CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

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PROPOSED AMENDMENTS TO THE *COMPETITION ACT*: BILL C-20

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Milestones

June 28, 1995

The Director of the Competition Bureau releases a discussion paper inviting comments on the approach that should be taken in amending the *Competition Act*. A Consultative Panel is established to review responses to the discussion paper, and to advise on proposals and alternatives.

April 10, 1996

The Consultative Panel releases its report, outlining recommendations to the Director.

November 7, 1996

Bill C-67 receives first reading in Parliament.

Spring 1997

A package of amendments, introduced as Bill C-67, dies on the Order Paper in Parliament.

Fall 1997

The proposed amendment to allow judicially authorized interception of private communications - without consent is discussed with selected representatives of the business community, consumer and seniors groups, members of the Competition Bar and direct marketers.

November 20, 1997

The Bill is reintroduced as Bill C-20, with some modifications.

March 17, 1998

Bill C-20 receives Second Reading in Parliament. It is referred to the Standing Committee on Industry.

Proposed Amendments

Amendments contained in Bill C-20 are designed to modernize the *Competition Act* so that it is in step with emerging business trends and current enforcement requirements. The amendments will also help to improve enforcement efficiency and clarify the law.

Major amendments to the *Competition Act* will:

- Help to crack down on the recent proliferation of deceptive telemarketing practices that prey upon consumers and cast a shadow over Canada's legitimate telemarketing industry.
- Allow judicially authorized interception of private communications in the gathering of tangible evidence where serious cases of deceptive telemarketing, bid-rigging, conspiracy to fix prices or share markets may exist.
- Speed up and improve the process for resolving misleading advertising and deceptive marketing practices.
- Revise and clarify the law on price claims at the retail level.
- Improve the administration of the merger prenotification process, and reduce the regulatory burden for business.

Deceptive Telemarketing

In Canada's new economy, tens of thousands of Canadians are employed in legitimate telemarketing activities. Increasingly, however, illegal telemarketing activities are casting a shadow over this important marketing tool.

Total annual losses borne by Canadian consumers from all forms of telemarketing scams is estimated at $4 billion. This includes prize and recovery pitches, loan scams, investment, fund-raising and lottery schemes.

Amendments relating to telemarketing contain the following features:

- A provision creating a new criminal offence will apply when illicit interactive telephone communications are used for promoting the supply of a product or a business interest. The maximum penalty would be five years in jail, or a fine at the discretion of the courts or both.
- Telemarketers will be required to disclose certain information during telephone calls with consumers.
- Deceptive practices, such as demanding payment prior to delivery of products which are offered at prices grossly in excess of their fair market value, will be prohibited.
- Special provisions will expand the responsibility of corporations, their officers and directors, for ensuring compliance with the law.
- It will be easier for the courts to issue interim injunctions to halt operations of suspected fraudulent telemarketers.

Judicially Authorized Interception of Private Communications Without Consent

While public education and industry initiatives have helped to address the proliferation of fraudulent telemarketing activities, the anonymity of the telephone lines impedes the collection of tangible evidence. The amendments propose the use of judicially authorized interception, without consent, of private communications in suspected deceptive telemarketing, price fixing and bid-rigging cases. This investigative tool is sometimes referred to as wiretapping.

Misleading Advertising and Deceptive Marketing Practices

Misleading advertising and deceptive marketing practices can have serious economic consequences, for consumers as well as for competitors engaging in honest promotional efforts.

Studies over the past 20 years have shown that criminal sanctions may not be the only, or most efficient, method of reducing the incidence of misleading advertising. The inability to stop the offensive advertising until guilt has been proven through the court process is expensive, cumbersome and time-consuming.

The addition of a civil option will change the focus from punishment to quick and efficient compliance.

- A criminal sanction will remain in place to deal with the most serious misleading advertising cases.
- A new civil regime with a lower standard of proof will allow most misleading advertising and deceptive marketing practices to be settled more expeditiously through civil remedies, rather than criminal prosecution.
- Provisions will also allow, in many cases, for misleading advertising messages to be corrected more rapidly.

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 for determining under what circumstances ordinary price claims may be made. The amendments in Bill C-20 propose the following:

- Misleading regular price representations will be reviewable matters under the Act.
- The legitimacy of regular price claims will be determined after subjecting them to the following 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.

- In the event a regular price claim fails to meet either test, yet is shown by the advertiser not to be misleading, the court will not make an order.

Merger Prenotification Process

Effective merger review helps to maintain a competitive playing field: an environment where businesses and consumers can count on a wide selection of products at fair market prices. Merger prenotification starts the process for assessing the impact of large mergers in the marketplace by the Competition Bureau.

To address a number of issues and ambiguities, and to ensure the *Competition Act* is in step with current merger trends, the following amendments are proposed:

- The need to make merger prenotification information that companies give to the Competition Bureau more relevant.

- The Competition Bureau be given greater flexibility to shorten waiting periods for the completion of merger transactions, when warranted.

- Easier access for the Competition Bureau to interim orders from the Competition Tribunal. In the event concerns arise over a proposed merger, this will permit the Bureau's Director - with the permission of the Tribunal - to delay closing the transaction.

HUDSON'S BAY COMPANY FINED $600,000 UNDER MISLEADING ADVERTISING PROVISIONS OF THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on May 4, 1998, and is reproduced with permission.

The Competition Bureau announced today that Hudson's Bay Company ("HBC"), carrying on business as 'The Bay', pleaded guilty to one offence contrary to the misleading advertising provisions of the *Competition Act*.

A fine of $600,000 was imposed by the Ontario Court (General Division). The fine is the second highest ever imposed for a conviction of a misleading advertising offence under the *Competition Act*.

The charges relate to The Bay's marketing practices regarding a variety of brands and sizes of bicycles during the period February 1, 1989 to March 31, 1991. During this time, The Bay misled Canadians by representing that its bicycles would be offered at a sale price for a certain limited period of time when in fact the sale continued for a much longer period of time. The misrepresentations were in the form of flyers, newspaper advertisements and in-store displays.

"Consumers can be easily misled by sales promotions that create a general impression of urgency, especially when these relate to items as commonly purchased as bicycles," said Konrad von Finckenstein, Director of Investigation and Research. "The Competition Bureau will use every opportunity to ensure that big or small companies provide consumers with accurate information."

HBC, which operates department stores under the banners 'The Bay', 'Zellers', 'Kmart', and 'Fields', is Canada's largest department store retailer.

COMPETITION BUREAU RELEASES COMPUTER SOFTWARE PAMPHLET

The following is a News Release issued by the Competition Bureau on May 14, 1998, and is reproduced with permission.

The Competition Bureau announced today that it is releasing a pamphlet which advises consumers on how to be smart shoppers when they purchase computer software. The pamphlet is entitled "Be a Smart Shopper Know Your Software."

The pamphlet encourages consumers to be aware of claims and offers prior to buying any computer software. Shoppers should also ensure that the software they plan to buy will function using the minimum system requirement shown on the packaging, including all pictures and graphics. They should question the retailer about the meaning of any promotional offers, whether technical support includes "free" calls and know whether a separate licence for multi-user games is required. It is important to ask about the return policy. Other tips are also available.

The pamphlet was produced as a result of a survey conducted on the claims of various types and applications of computer software. The survey results were sent to members of the software industry and through the Industry Canada Strategis site. The industry has the responsibility to ensure consumers are provided with sufficient and accurate information.

TELEMARKETING OPERATION FINED RECORD $250,000 UNDER MISLEADING ADVERTISING PROVISIONS OF THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on May 25, 1998, and is reproduced with permission.

The Competition Bureau announced today that 841299 Ontario Limited, carrying on business as "The Office Supply Centre", and company president, Mr. Richard Mellon, pleaded guilty to one offence contrary to the misleading advertising provisions of the *Competition Act*.

A fine of $200,000 against The Office Supply Centre and $50,000 against Mr. Mellon were imposed by Madam Justice Molloy of the Ontario Court (General Division).

The fine is the highest ever imposed against an individual telemarketer for a conviction of a misleading advertising offence under the *Competition Act*.

"Deceptive telemarketing is an increasingly worrisome problem," said Konrad von Finckenstein, Director of Investigation and Research. "We will prosecute the operators of these scams with the full rigour of the law. This case is particularly odious as the targetted victims included churches and charitable organizations."

The charges relate to telemarketing practices for photocopier toner during the period July 1, 1989 to February 29, 1996. During this time, The Office

Supply Centre sold toner to large and small businesses, as well as non-profit organizations, charities and churches. Telemarketers, under the guise of doing a market survey, first contacted victims and obtained from them the make and model numbers of their photocopiers as well as the name of the person responsible for ordering copier supplies. The information was then "plugged" into a standard script which was designed to leave the impression that the telemarketers, in a follow-up call, were from the regular supplier of toner. The telemarketers then would advise that a price increase was coming and that customers should order additional toner at the old price. The actual price was not mentioned. When the orders were shipped, the invoice prices charged by The Office Supply Centre were higher than those of the regular supplier.

In addition, Madam Molloy imposed a Prohibition Order to prevent a repetition of the anti-competitive conduct.

$16 MILLION IN FINES PAID BY ARCHER DANIELS MIDLAND FOR VIOLATIONS OF THE *COMPETITION ACT* IN THE FOOD AND FEED ADDITIVE INDUSTRIES

The following is a News Release issued by the Competition Bureau on May 27, 1998, and is reproduced with permission.

The Competition Bureau announced today that Archer Daniels Midland Company, a United States corporation, pleaded guilty to having participated in price-fixing and market sharing conspiracies and will pay fines totalling $16 million.

This is the largest fine ever imposed under the *Competition Act.*

The offences relate to the participation of the firm in an international conspiracy to fix prices and allocate market shares in the lysine and citric acid markets worldwide. Archer Daniels Midland was fined $9 million for price fixing and $5 million for market sharing in the lysine industry. In the citric acid conspiracy, the company was fined $2 million. The company has also agreed to cooperate with the Bureau in ongoing investigations into these and other food and feed additives.

"The penalty levied today sends a message to business that conspiracy offences will not be tolerated in Canada, nor will Canada be a safe haven for those who would try to exploit Canadian consumers and business," said Konrad von Finckenstein, Q.C., Director of Investigation and Research. "Competition law agencies around the world are increasingly cooperating to combat global cartels. This type of criminal behaviour is unacceptable and perpetrators cannot expect to escape sanction in Canada by carrying out their illegal conduct outside the country."

The charges relate to the period from 1992 to 1995 and are the result of an extensive criminal investigation conducted by the Competition Bureau into a scheme designed to inflate prices of lysine and citric acid and divide world markets, including Canada.

In addition, the Federal Court of Canada imposed a prohibition order on the company under the *Competition Act* to ensure that the company does not repeat these offences.

Lysine is an amino acid feed additive used in hog and poultry feeds worldwide. Annual sales of lysine total $960 million worldwide, with Canadian sales of all producers reaching approximately $89 million over the period of the conspiracy. Archer Daniels Midland sold $48 million worth of lysine during the period.

Citric acid is an ingredient in a variety of consumer products. It is used in the food and beverage industry as a flavour enhancer and preservative to prevent food spoilage and to reduce the risks of food poisoning. It has recently found application in the manufacture of environmentally friendly detergents as a replacement for phosphates. Worldwide sales total some $1.7 billion. Total Canadian sales are estimated at some $104 million during the period in question, with Archer Daniels Midland accounting for $17 million of that amount. It should be noted that the vast majority of citric acid is consumed by Canadians as an ingredient in processed foods and beverages such as tinned vegetables, fruit juices and soft drinks.

As a result of these conspiracies, feed companies and farmers paid millions more to buy lysine. Similarly manufacturers of processed foods, soft drinks and detergents paid millions more for citric acid. These additional costs ultimately caused Canadian consumers to pay more for chicken, pork, soft drinks, processed foods and other products.

CANADA - EU COMPETITION POLICY AGREEMENT INITIALED

The following is a News Release issued by the Competition Bureau on June 4, 1998, and is reproduced with permission.

The Competition Bureau announced today that the text of an agreement between the European Union and the Government of Canada regarding the application of their competition laws has been initialed by both the Bureau and the European Commission. The Commission also adopted a proposal for a joint decision with the Council of Ministers of the European Union to conclude the proposed agreement.

These are significant steps towards the signing of the proposed agreement which will provide for a framework for closer relations between Canada and the E.U. regarding the enforcement of their competition laws. Expanded cooperation and coordination will involve matters affecting their individual and mutual interests and will be consistent with existing laws protecting the confidentiality of information.

Along the lines of the 1995 Canada - U.S. agreement, the proposed agreement with the E.U. will provide tools to improve the enforcement of the *Competition Act* in relation to cross-border anti-competitive activities which can impair the benefits of increased trade between Canada and the E.U.

The agreement will enter into force upon signature following its approval by Canada and by the Council after consultation of the European Parliament.

Signature is likely to take place early in 1999. Until then, the Competition Bureau will continue to cooperate with the European Commission under the auspices of the OECD framework.

MEDI-MAN REHABILITATION PRODUCTS INC. AND SENIOR OFFICIALS FINED $200,000 UNDER MISLEADING ADVERTISING PROVISIONS OF THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on June 12, 1998, and is reproduced with permission.

The Competition Bureau announced today that Medi-Man Rehabilitation Products Inc. and senior officials pleaded guilty to offences contrary to the misleading advertising provisions of the *Competition Act*. In accordance with the plea agreement a joint submission was made where the company and officials were fined a total of $200,000.

Medi-Man is a Mississauga-based medical products manufacturer and distributor. The charges relate to Medi-Man's marketing practices regarding two of its patient lifts, at the early stages of the development of these products, during the period January 1988 to January 1994. During this period of time, two of Medi-Man's patient lifts were marketed as having been "Made in Canada". Medi-Man imported the two lifts unassembled, and modified them in Canada. The patient lifts were not, however, manufactured in Canada.

"The country of origin is significant for many consumer products," said Francine Matte, Q.C., Acting Director of Investigation and Research. "The Competition Bureau has, and will continue to prosecute anyone who misleads consumers in the marketing of its products."

Medi-Man and its senior management co-operated with the Competition Bureau to address and resolve this issue which related to company practices solely during the time period noted above.

DECISION BY PETRO-CANADA AND ULTRAMAR TO ABANDON MERGER PLANS WILL PRESERVE COMPETITION FOR INDEPENDENT GAS RETAILERS AND CONSUMERS

The following is a News Release issued by the Competition Bureau on June 22, 1998, and is reproduced with permission.

The Competition Bureau has learned that Petro-Canada and Ultramar Diamond Shamrock ("Ultramar") have decided to discontinue their joint venture arrangement following discussions with the Bureau.

After an intensive five-month investigation, and several discussions with both companies, the Director of Investigation and Research, Konrad von Finckenstein, had informed the companies of his serious concerns that the transaction would likely cause a substantial lessening or prevention of competition in wholesale and retail petroleum markets in Quebec and Atlantic Canada.

As a result, the two companies have chosen today to abandon their proposed merger.

"In joint ventures of this size, there is often room to restructure a deal to alleviate competition concerns," added Mr. von Finckenstein. "However, in this instance no workable alternatives could be identified."

In its investigation, the Competition Bureau's team of 20 lawyers, economists, accountants, industry specialists and experienced merger investigators found that the proposed merger would have led to a substantial lessening or prevention of competition in the Quebec and Atlantic Canada markets, where the two companies currently compete at both the wholesale and retail levels.

"The Petro-Canada and Ultramar decision will be good for independent gasoline retailers and consumers," noted Mr. von Finckenstein. "Petro-Canada and Ultramar are profitable in both Quebec and Atlantic Canada, so we see no reason why they cannot remain in those markets as vigorous, efficient and effective competitors in the supply of refined petroleum products."

In its investigation, Competition Bureau staff interviewed and obtained documents from the parties, independent gas retailers, importers of crude oil and refined petroleum products, other refiners and wholesalers, industry associations and provincial authorities from across the country.

Throughout the January to May investigation period, the lines of communication between Competition Bureau investigators and legal counsel for the two companies remained open. As a result, both Petro-Canada and Ultramar were aware of the Bureau's preliminary concerns at a very early stage and were encouraged to respond at every juncture.

Key concerns raised by Bureau investigators related to the Quebec and Atlantic Canada markets, where the companies currently compete at both the wholesale and retail levels, include:

- The removal of a vigorous and effective competitor like Ultramar at both the wholesale and retail levels for gasoline and other oil-based products.

- Increased levels of concentration for gasoline and distillate products, and the likelihood that prices could increase.

- The fact that costs at the wholesale level inevitably trickle down to consumers over the longer term.

"The mandate of the Competition Bureau is to maintain competitive markets," explained Mr. von Finckenstein. "In the final analysis we must be sure that consumers across the country have access to as wide a range of products as possible at the best possible prices.

SIXTH ANNUAL CANADIAN BAR ASSOCIATION CONFERENCE ON COMPETITION LAW: COMPLIANCE AND ENFORCEMENT ON AGENDA SEPTEMBER 24-25, 1998 – CHATEAU LAURIER HOTEL, OTTAWA

This year's CBA conference on competition law has moved to a full two-day format, commencing with a review of the year's most significant competition-related developments. Another improvement is that the panels will be limited to no more than four speakers, to provide sufficient time for presenters to develop their topics and allow discussion and debate. Another important change is a roundtable format for Section committee meetings to encourage greater member participation and allow adequate time for substantive presentations. It will also afford conference delegates a chance to catch up on new developments in their particular area of interest.

The conference opens with a "Year in Review" plenary. Three panelists will present papers summarizing significant civil, criminal and administrative/legislative developments in the past year. The panel will be chaired by John Lowman (Imperial Oil) and will include Russell Lusk (Ladner Downs), John Rook (Osler Hoskin) and Lawson Hunter (Stikeman Elliott).

Following a buffet lunch, the afternoon will feature a break-out session with a choice of two panels:

- **Investigation procedures, enforcement and compliance:** The first panel features the recently updated compliance film "The Price" and a discussion of such issues as substantive differences between Canadian and American law and investigation of employee criminal misconduct. This will be chaired by Jo-Anne Strekaf (Bennett Jones) and composed of Kent Thomson (Tory Tory), Peter Franklyn (Osler Hoskin) and Harry Chandler (Competition Bureau).

- **Leveraging, unilateral effects and differentiated products analysis:** Moderated by Stan Wong (Davis & Co) with Margaret Sanderson (Competition Bureau), Steven Salop (Georgetown Law School/CRA Consultants) and Neil Campbell (McMillan Binch), this panel will examine the most recent legal and economic thinking on this issue.

Day one concludes with the committee roundtables. Conference attendees will have seven sessions from which to choose, including bank mergers (co-sponsored by the Economics & Law and the Mergers committees), wiretapping (co-sponsored by the Criminal Matters and the Enforcement Practices & Procedures committees), misleading advertising (sponsored by the Marketing Practices committee) and the *Competition Act* amendments (sponsored by the Legislation and Competition Policy committee).

Day two opens with a plenary session on private enforcement actions. James Musgrove (Lang Michener) will lead panelists Don Houston (Kelly Affleck), Glenn Hainey (Smith Lyons) and Robyn Bell (Bennett Jones) in a discussion of issues in civil actions following a criminal prosecution and types of claims and liabilities which defendants could face in such actions.

CANADIAN COMPETITION RECORD

A break-out session follows, comprised of two panels:

- **Merger amendments** will examine the implications of the proposed amendments to the *Competition Act* and the Notifiable Transaction Regulations. Speakers include Paul Crampton (Davies Ward) as moderator and Ray Pierce (Competition Bureau), Richard Epstein (Byers Casgrain) and David Wolinsky (Bell Canada).

- **Marketing** will examine recent changes to Canadian law, focusing on such issues as criminal versus civil liability and the intersection of marketing law and the anticipated new provisions of the *Competition Act*. Panelists include Yves Beriault (McCarthy Tetrault) as moderator, Paul Collins (Stikeman Elliott), Rob Kwinter (Blake Cassels) and Tom Wright (Competition Bureau).

The luncheon address will be provided by Konrad von Finckenstein, Director of the Competition Bureau, followed by a two panel break-out session:

- **An examination of the interface between international trade and competition law** features moderator Jack Quinn (Blake Cassels), who will lead a panel comprised of Milos Barutciski (Davies Ward), Patricia Smith (Competition Bureau) and Harvey Applebaum (Covington & Burling). Topics include an update on the status of the WTO Working Group on trade and competition, as well as an assessment of the implications of the Boeing merger on the use of trade measures in competition cases, and of the Kodak/Fuji case on competition issues raised at the WTO.

- **The use of experts and expert evidence** utilizes a hypothetical fact situation to highlight the practical and theoretical issues which arise when using experts. The panel is moderated by Randy Hughes (Fraser & Beatty) and rounded out by Frank Roseman (former Tribunal member), Bill Miller (Department of Justice) and Don McFetridge (Carleton University).

- **Competition policy and innovation issues** are explored in the conference's final panel, lead by Warren Grover (Blake Cassels) and featuring Bernd Langeheine (Trade Counsellor, European Commission), Susan DeSanti (Director, Policy and Planning, Federal Trade Commission) and Gwillym Allen (Acting Assistant Deputy Director of Investigation and Research, Competition Bureau). Topics include international cooperation agreements and the primary challenges faced by enforcement authorities.

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 (1-800-267-8860 toll free); or fax (613) 237-0185; or e-mail caroler@cba.org (Carole Roussel, CLE Programme Coordinator).

T.B.