rule 20.
10 *Supra*, note 4 at 5.

COMPETITION LAW AND POLICY IN CANADIAN TELECOMMUNICATIONS

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Introduction

In Canada, as elsewhere in the world, traditional assumptions underlying the regulation of competition in telecommunications are being challenged and overturned by factors such as the globalization of markets, the rapid growth in the capacity and use of fibre optics and digital switching equipment in telecommunications, and the development of alternative telecommunications technologies.

This outline briefly summarizes the legal framework governing competition in Canadian telecommunications. It also identifies agents of change, recent regulatory decisions, current competition law issues and considerations that international telecommunications firms may wish to keep in mind with respect to the interface of Canadian with U.S. or E.C. competition law. In summary, this outline discusses:

- the federal ministers and agencies responsible for the development of telecommunications competition policy in Canada;
- the statutes, administrative agencies and tribunals that regulate competition in Canadian telecommunications;
- factors that are leading to changes in telecommunications competition law and policy in Canada;
- recent competition-related decisions affecting Canadian telecommunications;
- the impact of international competition on Canadian telecommunications law and policy; and
- the manner in which Canadian competition law authorities may coordinate investigations with U.S. or E.C. antitrust and competition law authorities and share confidential information with authorities in other jurisdictions.

How and By Whom is Telecommunications Competition Policy Established in Canada?

The competition policy framework in Canadian telecommunications is established by the federal government,[1] principally through the provisions of the *Telecommunications Act*[2] and the *Competition Act*.[3]

However, while the federal government has established the legislative and regulatory frameworks for competition in Canadian telecommunications, the *Telecommunications Act* has effectively delegated an important role in the development and implementation of competition policy to the federal telecommunications and broadcast regulatory commission, the Canadian Radio-Television and Telecommunications Commission (the "CRTC").[4]

Decisions of the CRTC are, however, subject to review by the federal Cabinet, which has the power to reverse or vary the CRTC's decisions. Within the federal government, the Industry Minister, John Manley, and his department, Industry Canada, are principally responsible for both the *Telecommunications Act* and the *Competition Act*. However, other federal ministers, in particular those responsible for Canadian culture, trade and international relations and their departments, the Canadian Heritage and International Trade departments, also contribute to the development of competition policy with respect to Canadian telecommunications.

The protection and promotion of Canadian culture is becoming a more significant factor in telecommunications policy matters due to the ongoing elimination of the technological barriers between broadcasting and telecommunications services. The Heritage Minister, Sheila Copps, who has responsibilities under the *Broadcasting Act*, may be expected to become increasingly involved in telecommunications competition policy matters[5] as a result of the convergence of these technologies.

The World Trade Organization Agreement (the "WTO Agreement") respecting basic telecommunications services under the General Agreement on Trade in Services (the "GATS") has recently given competition policy in Canadian telecommunications a more significant international dimension. As a result, the International Trade Minister, Art Eggleton, and the Foreign Affairs Minister, Lloyd Axworthy, have demonstrated a greater degree of interest in the evolution and impact of telecommunications competition policy decisions.[6]

Consequently, federal Cabinet decisions establishing competition policy relative to telecommunications may be expected to reflect continuing efforts to balance the sometimes contrasting policy objectives advanced by these departments.

What laws, administrative agencies and tribunals regulate competition in telecommunications in Canada?

Statutes

Canadian competition policy in telecommunications is regulated principally by the *Telecommunications Act*. However, the competition laws of general application, set out in the *Competition Act*, apply generally to matters not expressly regulated by the CRTC. In addition, the non-criminal (*i.e.*, reviewable matters) provisions of the *Competition Act* may have concurrent application, notwithstanding CRTC regulation.[7] In addition, it should be noted that s. 34 of the *Telecommunications Act*[8] requires that the CRTC refrain from regulating telecommunications services which are sufficiently competitive to protect the interests of users. For example, the CRTC has decided to refrain from regulating the rates charged for long distance services by the alternative long distance carriers, and from regulating the rates charged by the regional telephone companies (the telcos) for certain of their packet data and frame relay services and for their electronic messaging and information services.[9] Consequently, in the telecommunications area, the role of the *Competition Act* is expected to increase and the role of the *Telecommunications Act* to decrease as technological change and other developments give rise to increased competition. Other enactments which may affect competition policy with respect to telecommunications include the *Radiocommunication Act*[10] and the *Broadcasting Act*.[11]

The *Telecommunications Act* establishes the statutory framework for the regulation of Canadian telecommunications carriers by the CRTC and the Cabinet. It applies to telecommunications common carriers, these being defined as "a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation".[12] The principal provisions of the *Telecommunications Act* which relate to competition policy matters are as follows:

- s. 7,[13] which sets out the principal objectives of Canadian telecommunications policy;
- s. 8,[14] which empowers the federal Cabinet to give the CRTC "directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives";
- s. 12, which authorizes the federal Cabinet to vary or rescind an order of the CRTC, or to refer it back to the CRTC for reconsideration. This section permits the federal Cabinet to override or amend CRTC decisions and provides a "political" avenue for appeals of CRTC decisions. Over the past few years the federal Cabinet has overturned or amended a number of CRTC decisions relating to telecom and broadcast matters;
- s. 15, which authorizes the Industry Minister to establish standards with respect to technical aspects of telecommunications;

- s. 16, which requires that new, facilities-based telecommunications common carriers operating in Canada be Canadian-owned and controlled corporations incorporated or continued under the laws of Canada or a province thereof which meet the strict Canadian ownership and control criteria set out in the *Telecommunications Act* and regulations thereunder;[15]

- ss. 24 and 25, which make the offering of telecommunications services by a Canadian carrier subject to any conditions, including rate tariffs, which may be imposed by the CRTC (however, the CRTC may be required to forbear from regulating in the circumstances referred to in s. 34);

- s. 27, which requires that rates charged for telecommunications services be "just and reasonable", and prohibits carriers from unjustly discriminating or giving undue or unreasonable preferences to any person, including itself, in the provision of telecommunications services;

- s. 28, which requires the CRTC to consider the broadcasting policy of Canada as set out in the *Broadcasting Act* with respect to the use of the facilities of a Canadian carrier for the transmission of programs to the public;

- s. 29, which requires that the CRTC give its prior approval to arrangements respecting the interchange of telecommunications, the management of telecommunications facilities or the apportionment of rates or revenues between carriers;

- s. 34, which permits the CRTC to forbear from regulating a Canadian carrier where such forbearance would be consistent with Canadian telecommunications policy objectives and requires that the CRTC refrain, to the extent that it considers appropriate, from the exercise of its powers under ss. 24, 25, 27, 29 and 31 where it has determined that a telecommunications service or class of services is or will be subject to competition sufficient to protect the interests of its users;

- s. 40, which authorizes the CRTC to order Canadian carriers to connect their telecommunications facilities to other telecommunications facilities;

- s. 47, which requires that the CRTC exercise its powers and perform its duties under the *Telecommunications Act* with a view to implementing the Canadian telecommunications policy objectives set out in s. 7 and in accordance with any orders or standards made or prescribed under ss. 8 or 15;

- s. 62, which provides that the CRTC may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision; and

- s. 64, which provides that the decisions of the CRTC may be appealed to the federal Court of Appeal with the leave of that Court on questions of law or jurisdiction.

The *Competition Act* applies generally to all businesses in Canada.[16] Criminal offences under the Act include bid-rigging, price maintenance, discriminatory and/or predatory pricing, misleading advertising and anti-competitive conspiracies. Prosecutions under these provisions are heard in the criminal courts and require that the Crown prove the offence beyond a reasonable doubt. Penalties include fines or imprisonment, or both. Individuals as well as companies can be charged. Prohibition orders and interim injunctions may also be obtained from the court upon application by the Attorney General. Non-criminal reviewable matters, including mergers, abuse of dominant position, tied selling, exclusive dealing, refusal to deal and market restriction, may be challenged by the Director before the Tribunal. The Tribunal, which is comprised of federal court judges and lay members (typically selected for their economic or business expertise and experience), decides cases on a civil standard of proof. The Tribunal has the power to issue interim injunctions and a wide range of orders but does not have the ability to impose penal sanctions or to award damages.

A private right of civil action is available in respect of violations of the criminal provisions of the *Competition Act* or a failure to comply with an order made under the *Competition Act* by the Tribunal or a court. Anyone who has suffered losses or damages as a result of such anti-competitive behaviour may recover an amount equal to the losses or damages suffered.

The *Radiocommunication Act* provides for the allocation of spectrum, the issuance of radio licences, and the regulation of satellite telecommunications by the Minister of Industry in accordance with regulations passed by the federal cabinet.[17] The recent development and proliferation of new digital wireless technologies, such as digital cellular, Personal Communications Services, Local Multipoint Communications Systems and mobile satellite systems has made wireless telecommunications systems an increasingly important factor in the development of telecommunications competition policy and has increased the importance of the role played by the Industry Minister in this area.

The *Broadcast Act* complements the *Telecommunications Act* by setting "broadcasting policy for Canada" and establishing the manner in which broadcast programming is to be regulated by the CRTC.

The overlapping application of these statutes may be illustrated with reference to a telecommunications carrier which uses wireless technologies to deliver programming. Such a carrier will be subject to regulation: (i) by the CRTC under the *Telecommunications Act* in respect of its role as a Canadian carrier, (ii) by the CRTC under the *Broadcasting Act* in respect of its distribution of programming, (iii) by the Minister of Industry under the Radiocommunication Act in respect of its operation of radio apparatus, and (iv) also by the Director under the *Competition Act*.

Agencies and Tribunals

The CRTC is the Canadian counterpart of the U.S. Federal Communications Commission and is responsible for the regulation of telecommunications competition in accordance with the above-noted provisions of the *Telecommunications Act*. The CRTC, which is comprised of up to 13 full-time members, performs a wide range of investigative, administrative, quasi- judicial, consultative and legislative functions, and has the power to issue a wide variety of orders. The CRTC has a substantial measure of autonomy, *i.e.*, it sets its own procedures and has its own staff, who analyse submissions and prepare recommendations for consideration by the members of the CRTC. CRTC members may only be removed from office for cause. However, the CRTC is required to observe the policy directives provided in s. 7 of the *Telecommunications Act* and those issued by the federal Cabinet pursuant to s. 8 of that Act.

In addition, it should be noted that interested parties may seek to have a CRTC decision overturned or amended in as many as four different fora. First, they may appeal the decision to the federal Cabinet for a "political" review pursuant to s. 12 of the *Telecommunications Act*; second, they may apply to have the CRTC review and rehear the matter pursuant to s. 62 of the *Telecommunications Act*; third, they may seek to appeal the decision to the Federal Court of Appeal pursuant to s. 64 of the *Telecommunications Act*; or fourth, they may seek to have the decision judicially reviewed by the Federal Court of Appeal pursuant to s. 28 of the *Federal Court Act*.

The *Competition Act* is enforced by the Director with the assistance of the management and staff at the Competition Bureau. The lawyers and economists at the Bureau perform essentially the same tasks as the staff of the U.S. Department of Justice, Antitrust Division (the "U.S. DOJ") and the Federal Trade Commission (the "FTC"). However, the role of lawyers within the Bureau is far more limited than in the U.S. DOJ. The Director will usually involve counsel from the Canadian Department of Justice to assist him to make representations before a court, the Tribunal or the CRTC. In addition, the Director does not make decisions with respect to the prosecution of offences under the criminal provisions of the *Competition Act*. The Director refers such matters, usually with a recommended course of action, to the Attorney General of Canada, who ultimately decides whether an offence has been committed and what remedial course of action is appropriate.[18]

Decisions with respect to technical standards, spectrum allocation and other similar matters under the *Radiocommunication Act* are made by the Industry Minister with the assistance of his staff. The Industry Minister also plays a leading role in the development of policy directives to the CRTC under the *Telecommunications Act*.

What developments are affecting competition law and policy in telecommunications in Canada? What changes are resulting from these developments?

The most important factors driving change in competition law and policy in telecommunications in Canada relate to the rapid rate of innovation and technological development in computer and digital communications and switching technologies. Developments in computer technology are both increasing the demand for high-volume, wide-area digital data networks and providing the technology and hardware required for their operation and management. Specific examples of new technologies and/or trends, products or services which are affecting competition in Canadian telecommunications include:

- the high-speed data communications technologies made possible by the combination of fibre optics with advanced opto-electronics;
- packet switching, which involves the use of computer technology to digitize voice, data and video signals, and send them over public networks in individually-addressed packets of digital data;[19]
- the movement of telecommunications switching functionality from hardware to software;
- high-bandwidth digital wireless technologies;
- satellite telecommunications systems; and
- technologies that provide for the remote operation and management of telecommunications facilities and switching centres.

The foregoing technological developments are facilitating the development of alternatives to traditional Canadian wireline telecommunications services, including:

- alternative, facilities-based long distance services;[20]
- long distance resellers and rebillers, which use facilities owned by the telcos and their facilities-based long distance competitors;
- cellular telephone networks;[21]
- cable television systems, operators of these systems are upgrading their switching equipment to carry bi-directional voice and data signals in addition to video signals;

- mobile satellite systems ("MSAT"), which became commercially available in Canada in 1996;
- the Internet;
- Personal Communications Services ("PCS"), which have been licensed to four Canadian licensees and are currently being built and tested in different Canadian centres; and
- Local Multipoint Communications Systems ("LMCS"), which have also been licensed and are currently being built and tested in Canada.[22]

Other changes and policy considerations which are affecting the development of Canadian competition policy with respect to telecommunications include:

- the manner in which increasing competition for telecommunications services is changing the competitive dynamics of the market for such services by reducing telecommunications to a digital commodity and shifting the focus of competition from hardware, which involves relatively consistent marginal costs per additional user, to software, which has a minimal marginal cost per additional user and provides continually increasing returns to scale;[23]
- the federal government's commitment to the rapid development of the Canadian information highway.[24] In this regard, the federal government's IH Report recognized that the creation of "a competitive, consumer-driven policy and regulatory environment" is fundamental and essential to the development and construction of Canada's information highway;
- the federal government's Convergence Policy Statement,[25] which sets out the federal government's policies with respect to competition in telecommunications facilities, products and services and the relationship between competition and the promotion of Canadian content. The Convergence Policy Statement contemplates direct competition between the telcos and cable televisions companies, but prevents the telcos from offering cable services until the rules for competitive local telephone services have been implemented, with a view to preventing either industry from obtaining a head start in entering the business of the other;[26]
- the WTO Agreement, which has committed the Canadian federal government to opening up substantial areas of Canadian telecommunications to foreign competition;[27]
- the federal government's concerns with respect to the protection of the privacy of telecommunications users;[28]

- the federal government's strong commitment to the protection and promotion of Canadian cultural industries;

- the other policy objectives, such as universal access to telecommunications services, that are advanced by the existing regulatory structures; and

- the differences between the institutional policy mandates of the telecommunications and broadcasting regulatory agency, the CRTC and the competition law authority, namely, the Director.[29]

What competition issues have recently arisen in the telecommunications area?

Recent decisions and other regulatory developments affecting competition in Canadian telecommunications include:

- decisions under the *Telecommunications Act*;

- decisions under the *Competition Act* in connection with mergers and other conduct; and

- international trade developments relating to international access to Canadian customers, direct foreign investment and other similar matters.[30]

Decisions under the Telecommunications Act

The CRTC has played a leading role in the development of competition policy and the regulation of competition in Canadian telecommunications. Recent CRTC decisions that have crystallized or otherwise may be expected to significantly affect telecommunications competition policy are as follows:

- CRTC 92-12, *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*,[31] in which the CRTC opened up public long distance telephone services to facilities-based competition on an equal access basis. This decision required that long distance competitors pay access costs as a contribution to local service costs;[32]

- CRTC 94-13, *Review of Regulatory Framework - Targeted Pricing, Anti-Competitive Pricing and Imputation Test for Telephone Company Toll Filings*,[33] in which the CRTC required that the telcos impute a specific access cost contribution for the purpose of determining whether their long distance rates are compensatory;

- CRTC 94-14, *Forbearance Sale of Terminal Equipment by Canadian Carriers*,[34] in which the CRTC decided to substantially refrain from regulating the prices and terms of sale of terminal equipment by Canadian carriers;

- CRTC 94-17, *Equal Access - Marketing Information*,[35] in which the CRTC ordered the telcos to send out a billing insert, which had been drafted by the CRTC, containing information about long distance competition and describing the process and consequences of switching to an alternative long distance supplier;

- CRTC 94-19, *Review of Regulatory Framework*,[36] in which the CRTC established the framework for the transition of local services from rate base/rate of return regulation model to price cap regulation, and ultimately, to competition for such services, and provided for rate rebalancing pursuant to which local rates would be increased by a total of $6.00 per month in a series of staged increases (an aspect of the decision which was overturned by the federal Cabinet).[37] CRTC 94-19 recognized that fundamental changes to the Canadian regulatory framework were required if Canadians were to fully benefit from the advances in telecommunications technology. The new framework was intended to reduce technical, regulatory and economic barriers to entry and to place a much greater reliance upon market forces and competition. The rebalancing of the rates for long distance and local service,[38] which the CRTC described as being "necessary if Canadians are to benefit fully from increased competition and if bypass opportunities and the potential for uneconomic entry are to be reduced", is a central element of this new framework. CRTC 94-19 also contemplated CRTC forbearance with respect to the rates charged by the telcos for long distance services and the entry of the telcos into the business of providing content as well as carriage;[39]

- CRTC 95-12, *Customer Balloting to Select a Long Distance Service Provider*,[40] in which the CRTC declined to create a balloting process for long distance services[41] as it was not persuaded that the benefits of conducting such a ballot would justify the associated costs;

- CRTC 95-13, *Access to Telephone Company Support Structures*,[42] which imposed a general obligation on the telcos to make their support structures (conduits and poles) available to carry the cables and facilities of competing telecommunications carriers and cable television companies, except where technical or safety reasons would preclude such cooperation;

- CRTC 95-19, *Forbearance Services Provided by Non-Dominant Canadian Carriers*,[43] in which the CRTC decided to substantially refrain from regulating the facilities-based long distance services offered by non-telco competitors, subject to continuing requirements that these alternative carriers offer the use of their facilities to others on a non-discriminatory resale basis, and to continuing restrictions on the bypass of Canadian services and facilities;

- CRTC 95-21, *Implementation of the Regulatory Framework - Splitting of the Rate Base and Related Issues*,[44] in which, as directed by the federal Cabinet, the CRTC reconsidered the rate rebalancing provided for in CRTC 94-19 and allocated certain additional costs from the telcos' local segment to their long distance segment;[45]

- CRTC 96-130, *Stentor - Forbearance of Regulation of Packet Data Services*,[46] in which the CRTC decided to substantially refrain from regulating the packet data and frame relay services offered by the telcos, but declined to forbear from regulating ATM data services;

- CRTC 96-1392, *Stentor Forbearance Application for Electronic Messaging and Information Services*,[47] in which the CRTC decided to substantially refrain from regulating the electronic messaging and information services offered by the telcos; and

- CRTC 97-1, *Bell Canada and Bell Sygma Inc. - Joint Marketing of Sympatico Internet Services*,[48] in which the CRTC rejected the applicant Internet service providers' claims that Bell Canada's activities in marketing and distributing the Internet services of its subsidiary, Bell Sygma, conferred an undue preference on Bell Sygma in contravention of the *Telecommunications Act*.

The CRTC is currently considering the issues associated with the movement to local service price cap regulation and local service competition[49] and the question of whether the Canadian markets for long distance and private line services are sufficiently competitive that the CRTC should refrain from regulating the telcos' service offerings in these areas.[50] CRTC decisions on these and other related issues are expected later in 1997.

The recent decisions of the CRTC in the telecom area reflect its and the federal government's acceptance of the need for market forces and competition, rather than regulation, to serve as the primary protection of Canadians' interests in an efficient and internationally competitive domestic telecommunications system. The trend toward greater reliance on market forces means that the *Competition Act* may be expected to play an increasingly important role in the regulation of competition in Canadian telecommunications.

Decisions under the Competition Act

The Director has long recognized the vital importance of efficient domestic telecommunications services to Canadian industry's ability to achieve and maintain international competitiveness, and has made the efficient operation of Canada's telecommunications industry a Bureau priority. Recent investigations and activities of the Director and the Bureau with respect to telecommunications matters include:

- the publicly reported review, completed at the beginning of 1995, of the acquisition of Edmonton Telephone Corporation by Telus Corporation (which provides service throughout

the balance of the Province of Alberta). In his news release respecting this transaction, the Director referred to the potential emergence of competitive alternatives, both from cable companies and wireless technologies, such as cellular and PCS, as an important factor in his assessment and also arranged that Telus would provide open access to communications space on hydro and telephone support structures pending the release of the CRTC's decision on access to such support structures;[51]

- the publicly reported review, under the merger and abuse of dominance provisions of the *Competition Act*, of the 1993 reorganization of the Stentor Alliance, the national telecommunications network comprised of Canada's nine regional telcos. After an extensive, three-year examination, the Director concluded that he did not have grounds to challenge the Stentor Alliance under the *Competition Act*. He referred to evidence of competitive entry into long distance markets and the significantly declining rates charged for long distance services as important factors in this decision;[52]

- the consent proceedings and contested application brought before the Tribunal against the publishers of telephone directories in 1994 under the abuse of dominance and other reviewable matters provisions of the *Competition Act*;[53]

- the consent proceedings brought before the Tribunal against the major Canadian banks and the other charter members of the Interac Association which operates the automated banking machine network in Canada. The consent order required that Interac open its network to other potential participants on a non-discriminatory basis and prohibited the imposition of new member entry fees and other barriers to entry;[54] and

- the significant role played by the Director in shaping the CRTC's policies with respect to competition in Canadian telecommunications. The Director has intervened in numerous CRTC hearings and has made substantial submissions to the CRTC with respect to the major CRTC decisions referred to in the previous section.[55] The CRTC has largely adopted the "market power" paradigm, advocated by the Director, as the basis for determining whether the services provided by Canadian carriers will be subject to sufficient competition to protect the interests of users,[56] and has specifically referred to the Director's Merger Enforcement Guidelines for guidance with respect to market definition and market power issues.[57] The Director has also intervened and made submissions to the federal Cabinet in respect of telecom and broadcast decisions that have been appealed to the Cabinet, and to the CRTC in respect of matters reconsidered by the CRTC.

The Director and the *Competition Act* may be expected to play an increasingly important role in the development of telecommunications competition policy in the future as the CRTC forbears from regulating

and moves additional telecommunications services out from under its regulatory regime, such that they become subject to all of the provisions of the *Competition Act*.

International Agreements

The increasing globalization of trade in goods and services is a further factor that is affecting Canadian competition policy in telecommunications. The North American Free Trade Agreement (the "NAFTA") provisions relating to enhanced telecommunications services, and the WTO Agreement signed in Geneva on February 15 of this year, have each helped to open up certain aspects of Canadian telecommunications to foreign competition and reflect the trend toward increasing international competition in telecommunications services:

- NAFTA provides for non-discriminatory access to public telecommunications network services, including interconnection and switching rights.[58] NAFTA also applied the free trade regime to trade in "enhanced services".[59] However, NAFTA did not materially affect competition with respect to basic telecommunications services or the Canadian ownership and control requirements.

- The WTO Agreement has committed Canada to open up substantial elements of international telecommunications traffic to competition but has not changed the Canadian ownership and control requirements which must be satisfied by facilities-based telecommunications common carriers operating in Canada. Non-Canadians are still limited to 20 percent direct and 33 1/3 percent indirect ownership (46.7 percent in total) of the voting equity of Canadian facilities-based telecommunications common carriers. The WTO Agreement is generally to be implemented on January 1, 1998, although a number of Canada's commitments under this agreement take effect at later dates.[60] The Canadian offer provides for the elimination of the present monopolies on international (overseas) telecommunications services and fixed domestic telecommunications satellite services. Canada has also agreed to remove foreign ownership restrictions in the area of global mobile satellite services and in the ownership of submarine cable landings.[61] Thus on March 1, 2000, all international telecommunications traffic, to and from Canada, may be carried on non-Canadian satellite and cable facilities. In addition, the WTO Agreement bound Canada to continue to permit resale operations in Canada by 100% foreign owned and controlled businesses.

How does international competition affect Canadian law and policy?

International competition is having a profound effect on Canadian competition law and policy in the telecommunications area. For example, the rate rebalancing (to reduce or eliminate the cross-subsidy of the local segment by the long distance segment) was, in part, required in order to prevent the use of

international facilities to bypass the long distance services offered by Canadian carriers on Canadian facilities. Other examples which illustrate the potential impact of international competition on Canadian telecommunications include:

- the manner in which the Canadian associates of international industry leaders, namely Sprint and AT&T, are extending their international networks into Canada, within the Canadian ownership restrictions, by using their trademarks and trade names, technologies and international networks to integrate their Canadian operations into their worldwide operations. AT&T Canada and Sprint Canada are now principal competitors of the Canadian telcos;

- the manner in which the rates charged for calls placed from outside Canada into Canada and between U.S. locations now serve as a benchmark or a point of reference for calls placed inside Canada, and indirectly drive down the cost of Canadian telecommunications services;

- the manner in which the Internet, which is another international telecommunications network, is increasing telecommunications competition in Canada. The Internet is now used for voice, data and, to a lesser extent, video services, and is expected to grow rapidly in importance over the coming months and years;

- mobile satellites, which provide another technology through which international competition extends into Canada and affects competition within Canada; and

- the technological developments, discussed above, that are increasing the capacity and sophistication of telecommunications networks while simultaneously driving down the costs and traditional barriers to entry to the provision of these services. These international forces may be expected to result in the international consolidation of telecommunications service providers (either by way of mergers, partnerships, joint ventures or strategic alliances) as the established service providers seek to reduce costs and achieve international economies of scale.

In summary, factors such as technological developments, the WTO Agreement, globalization and ongoing efforts by the U.S. to have Canadian ownership restrictions removed from the *Telecommunications Act*, promise to make international competition an increasingly important factor in Canadian telecommunications.

How do the Canadian competition law authorities coordinate investigations with U.S. and E.C. antitrust and competition authorities? What rules apply to the sharing of confidential information between the Canadian competition law authorities and U.S. or E.C. antitrust or competition law authorities?

Overview

U.S. firms that are contemplating entering Canada, whether directly, through partnerships or even through an investment, need to be aware of not only Canadian law (and the areas in which it differs from U.S. law), but also of the unprecedented degree of cooperation and information-sharing that occurs between enforcement agencies in these two countries.

The emergence of North American and global markets has led the U.S. and Canadian governments to increase the extent of cooperation and information-sharing between them through several steps, including:

- 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 in 1990;

- the signing, in August 1995, of a mutual cooperation agreement between Canada and the U.S. regarding the application of their competition and deceptive marketing practices laws (the "1995 Agreement");

- the passage in the U.S. of the *International Antitrust Enforcement Assistance Act*, which provides the U.S. government with a framework for increased cooperation and information-sharing with foreign governments;

- discussions in 1995 and 1996 regarding the possibility of amendments to the *Competition Act* to clarify and arguably extend the Canadian government's ability to cooperate and share information with authorities in other countries (although these issues have not been addressed in the amendments recently proposed by the federal government);

- the extension of the extradition treaty between Canada and the U.S. to include offences punishable by the laws of both countries by imprisonment for one year or more (which includes a number of competition offences); and

- the completion in July 1995 by the U.S. and Canada and the other members of the Organization for Economic Co-operation and Development (the "OECD") of the "Revised Recommendation of the Council Concerning Co-operation Between Member Countries on

Anti-competitive Practices Affecting International Trade" which imposed general obligations with respect to notification, coordination, consultation and conciliation on a voluntary basis in connection with the investigation of anti- competitive practices having international effects, and the enforcement of national competition laws.

Similarly, over the last three years, Canada has been negotiating a competition law cooperation agreement with the E.C. This agreement will likely be signed later this year and is expected to be very similar to the 1995 Agreement, which, in turn, is similar to the current cooperation agreement between the U.S. and the E.C. Since most of the cases and issues relating to Canadian matters have arisen in the context of Canadian/U.S. cooperation, the relations between these countries will form the focus of this section of the outline.

The above-listed recent initiatives of the Canadian government reflect a significant evolution in its approach to transborder enforcement. Historically, the Canadian position on cooperation reflected Canadian concerns over the U.S. "long arm" approach to the enforcement of its laws. The Canadian response to these concerns took the form of a number of legislative measures designed to overcome the effects of the extraterritorial exercise by the United States of its laws. For example, blocking statutes, so-called because they can be used to prohibit Canadian firms and persons from supplying information to foreign authorities, were put in place.[62] However, over the past few years the Director and the federal government have recognized the need to give domestic competition laws some measure of extraterritorial effect and have shown greater tolerance toward the U.S. exercise of extraterritorial jurisdiction and have extended the reach of the Canadian law to reach certain conduct outside Canada which adversely affects the competitiveness of markets in Canada.[63]

Our recent experience in international antitrust cases has demonstrated that the two governments engage in joint interviews of witnesses and share information gathered from firms under investigation without notice to the affected parties. Representatives of the Canadian and U.S. governments have indicated that they expect this trend to greater cooperation will continue.[64]

While a number of mechanisms for cooperation between the Canadian and U.S. antitrust authorities are currently in place, a significant issue remains outstanding regarding the scope of the confidentiality protections afforded by the *Competition Act*. Section 29 of the Competition Act prohibits the disclosure of information in the Director's possession that was obtained through compulsory processes, other than to a Canadian law enforcement agency or "for the purposes of the administration or enforcement" of the *Competition Act*.[65]

The Director interprets s. 29 of the *Competition Act* as permitting the disclosure of information to a foreign agency without notice to the party from whom information was obtained, where such disclosure would advance a specific Bureau or joint Canada/U.S. investigation, for example, by enabling the Bureau to obtain helpful information in exchange.[66]

The Canadian Bar Association (the "CBA") has publicly stated that it disagrees with the Director's interpretation of the confidentiality provision of the *Competition Act*, and has recommended amendments to the Act whereby notice would have to be given whenever the Bureau plans to share information with a foreign agency.[67] The Bureau did not agree with the CBA's recommendation. However, as a result of a recent decision of the Federal Court (Trial Division),[68] the amendments respecting confidentiality and information-sharing have been postponed. This leaves the status of the law in a somewhat unsettled state, and raises significant uncertainty respecting the authority of the Director to exchange information with foreign authorities.

The following sections describe the MLAT and the 1995 Agreement, and the practical implications of these agreements for firms in both countries.

The MLAT

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".[69] It applies in Canada with respect to all indictable criminal offences, including those under the *Competition Act*, *i.e.*, conspiracy and price maintenance.

The MLAT specifies the types of assistance that can be provided. 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.

Issues have arisen concerning the extent to which the confidentiality provisions of the Act apply to ensure that requests by Canada under the MLAT do not trigger concurrent investigations in the U.S. Specifically, we are aware of at least one case in which an independent investigation was commenced in the U.S. as a result of a request for assistance by Canada under the MLAT.

The 1995 Agreement

The 1995 Agreement is a binding, international agreement, but unlike the MLAT, which applies only to criminal matters, the 1995 Agreement extends to both criminal and civil matters, such as mergers. Recent comments by a former Director suggest that, in the telecommunications area, the 1995 Agreement may be of greater importance than the MLAT.[70]

The 1995 Agreement places a number of positive obligations on both countries, subject to possible override where the enforcement policies and other enforcement interests of the disclosing country otherwise require. Specifically, the 1995 Agreement requires both countries to:

- notify the other country of any conduct which may raise issues under the laws of that other country;[71]

- consider comity implications in order to avoid or minimize conflicts in enforcement. 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";[72] and

- to assist the other country in locating and securing evidence and witnesses, as well as providing information in each case, upon request.[73]

The 1995 Agreement also includes, for the first time, the concept of "positive comity" between the two countries. Specifically, if one country believes that anti-competitive activities occurring in the other are affecting the first country's "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 anticompetitive activities identified in the request".[74]

Downstream Disclosure

While both the MLAT and the 1995 Agreement do not contemplate downstream disclosure of information provided to Canada by the U.S., it could nevertheless occur in a number of different ways.[75] Subsection 29(1) of the *Competition Act* provides that the Director may provide confidential information gathered by the Bureau to other Canadian law enforcement agencies. It is possible that the Director might wish to make similar disclosure of information provided 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. We are aware of one case in which this resulted in the disclosure of the information to the person searched.[76]

Apart from the Director's own initiative in making disclosure, generally the Director has the ability to resist disclosure to third parties. Specifically, assertions of public interest and other forms of privilege[77] and the provisions of Canadian access to information legislation[78] are usually adequate to prevent information from being obtained from the Director without his consent. However, there are two important exceptions, both of which arise by virtue of the *Canadian Charter of Rights & Freedoms*.[79]

Practical Implications

The increasing cooperation of the Canadian and U.S. authorities, when combined with the differences between law and practice in the two countries, suggests that:

- it is increasingly important to consider the implications of business arrangements under the laws of both Canada and the U.S.;

- an investigation in one country may lead to an investigation and/or civil suits in the other;[80]

- individuals in one country can be prosecuted, extradited and imprisoned for violations of the other country's laws;[81]

- information stored on computers that are located outside Canada, but which is accessible to computers in Canada, may be subject to search by Bureau officers in Canada;[82] and

- following a search or subpoena in Canada, a firm's records may be sent to the U.S. DOJ without notice to the firm and, in circumstances where there are no "iron-clad" protections against downstream disclosure, to third parties in the course of a prosecution or through court orders. Further, the privilege that might serve to protect information gathered in Canada may not extend to information gathered from other jurisdictions where the scope of privilege may not be the same.[83]

In summary, the differences in the laws and regulatory environments, and the extensive cooperation between Canada and other jurisdictions, especially the U.S., suggest that non-Canadian telecommunications firms doing business in Canada could benefit from involving their counsel in both countries in the review and implementation of the firms' business plans from the earliest stages.

Notes

* Partners, Davies, Ward & Beck. The assistance of our partner, Joel T. Kissack, in the preparation of this outline is gratefully acknowledged.

1 The Supreme Court of Canada decision in *Quebec* v. *Telephone Guevremont Inc.*, [1994] 1 S.C.R. 878 confirmed that the federal government has legislative jurisdiction over all Canadian telecommunications carriers.

2 S.C. 1993, c. 38.

3 R.S.C. 1985, c. C-34.

4 The CRTC is constituted under the *Canadian Radio-Television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22.

5 For example, the federal government May 1996 report, "Building the Information Society: Moving Canada into the 21st Century", notes that the Ministers of Industry and Canadian Heritage are to develop the policy framework governing competition between cable television and telephone companies.

6 The WTO Agreement on Basic Telecommunications, which was settled on February 15, 1997 in Geneva, involved a significant liberalization of Canadian policy with respect to the international carriage of Canadian telecommunications traffic. However, the U.S. government, which strongly opposes Canadian efforts to protect and promote Canadian culture, has indicated that it considers the Canadian concessions to have been inadequate due to their failure to lift Canadian ownership and control restrictions. For example, see "U.S. decries Canada's telecom rules Angered by Ottawa's firm stand, FCC chief says Canadian firms will get icy greeting", *The Financial Post* (February 20, 1997).

7 We note that the extent to which CRTC regulation or forbearance from same may give rise to a "regulated conduct" defence with respect to the non-criminal provisions of the *Competition Act* has yet to be decided by Canadian courts. However, the Director has taken the position in a recent case that the Competition Tribunal (the "Tribunal") has concurrent jurisdiction with respect to reviewable matters (mergers, abuse of dominant position, refusal to deal, tied selling, exclusive dealing, etc.) notwithstanding that a similar issue is before the CRTC and was the subject of submissions made by the Director to the CRTC. (See, Director's Reply and the Director's Memorandum of Argument filed January 18, 1995 in response to the Notice of Motion dated January 16, 1995 in *Canada (Director of Investigation and Research)* v. *Tele-Direct (Publications) Inc.*, CT/94-3.) The Director has also taken the position that, unless the CRTC has exercised its powers in a manner that specifically requires a respondent to act in a manner inconsistent with the relief

sought by the Director, that the CRTC's exercise of jurisdiction over the respondent is not a bar to *Competition Act* relief.

8 Subsection 34(2) of the *Telecommunications Act* provides that, where "the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, ... from the exercise of any power ... in relation to the service or class of services".

9 See CRTC Telecom Decisions and Orders 95-19, 96-130 and 96-1392, discussed *infra.*

10 R.S.C. 1985, c. R-2.

11 S.C. 1991, c. 11.

12 Telecommunications common carriers are defined in subsection 2(1) of the *Telecommunications Act.*

13 Section 7 provides as follows:

> 7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives:
> (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
> (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
> (c) to enhance the efficiency and competitiveness at the national and international levels of Canadian telecommunications;
> (d) to promote the ownership and control of Canadian carriers by Canadians;
> (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
> (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
> (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
> (h) to respond to the economic and social requirements of users of telecommunications services; and
> (i) to contribute to the protection of the privacy of persons.

14 Section 10 of the *Telecommunications Act* prescribes the notice and comment procedures which must be followed with respect to orders made under s. 8.

15 Canadian ownership and control of a telecommunications common carrier requires that:

> (a) at least 80 percent of the directors be individual Canadians;
> (b) at least 80 percent of voting shares be owned by Canadians (under the *Regulations Respecting the Ownership and Control of Canadian Telecommunications Common Carriers*, SOR/94- 667, a corporation or another entity will be considered to be a Canadian provided that (i) at least 66 2/3 percent of the voting shares are owned and controlled by Canadians and (ii) the entity is not "controlled-in-fact" by a non-Canadian); and
> (c) the carrier not be "controlled-in-fact" by a non-Canadian.

16 While it is likely that CRTC regulation of telecommunications services would provide a valid defence to charges brought under the criminal provisions of the Act with respect to matters that are specifically regulated by the CRTC, such as the setting of prices under tariffs, the Director has taken the position that he has concurrent jurisdiction under the *Competition Act* with respect to reviewable matters and other matters which have not been specifically regulated by the CRTC. This issue has not yet been tested in the courts, although the recent decision of the Ontario Supreme Court (General Division) in *Re Law Society of Upper Canada and Attorney General of Canada* (1996), 28 O.R. (3d) 460, in which the applicant Law Society was granted a declaration that the regulated conduct exemption precluded the Director from investigating the Law Society's insurance business, raises questions with respect to the Director's position on this issue.

17 Subsection 4(1) of the *Radiocommunication Act* prohibits persons from installing or operating radio apparatus for the purpose of sending or receiving telecommunications signals except in accordance with a licence or exemption under that Act.

18 See *Competition Act, supra*, note 3 at s. 23.

19 Asynchronous Transfer Mode ("ATM") and the Internet are two examples of packet switching technologies.

20 AT&T Canada Inc. (associated with AT&T), Sprint Canada (associated with Sprint) and *f*ONOROLA have all established substantial long distance facilities in Canada.

[21] The Cantel/AT&T network and the telcos' "Mobility" network.

[22] See Industry Canada News Release, "Brand New Communications Technology Promises Increased Competition and More Choices for Consumers" (February 29, 1996); and Industry Canada News Release, "More Communications Choices for Consumers" (October 29, 1996), which announced, respectively, the call for applications for LMCS licences and the award of licences to three successful applicants.

[23] The formation of large international telecommunications companies (and joint ventures or strategic alliances), in part, is a response to this change. These trends, together with the increasing globalization of telecommunications markets, conflict with the Canadian ownership and control requirements of the *Telecommunications Act* which limit the extent to which international carriers may acquire equity interests in or control over Canadian carriers in an effort to achieve a more efficient scale of operations.

[24] The Minister of Industry established the Canadian Information Highway Advisory Council ("IHAC") to advise the federal government on the development of the Canadian information highway. The IHAC Report, "Connection, Community, Content: the Challenge of the Information Highway", was published in September 1995. In May 1996, the federal government released its own action plan, "Building the Information Society: Moving Canada into the 21st Century" (the "IH Report").

[25] See Government of Canada, "Convergence Policy Statement" (released August 6, 1996) and Government of Canada News Release, "Competition and Culture Set to Gain in Convergence Policy Framework" (August 6, 1996).

[26] The Convergence Policy Statement also contemplates that:

(a) cooperation or sharing of facilities between cable licensees and telecommunications carriers would be permitted;

(b) the telecommunications facilities of cable companies, beyond that used by the licensee for the carriage of broadcasting services, to the extent practicable, would be made available for lease, resale and sharing by service providers and other carriers on a non-discriminatory basis;

(c) facilities and capacity, including the use of support structures, would, to the extent practicable, be made available to other users;

(d) regulation should prevent cross-subsidization and other forms of anti-competitive behaviour; and

(e) that regulation would permit consumers to use the telephone and cable wires within their homes to obtain services from any combination of suppliers they choose.

[27] Canada's obligations under the WTO Agreement, which was signed on February 15, 1997, have not yet been incorporated in Canada's legislative and regulatory framework.

[28] However, the development of open, international networks, such as the Internet, will make it increasingly difficult to protect the privacy of Canadians. For example, individuals' names, addresses and telephone numbers are now widely available from free directory services on the Internet.

[29] Although the CRTC, and Canadian telecommunications policy generally, are becoming increasingly sympathetic and attuned to the competition policy objectives which underpin the *Competition Act*, significant differences in approach remain. The CRTC is concerned, to a greater extent than the Director, about the fair treatment and protection of competitors, while the Director is concerned about the protection of competition, rather than individual competitors, and is less concerned than the CRTC about the possibility that some competitors will be unable to survive in a fully competitive market.

[30] However, it should be noted that these three areas overlap substantially. For example, the Director makes frequent submissions to the CRTC and other government agencies on competition matters, and the federal government is relying upon the CRTC and the competition law authorities to implement commitments made by Canada in international agreements such as the WTO Agreement.

[31] June 12, 1992.

[32] CRTC 92-12 provided for the interconnection of competing long distance carriers to six of the nine Canadian regional telcos. Interconnection arrangements were entered into with two of the remaining telcos in 1993 and the last telco in 1995.

[33] July 13, 1994.

[34] August 4, 1994.

[35] August 24, 1994.

[36] September 16, 1994.

[37] The CRTC decision to raise the rates for local service became the subject of intense media attention and lobbying. This aspect of the decision was appealed to the federal Cabinet which directed the CRTC to delay the implementation of the local rate increases proposed in CRTC 94-19 and ordered the CRTC to reconsider the cost allocation model used in CRTC 94-19. See Order-in-Council P.C. 1994-2036, December 13, 1994.

[38] To eliminate the longstanding cross-subsidy of local rates by long distance rates.

[39] CRTC 94-19 contemplated the entry of the telcos into the broadcasting business and the entry of the cable television companies into the telecommunications business.

[40] June 8, 1995.

[41] The applicant long distance companies had requested that customers be asked to select a long distance service provider in order to overcome customer inertia due to lack of information.

[42] June 22, 1995.

[43] September 8, 1995.

[44] October 31, 1995.

[45] The CRTC decided that local rate increases of $4.00 a month, implemented in two stages in 1996 and 1997, were required but deferred a decision about a third increase to a future date. The CRTC decision that the telcos reduce their long distance rates by the amount of this decrease was appealed to the federal Cabinet which overturned that aspect of the decision. See Order-in-Council P.C. 1995-2196, December 19, 1995.

[46] February 19, 1995.

[47] December 2, 1996.

[48] January 13, 1997.

[49] The CRTC has raised these issues in Telecom Public Notice CRTC 96-8, *Price Cap Regulation and Related Issues* (March 12, 1996).

[50] The CRTC has raised these issues in Telecom Public Notice CRTC 96-26, *Forbearance From Regulation of Toll Services Provided by Dominant Carriers* (July 24, 1996); and Telecom Public Notice CRTC 96-35, *Stentor Resource Centre Inc. - Forbearance From Regulation of Interexchange Private Line Services* (November 18, 1996).

[51] Bureau of Competition Policy, News Release, "Director of Investigation and Research Will Not Challenge Telus Corporation's Acquisition of Edmonton Telephone Corporation" (February 28, 1995) (reproduced in (1995) 16:1 Can. Comp. Rec. 23).

[52] Competition Bureau, News Release, "Director Announces Results of *Competition Act* Review of Stentor" (February 22, 1996); and Competition Bureau, Backgrounder, "Director Announces Results of *Competition Act* Review of Stentor" (February 22, 1996) (reproduced in (1996) 17:1 Can. Comp. Rec. 10 and 11).

[53] The consent proceeding concerned an alleged practice of anti-competitive acts relating to the sale of national advertising in telephone directories. See Bureau of Competition Policy, News Release, "Director Brings Consent Order Before Competition Tribunal Regarding Yellow Pages Publishers" (September 20, 1994). The contested application was filed on December 22, 1994 and the Tribunal's decision was finally issued on February 26, 1997. This latter case related to the publication and sale of advertising in telephone directories. For analysis of the Yellow Pages case, see (1994-1995) 15:4 Can. Comp. Rec. 8 and *Director of Investigation and Research* v. *Tele-Direct (Publications) Inc. et. al.*, *supra*, this issue at 10.

[54] See, Competition Bureau, Competition Communiqué, "Competition Bureau's Solution in the Interac Paves the Way for Business and Consumer Benefits" (July 19, 1996). For background on the Interac case, see (1995-1996) 16:4 Can. Comp. Rec. 12 and 14; (1996) 17:1 Can. Comp. Rec. 9; and (1996) 17:2 Can. Comp. Rec. 1.

[55] For example, see the Director's submissions of April 13, 1993, January 17, 1994 and February 7, 1994, in the *Regulatory Framework* proceedings leading to CRTC 94-19. The Director is also intervening in the pending proceedings in which the CRTC is to consider whether it should refrain from regulating the telcos' long distance services.

[56] As required for the CRTC to order forbearance under s. 34 of the Telecommunications Act.

[57] For example, see Part III, CRTC Telecom 94-19, *supra*, note 36, respecting the CRTC's test for forbearance.

[58] See NAFTA Article 1302.

[59] NAFTA defines "enhanced or value-added services" as meaning those telecommunications services employing computer processing applications which format or restructure information or involve customer interaction with stored information.

60 The following restrictions terminate effective October 1, 1998:

(i) the Teleglobe Canada monopoly on overseas traffic,

(ii) all restrictions on the foreign ownership and control of international submarine cable landings in Canada, and

(iii) all restrictions on the foreign ownership and control of global mobile satellites providing services to Canadians.

The routing restrictions that require all overseas traffic to be handled by Teleglobe end on December 31, 1999. The following restrictions terminate effective March 1, 2000:

(i) the Telesat monopoly on fixed satellite services,

(ii) prohibitions on the use of foreign satellites to provide services (other than direct-to-home and direct-broadcast satellite services), and

(iii) traffic routing rules for all satellite services.

61 The Canadian offer was set out in two documents, "Canada - Schedule of Specific Commitments" dated February 14, 1997 and the "Reference Paper" dated April 24, 1996 in which the government of Canada had summarized the competition safeguards incorporated in the Canadian regulatory framework for basic telecommunications services. The regulation of essential facilities, prevention of anti-competitive acts, interconnection rights, and the availability of an independent regulatory body are among the commitments made by Canada under the Agreement on Basic Telecommunications.

62 Blocking statutes have been enacted 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 corresponding 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 résumé 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 prepared for the Criminal Antitrust Law and Procedure Workshop of the American Bar Association Section of Antitrust Law, Dallas, Texas, February 23-24, 1995) ("ABA Dallas Paper") at 19. Also, see *Competition Law of Canada* (Juris Publishing Inc., C.S. Goldman and J.D. Bodrug, eds.) at §§5.07 and 13.04(3)(b).

63 See C.S. Goldman, G.P. Cornish & R.F.D. Corley, "International Mergers and the Canadian *Competition Act*", 1992 Fordham Corp. L. Inst. 217; G.N. Addy, Address, International Coordination of Competition Policies, HWWA - Institut für Wirtschaftsborschung-Hamburg (Oct. 9-11, 1991); and Brief of the Government of Canada as Amicus Curiae in Support of Certain Petitioners, dated November 19, 1992, filed in the Supreme Court of the United States in *Hartford Fire Insurance*.

64 A former Director (then in office) 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 to the Canadian Bar Association, National Competition Law Section, Aylmer, Quebec (September 29, 1995) at 17 (reproduced in (1995) 16:3 Can. Comp. Rec. 1). Further, it was recently reported that 22 U.S. grand juries are looking into international antitrust cases. See "U.S. Trust-Busters Increasingly Target International Business", *The Wall Street Journal*, February 5, 1997 at 1.

65 Even though it is not required under the *Competition Act,* the Director has indicated that information which has been voluntarily provided to the Bureau is treated in the same way as information gathered through compulsory processes, which benefits from the confidentiality protections in the *Competition Act*.

66 A prior Director indicated that, with respect to information voluntarily supplied to the Bureau, it would not be supplied to foreign agencies without prior consent from the person who had initially offered such information, and that, if foreign agencies wanted to obtain the information, they would have to invoke compulsory process in order to have the information gathered on their behalf.

67 For a further discussion, see C. Goldman and J. Kissack, "Current Issues in Cross-Border Criminal Investigations: A Canadian Perspective", (1995) *Fordham Corp. L. Inst.* (B. Hawk, ed.) (the "Fordham Paper") (reproduced in (1995-

1996) 16:4 Can. Comp Rec. 81).

[68] This decision held that, before submitting a request to foreign authorities to search and seize a person's records in a foreign jurisdiction, the Canadian authorities must obtain a prior authorization from a Canadian court.

[69] Article II(1). For a more detailed discussion of the MLAT, see the Fordham Paper, *supra*, note 67. Also see J.F. Rill and C.S. Goldman, "Confidentiality in the Era of Increased Co-operation between Antitrust Authorities" (Paper prepared for the Project on Competition Policy in a Global Economy, June 1995) (the "Rill/Goldman Paper").

[70] Specifically, the former Director recently remarked that his "expectation is that the competition issues in the telecommunications industry will be more likely to involve the civil rather than the criminal provisions of the Act". George Addy, "Notes from An Address to the Institute for International Research Telecommunications Conference" (March 29, 1994) at 6.

[71] Article III(3)(d) of the 1995 Agreement. The obligations to provide such notice are limited by the extent to which notification would be "compatible with [the other] Party's laws, investment policies and other important interests".

[72] See Article V(5)(ix). 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.

[73] Article III(3).

[74] Article V(3).

[75] We are aware of at least one case where, in the context of a cross-border investigation, 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. Thus, it appears possible that information provided to the Bureau by the U.S. could be shown to industry participants in Canada for the purpose of assisting the Bureau investigation.

[76] In this instance, affidavits and other documents that were obtained voluntarily from a U.S. firm seeking leniency in the U.S. were attached to an application for a search warrant in Canada. These documents were obtained under a court order after a Canadian firm that was subjected to a search argued that it was entitled to such information under the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, enacted as Schedule B of the *Canada Act 1982* (U.K.), c. 11 (1982) (the Charter). See, *Re United States Pipe and Foundry Co. et al.* (1994), 58 C.P.R. (3d) 463 (Ontario Court (General Division)).

[77] The 1995 Agreement specifically contemplates the possibility of a party invoking privilege to resist disclosure. See Article X(2) of the 1995 Agreement.

[78] For a discussion of these provisions, see the Rill/Goldman Paper, *supra*, note 69.

[79] The first exception relates to disclosure of information used to support an application for a search warrant in Canada, discussed above.

The second exception relates to the disclosure obligations of the government in criminal cases under the Supreme Court decision in *Stinchcombe*, which may arise by virtue of s. 7 of the Charter. Specifically, after the laying of charges, it is possible that information obtained from the U.S. would be required to be disclosed to an accused. To our knowledge, there is no obligation preventing the person receiving such information from using it or otherwise disclosing it.

[80] We understand that, in the fax paper case, a District Court in Wisconsin ordered the U.S. DOJ to ask the Canadian and Japanese authorities to voluntarily review their respective files for any exculpatory material, and, if any was discovered, to make it available to the United States, which, in turn, could disclose it to the defendants. The Court remarked "there was no harm in asking" (*U.S.A.* v. *Appleton Papers Inc., et al.*, Case No. 96-CR-83, July 8, 1996).

[81] In the plastic dinnerware case in 1994, a Canadian officer of one of the companies pleaded guilty and was imprisoned in the U.S. for a violation of U.S. antitrust law. See also, the case of Thomas Liquidations Inc., when the Canada/U.S. Extradition Treaty was used to cause an American accused to attend a Canadian criminal court to answer charges under the *Competition Act*. See the 1995 Annual Report of the Director of Investigation and Research, at 28.

82 There is a significant amount of uncertainty in this new and evolving area. There are issues, yet to be tested, before a Canadian court, pertaining to whether the Bureau officers may legally search and copy computer data stored outside Canada which is accessible to computers in Canada. While the Act allows for disputes to be brought before a court, there are two problems:

- first, the Bureau officers may not wait while a challenge is mounted, and may continue to search the computer system and, if necessary, settle or argue any legal disputes at a later time; and
- second, a firm's computer system may operate in a manner such that the Bureau officers are not even aware that they are viewing (and copying) data stored on computers located outside Canada.

It is our understanding that the Bureau is technologically more advanced than the U.S. DOJ and FTC in computer search techniques and document imaging, and has provided technical assistance in these areas to the U.S. authorities.

83 For example, we understand that the scope of the solicitor and client privilege is not as broad in Japan or Europe as it is in Canada.

CANADIAN COMPETITION RECORD

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