# COMMENT & ANALYSIS

***This article is dedicated to the memory of Jim Bocking, Chief of the Merger Branch of the Competition Bureau, who died of a heart attack in January 1999. He was truly a scholar and an invaluable colleague.***

## STATISTICS ON CANADIAN MERGERS EXAMINED BY THE COMPETITION BUREAU (1986-1998)

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Most Canadians have become familiar with the term mergers, a word that appears daily in every major newspaper. As one newspaper recently noted it was a year gripped by merger fever.[1] Over the last few months it appeared in connection with proposed bank mergers where the benefits of such mergers to consumers were being vigorously debated. This note is also about mergers, however its purpose is less controversial. It is confined to presenting the statistics on mergers examined by the Competition Bureau.

The paper is organized as follows. The first section indicates the trend in mergers reviewed by the Competition Bureau over the period 1986-1998; the second section examines the merger activity by major sector; the third section reviews the merger activity in the regulated sectors in greater detail; and the final section briefly indicates the statistics on the processes involved in examining the above mergers.

Before proceeding with the above review, an explanation about the statistical information will be provided. The data for this article has been complied from the Merger Register and is made available for the first time by year and sector. This is shown in detail in Table 7. The sectoral data corresponds to a large extent to the major divisions or parts thereof published in the Standard Industrial Classification.[2]

### Mergers Examined by the Competition Bureau (1986-1998)

In 1986, the *Competition Act* with new provisions for dealing with mergers and notifiable transactions came into force. Under the latter provisions, the Act requires prenotification to the Director of Investigation and Research of all merger proposals involving companies who, together with their affiliates, have combined revenues or assets of more than $400 million and when the value of the assets involved in the transaction, or revenues from those assets, exceed the threshold of $35 million. However in the case of corporate amalgamation, the latter threshold is $60 million. Since the coming into force of these sections, the

Competition Bureau examined 2,493 mergers[3] over the period 1986-1998, and 858 notifiable transactions over the period 1987-1997.

The above mergers are shown on a yearly basis (i.e., fiscal basis) in Table 1. On a yearly basis, the average number of mergers examined is approximately 208. Breaking the ten years into three periods illustrates the trend in merger activity. During the period 1986-1989, mergers rose steadily from 38 to 221, averaging 147 or totaling 590. Some of the major reasons for the increase were the introduction of the new provisions in mid-1986, businesses were beginning to gain familiarity with the requirements of the new provisions under the revised Act, and the overall merger activity in the economy increased. Over the period 1990-1994, the number of mergers remained roughly constant averaging 195 or totaling 973 over the five year period. In the final period 1995-1998, the number of mergers rose significantly, averaging 310. This is particularly true of the final year (i.e., 1997-1998) where the mergers examined peaked at 390. This can be partly explained by the overall increase in merger activity in the economy, the restructuring that was occurring in some major sectors, and the general upswing in the economy. The trend in notifiable transactions is similar to that of mergers.

TABLE 1 - Mergers and Notifiable Transactions Examined

| Section | 86/87 | 87/88 | 88/89 | 89/90 | 90/91 | 91/92 | 92/93 | 93/94 | 94/95 | 95/96 | 96/97 | 97/98 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Mergers Examined* | 38 | 148 | 183 | 221 | 193 | 198 | 202 | 190 | 190 | 227 | 313 | 390 |
| Notifiable Transactions* | | 65 | 92 | 109 | 75 | 76 | 62 | 65 | 74 | 100 | 140 | |

Source: * *Annual Reports of the Director of Investigation and Research.*

**Mergers Examined in Major Sectors (1986-1998)**

The statistics provided in the previous section have been classified by major sectors. For the entire period, most of the mergers occurred in the manufacturing sector accounting for 507, followed by the financial sector accounting for 490. In addition, the resource sector accounted for 276, the agriculture and agri-food sector accounted for 227, the service sector accounted for 208, the real estate sector accounted for 141, the forestry sector accounted for 124, the transportation sector accounted for 100, the retail trade sector accounted for 92, the telecom sector accounted for 85 and the mining sector accounted for 73. This is shown in Table 7 in the last column for these sectors and others, together with the percentage statistics on a yearly basis. This latter information is also shown by percentage in Table 2.

TABLE 2 - Percent of Mergers by Major Sector Recorded in the Merger Register (1986-1998)

| Trans-portation | Tele-com | Fin-ance | Res-ources | Agri Agri-Food | Ser-vice | Forest | Min-ing | Con-stru-tion | Stor-age | Fish-ing | Manu-fact-uring | Retail Trade | Whole Sale Trade | Real Estate | Health | NES |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 4.0 | 3.4 | 19.6 | 11.1 | 9.1 | 8.3 | 5.0 | 2.9 | 0.9 | 0.3 | .08 | 20.3 | 3.7 | 2.1 | 5.6 | 0.8 | 2.6 |

When reviewed annually, the statistics over the entire period indicate that in the manufacturing sector, the mergers reached a peak in 1989 and have steadily declined relatively since then. This is also true for the wholesale trade sector. In some of the other sectors the trend appears quite different. For example, in the financial sector, the resource sector, and the real estate sector mergers have peaked in the last period (i.e., 1996-1998). Thus the total conceals how the composition is changing. The regulated sectors will be examined in greater detail in the next section. Before concluding this section, an explanation will be provided on what industries are contained in these major groups.

The Agricultural sector groups together industries classified under agricultural industries, services incidental to agriculture, food, beverage and tobacco product industries. The Manufacturing sector consists of industries under rubber, plastics, clothing, leather allied, primary textile, textile products, clothing, printing, publishing, primary metal, fabricated metal, transportation equipment, electrical & electronic, non-metallic mineral, chemical, chemical products industries, and other manufacturing industries. Forestry groups together industries under logging and forestry services industries, wood, furniture, fixtures, paper and allied products industries. Resources groups industries under crude petroleum, natural gas industries, service related to mineral extraction, refined petroleum, coal product industries, other utility industries, and wholesale of petroleum products. The Financial sector groups together industries classified under deposit accepting intermediary industries, consumer and financial intermediary industries, investment intermediary industries, insurance industries, and other financial intermediary industries. The Real Estate sector contains industries classified under real estate operators, insurance agents, and insurance and real estate agents industries. Finally, the Service sector contains industries classified under business service, federal/provincial and territorial/ local/ international and ex-territorial government services, educational, accommodation, food and beverage, person and household, membership organization service industries and other service industries.[4]

## Mergers Examined in the Regulated Sectors (1986-1998)

Mergers in the regulated sectors of transportation, telecommunications, finance, resources, agriculture and agri-food, and services are shown in Table 3.

TABLE 3 - Mergers by Major Regulated Sector Recorded in the Merger Register (1986-1998)

| Sector | 86/87 | 87/88 | 88/89 | 89/90 | 90/91 | 91/92 | 92/93 | 93/94 | 94/95 | 95/96 | 96/97 | 97/98 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Trans-portation | 6 | 7 | 7 | 4 | 12 | 5 | 13 | 6 | 12 | 4 | 12 | 12 | 100 |
| Telecom | 1 | 3 | 12 | 5 | 4 | 7 | 7 | 4 | 6 | 10 | 8 | 18 | 85 |
| Financial | 2 | 14 | 21 | 21 | 21 | 28 | 43 | 38 | 49 | 54 | 91 | 108 | 490 |
| Resources | 3 | 14 | 20 | 21 | 19 | 21 | 15 | 28 | 18 | 24 | 42 | 51 | 276 |
| Agri-Agri food | 7 | 29 | 20 | 20 | 22 | 24 | 15 | 8 | 13 | 20 | 22 | 27 | 227 |
| Service | 4 | 14 | 9 | 20 | 16 | 22 | 15 | 23 | 15 | 15 | 31 | 24 | 208 |

# CANADIAN COMPETITION RECORD

The numbers reveal that over the period 1986-1998, mergers in transportation and telecommunications have been roughly stable. In other words, mergers in transportation have not risen, though in some years it rises and falls successively. However, in telecommunications it has averaged steadily around seven, with an exception of the 1997-1998 period where it has increased considerably. In the other regulated sectors, such as the financial, the resource and the service sectors, mergers have increased in absolute terms over the period, particularly since 1991. The increase in mergers is more pronounced in the financial sector. In the agriculture and agri-food sector, the mergers examined peaked in 1987 in relative terms, thereafter it steadily declined until 1993, and from then on it has increased in absolute terms till 1998.

Since the increasing trend of mergers in the financial sector is particularly noticeable, a further examination of it may be useful. The financial sector collates mergers examined in the following groups: 1) SIC 70 Deposit Accepting Intermediary Industries (i.e., banks, trust companies, deposit accepting mortgage companies, credit unions and other deposit accepting intermediaries); 2) SIC 71 Consumer & Financial Intermediary Industries (i.e., consumer loan companies, and business financing companies); 3) SIC 72 Investment Intermediary Industries (i.e., Portfolio Investment Intermediaries, Mortgage companies, and other investment intermediaries); 4) SIC 73 Insurance industries (i.e., life insurers, deposit insurers, and property and casualty insurers); and 5) SIC 74 Other Financial Intermediary Industries (i.e., security brokers and dealers, mortgage brokers, security and commodity exchanges, and other financial intermediaries). These subsectors are shown in Table 4 below by percent.

TABLE 4 - Percent of Mergers Examined in the Financial Sub-Sectors

| Financial Sub-sectors | 86/87 | 87/88 | 88/89 | 89/90 | 90/91 | 91/92 | 92/93 | 93/94 | 94/95 | 95/96 | 96/97 | 97/98 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| SIC 70 | 100 | 21.4 | 38.1 | 33.3 | 28.6 | 46.4 | 9.3 | 5.3 | 8.2 | 11.1 | 11.0 | 10.1 |
| SIC 71 | | 7.1 | 23.8 | 9.5 | 4.8 | 7.1 | 0 | 2.6 | 2.0 | 3.7 | 4.4 | 15.7 |
| SIC 72 | | 7.1 | 0 | 19.0 | 23.8 | 3.6 | 0 | 0 | 0 | 0 | 2.2 | 2.8 |
| SIC 73 | | 7.1 | 28.6 | 33.3 | 23.8 | 21.4 | 18.6 | 21.0 | 30.6 | 16.7 | 19.8 | 13.0 |
| SIC 74 | | 57.1 | 9.5 | 4.8 | 19.0 | 21.4 | 72.11 | 71.0 | 59.2 | 68.5 | 62.6 | 58.3 |

Source: * *Annual Reports of the Director and Investigation and Research.*

The final SIC 74 group accounts for most of the mergers in the financial sector since 1992, accounting for 64 percent of all mergers between 1992-1998. Besides this group, a number of mergers were examined in the insurance industries group which accounted for 19 percent of all mergers in the financial sector between 1992-1996. In the deposit accepting intermediary industries, the mergers examined peaked in 1991-92. After this period however, the mergers examined in this group (i.e., 1) and in groups 2 and 3 were relatively few, though they have increased in 1997-1998. The above pattern largely reflects the acquisition by banks of trust companies in the early nineties, the rationalization in the insurance industry and the current rationalization occurring in the brokerage and securities industry.

The increasing number of mergers in sectors that are being deregulated is expected as firms attempt to introduce economies to meet the challenges of domestic competition and in response to international competition.

**Processes involved in the Mergers Examined (1986-1998)**

Statistics on the three major processes — Advance Ruling Certificates (ARCs), Advisory Opinions (AOs), and applications to the Competition Tribunal (CT) — involved in examining mergers are shown in Table 5. Over the 1986-1997 period, ARCs have steadily arisen from 3 to 188 (except in the years 1990-1991 and 1994-1995)[5] reaching a total of 932. On the other hand, AOs have decreased over the entire period, steadily declining from 1992-1993. Over the entire period, 152 AOs were given. Even fewer applications to the Competition Tribunal were made. Over the entire period (1986-1998), 18 applications were made to the Competition Tribunal or less than 1 percent of the mergers examined. The 18 applications that were made involved 15 cases as in three cases two applications were made (see Table 6).

TABLE 5 - Mergers Examined, Advance Ruling Certificates Issued, Advisory Opinions Issued, Applications to the Tribunal

| Section | 86/87 | 87/88 | 88/89 | 89/90 | 90/91 | 91/92 | 92/93 | 93/94 | 94/95 | 95/96 | 96/97 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Mergers Examined* | 40 | 146 | 191 | 219 | 193 | 195 | 204 | 192 | 193 | 228 | 319 | 2120 |
| Advance Ruling Certificates Issued* | 3 | 26 | 59 | 72 | 70 | 72 | 101 | 114 | 106 | 121 | 188 | 932 |
| Advisory Opinions Issued* | 8 | 21 | 20 | 17 | 17 | 9 | 27 | 10 | 11 | 10 | 2 | 152 |
| Applications to the Tribunal** | 1 | 2 | 2 | 2 | 2 | 0 | 1 | 0 | 1 | 1 | 3 | 15° |

Source: * *Annual Reports of the Director and Investigation and Research.* ** Competition Tribunal (Internet http:/ /www.ct-tc.gc.ca) See Table 6. °In 1997-1998, three applications to the Tribunal were made.

## CONCLUSION

Over the 1986-1998 period, the Competition Bureau examined 2,493 mergers or approximately 208 annually. Most of the mergers examined occurred in the manufacturing sector, followed by the financial, resource, agriculture and service sectors. The mergers examined by the Bureau have begun to increase significantly since 1994, particularly in the 1997-1998 period, reaching 390. The increase in mergers examined in the sectors that are being deregulated such as the financial, resources and services sectors are the most pronounced. For the period 1986-1997, ARCs have risen, reaching a total of 932. AOs, on the other hand have declined totaling 152. Over this period, applications made to the Competition Tribunal accounted for less than 1 percent of the mergers examined.

TABLE 6 - Case Name, Competition Tribunal Decision No., Date Filed, Date Decided and Information Note (1986-1998)

| Case Name | Decision No. | Date Filed | Date Decided | Information Note |
|---|---|---|---|---|
| Palm Dairies Ltd.<br>Sanimal Industries Inc. | CT- 86/1<br>CT- 87/2 | 04.09.86<br>18.06.87 | 27.11.86<br>21.08.92<br>Withdrawn | 27.11.86<br>18.06.87 |
| Air Canada | CT- 88/1 | 03.03.88<br>05.11.92 | 07.07.89<br>22.04.93 | 07.07.89<br>22.04.93<br>24.11.93 |
| Institut Mérieux S.A. | CT- 88/2 | 28.04.88 | 02.05.88<br>Withdrawn | 28.04.88 |
| Pepsi-Cola Canada Limited | CT- 88/3 | 14.10.88 | 05.12.88<br>Withdrawn | 14.10.88 |
| Asea Brown Boveri | CT- 89/1 | 26.04.89 | 15.06.89<br>18.12.89 | 06.09.89<br>16.03.09 |
| Imperial Oil Limited | CT- 89/3 | 29.06.89 | 26.01.90<br>06.02.90 | 26.01.90 |
| Southam Inc. | CT- 90/1 | 29.11.90<br>28.07.97 | 02.06.92<br>10.12.92 | 02.06.92<br>10.12.92 |
| Hillsdown Holdings (Canada) Limited | CT- 91/1 | 15.02.91 | 09.03.92 | 09.03.92 |
| Québecor Printing Inc | CT- 95/1 | 16.01.95 | 16.01.95 | 16.01.95 |
| Dennis Washington (Seaspan) | CT- 96/1 | 01.03.96<br>03.02.98 | 29.01.97<br>09.03.98 | 29.01.97<br>09.03.98 |
| Canadian Pacific Limited | CT- 96/2 | 20.12.96 | 31.03.98 | 31.03.98 |
| Canadian Waste Services Inc. | CT- 97/1 | 05.03.97 | 16.04.97 | 16.04.97 |
| ADM Agri-Industries, Ltd. | CT- 97/2 | 21.03.97 | 08.05.97 | 08.05.97 |
| Waste/Capital | CT- 98/01 | 06.03.98 | 23.04.98 | 23.04.98 |

Source: Competition Tribunal (Internet http://www.ct-tc.gc.ca)

TABLE 7 - Mergers by Major Sector Recorded in the Merger Register (1986-1998)

| Sector | 86/87 | 87/88 | 88/89 | 89/90 | 90/91 | 91/92 | 92/93 | 93/94 | 94/95 | 95/96 | 96/97 | 97/98 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Mergers Examined | 38 | 148 | 183 | 221 | 193 | 198 | 202 | 190 | 190 | 227 | 313 | 390 | 2493 |
| Trans-portation (% of ann. mergers) | 6 (15.8) | 7 (4.7) | 7 (3.8) | 4 (1.8) | 12 (6.2) | 5 (2.5) | 13 (6.4) | 6 (3.2) | 12 (6.3) | 4 (1.8) | 12 (3.8) | 12 (3.1) | 100 (4.0) |
| Telecom (% of ann. mergers) | 1 (2,6) | 3 (2,0) | 12 (6.6) | 5 (2.3) | 4 (2,1) | 7 (3,5) | 7 (3.5) | 4 (2.1) | 6 (3.2) | 10 (4.4) | 8 (2.6) | 18 (4.6) | 85 (3.4) |
| Financial (% of ann. mergers) | 2 (5.2) | 14 (10.1) | 21 (11.5) | 21 (9.5) | 21 (10.9) | 28 (14.1) | 43 (21.3) | 38 (20.0) | 49 (25.9) | 54 (23.8) | 91 (29.1) | 108 (27.7) | 490 (19.6) |
| Resources (% of ann. mergers) | 3 (7.9) | 14 (9.5) | 20 (10.9) | 21 (9.5) | 19 (9.8) | 21 (10.6) | 15 (7.4) | 28 (14.7) | 18 (9.5) | 24 (10.6) | 42 (13.4) | 51 (13.1) | 276 (11.1) |
| Agri-Agri food (% of ann. mergers) | 7 (18.4) | 29 (19.6) | 20 (10.9) | 20 (9.0) | 22 (11.4) | 24 (12.1) | 15 (7.4) | 8 (4.2) | 13 (6.8) | 20 (8.8) | 22 (7.0) | 27 (6.9) | 227 (9.1) |
| Service (% of ann. mergers) | 4 (10.5) | 14 (9.5) | 9 (4.9) | 20 (9.0) | 16 (8.3) | 22 (11.1) | 15 (7.4) | 23 (12.1) | 15 (7.9) | 15 (6.6) | 31 (9.9) | 24 (6.1) | 208 (8.3) |
| Forest (% of ann. mergers) | 2 (5.2) | 9 (6.1) | 9 (4.9) | 14 (6.3) | 6 (3.1) | 10 (5.0) | 16 (7.9) | 11 (5.8) | 7 (3.7) | 14 (6.2) | 9 (2.9) | 17 (4.3) | 124 (5.0) |
| Mining (% of ann. mergers) | | 4 (2.7) | 7 (3.8) | 10 (4.5) | 8 (4.1) | 4 (2.0) | 11 (5.4) | 5 (2.6) | 7 (3.7) | 6 (2.6) | 4 (1.3) | 7 (1.8) | 73 (2.9) |
| Const. (% of ann. mergers) | | 1 (0.7) | 6 (3.3) | 1 (0.4) | 6 (3.1) | 1 (0.5) | 3 (1.5) | | | | 2 (0.6) | 2 (0.5) | 22 (0.9) |
| Storage (% of ann. mergers) | 2 (5.2) | | | | | 2 (1.0) | | | 3 (1.6) | | | 1 (0.3) | 8 (0.3) |
| Fishing (% of ann. mergers) | | | | 2 (0.9) | | | | | | | | | 2 (0.08) |
| Manu-facturing (% of ann. mergers) | 7 (18.4) | 40 (27.0) | 43 (23.5) | 66 (29.9) | 55 (28.5) | 43 (21.7) | 42 (20.8) | 36 (18.9) | 33 (17.4) | 49 (21.6) | 46 (14.7) | 47 (12.0) | 507 (20.3) |
| Retail Trade (% of ann. mergers) | 2 (5.2) | 5 (3.4) | 11 (6.0) | 11 (5.0) | 11 (5.7) | 10 (5.0) | 8 (4.0) | 9 (4.7) | 6 (3.2) | 8 (3.5) | 6 (1.9) | 5 (1.3) | 92 (3.7) |
| Wholesale Trade (% of ann. mergers) | | 1 (0.7) | 6 (3.3) | 9 (4.1) | 3 (1.5) | 1 (0.5) | 4 (2.0) | 7 (3.7) | 5 (2.6) | 5 (2.2) | 7 (2.2) | 4 (1.0) | 52 (2.1) |
| Real Estate (% of ann. mergers) | | 6 (4.0) | 11 (6.0) | 15 (6.8) | 7 (3.6) | 16 (8.0) | 10 (4.9) | 9 (4.7) | 10 (5.2) | 12 (5.3) | 18 (5.7) | 27 (6.9) | 141 (5.6) |
| Health (% of ann. mergers) | 1 (2.6) | 1 (0.7) | 1 (0.5) | 2 (0.9) | 2 (1.0) | 2 (1.0) | | 3 (1.6) | 2 (1.0) | | 1 (0.3) | 5 (1.3) | 20 (0.8) |
| NES | 1 (2.6) | | | | 1 (0.5) | 2 (1.0) | | 3 (1.6) | 4 (2.1) | 6 (2.6) | 14 (4.5) | 35 (9.0) | 66 (2.6) |

The above information has been compiled from the Merger Register reported for the fiscal year in which the merger was commenced, it should be noted that the totals differ very marginally from the statistics published in the yearly *Annual Reports of the Director of Investigation and Research.*

## Notes

* The author would like to thank Gerald Robertson, Joanis Rollande and Jim Bocking for their assistance in reviewing the paper or making data from the merger register available. However, the views expressed are those of the author and not necessarily those of the Competition Bureau or the Director of Investigation and Research, *Competition Act*.

1 See Janet McFarland, "A year gripped by merger fever" *The Globe and Mail*, Tuesday (December 29, 1998), pp. B1-B3.

2 See *Concordance Between the Standard Industrial Classifications of Canada and the United States*, 1980 Canadian SIC 1987 United States SIC, Statistics Canada, Catalogue No. 12-574E, February 1991.

3 These overall merger statistics differ marginally (i.e., .8 percent) from those published annual in the *Report of the Director of Investigation and Research, Competition Act.* The notifiable transaction statistics are from the above report.

4 SIC 01-02 (i.e., Agricultural Industries and Services incidental to Agriculture) and 10-12 (i.e., Food, Beverage and Tobacco Product Industries); SIC 15-24, 28-35 and 37-39 (i.e., Rubber, Plastics, Clothing, Leather Allied, Primary Textile, Textile Products, Clothing, Printing, Publishing, Primary Metal, Fabricated Metal, Transportation Equipment, Electrical & Electronic, Non-Metallic Mineral, Chemical & Chemical Products Industries, and Other Manufacturing Industries); SIC 03 (i.e., Fishing); SIC 04-05 (i.e., Logging and Forestry Services Industries) and 25-27 (i.e., Wood, Furniture, Fixtures, and Paper & Allied Products industries). SIC 06 and 08 (i.e., Mining). SIC 07, 09, 36, 49 and 51 (i.e., Crude Petroleum & Natural Gas Industries, Service Related to Mineral Extraction, Refined Petroleum & Coal Product Industries, Other Utility Industries, and Wholesale of Petroleum Products). SIC 40, 41, 42 and 44 (i.e., Construction). SIC 45 and 46 (i.e., Transportation and Pipeline transportation). SIC 47 and 48 (i.e., Storage and Telecom industries); SICs 50, 52-59 and 60-69 (i.e., wholesale trade and retail trade); SIC 70-74 (i.e., Deposit Accepting Intermediary Industries, Consumer & Financial Intermediary Industries, Investment Intermediary Industries, Insurance industries, and Other Financial Intermediary Industries); SIC 75 and 76 (i.e., Real Estate Operators & Insurance Agents, and Insurance and Real Estate Agents Industries); SIC 86 (Health & Social); and SIC 77-85 to 87-99 (i.e., Business service, Federal/Provincial & Territorial/Local/International & Ex-Territorial Government services, Educational, Accommodation, Food & Beverage, Person & Household, Membership Organization Service Industries and Other Service Industries).

5 On a relative basis (i.e. ARCs/Mergers Examined), ARCs increased from 1986 to 1993, thereafter it declined. In 1996, ARCs increased, however it did not surpass the peak achieved in 1993.

# THE COMMISSIONER IS "IN": AN OVERVIEW OF THE MARCH 1999 AMENDMENTS TO THE *COMPETITION ACT* AND DRAFT NEW MERGER PRE-NOTIFICATION REGULATIONS

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Almost four years after significant amendments to the *Competition Act* (the "Act") were first proposed by the Minister for Industry Canada, Bill C-20, "An Act to amend the *Competition Act* and to make consequential and related amendments to other Acts" (the "Bill") was, with certain exceptions, proclaimed in force on March 18, 1999. The Bill changed the title of the Director of Investigation and Research to the Commissioner of Competition (the "Commissioner").[2] A number of other significant changes to the Act were also proclaimed in force, including the creation of alternative criminal and civil regimes for dealing with misleading advertising, the strengthening of the Commissioner's investigation and enforcement powers, and the creation of a new deceptive telemarketing offence. The Competition Bureau (the "Bureau") has also released administrative guidelines and information bulletins covering deceptive telemarketing practices, wire taps, "ordinary price" claims in advertising, and the choice between the criminal and civil tracks for misleading advertising as well as Interpretation Guidelines regarding Part IX (merger pre-notification).[3]

Some of the most significant changes relating to the pre-merger notification regime have not been proclaimed in force. Amendments to the waiting periods, information requirements and others have been enacted but will not be proclaimed in force until companion amendments to the *Notifiable Transactions Regulations* (the "*Regulations*") are adopted. The proposed new *Regulations* were published in the Canada Gazette Part I on May 15, 1999. Comments or representations with regard to the Regulations were invited for a period of 60 days following publication. The new *Regulations* when they come into force, will be modified in light of the comments received. The Commissioner expects the new pre-notification regime to come into force before the end of 1999.

Extensive public consultations were conducted by the Commissioner in relation to the new merger regime and all other aspects of the amendments, and they follow closely the recommendations of a Consultative Panel of competition law practitioners, academics, and consumer and industry representatives.[4]

This article highlights and comments on the proposed changes to the merger pre-notification regime, as well as the principal provisions of the amendments proclaimed in force March 18, 1999. Some thoughts regarding practical implications for industry and for competition law practitioners are also put forward for discussion.

### 1. Changes to the merger pre-notification regime

Probably the most significant changes to the Act from the point of view of many businesses and business lawyers are the changes to the merger pre-notification regime. As mentioned above, the necessary amendments to the Act have been passed. With the exceptions of a relaxation in the requirements for the Commissioner to obtain an interim injunction to delay closing and changes to the penalties for failure to pre-notify, however, the changes to the merger pre-notification regime await the finalization of the accompanying amendments to the *Regulations* before they will be proclaimed in force. The most important changes to the merger provisions of the Act are discussed below, along with some observations concerning the practical implications of these changes. For complete details refer to the proposed *Regulations* at Canada Gazette Part I page 1431. Please note that the *Regulations* are expected to be modified somewhat in their final form, but the authors understand that most of the important elements are unlikely to change significantly.

#### *(a) Waiting periods doubled*

The statutory waiting periods will be doubled, from 7 days for a short-form filing and 21 days for a long-form filing, to 14 days and 42 days, respectively. The waiting period applicable to a long-form filing for a transaction effected on a stock exchange will also be extended from 10 to 21 trading days. This additional time reflects a more realistic time frame within which the Commissioner may actually complete his review of a proposed transaction.

In that regard, the 14-day waiting period for a short-form filing matches exactly the maximum for a "non-complex" merger review as stated in the Commissioner's *Fees and Service Standards Handbook*. The 42-day waiting period for a long-form filing, at 6 weeks, is considerably shorter than the 10 week target for completion of the review of "complex" transactions and the 20 week target for dealing with "very complex" transactions. That said, it is now very much easier for the Commissioner to obtain interim injunctions to delay the closing of mergers that he has not finished investigating, as he need no longer be in a position actually to oppose the transaction nor even to show likely anti-competitive effects. Six weeks ought to be ample time for the Commissioner to discover whether he *potentially* has a problem with a merger such that he might wish to seek an injunction to delay closing while he completes his inquiry.

Moreover, six weeks is already long enough that it will delay significantly more business deals which otherwise might be in a position to close than are caught by the current maximum three week waiting period. Six weeks seems to be a reasonable compromise between the Commissioner's desire for more time to conduct his reviews, and the costs to business entailed by delay. That said, where a long-form filing is required, the waiting period may exceed those in foreign jurisdictions so greater co-ordination will be required in multi-jurisdictional transactions.

*(b) Expanded information requirements*

The lists of information that the Commissioner requires in a pre-merger notification have been moved out of the *Act* and into the *Regulations*. This will make the list of required information much easier to amend in the future as and when the need arises.

If the revised *Regulations* remain as currently proposed, the amount of information that the parties have to provide as part of a short-form or long-form notification will increase. More specifically, the additional information that will have to be provided in order to complete a short-form filing consists of:

- a list of foreign authorities which have been notified of the proposed transaction by the parties and the date of the notification;
- a summary description of each of the principal categories of products produced, supplied or distributed by the notifying company or its affiliates;
- statements identifying, for each of those principal categories of products, a list of the twenty (20) most important suppliers and customers, along with annual volume or dollar value of purchases (previously, companies had to provide a list of "principal" suppliers and customers for such business rather than product, and no number was specified); and,
- the geographic regions of sales for the company and its affiliates.

Some information requirements have been removed from the short-form filing: i.e., copies of legal documents related to the transaction, the company's jurisdiction of incorporation, pro-forma financial statements and copies of documents filed with securities commissions, stock exchange or other similar authorities during the last two years. All other short-form information requirements remain as they were in the past.

It is with respect to a long-form filing that the burden on notifying businesses really increases. To complete a long-form filing, each party will have to provide, in addition to the information required in a short-form filing, the following information:

- a list of the forty (40) most important current suppliers and customers for each of the principal categories of products identified, along with annual volume or dollar value of purchases (previously, companies had to provide a list of "principal" suppliers and customers for each business rather than product, and no number was specified);

- the location of principal offices and the location of all plants, warehouses, retail establishments or other places from which business is conducted;
- similar information with regard to affiliates that are not wholly-owned or wholly-owning affiliates;
- detailed information regarding categories of products sold by both the company and its affiliates, including information with regard to production capacity, geographic regions of sales, revenues and transportation modes and costs;
- information regarding products that have been approved for development or sale during the three-year period following the completion of the transaction, including estimated sales and production figures as well as the expected geographic region of sales;
- copies of all studies, surveys, analyses and reports which were prepared or received by a senior officer for the purpose of evaluating or analyzing the proposed transaction, including the name and title of the person who prepared the document; and,
- copies of all marketing plans, business plans and strategic plans, or similar documents, prepared by or received by a senior officer and implemented in Canada over the last three years, or to be implemented in Canada, for each of the categories of products.

The proposed information requirements for short-form and for long-form filings are essentially the same as those which were developed by the Consultative Panel as reflected in its Report dated June 6, 1996. As stated in that report, the aim is to provide the Commissioner with information necessary to perform at least a preliminary assessment of the likely competitive impact of a proposed transaction, without requiring the submission of subjective information or imposing an undue burden on business.

That said, these expanded long-form filing requirements may be significantly more onerous for the filing parties to fulfill. They are comparable to, and arguably go beyond, the 4(c) requirements under the U.S. counterpart legislation (the *Hart-Scott-Rodino Antitrust Improvements Act of 1976)*. In many cases, the additional information requested (e.g., detailed transportation costs for each product category) may not be readily available. In other cases (e.g., the request for all marketing, business and strategic plans and similar documents), the information may be available, but the broad scope of the request makes its collection particularly burdensome.

Furthermore, the expanded long-form filing requirements will in certain instances require a heightened degree of discretion. For example, it is often far from clear whether a particular document should be characterized as a marketing, business or strategic plan, whether it is a "similar document", or whether it falls outside of the intended scope of the requirement. Likewise, whether a document's author or recipient is a "senior officer" is open to interpretation. As a result, more thorough document searches and special care in drafting the affidavit confirming completeness of the required information will be required.

*(c) Interim injunctions against mergers more easily obtained*

Amendments already in effect make it significantly easier for the Commissioner to obtain an interim injunction under section 100 to delay the closing of a merger when he has not had time to complete his review. He no longer needs to prove on a balance of probabilities that the proposed transaction is reasonably likely to prevent or lessen competition substantially, and he need no longer be in a position to file an application with the Competition Tribunal to challenge the transaction as a condition of obtaining the injunction.

Rather, the Commissioner now needs only to certify to the Competition Tribunal that an inquiry is being conducted into the competitive impact of the proposed transaction and that more time is required to complete the inquiry. The Tribunal must also find that, in the absence of the injunction, a party is likely to do something that would substantially impair the ability of the Tribunal to remedy the effect of the merger on competition because the action would be difficult to reverse. No likelihood of anti-competitive impact need be shown, merely irreversible steps to blend the merging businesses and a request by the Commissioner for more time to investigate the likely competitive impact. Injunctions on these grounds will be granted initially for up to thirty (30) days, but can be extended to a maximum of sixty (60) days in total if the Commissioner certifies that he has not been able to complete his review due to circumstances beyond his control.

Such applications for injunctions on the ground that the Commissioner needs more time must be brought on 48 hours' notice to the parties. Thus, *ex parte* applications are no longer possible under section 100 in respect of injunctions on these grounds. This makes sense, since an inquiry must have been commenced and, in the case of merger reviews, the parties to the transaction are always aware of the inquiry.

As before, interim injunctions to prevent a merger from closing are also available where the Tribunal finds that there has been a failure to pre-notify a required transaction. An injunction can, in this circumstance only, be obtained *ex parte*, but if obtained *ex parte* the injunction is limited to a maximum of 10 days, rather than the standard 30 days if obtained on notice.

Clearly, the ability of the Commissioner to obtain an interim injunction to prevent a merger from closing without needing to prove a likely anti-competitive effect greatly increases the Commissioner's ability to obtain such injunctions. Under the previous section 100, the Commissioner was in the "catch-22" of needing more time to obtain the very evidence required in order to get the injunction which would provide him with more time. With this evidentiary roadblock removed, the Commissioner is expected to seek interim injunctions much more readily. As a result, companies may well be more willing to postpone closing when the Commissioner has concerns. It will be interesting to see how the facilitated access to injunctions affects the Commissioner's acceptance of "hold separate" undertakings in future cases where his concerns do not affect the entire transaction.

*(d) Potential waiver of notification requirements*

A significant improvement to the pre-notification regime is the ability of the Commissioner to waive the pre-notification requirement in circumstances where information concerning the competitive impact of a proposed transaction was provided pursuant to a request for an Advance Ruling Certificate ("ARC") but, although the Commissioner is not opposed to the closing of the transaction, the ARC was denied. Previously, if the notification materials had not been filed along with the ARC request "just in case", and if an ARC was denied, the parties then had to file pre-notification materials and either wait the statutorily required length of time or request the abridgement of the waiting period.

Once the new provisions go into effect, the Commissioner will have the power to exempt parties from the requirement to file notification materials where substantially the same information was provided pursuant to a request for an ARC in respect of the same transaction. Clearly, ARC requests, unless sure to succeed, should now include substantially all information required for a short-form filing.

In addition, where information or documents were previously provided to the Commissioner, including in relation to a previous transaction, the amendments make it clear that the practice of incorporating such information and documents in a filing by reference is permitted. Curiously, such information, even if already in the Commissioner's possession, is treated as omitted information that can nonetheless be requested by the Commissioner in order to complete the filing.

*(e) Obligation of both parties to file*

Previously, the "persons proposing the transaction" were under the legal obligation to file. Particularly in the context of a hostile takeover, however, it was not clear that the acquiree had a legal obligation to file pre-notification materials. Once the amendments come into effect, *both* parties to a proposed transaction will be legally required to file pre-notification materials. In the case of a hostile takeover, where the acquiree may not have known about the proposed transaction prior to its announcement and/or filing of pre-notification materials by the acquiror, the Commissioner will inform the target of its obligation to file, and the target will have 10 days to provide short-form information and 20 days to provide long-form information. A potential delaying tactic has thus been removed from the arsenal available to management in such circumstances.

*(f) Exemption for asset securitizations, underwriting of foreign transactions*

According to the Commissioner, asset securitizations accounted for about 15% of all filings, yet rarely, if ever, posed a concern from a competition point of view. The draft revised *Regulations* exempt asset securitization transactions from the requirement to notify, unless as a result of the transaction any person acquires control over a business or an operating segment of a business.

Under the Act, the exemption from the requirement to pre-notify for underwriting transactions had previously applied only to transactions for which a Canadian prospectus was required or which was exempted from such a requirement pursuant to Canadian securities legislation. Pursuant to amendments already in force, the underwriting exemption now applies to all underwriting transactions for which securities legislation either inside or outside of Canada requires a prospectus to be filed, or which specifically exempts such a requirement.

*(g) Clarifications regarding partnerships, combinations, foreign currency conversion*

The amendments to the Act which went into force on March 18, 1999 define control of a partnership in terms similar to that applicable to control of a corporation. A partnership interest entitling the owner to more than 50% of the assets upon dissolution, or more than 50% of the profits of the partnership will constitute "control" of the partnership.

Similarly, a new section 110(6) makes it clear that the acquisition of an interest in a combination (essentially, an unincorporated joint venture) is to be treated in a manner similar to the acquisition of an equity interest in a corporation. Previously, only the monetary threshold relating to the "size of the transaction" applied to the acquisition of an interest in a combination as it was treated like an asset purchase. This resulted in unnecessary filings, however, since the acquisition of a minority interest in a combination may not result in a change in control of the underlying business. Accordingly, the new provisions make it clear that the acquisition of an interest in a combination is required to be pre-notified only if the value of the combination exceeds $35 million (Cdn.) (based, as usual, on the book value of the assets or the value of the revenues generated by the combination), and if the acquiror will as a result of the transaction have the right to more than 35% of the profits or of the assets on dissolution (or 50% if the 35% threshold was previously exceeded). Finally, the proposed new *Regulations* provide direction in the conversion of foreign currency amounts to Canadian dollars for the purpose of determining the value of assets and revenues under the *Regulations*. Assets are to be converted using the Bank of Canada noon rate on the date of valuation, and revenues are to be converted using the Bank of Canada noon rate on the last day of the annual period for which revenues are being valued.

Practical implications

The doubling of the statutory waiting periods and the increase in the information required to be filed will have the most immediate impact upon the parties to proposed transactions that are caught by the new merger pre-notification provisions. The waiting periods are included in the statute itself, and are no longer open to debate. The information requirements are contained in the draft *Regulations*, however, and may be revised to reflect the representations received.

For transactions that the Commissioner is unable to review within the waiting periods, the ease with which the Commissioner can now obtain an interim injunction to delay closing means that, as a practical matter, the parties may be forced to wait even longer than the now-doubled statutory waiting periods while the Commissioner completes his review. Accordingly, it will be all the more important for the Commissioner to ensure that his self-imposed service standards for completing merger reviews will be respected, and that the classification of a transaction as "complex" or "very complex" is not a reflection of a lack of resources to address the transaction in a timely fashion.

Of course, although he does not need to show a likely anti-competitive effect, nor does he have to be in a position to file a challenge to the transaction in order to obtain the injunction, the Commissioner must still show that the closing of the transaction would likely lead to irreversible steps which would impede his ability to remedy any anti-competitive impact which did occur. One question that comes to mind is whether the Competition Tribunal will consider a willingness to provide a voluntary undertaking to hold certain assets separate while the main transaction closes (a useful but informal tool under the current procedures) sufficient to show that such irreversible steps are not likely to occur.

The exemption for most assets securitization transactions, the expansion of the underwriting exemption, the clarifications regarding transfers of interests in combinations and partnerships, and rules for the conversion of foreign currencies have all been the subject of widespread consultation and provide welcome clarification to the process.

With respect to transitional issues, Mr. Raymond Pierce, Acting Deputy Commissioner of Competition, Mergers Branch, confirmed in an address to the Competition Law Section of the CBA on September 30, 1999 that requests for advance ruling certificates ("ARCs") and pre-notification information filed prior to the coming into force of the new provisions of Part IX and the new *Regulations* will be subject to the old regime. Thus, even if a short-form filed under the old regime is "bumped" to a long-form, and the request for long-form information is issued after the new Regulations are in effect, the old regime will continue to apply to govern both waiting periods and the information required.

**2. Misleading Advertising and Deceptive Marketing Practices: new 2-track offence**

The amendments bring significant changes to the provisions concerning misleading advertising and deceptive marketing practices. These were previously dealt with only as criminal offences under Part VI of the Act. The most egregious cases will continue to be subject to criminal sanctions, but most cases will now be dealt with under a newly-created civilly reviewable practice. This change will affect advertisers, manufacturers, wholesalers, retailers and all others who make representations to the public or otherwise market products to the public. Indeed, if the recent decision of Justice Winkler in *Carom v Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4th) 163 (Ont. Gen. Div.) is any indication, the misleading advertising provisions also affect stock brokers, engineers and other professionals.

As mentioned above, the amendments to the Act establish two alternative adjudicative regimes for dealing with misleading advertising: a criminal regime and a civil regime. The Commissioner must elect to proceed under one regime or the other, but not both. The Act is silent regarding the time at which the Commissioner must make this election. The Commissioner's Information Bulletin regarding the choice between the two tracks (the " Criminal/Civil Bulletin") provides only that the Commissioner will strive for consistency in his approach to enforcement and will arrive at a decision in this regard "as quickly as possible". Clearly, those subject to inquiries for misleading advertising will need to know very soon indeed if they are subject to criminal, rather than civil, enforcement action.

*(a) Criminal Track*

Making representations to the public that are false or misleading in a material respect ("misleading advertising") remains a criminal offence under section 52 of the Act, but only if the Crown can prove, beyond a reasonable doubt, that the misleading representation was made "knowingly or recklessly". The Crown is still not required to show that any person was *in fact* deceived, and, in determining whether a representation is false or misleading, a court is still directed to consider both a literal and a general impression test. Criminal penalties have also been retained for multi-level marketing and pyramid selling schemes under section 55 of the Act, as well as for the double-ticketing offence under section 54. Other than retention of a "good faith advertising" defence to a charge of double-ticketing and its removal for offences under sections 52 (criminal misleading advertising) and 55 (multi-level marketing and pyramid selling), these offences have not been touched by the latest amendments.

Clearly, the criminal sanctions are meant to be reserved only for the most serious offences. This is confirmed in the Criminal/Civil Bulletin, which states that the civil track will be pursued unless each of the following two criteria are met:

(i) there is clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public; and

(ii) the Bureau is also satisfied that a criminal prosecution is in the public interest.

The Criminal/Civil Bulletin notes that, in making the public interest determination, the Commissioner will consider, *inter alia*, (a) the seriousness of the alleged offence, and (b) mitigating factors. Factors related to the "seriousness of the offence" include whether, once corporate officials became aware of the problem, they took steps to stop the conduct and to remedy the adverse effects of the conduct. Thus, it appears that, even if a business unwittingly makes a misleading representation to the public, this can still be elevated into a crime if officials do not act promptly to resolve the problem once it is discovered.

Other factors which will tend toward a determination by the Commissioner that the offence is serious (assuming there is evidence of wilful or reckless conduct) include the adequacy of the civil remedies to deal with the harm caused to consumers, whether a particularly vulnerable group of consumers such as the elderly or children were targeted, and whether the accused has a past history of misleading advertising. Among other things, the existence of a corporate compliance program will be considered by the Commissioner as a factor mitigating in favour of use of the civil track even for "serious" offences. Clearly, good corporate citizens are encouraged to implement competition law compliance programs, and to act quickly to remedy any potentially misleading representations which nonetheless might slip through the cracks.

While the penalties on indictment in respect of criminal misleading advertisement remain the same as before (i.e., a fine at the discretion of the court and/or imprisonment for up to five years), the available penalties for summary conviction offences have been substantially increased to a maximum fine of $200,000 (up from $25,000) and/or imprisonment for up to one year, per offence. The penalties in respect of both "pyramid selling" and "multi-level marketing" have also been increased for summary conviction offences to a maximum of $200,000 (up from $25,000) and/or imprisonment for up to one year, per offence.

The defence formerly available to persons who, in good faith, print, publish or otherwise distribute an advertisement on behalf of another person, provided that they obtain and record the name and address of that other person, is no longer available for the criminal offence of misleading advertising under section 52 nor for offences under section 55 of the Act. Indeed, with respect to section 52, it is hard to see how an offender could "knowingly or recklessly" issue a misleading representation to the public and at the same time claim "good faith", so the defence was likely no longer relevant to the offence. As mentioned above, the "good faith advertising" defence has been retained in relation to double-ticketing offence under section 54 of the Act (see section 60).

*(b) Civil Track*

A new Part VII.1 of the Act, entitled "Deceptive Marketing Practices", makes certain misleading representations and deceptive marketing practices subject to civil review by the Competition Tribunal, provincial courts or the Federal Court. Pursuant to Part VII.1 of the Act, making false or misleading representations to the public for the purpose of promoting business interests is a civilly reviewable matter, regardless of the intention or state of mind of the perpetrator. As noted above, such conduct can be elevated to a criminal offence if it was undertaken "wilfully or recklessly".

The new Part VII.1 also removes the following matters from the scope of the criminal provision and makes them subject only to civil remedies (see below): ordinary price claims (previously subsection 52(1)(d)), representations as to reasonable test and publication of testimonials (previously section 53), bait and switch (previously section 57); selling above advertised price (previously section 58); and promotional contests (previously section 59).

In determining whether an ordinary price claim is misleading, the Act directs the Commissioner to consider both a "volume" and a "time" test, in particular:

- whether a substantial *volume*[5] of the subject product had been sold at that price or a higher price within a reasonable period of time[6] before or after the making of the representation; and

- whether the product had been offered at that price or a higher price in good faith[7] for a substantial period of *time*[8] recently before or immediately after the making of the representation.

In contrast to the former provision, which ostensibly required retailers and other advertisers to investigate all of their competitors' prices in order to determine the price at which "sellers generally" sold the product in the relevant market, the "ordinary price" claimed will now typically be that of the person making the representation. That said, where the person who is making the representation has not sold the product in the past, the Commissioner will employ the "volume" and "time" test in reference to sales and pricing information of suppliers of like products. The Ordinary Price Claims Bulletin states that price comparison representations that do not meet these tests still may not raise an issue if the advertiser can prove that the subject representations were not otherwise misleading in a material respect. To this extent, the Bulletin notes that:

> For example, a "clearance sale" may fail both the time and volume tests. However, a supplier promoting this type of sale will likely be able to show that the price comparison representations were not otherwise misleading if the supplier can demonstrate that the sale was clearly marked as a clearance sale, the representations refer to the original price and any subsequent interim prices and the original price was offered in good faith.

Potential penalties for the new civilly reviewable marketing practices include the following:

(i) cease and desist orders (maximum of 10 years duration);
(ii) publication of a corrective notice; and/or
(iii) payment of an "administrative monetary penalty" (i.e., a fine) (in the case of an individual, up to $50,000 for the first order issued and $100,000 for each subsequent order; and/or in the case of a corporation, up to $100,000 for the first order issued and $200,000 for each subsequent order).

Neither orders requiring the publication of a corrective notice nor monetary penalties may be imposed where, notwithstanding that reviewable marketing practices have occurred, the offending persons exercised *due diligence* in trying to prevent the commission of such practices. Interestingly, the Act states that civil fines are not punitive, although for an individual subject to a fine for $100,000, this distinction may be lost. To add to the Commissioner's enforcement powers, the Commissioner can now apply for a temporary order preventing a person from engaging in a deceptive marketing practice for a period of up to 14 days, with the possibility of an additional 14 day extension (or longer if the parties agree). A temporary order may be issued where:

- there is a strong *prima facie* case that a person is engaging in deceptive marketing practices;
- failure to issue the order will likely result in serious harm to the person affected by the undesirable conduct; and
- the balance of convenience favours issuing the order.

A consent order process is also established whereby the Commissioner and the person against whom the order is sought may agree on the terms of the order and may have the order registered with a Court. It would appear that this consent order process is designed to avoid substantive review of the order by the Court.

Practical Implications

The new two-track regime should stream-line the enforcement process by forcing only the most serious and egregious cases of misleading advertising along the criminal track. At the same time, the lower civil standard of proof now applicable to most violations will likely result in more successful enforcement actions by the Commissioner than in the past, particularly in relation to offences which were sometimes crimes of inadvertence, such as "bait & switch".

As noted, the Criminal/Civil Bulletin states that, in electing upon which track to proceed, the Commissioner will be guided by the goals of consistency and swiftness. This discretion could potentially raise the spectre of the use of the threat of proceeding by way of the criminal track as a stick for some other settlement purpose, such as entering into a civil consent order. That said, the higher burden of proof required for conviction of the criminal offence and his approach to compliance generally will presumably make it unlikely that the Commissioner would abuse his powers in this manner.

It is also significant to note that as a result of the amendments, the bar has been raised for initiating a private action under section 36 of the Act in respect of misleading advertising. Proof is now required that the misleading representation was made "knowingly or recklessly". Although the new section 74.08 provides that "except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action", section 36 continues to provide for civil actions for damages in respect only of criminal violations under Part VI of the Act and for breaches of court or Tribunal orders. It will be interesting to see how section 74.08 is interpreted by the Courts.

Finally, the details of all of the provisions regarding ordinary price claims and the other reviewable advertising practices will be of interest to any advertiser and retailer. In the view of the authors, the ordinary price claim provisions in particular now make it much easier for retailers and others to avoid violating the Act

in this regard. In particular, they are permitted to refer to their own "ordinary" prices when making claims about "sale" prices, and if they do refer to "general" prices as the point of comparison, the relevant market is that which the advertisement will reach, unless the advertisement otherwise limits the relevant geographic scope of the claim.

### 3. Deceptive telemarketing practices

The Commissioner has estimated that Canadian consumers suffer losses of approximately $4 billion annually as a result of deceptive telemarketers using this personal form of communication to defraud unsuspecting consumers. In response, the amendments create the entirely new criminal offence of deceptive telemarketing. Section 52 alone was not sufficient to deal with deceptive telemarketers as their representations are not made to the public. Rather, they use private telephone communications in much the same manner as did deceptive door-to-door salespeople in decades past, to prey on the gullible and isolated in society. The new offence affects not only such intentionally fraudulent practices, however, but also imposes criminal penalties for the failure of any telemarketer to disclose certain required information either during the call or, for certain information, within a reasonable time thereafter.

For the purposes of the new section 52.1 of the Act, "telemarketing" is defined as: "the practice of using *interactive telephone communications* for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest".

Section 52.1 of the Act prohibits persons engaged in telemarketing from:

- making representations that are false or misleading in a material respect;

- conducting contests or other games of chance, skill or mixed games of chance and skill where (i) the prize or benefit to be received is conditional on the participants providing prior payment, or (ii) adequate and fair disclosure has not been made of the number and approximate value of the prizes to be awarded or of any other fact that affects materially the chances of winning;[9]

- offering a product at no cost or at a price less than its fair market value ("FMV") in consideration of the supply or use of another product without fair, reasonable and timely disclosure of the FMV of the first product and any other terms and conditions applicable to its supply; or

- offering a product for sale at a price grossly in excess of its FMV, where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.

Section 52.1 also requires telemarketers to make "fair, reasonable and timely" disclosure of the following information, failure to do which is a criminal offence:

- the person on whose behalf the communication is being made is identified (must be made at the beginning of *each* telephone communication);
- the nature of the product or the business interest being promoted (must be made at the beginning of *each* telephone communication);
- the purpose of the communication (must be made at the beginning of *each* telephone communication);
- the price of the product being promoted;
- any material restrictions, terms or conditions that apply to the delivery of the product; and
- any other information that may otherwise be prescribed by regulation (the Telemarketing Bulletin notes that this residual power is intended to allow "some measure of flexibility to react efficiently and quickly to deceptive telemarketing trends, since these can develop with great speed", however the Bulletin notes that no new substantive offence will be created by regulation).

With reference, presumably, to telephone stock brokers, as well as to telemarketers based in the United States or another foreign country, the Telemarketing Bulletin states that "price" may be disclosed by way of reference, such as the price at the end of the day of trading or when converted into Canadian dollars based on a specified exchange rate applicable at a specified time, provided that:

- the price can not otherwise reasonably be determined at the time of the telephone call;
- the reference price is reasonably able to be determined;
- the use of a reference price is reasonable in terms of typical similar transactions;
- the terms of the reference price are disclosed as part of the "price";
- the risk and volatility of the reference price are disclosed; and
- the actual price is disclosed within a fair, reasonable and timely manner (not necessarily by way of telephone) once it has been determined.

Certain elements of the telemarketing offences are similar to misleading advertising, in that the Crown does not have to prove that any person was *in fact* deceived, and both the literal and general impression tests are prescribed. Also, no person may be convicted under the deceptive telemarketing provisions where that person has exercised due diligence in attempting to prevent the commission of the offence.

The provision specifically makes a corporation, and/or an officer or director who is in a position to direct or influence the policies of that corporation, potentially liable for the telemarketing activities of the corporation's employees. Of importance to corporations and the officers and directors thereof, the new provision also creates a due diligence defence similar to the one available to the telemarketers themselves.

Pursuant to a revised section 33, interim injunctions can be obtained to prevent a continuation of misleading telemarketing offences by the perpetrators. In the case of repeat offenders, injunctions can be directed to third parties to prevent the supply of articles or services used for the commission or continuation of the offence.

As noted below, deceptive telemarketing is one of the offences with respect to which the Commissioner may now seek a wire-tap on a non-consensual or *ex parte* basis. Inclusion of the new offence in the list of serious offences for which the Commissioner has sought expanded enforcement powers serves to highlight how difficult a problem this has become.

The Act provides the following penalties for breach of the deceptive telemarketing provisions:

- for an indictable offence, a fine in the discretion of the court and/or imprisonment for a term not exceeding 5 years; or

- for summary conviction, a fine not exceeding $200,000 and/or imprisonment for a term not exceeding 1 year.

Practical Implications

Interestingly, the new deceptive telemarketing offence does not cover communications by facsimile, Internet, or automated pre-recorded messages. These latter forms of communication continue to be regulated under the misleading advertising provisions of the Act if they can be said to be "representations to the public". Indeed the Telemarketing Bulletin states that calls to a customer relations line or calls initiated by the caller, unless part of a pattern of representations, normally will not be considered to be telemarketing, even though technically they may be covered by the definition. In addition, Internet communications and facsimile communications are not caught by the new provisions but continue to be covered by section 52 or 52.1 if they qualify as representations to the public. It will be interesting to see how the courts define the "public" in relation to these new media. On the other hand, non-interactive communications such as these have all the power and persuasion of the more old-fashioned "junk mail" and as a practical matter are not nearly as likely to lead to fraudulent deception of the recipients as are personal telephone communications.

All telemarketers, the vast majority of whom are not purposefully deceptive, now face criminal sanctions for failure to make fair and timely disclosure of certain essential information. The list of required disclosure can be expanded by regulation, although the Commissioner hastens to point out in the Telemarketing Bulletin that no new substantive offence will be created by regulation, and that such regulations are likely only to specify the type of information about a product which a telemarketer is required to disclose. Still, failure to disclose all such information, even if required only by regulation, will constitute a criminal offence. The burden created on honest telemarketers is alleviated somewhat by the inclusion of a due diligence defence.

It will obviously be very important for companies engaged in telemarketing, and their officers and directors, to establish and adopt internal compliance programs in order to undertake the necessary steps to establish that defence.

### 4. The Commissioner's Criminal Enforcement Powers

There have been substantial amendments to both the Act and the *Criminal Code* (the "Code") in respect of the enforcement of the criminal offence provisions of the Act. In particular, the Act and the Code now provide for: (a) the issuance of prescriptive orders; (b) for certain offences, wire-taps without the consent of one of the parties to the communications; and (c) safeguards to protect "whistle blowers".

*(a) Prescriptive Orders*

The Act introduces substantial flexibility on the part of courts to fashion effective remedies by empowering a court to include prescriptive terms, not just prohibitions in orders pursuant to criminal convictions. A convicted criminal offender may now be required to:

- take such steps as the court considers necessary to prevent the commission, continuation or repetition of the offence; or

- take any steps agreed to by that person and the Attorney General of Canada or the Attorney General of a province.

A prohibition or prescriptive order may not have a duration of longer than 10 years. One interesting question which arose was the status of prohibition orders issued prior to March 18, 1999 with a perpetual duration or another duration longer than 10 years.. In a decision issued August 5, 1999, on an application brought by the Canadian Real Estate Association (the "CREA"), the Federal Court, Trial Division, declared that an order issued prior to March 18, 1989 of perpetual duration expired the day the amendments came into force. By implication, the maximum duration of any order issued prior to March 18, 1999 is also 10 years.[10] Orders issued prior to that day with a duration longer than 10 years will expire on the later of the tenth anniversary of the order or March 18, 1999.

*(b) Wire-Tapping*

The traditional methods of enforcement available to the Commissioner under the Act include those provided by section 11, which provides the Commissioner with numerous investigative powers, including the ability to compel attendance for an oral examination, to produce documents, and to make a written return, as well as those provided by section 15 regarding the power to conduct a search and to seize documents and other evidence.

The amendments give the Commissioner new, and significantly enlarged, investigative powers in the form of the ability to request a wire-tap in relation to investigations of certain offences under the Act without the consent of any party to the communications. In particular, section 183 of the Code has been amended, thus giving the Commissioner the power to obtain judicial authorization, without consent of any party to a communication, to intercept a private communication (i.e., obtain an order for a "wire-tap") for the purpose of investigating any of the following:

- price fixing and market sharing conspiracies (section 45(4)(a) to (d));
- bid rigging (section 47); and
- deceptive telemarketing (section 52.1(3)).

Previously, section 183.2 of the Code allowed the Commissioner to obtain judicial authorization for a wire-tap only where either the originator or the intended recipient of the communication consented to the wire-tap (provided that certain express tests were met). By including certain *Competition Act* offences in the list of offences for which wire-taps can be requested on a non-consensual basis, the Commissioner can now apply to a court for a wire-tap where neither the originator nor the recipient of the communication have consented, but only in relation to the offences listed above, and only if, among other things, other investigative procedures have been tried and have failed, are impractical, or are unlikely to succeed. The Commissioner is also entitled to apply for such a wire-tap on an *ex parte* basis, provided that the application has been signed by a provincial Attorney-General, the Solicitor General of Canada or an agent designated for that purpose; and is accompanied by an affidavit of an officer of the Bureau. For greater detail of the requirements and constraints applicable to such applications, refer to sections 182 through 186 of the Code.

The Information Bulletin on the "Interception of Private Communications and the *Competition Act*" (the "Wire-Tap Bulletin") provides that the Commissioner will only pursue a wire-tap without consent of any party to the communication "under exceptional circumstances". The Commissioner is also at pains to point out that the possibility of intercepting privileged communications will be minimized. Interestingly, the possibility of obtaining a wire-tap in relation to a merger or strategic alliance is raised, but only if there is compelling evidence that such a transaction or structure is a "sham, intended as a cover for covert criminal behaviour." Hopefully, this interpretation will be narrowly applied.

*(c) Whistle Blowing*

The Act as amended includes a so-called "whistle blowing" provision which is aimed at encouraging employees and others to come forward when they have reason to believe that a criminal offence under the Act is being or will be committed, without fear of subsequent reprimand or retribution. The "whistle blowing" provision engendered significant debate before Parliament and, indeed, delayed the eventual passage of the Bill. The Standing Senate Committee on Banking, Trade and Commerce, in a rare move, sent the Bill back to the House of Commons, requesting that the provisions governing whistle blowing be removed from the Bill altogether. On February 5, 1999, after considering the Senate Committee's proposed amendment, the House re-introduced the whistle blowing provisions with the following amendments:

- the whistle blowing provision no longer covers matters pertaining to Part VII.1, regarding civil misleading advertising and deceptive marketing practices, or to Part VIII, regarding the existing reviewable conduct provisions (e.g., refusal to deal, exclusive dealing, tied selling and abuse of dominance); and

- specific penalties are no longer provided in the Act for an employer who dismisses, suspends, demotes, disciplines, harasses or otherwise disadvantages an employee as a result of that employee coming forward under the whistle blowing provisions.

The Act still provides that any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act may notify the Commissioner of such particulars and may request that his or her identity be kept confidential (although section 29 should have been sufficient to require such confidentiality, there is no harm in making it explicit). It also states that no employer may reprimand an employee, provided that such employee acted in good faith and on the basis of a reasonably held belief, for any of the following acts:

- disclosing that the employer or any other person has committed or intends to commit a criminal offence under the Act;

- refusing or stating an intention to refuse to do anything that is a criminal offence under the Act; or

- doing or stating an intention to do anything necessary so that a criminal offence not be committed under the Act.

The Act does not provide explicit penalties for employers who do reprimand employees who "blow the whistle" on suspected criminal conduct. That said, the provisions will likely protect the employee from wrongful dismissal pursuant to provincial labour laws. In addition, section 126 of the *Criminal Code* provides for imprisonment of up to two years for wilful violations of federal statutes without lawful excuse.

Practical Implications

The amendments to the Commissioner's enforcement powers for the criminal offences under the Act will have a wide application. In particular:

- courts will be able to order positive action to restore competition if it has been harmed as a result of a criminal violation of the Act;

- the wire-tap amendments give the Commissioner long-sought tools for apprehending those persons who engage in price fixing or market sharing, bid-rigging or deceptive telemarketing offences which typically occur behind close doors and away from investigators; and

- an employee may have grounds for a wrongful dismissal suit should he or she be dismissed for "whistle blowing" in respect of criminal activities (reviewable conduct not being illegal until so ordered by the Competition Tribunal there is no illegal behaviour to "blow the whistle" on in respect of reviewable conduct). Employers who reprimand employees who blow the whistle in respect of criminal violations of the Act in wilful violation of this provision and without lawful excuse are also liable on conviction under section 126 of the Code to imprisonment for up to two years.

## 5. Future developments

After first proposing significant changes to the Act in June, 1995, the Minister of Industry succeeded in enacting many of those proposed changes in just under four years' time. Considering that the 1986 amendments to the Act were the culmination of literally decades of debate and several legislative attempts, the recent amendments process had a rather smooth time of it. That said, this round of amendments is not yet quite complete. As discussed above, the revised *Regulations* are expected to be published in final form and to go into effect before the end of 1999. The amendments to the Act affecting the pre-merger notification regime (excluding the amendments regarding interim injunctions, and those increasing the fines but removing the threat of jail time for failure to notify – which are already in force) have been enacted and will be proclaimed in force along with the new *Regulations*. The most significant aspects of the new *Regulations* – doubled waiting periods and new lists of required information – are unlikely to be substantially modified from the draft *Regulations* published last spring.

Consultations concerning the next round of amendments have already commenced. Certain elements of the amendments package originally proposed fell by the wayside after public consultations gave rise to considerable controversy. In particular, the Commissioner has stated publicly many times that he feels that the current restrictions on the disclosure of certain confidential information under section 29 of the Act impedes his ability to co-operate as much as he would wish with his competition law enforcement counterparts outside of Canada. He has said that he intends to include amendments to the confidentiality provisions

in the next round of amendments. Similarly, the idea of permitting private party access to bring applications to the Competition Tribunal in respect of reviewable matters was quite controversial, and the Commissioner undertook to gather more information about the likely implications of such a move. Finally, although the Consultative Panel recommended repealing the price discrimination and promotional allowance provisions in favour of dealing with any such practices as may have anti-competitive effects under the "abuse of dominance" provision in section 79, these remain criminal offences under the Act.

The amendments that resulted from this latest round of consultations will, in general, tend to streamline the enforcement of competition law in Canada, but also to strengthen the Commissioner's ability to investigate and to obtain appropriate remedies in relation to anti-competitive behaviour. On the other hand, the increase in the information required in order to pre-notify, particularly if a long-form filing is required, will likely increase the burden of compliance.

**Notes**

[1] Susan M. Hutton practices competition, trade and regulatory law with the Ottawa office of Stikeman, Elliott. Jason L. Gudofsky practices competition, trade and regulatory law with the Toronto office of Stikeman, Elliott. The views expressed in this article are those of the authors alone and do not represent legal advice in relation to any particular facts or situation.

[2] The Commissioner has also taken over responsibility for the administration and enforcement of the *Consumer Packaging and Labelling Act* (except for enforcement as it relates to food), the *Precious Metals Marking Act* and the *Textile Labelling Act*.

[3] These guidelines and information bulletins, as well as the proposed *Regulations* are available on the Bureau's web-site: http://strategis.ic.gc.ca/SSG/ct01250e.html (English) or http://strategis.ic.gc.ca/SSGF/ct01250f.html (français)

[4] The Report of the Consultative Panel is available on the Bureau's web-site.

[5] The Commissioner's Information Bulletin regarding ordinary price claims (the "Ordinary Price Claims Bulletin") provides that the substantial volume requirement would be met if more than 50% of sales are at or above the higher price claimed. However, where no single price counts for the majority of sales, reference may be made to the average price of two or more of the highest prices which make up a majority of sales.

[6] The Ordinary Price Claims Bulletin provides that a reasonable time will be the twelve months prior to (or following) the making of the representation. A reasonable period may be shorter having regard to the nature of the product.

[7] The Ordinary Price Claims Bulletin states that, in order to be considered to be offered in good faith, the product must be openly available in appropriate volumes, and the comparison price must be reasonable in light of the competition in the relevant market during the relevant period.

[8] According to the Ordinary Price Claims Bulletin, although it will vary depending on the nature of the product and its sales history, the period to be considered will be the six month period prior to (or following) making the representation, with a shorter time period generally for seasonal products. The Bulletin notes that the substantial period of time requirement will be met if the product is offered at the higher comparison price for more than 50% of the time period considered.

[9] In terms of "(i)", the Commissioner's Information Bulletin regarding the application telemarketing provision (the "Telemarketing Bulletin") states that the initial cost of entering the game, such as a postage stamp, generally will not be considered to be "payment", nor will a nominal payment *to someone other than the marketer* generally be considered to be "payment".

[10] *R.* v. *Chambre d'Immeuble du Saguenay – Lac St. Jean Inc. et al* (unreported; docket T/24-32/88).

# CANADIAN COMPETITION RECORD

## HIGHLIGHTS

NEW MERGER PRE-NOTIFICATION REGIME PROCLAIMED IN FORCE

THE BOEHRINGER CASE

COMPETITION BUREAU STATEMENTS

INTERNATIONAL DIMENSION OF THE COMPETITION POLICY OF THE EUROPEAN COMMISSION

NEW ERA DAWNS FOR UK COMPETITION LAW

CANADIAN TELECOMMUNICATIONS REGULATION AND POLICY: 1999 REVIEW

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| DRAPER and WEST: | EVALUATING CHALLENGES TO NON-PRICE VERTICAL RESTRAINTS |
| MATHEWSON and QUIGLEY: | COMPETITION IN ELECTRONIC BANKING NETWORKS: REPLY TO RIVARD AND WARE |
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