CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

The articles in this section were written by Paul Collins of Stikeman, Elliott, Toronto, James Musgrove and Daniel Edmondstone of Lang Michener, Toronto, and staff of the Competition Bureau.

CANADIAN FINANCE MINISTER BLOCKS TWO MAJOR BANK MERGERS

Introduction

On December 14, 1998, the Canadian Minister of Finance, the Honourable Paul Martin (the "Minister"), blocked the proposed mergers between The Royal Bank of Canada ("Royal")/Bank of Montreal ("BMO"); and Canadian Imperial Bank of Commerce ("CIBC")/The Toronto-Dominion Bank ("TD"), respectively (collectively, the "Mergers"). As noted in a Department of Finance press release, the Minister stated that the mergers were not in the best interests of Canadians as they would lead to (i) an unacceptable concentration of economic power in the hands of fewer, very large banks; (ii) a significant reduction of competition; and (iii) reduced policy flexibility for the government to address potential future prudential concerns.

One of the principal reports relied upon by the Minister in making his decision was the analysis of the Mergers by the Canadian Competition Bureau (the "Bureau")[1]. The analysis of the Bureau was likely the most significant in its history due to the magnitude of its task[2]. The Bureau released its reports to the banks on December 11, 1998 and made them public on December 14, 1998. These reports are available on the Bureau's website (www.strategis.ic.gc.ca). The discussion below provides background to the Mergers, an overview of the applicable regulatory process and a summary and analysis of the Bureau's findings.

Background to the Mergers

Acknowledging the powerful forces of change affecting the financial services industry, on December 19, 1996, the Minister announced the formation of the Task Force on the Future of the Canadian Financial Services Sector (the "Task Force") to make recommendations that would ensure the Canadian financial system remained strong and dynamic into the 21st century. On November 25, 1997, the Director of the Bureau (its most senior official) made submissions to the Task Force which included a consultative draft of the Merger Enforcement Guidelines as Applied to a Bank Merger (the "Bank MEGs")[3]. A final version of the Bank MEGs was released on July 15, 1998. The major change implemented from its draft version was to co-ordinate the regulatory mandates of the Director and the Minister which is discussed in greater detail below.

Despite the fact that the Task Force had yet to release its final report, and that the Minister had confirmed that no substantial changes to the regulation of the financial services industry or its

structure would occur until the release of the Task Force Report, Royal and BMO announced their proposed merger on January 23, 1998. CIBC and TD followed suit with their own merger announcement on April 17, 1998.

The Regulatory Framework

The announcements of the Mergers started one of the most high-profile, multi-level reviews of any transaction(s) in Canada's history. The reviews involved three principal regulators. First, in accordance with its mandate, the Bureau addressed the competitive impact of the Mergers and whether they would "prevent or lessen competition substantially" in any properly defined markets. In this regard, the Director made it clear that the Mergers would be considered simultaneously rather than on a "first-in-first-out" basis. Also involved, was the Office of the Superintendent of Financial Institutions (the "OSFI") whose mandate was to address the prudential implications of the Mergers. Finally, the mandate of the Minister, which encompassed the mandates of all other regulators, was to assess whether the Mergers were in the "best interest of Canadians". To ensure this multi-level process was co-ordinated, the Minister made it clear that he would only announce his decision once he had the benefit of reviewing all other reports, including those of the Bureau, OSFI, various Parliamentary Committees and the Task Force.

Summary of the Bureau's Findings

Scope of the Bureau's Review

Without question, the Bureau dedicated more resources to the Mergers than it had for any other transaction in its history. Through voluntary information requests and subpoenas[4], the Bureau obtained information from the four merging banks (i.e., approximately 400,000 pages of documents) as well as all other significant participants in the financial services industry. Numerous meetings and contacts were made with all relevant entities. Although one may take exception to their conclusions in certain areas, throughout the entire review process, the Bureau demonstrated a high degree of professionalism and integrity in carrying out its formidable task.

The Relevant Markets

The single most daunting task facing the Bureau was to properly define the relevant markets for competition law purposes. As detailed in its report, the Bureau segmented the operations of the merging banks (which were quite similar) into three areas: branch banking, credit cards and securities.

In the context of branch banking, the Bureau identified the following personal financial services product markets for further consideration: (i) personal long-term investments; (ii) personal short-term savings; (iii) personal transaction accounts; (iv) residential mortgages; (v) personal loans/lines of credit; and (vi) student loans. Particularly important for the Bureau was the impact of the Mergers on small and medium-sized enterprises ("SMEs"). With respect to SMEs at the branch level, the Bureau identified three product markets: (i) business transaction accounts and related services; (ii) term loans; and (iii) operating loans. From a geographic perspective, the Bureau defined the market as being "local" (i.e., in accordance with Statistics Canada census agglomerations (urban areas with populations of 10,000-100,000) and census metropolitan areas (urban areas with populations

in excess of 100,000). In addition, the Bureau identified rural markets (i.e., areas with populations of less than 10,000) as those geographic areas where either set of the merging banks had branches within 20 kilometres of one another. The one exception was mid-market loans (Cdn.$1-$5 million) which were defined in accordance with provincial boundaries.

The area of credit cards presented a further challenge to the Bureau particularly because of the "non-duality" structure of the credit card business in Canada. That is, unlike in most countries, the bylaws of the Canadian Visa and MasterCard subsidiaries restrict banks in Canada to issuing to individuals and supporting the merchant acquiring business of, either Visa or MasterCard, but not both. This presented a particular problem for Royal and BMO since they are affiliated with Visa and MasterCard, respectively. CIBC and TD are both affiliated with Visa. The Bureau identified the following six product markets in the context of the credit card business: (i) general purpose credit card issuing to business; (ii) general purpose credit card network services; (iii) general purpose credit card issuing to individuals; (iv) Visa merchant acquiring; (v) MasterCard merchant acquiring; and (vi) primary merchant acquiring. With the minor exception of viewing primary merchant acquiring as a geographic market in transition to a national market, all other elements of the credit card industry was examined on a national geographic market basis.

Finally, in regard to the securities business of the relevant banks, the Bureau identified the following relevant markets: (i) discount brokerage; (ii) full-service brokerage; (iii) debt underwriting; (iv) institutional equity trading; (v) institutional debt trading; (vi) mergers and acquisitions advice; and (vii) equity underwriting. The geographic markets for the foregoing product markets were defined nationally with the exception of full-service brokerage which was defined on a local market basis.

Summary of the Bureau's Conclusions

<u>The CIBC/TD Merger</u>

- In respect of branch banking, the Bureau identified 179 local geographic markets in which CIBC and TD had overlapping operations. Of these, the Bureau concluded that the merger would lead to a substantial lessening of competition ("SLC") in 36 of the 179 markets; may lead to an SLC in another 53 local markets; and would not lead to an SLC in the 90 remaining local markets.

- In respect of mid-market operating loans (Cdn.$1-$5 million), the Bureau defined the geographic market along provincial lines and concluded that there would be an SLC in Prince Edward Island, the Yukon and the Northwest Territories, three very small population areas.

- In regard to credit cards, the Bureau concluded that the proposed merger: (i) would not result in an SLC in the market for general purpose credit card network services; (ii) would not result in an SLC in the market for the issuing of general purpose credit cards to individuals; (iii) would result in an SLC in the Visa merchant acquiring market (the business of providing settlement of Visa credit card transactions to merchants); (iv) may result, at the national level, in an SLC for primary merchant acquiring (the business of providing both terminals and settlement of credit card transactions to merchants) for SME

merchants; and (v) would result, at the national level, in an SLC for primary merchant acquiring for SME merchants should both mergers proceed.

- In respect of the securities business of CIBC/TD, the Bureau identified 22 local geographic markets in which CIBC Wood Gundy and TD Evergreen compete in the provision of full-service brokerage services and concluded that there: (i) would be an SLC in only one of these markets; (ii) may be an SLC in two markets; and (iii) would not be an SLC in the remaining 19 markets.

- The Bureau also concluded that the proposed merger would not result in an SLC in the national market for discount brokerage services.

The Royal/BMO Merger

- In respect of branch banking, the Bureau identified 224 local geographic markets in which Royal and BMO had overlapping operations. Of these, the Bureau concluded that the merger would lead to an SLC in 104 of the 224 markets; may lead to an SLC in another 71 local markets; and would not lead to an SLC in the 49 remaining local markets.

- In respect of mid-market operating loans (Cdn.$1-$5 million) the Bureau concluded that there would be an SLC in British Columbia, Saskatchewan, Manitoba, Ontario and Nova Scotia.

- In regard to credit cards, the Bureau concluded that the proposed merger: (i) would result in an SLC in the market for general purpose credit card network services if BMO's MasterCard portfolio were converted to Visa but would not result in an SLC if Royal's Visa portfolio were converted to MasterCard; (ii) will not result in an SLC in the market for the issuing of general purpose credit cards to individuals; (iii) would not result in an SLC in the MasterCard merchant acquiring market if Royal converts to MasterCard; (iv) may result, at the national level, in an SLC for primary merchant acquiring for SME merchants; and (v) would result, at the national level, in an SLC for primary merchant acquiring for SME merchants should both mergers proceed.

- In respect of the securities business of Royal/BMO, the Bureau identified 63 local geographic markets in which Nesbitt Burns and RBC Dominion Securities compete in the provision of full-service brokerage services and concluded that there: (i) would be an SLC in 39 of these 63 markets; (ii) may be an SLC in 16 of these markets; and (iii) would not be an SLC in the remaining 8 markets.

- The Bureau also concluded that the Royal/BMO merger may result in an SLC in the national market for the underwriting of equity issues exceeding $50 million.

Analysis of the Bureau's Conclusions

The Bureau reports raise a number of points which merit further discussion. First, it is clear from both reports that, should the Minister have permitted the mergers to proceed to a further stage, the Director was prepared to entertain remedy packages to address the SLC findings. However, the relevant banks did not have the opportunity to restructure their respective transactions or to offer remedies (e.g.,

selective branch divestitures) to the Director to address his substantive concerns[5]. This was particularly unfortunate in the case of the CIBC/TD merger which raised fewer concerns.

Second, if a remedial stage were permitted to proceed, it is evident from the foregoing summaries of the Director's conclusions that the two mergers raised quite different levels of concern. Specifically, the CIBC/TD merger raised fewer concerns, i.e., largely branch banking in rural territories and certain aspects of the Visa merchant acquiring business. By contrast, the Royal/BMO transaction raised concerns in far more geographic markets in connection with branch banking, as well as serious concerns in respect of credit cards and full-service brokerage services. Despite the significant discrepancy in the Bureau's findings regarding the competitive implications of the two mergers, the Minister addressed the issues raised by the Mergers on what amounted to a collective basis. This is a curious treatment by the Minister when, as was clearly the case in the context of their competitive implications, other considerations (eg., prudential concerns) would presumably also have differed between the Mergers. Simply stated, the Minister appeared unwilling to analyze either merger on an individual basis.

Third, the lengthy review of the Mergers allowed the Bureau to gain tremendous insight into the functioning of financial institutions and their markets. From a positive perspective, the Bureau constructed and worked with what is now likely the single most comprehensive financial services database in Canada. Furthermore, the Bureau undertook and relied upon econometric analyses to assess the impact on the relevant markets which they identified. From a negative perspective, market definition related to certain parts of the banks' businesses was, to say the least, questionable. For example, a local geographic market definition for full-service brokerage services seems to contradict the behaviour of customers in the market.

Fourth, the skepticism of the Bureau in respect of the influence of technology in the market suggests a strong reluctance to accept current trends of technology adoption as indicators of future rates. Beyond the implications for financial services providers, this raises a broader concern about how the Bureau deals with highly dynamic industries. That is, with the rapidly accelerating rate of technological change witnessed in the financial services (e.g., telephone and Internet banking) and other sectors, one would have expected the Bureau to show a greater willingness to accept current trends in technology adoption as an indication of future behaviour. Instead, the Bureau steadfastly held to its two year time frame under the Banks MEGs and adopted more of an "I'll believe it when I see it" approach to this issue. This was a critical point for the banks since the adoption of technology de-emphasizes the importance of having a local branch presence. Having said that, the financial services industry should be far better positioned with respect to this issue in the future assuming that the anticipated adoption rates are realized.

Fifth, the Director's application of interdependent market power theory is particularly troubling. In accordance with the Bank MEGs, the Bureau views interdependent behaviour as being "...explicit or implicit understandings to jointly exercise market power or limit competition on price, quality, service, variety or any other dimension." In this regard, the Bank MEGs discussed many factors (i.e., so-called "plus factors") that influence whether the requisite conditions are present to facilitate interdependent

market power. These factors include a high level of industry concentration, homogeneity of product offerings, a low degree of product innovation, transparency of market transactions, stability of underlying costs and participation of firms in industry associations. While the Bank MEGs provided much important guidance to the parties concerning how the Bureau would conduct its interdependence analysis, their usefulness was undermined by the fact that they did not clearly delineate what constitutes an "understanding".

Based on economic theory in this area and statements of the Director himself, one would expect an "understanding" to require a conscious effort on the part of firms to co-ordinate their conduct. Nevertheless, it appears the Director adopted a broader interpretation, based on the expert advice he received, in finding that the presence of several of the "plus factors" was sufficient to support his conclusion that further concentrations in the banking industry would lead to "reduced competitive vigour". However, due to the broad range of product and service offerings, the Director's decision raises the following concern: if he can find a substantial risk of anti-competitive interdependent behaviour in the banking industry, would he not be able to do so in virtually any relatively concentrated industry. This is particularly problematic for Canada where numerous industries would have high four-firm concentration ratios.

Conclusions

While the decision of the Minister halted any further consideration of the Mergers or any other mergers between Canada's major banks until legislative reforms to the financial services industry are complete (likely 2-3 years), the economic rationale underlying significant consolidations in this industry is undeniable. That is, the financial services industry is increasingly being driven by technology which, in turn, requires huge capital expenditures to maintain. Simply stated, the banks will not be able to, in the long run, maintain their extensive legacy systems while keeping up with advancements in technology, all while attempting to remain "all things to all people". Large monoline operators like MBNA and virtual banks such as ING will not permit this to continue. For the sake of the Canadian banking system, one can only hope that this is acknowledged by the regulators in Canada when they are next presented with a bank merger to review.

P.C.

Notes

[1] Other key reports considered by the Minister include the Task Force on the Future of the Canadian Financial Services Sector Report (MacKay Report) (released on September 15, 1998); The National Liberal Caucus Task Force on the Future of the Financial Services Sector (released in November 1998); the House of Commons Standing Committee on Finance - The Future Starts Now: A Study of the Financial Services Sector (released on December 10, 1998); the Senate Committee on Banking, Trade and Commerce - Blueprint for Change: Response to the Report of the Task Force on the Future of the Canadian Financial Services Sector (released December 1998).

[2] The banking industry in Canada is relatively concentrated with five major banks operating national branch networks. The Bank of Nova Scotia is the other national bank in Canada. In addition, Canada Trust is often treated like a bank due to the scope of its operations. Please note that there are also numerous regional banks, trust companies, co-operatives and other financial services providers operating across Canada.

[3] The Bank MEGs, which were issued to address the unique analytical issues raised by mergers in the financial services industry, follow closely the analytical framework established in the general Merger Enforcement Guidelines ("MEGs") issued by the Director in 1991.

[4] Royal and BMO were issued subpoenas on July 17, 1998 whereas neither CIBC nor TD received subpoenas.

[5] The Director released his report to the relevant banks at the close of business on Friday, December 11, 1998 and the Minister announced his decision at the opening of business on Monday, December 14, 1998.

THE PROPANE MERGER: BUREAU'S INJUNCTION APPLICATION FLAMES OUT

Background

Timing and Procedure

On July 14, 1998, Superior Propane Inc. ("Superior") notified the Competition Bureau of its proposed acquisition of the shares of The Chancellor Holdings Corporation, which was a wholly owned subsidiary of Petro Canada Inc. Chancellor owned all of the shares of ICG Propane Inc. ("ICG"). Both ICG and Superior are propane retailers. They are the only two national chains of propane retailers in Canada.

Subsequent to the initial prenotification filing, the parties agreed to give the Bureau 21 days notice of their intention to close the transaction. On October 9, 1998, the parties gave such notice, indicating their intention to close the transaction on October 31, 1998. This date was selected in connection with the Director's indication that he would provide his preliminary views with respect to the transaction on October 30, 1998 and final views November 30, 1998.

On October 14, 1998, the Director rejected the initial proposal offered by the parties to alleviate the competition concerns on an interim basis, and on October 16, 1998, the parties withdrew their original announcement that they would close on October 31st.

On November 16, 1998, the parties again gave notice that they would close the transaction on December 7, 1998. The Director provided his final views to the parties on November 30, 1998, indicating that he had serious concerns with regard to the transaction and would oppose the consummation of the transaction. On December 1, 1998, the Director filed an application with the Competition Tribunal under section 100 of the Act seeking to prevent closing of the transaction. On Sunday, December 6, 1998, after a hearing which had commenced on the previous Friday and carried through the weekend, the Tribunal released its Reasons and Order rejecting the Director's application. On December 7, 1998, the Director filed an application under section 92 seeking to dissolve the transaction. Also on December 7, 1998, the parties closed the transaction. Subsequently that same week a limited hold separate regime was established pursuant to a consent Order.

The Marketplace Concern

The Director's concern with respect to the transaction arose from the fact that ICG and Superior were the only two national propane retailers in Canada and had, according to the Director, in excess of 70% of total propane retailing volume in Canada. In various local markets the Director concluded there would be a monopoly, and the parties would have in excess of a 65% market share in propane retailing in many others. In the Director's view, barriers to entry into the marketplace were significant. They included the fact that propane is a mature market, and therefore, little entry might be expected; the fact that there are long term customer supply and equipment contracts; the fact that there are reputational barriers; and the fact that there are significant sunk capital costs and time involved in building a distribution business.

The Section 100 Application

The Statutory Test

Section 100 of the *Competition Act* provides:

> (1) Where, on application by the Director, the Tribunal finds, in respect of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, that
> (a) the proposed merger is reasonably likely to prevent or lessen competition substantially and, in the opinion of the Tribunal, in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under section 92 because that action would be difficult to reverse, or
> (b) there has been a failure to comply with section 114 in respect of the proposed merger,
> the Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of the proposed merger.
> (2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Director to each person against whom the order is sought.
> (3) Where the Tribunal is satisfied, in respect of an application made under subsection (1), that
> (a) subsection (2) cannot reasonably be complied with, or
> (b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest, it may proceed with the application ex parte.
> (4) An interim order issued under subsection (1)
> (a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and
> (b) subject to subsection (5), shall have effect for such period of time as is specified therein.
> (5) An interim order issued under subsection (1) in respect of a proposed merger shall cease to have effect
> (a) in the case of an interim order issued on ex parte application, not later than ten days, or
> (b) in any other case, not later than twenty-one days,
> after the interim order comes into effect or, in the circumstances referred to in paragraph (1)(b), after section 114 is complied with.
> (6) Where an interim order is issued under paragraph (1)(a), the Director shall proceed as expeditiously as possible to commence and complete proceedings under section 92 in respect of the proposed merger.

The Key Tests

The heart of the issue, and the aspect on which the decision turned, was the onus on the Director to demonstrate that the proposed merger is reasonably likely to prevent or lessen competition substantially. The second branch of the test established by section 100 is that the Director must also show that without an order action is likely to be taken which will substantially impair the ability of the Tribunal to remedy the effect of the proposed merger. That second stage of the test was not the subject of much consideration by the Tribunal.

Interim Orders

Prior to releasing its decision, the Tribunal issued two interim decisions dealing with the Director's efforts to introduce into evidence summaries of conversations with third party informants; and his attempt to introduce into evidence, the transcript of the examination (pursuant to section 11 inquiry) of the CEO of ICG Propane.

The Director attempted to introduce the evidence summaries, while at the same time seeking to maintain public interest privilege and not reveal the identity of the persons providing the information. The Tribunal (Mr. Justice Rothstein) ruled that seeking to rely on such information before the Tribunal would constitute a waiver of privilege, and

therefore ruled that the evidence was inadmissible if the Director sought to withhold portions of such evidence, being the names of the persons who provided it and other information identifying them, while introducing the substance of their statements into evidence[1].

The second interim procedural order dealt with the attempt to introduce into evidence the section 11 examination of ICG's Chief Executive Officer. Here the Tribunal relied upon paragraph 23(1)(a) of the Competition Tribunal Rules, which provide that when seeking an interim order under section 100 the applicant is required to file an affidavit setting out the facts on which the application is based. Since the affidavit did not refer to such evidence, the attempt to introduce the transcript into evidence was rejected by the Tribunal[2].

Overview of Tribunal's Substantive Decision

The Tribunal noted that under section 100 the test is that the Director must show that the merger is reasonably likely to prevent or lessen competition substantially. By contrast, under section 92 the Tribunal must find that the merger is likely to prevent or lessen competition substantially. By further contrast, under section 104 (an interim application once the section 92 proceeding has been commenced) the Tribunal has the power to make an interim order, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Thus, the Tribunal struggled with the issue of the standard to be met by the Director in obtaining an order under section 100, as compared with the somewhat higher standard which must be met under section 92, and as well the different standard - that of the ordinary interlocutory injunction - under section 104. Starting with the section 104 test, the Tribunal found, citing the *RJR MacDonald* case[3] that under 104 the Director must show that there is a serious issue to be tried; that irreparable harm would ensue if the interim relief were not granted; and that the balance of convenience favours the granting of the injunction.

By contrast, in considering the requirements of section 100, the Director must show that the proposed merger is reasonably likely to prevent or lessen competition substantially. Mr. Justice Rothstein noted:

> It is insufficient for the Tribunal to simply be satisfied that there is a serious issue, or that the matter is not frivolous or vexatious as in the case of ordinary interlocutory or injunctive relief, and therefore, as would be the case under section 104. On the other hand, the Tribunal is not making a final determination and need only find that the proposed merger is reasonably likely to prevent or lessen competition substantially. Therefore, the standard of proof to be met by the Director is less than applicable after a full hearing of an application under section 92, but higher than that required under section 104.[4]

Mr. Justice Rothstein went on to say that it was not clear why a higher standard than that applicable to general injunction proceedings was mandated under section 100, but not under section 104. He stated that "One would think that such a limited interim order would justify a low threshold." Despite this observation, the Tribunal noted that it was governed by the statutory wording of sections 104 and 100 and therefore, the Director must show that the merger would be reasonably likely to prevent or lessen competition substantially.

As noted above, the second branch of the section 100 test is that in the absence of an order there is likely to be action which will substantially impair the ability of the Tribunal to remedy the effect of the proposed merger. The Director had argued that if the Tribunal was of the view that the closing of the transaction would be difficult to reverse, that the test of substantial impairment was met. The Respondents, by contrast, argued that so long as some appropriate remedy under section 92 would be available, including divestiture of assets, it is not possible for the Director to successfully argue that the second branch of the test - the scrambling of the eggs issue has been adequately met. That is, the Respondents argued that so long as divestiture was a realistic option the Director should not be able to make out that an order preventing closing would be necessary.

Mr. Justice Rothstein agreed with the Respondents' position, that what is relevant is whether the Tribunal has the ability to remedy the effect of the proposed merger on competition. However, he also stated that at that stage of the proceedings he was of the view that to foreclose any of the available remedies under section 92, including unwinding of the transaction, would be inappropriate.

Ultimately, this aspect of Mr. Justice Rothstein's decision may turn out to be the most important aspect of the case given the statutory amendments expected shortly, which would render irrelevant much of the Tribunal's consideration of the "reasonably likely" test, discussed above.

Finally, Mr. Justice Rothstein noted that the Tribunal has discretion under section 100, in that the section provides that the Tribunal <u>may</u> make an order if the required conditions are made out by the Director. The Tribunal noted that this wording provides the Tribunal with a residual discretion to make or not make the order, but that to the extent that the exercise of the Tribunal's discretion is a weighing of public interest considerations versus those of the Respondents, and the Director is presumed to operate in the public interest, the Director has a minimal onus persuading the Tribunal that it should make an order if the pre-conditions are met.

Product Market Issue

The Tribunal noted that the requirement that the Director show that the merger is reasonably likely to substantially lessen competition requires an objective consideration of the evidence which must, on a balance of probability, support the necessary finding. In order to make such determination the Tribunal should be guided by considerations in sections 92(2) and 93 of the *Competition Act*. While significant weight can be put on considerations of market share, that consideration cannot be the sole basis for a finding of proposed merger is <u>likely</u> to prevent or lessen competition substantially under section 92.[5] Under section 100, however, Mr. Justice Rothstein found that there must be evidence of significant concentration or market share to support or find an order under section 100, but that section 100 is silent on whether evidence of concentration or market share alone is sufficient to support a finding of <u>reasonable likelihood</u> of a substantial lessening. He stated that: "While I think this is probably the case given the lower standard of proof, for the purpose of this application, I need not decide the question."[6]

Mr. Justice Rothstein noted that in order to make any determination of market share, a market must be defined both in geographic and product terms. The Director had substantial evidence of high market shares of the merged ICG, and Superior, if the market were properly defined as propane supply and delivery (i.e. over 90% in 17 markets and over 35% in 58 of 80 markets, and also dominance on a national basis with over 70% of national supply). The Respondents did not materially challenge these figures. Mr. Justice Rothstein noted that if the product market were indeed propane, the market shares were impressive and that would weigh heavily in favour of the Director's application.[7]

The Tribunal noted that "The fundamental test for determining the boundaries of the relevant market is substitutability. Products must be close substitutes in order to be placed in the same product market. The question is whether there are close substitutes for propane in the relevant geographic markets. In the present case, functional interchangeability, views of customers, comments of the merging parties, pricing practices, switching costs, and other factors have all been considered in determining whether propane is in a market by itself, or whether it is part of a larger energy market."[8]

The evidence was apparently that whenever natural gas became available in an area, demand for propane for heating and many other uses quickly disappeared, due to the substantial price advantage natural gas enjoyed over propane. Apparently, propane appliances and furnaces can be adapted for natural gas use with relatively minor adjustments. For automotive use, the evidence was that general propane use had been declining at a rate of 10-15% per year since the mid-1990's.

The Tribunal noted that while the Director made general references to alternate fuels not being close substitutes for propane, the details and other support for the lack of substitutability was not provided. The Tribunal noted that there was evidence of switching to and from propane as a fuel source. The Tribunal also noted that: "Of some significance is the fact that the Director has provided no evidence as to whether propane pricing is or is not observed to be disciplined by other fuel prices. One would expect that if the relevant market was limited to propane, that there would be some evidence that propane pricing was independent of pricing of other fuel sources[9]." The Tribunal noted that, on the contrary there was evidence from the Respondents that pricing practices were governed by alternate fuel cost comparisons[10]. It is worth noting however that the reference to the Respondents' evidence in that regard was simply a reference to annual report and securities filing type information.

The Tribunal's Conclusion

The Tribunal ultimately concluded that it was not satisfied that the relevant product market was propane. Consequently, at least for the purpose of the interim application, the Director had failed to meet the statutory test, and consequently the application was dismissed.

Some Brief Comments

Section 100 and the Bill C-20 Amendments

Section 100 of the *Competition Act* was enacted originally in 1986[11]. Since that time, there have been a very small number of orders made under it[12], and none have proceeded to a contested hearing.

Nonetheless, it has been the general presumption that the Director would have a fairly easy hurdle persuading the Tribunal, on a interim basis, that a merger which involved high market shares was reasonably likely to substantially lessen competition, for the purpose of obtaining an interim injunction. That is, the test was thought to be reasonably low.[13]

Indeed, the Tribunal itself did not appear to understand why a higher threshold was set under section 100 than under 104. The logic would suggest a fairly low standard would be appropriate for an interim order lasting only 21 days, particularly when an order would be available if the normal interlocutory injunctive test were met, once an application has been commenced under section 92, pursuant to section 104[14]. That said, the wording of section 100 as analyzed by the Tribunal dictated a fairly clear standard which Mr. Justice Rothstein applied in the Superior Propane case.

There is some irony in that the standard in section 100, having been in existence and untested for more than a decade, is scheduled, pursuant to Bill C-20[15] (Section 24), to be replaced by a new section which will provide, in part "The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion of implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where (a) on application by the Commissioner, certifying an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order, a party to the proposed merger or any other person is likely to take action that will substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse; or (b) the Tribunal finds on application by the Commissioner, that there has been a contravention of section 114 of the proposed merger."

Therefore, Mr. Justice Rothstein's detailed consideration of the "reasonably likely" standard in the current section 100 is likely to be a one decision wonder. In fact, the amendment to section 100, somewhat of a sleeper in the discussions with respect to Bill C-20[16], may be one of the most significant provisions of the amendments. The Bureau, in proposing this amendment to section 100 may well have provided itself with a significantly enhanced bargaining position with merging parties perhaps more significantly enhanced than even it anticipated when it originally proposed such an amendment.

Product Market Discussion

Another interesting item in Mr. Justice Rothstein's decision was his conclusion that the Director had not adduced sufficient evidence with regard to the product market to find that there existed a propane product market. Without being privy to all of the evidence it is difficult to comment in any meaningful way on this point. That said, the fact that (as noted in the reasons) natural gas is significantly less expensive than propane, and that it tended to supplant propane (at least for heating and similar applications) whenever it entered a local marketplace, would appear to be reasonably good evidence that at least propane and natural gas are <u>not</u> in the same product market. That is, the continued use of propane despite natural gas' pricing differential suggests that propane really is a different

market, given that otherwise it could not sustain a pricing differential. Thus, it is submitted, the Tribunal may have had more evidence of substitutability, or the lack thereof, before it than it realized in making the interim order.

The Tribunal's Approach

Finally, while the specific issue of the interpretation of section 100 is likely not to be repeated, given the Bill C-20 amendments, the Tribunal's willingness, evidenced in this case, to carefully require that the Director meet the burden placed by the statute on him or her, rather than offer the Director a general benefit of the doubt, it is submitted, is a welcome development. As a practical matter, however, this decision may suggest that in merger cases which are likely to be controversial the Bureau will adopt a litigation stance reasonably early in its inquiries, so that if and when it has to go to the Tribunal it will have a fairly well-articulated preliminary case.

J.M.

Notes

[1] *Canada (Director of Investigation and Research)* v. *Superior Propane Inc. et al*, Reasons and Order Regarding the Use of Information Subject to Privilege (December 4, 1998), No. 98/02 (Comp. Trib.).
[2] *Canada (Director of Investigation and Research)* v. *Superior Propane Inc. et al*, Reasons and Order Regarding the Introduction of Portions of the Examination of Andrew Wiswell (December 5, 1998), No. 98/02 (Comp. Trib.).
[3] *RJR MacDonald Inc.* v. *A.G. Canada*, [1994] 1 S.C.R. 311.
[4] *Canada (Director of Investigation and Research)* v. *Superior Propane Inc. et al*, Reasons and Order Regarding Application for Interim Order under Section 100 of the *Competition Act* (December 6, 1998), No. 98/02 (Comp. Trib.) at 5-6.
[5] *Ibid.* at 10.
[6] *Ibid.* at 11.
[7] *Ibid.* at 13.
[8] *Ibid.* at 14.
[9] *Ibid.* at 16.
[10] *Ibid.* at 16-17.
[11] R.S.C. 1985, c.19 (2nd Supp.) s.45.
[12] Only one order, and that on consent, has previously been made under s.100: *Canada (Director of Investigation and Research)* v. *Quebecor Printing* (January 5, 1995), No. 95/01 (Comp. Trib.).
[13] A.N. Campbell, *Merger Law and Practice* (Scarborough: Carswell, 1997) at 353-354; and P.S. Crampton, *Mergers and the Competition Act* (Scarborough: Carswell, 1990) at 647: "...it is reasonable to infer that Parliament intended the words 'reasonably likely' to connote a significantly lower probabilistic threshold than that which is connoted by the words 'is likely to' in section 92".
[14] *Superior Propane* Order, *supra*, note 4 at 6.
[15] First Session 36 Parliament, 46, 47, Elizabeth II, 1997-98.
[16] See J. Musgrove & D. Edmondstone "Canada: Changes in Competition Law" (1997) 25:11 IBL 497.

THE AMENDMENTS — AT LAST

Background to Amendments

On March 18, 1999, Bill C-20, an Act to amend the *Competition Act*, was proclaimed in force. Some aspects of the amendments, dealing with merger prenotification, will be proclaimed later this year, once the new prenotifiable transactions regulations have received approval. All other aspects of the amendments are now in force.

Prior to Bill C-20, the last major amendments to the *Competition Act* occurred in 1985. The current amendment process commenced in earnest on June 28, 1995, when the Competition Bureau released a discussion paper with respect to possible amendments to the *Competition Act*. Comments from the bar as well as industry and consumer organizations were received and considered. The Commissioner then appointed a consultative panel to advise on the suitability and feasibility of the

proposals and alternatives. The panel's recommendations were released on March 6, 1996, and on May 10, 1996, the Commissioner provided his comments on the report of the consultative panel.

As a result of the panel's report and the Commissioner's comments, two aspects of the amendments initially proposed by the Competition Bureau — direct access to the Competition Tribunal by those allegedly injured by reviewable practices; and repeal of the price discrimination provisions of the *Competition Act* — were dropped from the proposal for amendments. Such proposed amendments may be revived at a later time. In the fall of 1996, the government announced that a third aspect of the originally-proposed amendments, dealing with confidentiality of information and international cooperation, would not proceed in the present amendment package.

On November 7, 1996, the government introduced Bill C-67, An Act to Amend the *Competition Act* and Another Act in Consequence, into Parliament. The Bill provided for changes in a number of areas, including pre-merger notification, interim injunctions, misleading advertising and deceptive marketing practices, deceptive telemarketing, regular price claims, and prohibition orders. As well, there were a variety of procedural and housekeeping amendments contained in the Bill. Bill C-67 received partial second reading before the dissolution of Parliament for the June 2, 1997 general election. However, as the Bill was not passed prior to dissolution, it died on the order paper.

One November 20, 1997 the Government introduced Bill C-20. Bill C-20 essentially reintroduced the amendments found in C-67, although it also contained a new provision with regard to wiretapping, which will be discussed below. In the Spring of 1998 Bill C-20 was reviewed by the Industry Committee. Arising out of that review the Bill was proposed for final reading with some minor amendments, including some change to the wiretap powers. The committee report also proposed that protection be given to those who come forward to the Competition Bureau with information ("whistleblowers"). The Bill passed by the Commons included protection for whistleblowers. In December 1998, the Senate amended Bill C-20 to delete the whistleblower provision and sent it back to the House of Commons. In February 1999, the House of Commons sent the Bill back to the Senate without accepting the Senate amendments. Rather, it narrowed the scope of the whistleblower protection that the Senate rejected entirely. The Senate acquiesced and passed the Bill, which has now received Royal Assent and been proclaimed in force.

This brief article represents a summary of the major changes to the *Competition Act* which have just been enacted. These changes represent the most significant amendments to Canada's antitrust regime in over a decade.

The Amendments

Amendments Respecting Pre-merger Notification (Not yet in force)

Significant amendments have been undertaken with respect to pre-merger notification, expected to be proclaimed in force concurrent with new pre-notifiable transactions regulations, within the next few months. The current practice of optional long-form or short-form filings, with the Commissioner (now renamed the Commissioner of Competition) having the discretion to require a long-form filing,

has been maintained. However, the waiting periods after filing, before the expiry of which closing may not occur, has been extended from 7 to 14 days in respect of short-form filings, and from 21 to 42 days in respect of long-form filings. There is an exception for the acquisition of voting shares through the facility of a stock exchange, in which case, if a long-form filing is made, the waiting period will be reduced to 21 trading days, or such longer period of time, not exceeding 42 days, as may be allowed by the rules of the Stock Exchange, before the shares must be taken up. As well, the Commissioner (and now also a person authorized by the Commissioner) has the ability to shorten the waiting periods by informing the parties that she or he does not intend to challenge the transaction.

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

The pre-merger notification regime now expressly applies to acquisitions of an interest in combinations, as well as to share acquisitions, asset acquisitions, amalgamations and the formation of a combination.

The obligation to pre-notify, which was previously on "the person or persons who are proposing the transaction" is now placed on "the parties to the transaction". In respect of a share acquisition, however, if the purchaser alone provides the prescribed information to the Commissioner, the Commissioner shall immediately notify the corporation whose shares are to be acquired and that corporation must supply either long or short-form information to the Commissioner within 10 or 20 days, as the case may be. This mechanism, which is designed primarily to deal with hostile bid situations, will be interesting. The "target" of such bids will now have to respond, within a short-time period during a hostile takeover battle, to an information notice from the Commissioner. Such targets will have to make interesting decisions as to how to respond, in fairly short order.

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

Finally, and perhaps of greatest interest, the list of information that must be provided by way of short-form and long-form filings will be changed. The changes, which are expected to include a requirement to list production facilities, production capacity, cost of transportation, geographic area of sales, and various internal studies, surveys, reports and plans, will be made by regulation.

Interim Orders To Prevent Mergers

The provisions that relate to the ability of the Competition Tribunal to grant an interim injunction to prevent a merger from being concluded have been changed significantly. Previously, the Tribunal, in order to grant an interim order, had to determine that the proposed merger was reasonably likely to prevent or lessen competition substantially. The amendment permits the granting of the order requested by the Commissioner where he or she certifies that an inquiry is being made, and that in

the Commissioner's opinion more time is required to complete the inquiry. That is a much less onerous test than the previous provision. The requirement that the Tribunal must find that, in the absence of an interim order, action would likely be taken that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger because the action would be difficult to reverse, remains unchanged. The recent *Superior Propane* case, however, suggests that the Commissioner will not have difficulty meeting such test.

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

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

New Reviewable Practice – Deceptive Marketing Practices

The criminal advertising and marketing practices provisions, previously contained in sections 52 to 59 of the Act, with the exceptions noted below, were repealed and substantially repeated as reviewable conduct in sections 74.01 to 74.08 of the amended Act (Part VII.1).

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

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

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

(1) final cease and desist orders;
(2) interim cease and desist orders;
(3) orders requiring advertisers to publish corrective notices; and
(4) orders requiring advertisers to pay an "administrative monetary penalty". The penalty is not to exceed $50,000 for an individual for a first "offence" or order, and $100,000 maximum for each subsequent order. In the case of a corporation, the penalty is up to a maximum of $100,000 for the first order, and $200,000 maximum for each subsequent order.

The size of such administrative monetary penalties will be affected by, amongst other things, the reach of the advertising, its frequency and duration, the vulnerability of those likely to be affected, the materiality of the representation, the likelihood of self-correction in the market, the injury to competition, and the history of (non)compliance with the Act. The Bureau has been adamant that these "administrative monetary penalties" are not fines. Any unpaid administrative monetary penalties are treated as debts to Her Majesty, rather than as contempt of court. That said, a $100,000 or $200,000 administrative penalty may well feel very much like a fine.

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

A key change from the previous criminal regime is that the government will no longer be required to prove its case beyond a reasonable doubt — a balance of probabilities will do. Advertisers which formerly sailed close to the wind, on the theory that a criminal burden of proof was difficult to make out, may find that the rules of the game have changed in a civil balance of probabilities context.

As noted above, there is the possibility of interim cease and desist orders. A court or the Tribunal may, on application by the Commissioner, make a temporary order prohibiting a party from engaging in conduct in violation of advertising and marketing provisions, if there is a strong prima facie case, serious harm is likely to ensue without the order, and the balance of convenience favours issuing the order. Such orders are to have a maximum life of 14 days, unless the party subject to the order consents, or the court or Tribunal on further application extends the order. These orders shall be sought on at least 48 hours notice to the person against whom the order is sought. The court or Tribunal may proceed without notice if the Commissioner can show urgency, or that "service of notice in accordance [with the Act] would not be in the public interest". An *ex parte* order has a maximum term of seven days.

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

The new provisions also provide for resolution of disputes via consent orders. Where the Commissioner and the party consent, the Tribunal

or court may register a consent order, and it shall become effective as if it were an order of the Tribunal or court, whether or not the Tribunal or court would have had the power to make an order on such terms as agreed if the matter had been contested.

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

Appeals from orders of the Tribunal or the Federal Court Trial Division lie to the Federal Court of Appeal. Appeals from a provincial court lie to the relevant Provincial Court of Appeal. Appeals on questions of fact may be brought only with leave of the relevant Court of Appeal.

The Remaining Criminal Misleading Advertising Rules

While the majority of the existing rules that relate to misleading advertising have been decriminalized and dealt with as reviewable conduct, there remain some criminal prohibitions. The pyramid selling and multi-level marketing regime remain criminal, and the summary conviction fine for those offences has been increased from $25,000 to a maximum of $200,000. The double ticketing provision (section 54) also remains a summary conviction offence.

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

The remaining section 52 criminal offence is expressly stated to be applicable to representations that could also constitute reviewable conduct within the meaning of Part VII.1 of the Act, although no proceedings may be commenced under the criminal provision against a person against whom an order is sought under Part VII.1, on the basis of the same or substantially the same facts.

A subtle but significant consequence of the removal of most of the misleading advertising provisions from the criminal sections of the Act, and the increased onus on the Crown to prove a mental element in respect of the remaining provision, may be to undermine civil damage actions for misleading advertising. Such actions have been on the rise over the last few years. Typically, actions under section 36 of the *Competition Act*, alleging breach of section 52

of the Act, also allege defamation, breach of the *Trade Marks Act*, and unlawful interference with economic interests. The section 36 cause of action is not available if the conduct under attack ceases to be prohibited by the criminal provisions of the *Competition Act*. As well, causes of action alleging unlawful interference with economic interests, and alleging as the unlawful conduct contrary to the reviewable matters provisions of the *Competition Act*, are likely to be successfully attacked as not disclosing a valid cause of action. Thus, as noted above, despite the fact that section 74.08 provides that "[e]xcept as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action", the scope of civil misleading advertising litigation may have been reduced by these amendments.

Choice of Criminal or Civil Enforcement Track

One of the concerns expressed with the new hybrid criminal — civil regime has been how and when the Commissioner would choose which track — civil or criminal — to pursue. There is a danger of making disclosure to the Commissioner, in an attempt to negotiate an appropriate civil resolution of the problem, only to face criminal charges and the use of such disclosure by the Commissioner in criminal proceedings. Once the Commissioner opts to proceed civilly, or criminally, she or he may not take the other route, but until the selection is made there may be a risk to the potential accused. In draft interpretation guidelines released at the time the Bill went before the Parliamentary Committee, the Commissioner ("Director", at the time) provided his view as to which track would be taken in what circumstances. Highlights of the draft guidelines are as follows:

- the Commissioner will decide whether a criminal or civil track is being pursued as quickly as possible, and notify the parties as soon as a decision is made;

- use of one route will preclude the other route;

- the Commissioner will attempt to approach matters consistently as between the civil and criminal tracks;

- to proceed criminally there must be clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public, and the Commissioner must be satisfied that a criminal prosecution will be in the public interest;

- in determining the public interest, the Commissioner will consider the seriousness of the alleged offence, including harm to consumers and competitors; whether there was an attack on a vulnerable group or groups; whether the advertiser failed to make timely and effective efforts to remedy the conduct; whether the conduct continued after corporate officials became aware of the problem; whether there was a breach of previous undertakings or other voluntary corrective actions; and whether there had been similar conduct in the past by the advertiser;

- where the consequence of prosecution will be disproportionately harsh, or where the company has an effective competition law compliance program in place, these will be factors suggesting that the civil reviewable track is the more appropriate route.

These guidelines, while they provide some assistance to firms in understanding the Bureau's likely approach in the abstract, will be of limited utility in specific cases when the potential accused is attempting to decide how it will respond to the Commissioner's questions. As a practical matter, however, persons subject to a misleading advertising inquiry under the old Act already faced the same dilemma in determining how to deal with the Commissioner, so the real world implications of the issue are likely not as significant, or novel, as the theoretical problem might suggest.

Ordinary Price Claims

The Provision

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

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

The amendments now specifically provide that a person engages in reviewable conduct when they make a representation to the public as to price at which products have been, are, or will be ordinarily supplied, when they, or other suppliers in the markets generally, have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, or have not offered the product at that price or a higher price in good faith for a substantial period of time, either recently before or immediately after making the representation. That is, the statute will now permit ordinary price comparisons justified either by a test based on a substantial period of time offered for sale, or a test based on a substantial volume of product sold.

Guidelines with respect to Ordinary Pricing Claims

The Commissioner also provided guidelines as to when he may consider there to have been a misleading comparison to an "ordinary" or "regular" price. The question typically turns on how long goods must be offered for sale, or what percentage of the goods must be sold, at the ordinary or regular price. The guidelines note:

- In considering what a "reasonable period of time" is (it will not be a breach to refer to a comparison price if a "substantial volume" of product is or was sold at such price within a reasonable period of time) the Commissioner will consider the nature of the product and the proportion of sales made during the selling life of the product.

- More than a year will not be considered a reasonable period of time.

- The "substantial volume" requirement will be met when more than 50% of the sales occur at or above the comparison price.

- With regard to determining a "substantial period of time" (it will not be a breach to refer to a comparison price if the product is or was offered for sale in good faith at the comparison price for a substantial period of time) that will be determined by a consideration of the nature of the product and the sales history of the product.

- Generally, the time period to be considered in relation to determining a substantial period of time will be the six months prior to or following the making of the representation, but it may be a shorter period of time if the product is of a seasonal nature.

- 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 considered.

- The "good faith" requirement as to the offering of goods for sale will generally require that the product be openly available in appropriate quantities, and genuine sales must have occurred at the offered price.

- "Clearance" sales need not meet the criteria as to time offered for sale or volume of product sold if the advertiser can show that the advertisement is not misleading because it clearly indicated to be a "clearance sale". If a representation refers to the original price or subsequent interim prices which were offered in good faith, that should be enough to avoid the conclusion that the representation is misleading.

- Similarly, other price comparisons which do not meet the above tests as to time or quantity will not be considered to be misleading if they are sufficiently clear and accurate on their face such that they may be shown not to be misleading.

- Finally, the guidelines state that "The nature of the market and the nature of the product will be considered in determining whether a violation under the section has occurred. For example, a market may be able to correct itself through competition, especially where the products are frequently purchased, low-priced items. Similarly, seasonal products may typically be sold or offered for sale for a short period of time than other products."

Commentary

A couple of interesting notes arise from this new regular price comparison provision. The first is simply the observation that when considering the volume of sales test, the time period one looks to is "a reasonable period of time before or after the making of the representation". When considering the time offered for sale test, the relevant time period is defined as "a substantial period of time recently before or immediately after the making of the representation". A "reasonable" time suggests a lesser period than a "substantial" time, although that may be appropriate given that during the "reasonable" time a substantial volume of product must be sold. The draft guidelines, however, do not support this view of the legislation.

The second note is that for both the volume and time tests, the period after the making of the representation will be considered — although the advertiser should specify which period, 'before' or

'after', is referred to in the advertisement. This should not be problematic in respect of the time one offers one's own products for sale, as that is within a retailer's control. There is no way, however, to guarantee how long others may offer a product at a given price in the future. Similarly, there is also no way to know, with confidence, what volume of product you or other suppliers may supply during a given period in the future. Therefore, while representations may be justified by future events, it may not be practical to advertise based on an assumption as to future events when such events are beyond the advertiser's control.

Deceptive Telemarketing

The amendments add a new substantive criminal provision to the *Competition Act* dealing specifically with telemarketing. Telemarketing is defined as the use of interactive telephone communications for the purpose of promoting the supply or use of a product or promoting any business interest. The Commissioner has released draft guidelines as to his interpretation of the telemarketing provisions. There he states interactive telephone communications will be interpreted as live voice communication. Therefore it will not include telecopies, internet communications and automated pre-recorded messages. He states as well that a customer initiated call to customer relations line, in response to unprompted consumer questions, will not be considered to be telemarketing if any sales proposal is incidental to the primary marketing drive and is not part of a general pattern of representations.

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

There is a simple prohibition on making telemarketing representations that are false or misleading in a material respect.

The section also prohibits telemarketing unless there is disclosure in a "fair and reasonable manner at the beginning of each telephone communication" of the identity of the person on behalf of whom the communication is made, the nature of product or business interest being promoted, and the purpose of the communication. As well, fair, reasonable and timely disclosure must be made of the price of the product being promoted, and of any material restrictions, terms or conditions applicable to its delivery, and of any other information which may be prescribed by regulation. The Commissioner has noted in his draft guidelines that where price is required to be disclosed, but is not available at the time of the telephone call, it can be disclosed by way of reference as long as it is a clear reference which is reasonably able to be determined; the use of a reference price is reasonable given similar transactions; all relevant reference terms are disclosed; any risk of volatility of the reference price is disclosed; the actual price is provided in a fair, and timely manner once determined.

There is also a prohibition on offering a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of any restrictions, terms or conditions applicable to its supply or purchase, and of the fair market value of the first product. As

well, there is a prohibition on offering a product for sale at a price grossly in excess of its fair market value, where delivery of the product is or is represented to be conditional upon prior payment by the purchaser.

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

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

There is also a new provision prohibiting telemarketing involving a contest, lottery or game of chance, skill or mixed chance and skill, where the benefit is conditional on prior payment of an amount by the participant, or where adequate and fair disclosure is not made of the number and approximate value of the prizes, or the areas to which they relate, or any fact within the person's knowledge that materially affects the chances of winning. The Commissioner's draft guidelines note that the cost of entering a contest (i.e. the cost of a postage stamp or the like) will not generally be considered to be a prohibited condition of prior payment. As well, a payment to a person other than a telemarketer or promoter, of an amount that is nominal in relation to the fair market value of the prize, will not generally be considered to be a prohibited condition for delivery of the prize.

This is an interesting provision in that it combines aspects of the old section 59, dealing with promotional contests (which will now be dealt with as reviewable conduct), and also rolls in some of the traditional Criminal Code lottery rules with respect to payment of money for participation in a game of chance or skill, or mixed chance and skill. These rules are, however, expressly limited to telemarketing situations. The section appears to be aimed at perceived abuses in "1-900" promotions, and at true fraudulent promotions where, for example, "winners" were told they had won a vehicle, but had to forward funds to cover tax on the vehicle. Of course, no vehicle ever arrived.

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

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

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

Finally, a companion amendment to the *Criminal Code* has been passed, which provides for the forfeiture of any proceeds of illegal telemarketing to the Crown, under the "enterprise crime offence" (proceeds of crime) provision of the *Criminal Code*.

Prohibition Orders

Section 34 of the *Competition Act*, which governs prohibition orders, has been amended to allow for consent orders, and to give the court some greater latitude in making prohibition orders. A conviction is not a prerequisite to the granting of a prohibition order, either contested or on consent. However, the Attorney General may not charge a person with an offence after seeking a prohibition order on a contested basis. Under the amended provision, the court will have the explicit power to prohibit a party from doing certain acts, or may order that the party carry out certain acts to prevent the commission, continuation or repetition of an offence. On consent, the court may order the person to undertake any acts agreed to by the person and the Attorney General.

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

Wire Taps and Whistleblowing

When Bill C-20 was introduced in the fall of 1997 it contained a new provision not found in Bill C-67, and not part of the consultation process with stakeholders, with respect to use of wiretap evidence. The amendment is in fact an amendment to the *Criminal Code*, section 202, which now permits the use of wiretaps in respect of investigations under sections 45 (Conspiracy), section 47 (bid rigging) or section 51.2 (deceptive telemarketing). The amendment was highly controversial, in part because it was not the subject of consultation, and in part because wiretaps are felt to be a highly intrusive investigative technique. The committee report in the spring of 1998 narrowed the use of wiretaps somewhat with respect to section 45, so that only items mentioned in section 45(4)(a) through (d) (that is conspiracies with respect to price, quantity or

quality of production, markets or customers or channels or methods of distribution) will be subject to investigation by a wire tap. The limitation is of course somewhat illusory, as any conspiracy with an undue effect is likely to be in relation to or affect one of the above. The wiretap powers continue to apply with respect to telemarketing and bid-rigging.

An entirely new amendment, which arose out of the parliamentary committee process, was the inclusion of a whistle-blower protection provision. The section gives a statutory grant of confidentiality to those reporting offences under the Act (i.e. offences, not reviewable matters) to the Commissioner. It also prohibits employers from disciplining employees (which term includes independent contractors) for reporting offences under the Act to the Commissioner, or for refusing to do things that amount to offences under the Act or believed by the employee to be so. This provision is unlikely to have a significant impact on the practice of the Commissioner, in that he already routinely asserted informant privilege with respect to his sources of information. Further, there is no evidence of any widespread or common reprisal against employees who come forward with information, although this provision will ensure that any such reprisal will constitute a criminal act.

Miscellaneous Amendments

In addition to the principal amendments discussed above, Bill C-20 contains a number of miscellaneous housekeeping matters. The familiar, if somewhat convoluted, title "Commissioner of Investigation and Research" has been replaced by the title "Commissioner of Competition". This parallels the earlier administrative change in the name of the Commissioner's fiefdom, the "Bureau of Competition Policy" to the "Competition Bureau".

The maximum fine in respect of failure to pre-notify merger transactions will be increased from $5,000 to $50,000, although the possibility of imprisonment will be removed.

The definition of "business" in section 2(1) of the Act is expanded to include the raising of funds for charitable or other non-profit purposes. This amendment is aimed specifically at expanding the reach of the telemarketing and misleading advertising provisions of the Act, as it is believed that many "scams" involve proported charitable giving arrangements.

Another amendment aimed at the telemarketing and misleading advertising provisions deals with the making of a representation. A new section has been added (section 52(1.2)) which provides that "for greater certainty, a reference to making a representation in sections 52 (criminal false or misleading representations), 52.1 (telemarketing), 74.01 (reviewable false or misleading representations) and 74.02 (reviewable tests and testimonials) includes permitting a representation to be made". The amendment is designed to "ensure that the persons who are responsible for the making of the misrepresentation as well as the person actually making the misrepresentations are covered by the Act". Apparently it was added to deal with the situation of a telemarketing firm instructed by the product marketer, but which firm actually makes the representation. However, the amendment might well have a broader impact. The Competition Bureau may argue, for instance, that franchisors "permit" franchisees to make misleading representations simply by virtue of the fact that there is a franchise system in place with the right to control franchisees, even though the franchisor had nothing to do with the particular representation made. Time will tell,

but this amendment may be broader than was initially anticipated.

Finally, the section dealing with exclusive dealing and tied selling will be amended to provide that, so long as there is an exclusionary effect in a market, the Tribunal may make an order. Previously, the exclusionary effect had to occur in the market in which the exclusive dealing or tied selling was ongoing.

Conclusion

These amendments to the *Competition Act*, while not representing wholesale change, are the most significant amendments in more than a decade. Further proposals for amendment, specifically with regard to private access to the Competition Tribunal, and confidentiality/international information exchanges are expected to be proposed shortly, and may be expected to be advanced much more quickly. The next round of proposed amendments to the *Competition Act* can be reasonably anticipated to be seriously debated soon.

J.M. and D.E.

COMPETITION BUREAU WILL FIGHT DECISION BY SUPERIOR PROPANE

The following is a News Release issued by the Competition Bureau on December 1, 1998 and is reproduced with permission.

The Competition Bureau announced today that it will challenge the scheduled December 7th closing by the parties of the proposed acquisition by Superior Propane of ICG Propane before the Competition Tribunal.

The Bureau has completed its investigation and concluded that the merged entity will likely cause a substantial lessening or prevention of competition in local and national markets. The parties were informed of this final conclusion on November 30, 1998.

An interim injunction has been filed with the Tribunal to prevent the parties from merging in any form. Superior and ICG have announced that they wish to proceed with the closing of the proposed merger and will challenge the Bureau's findings before the Competition Tribunal.

Superior and ICG operate a network of branches or distribution outlets across Canada for the provision of propane and related equipment to wholesale, commercial, industrial, residential, agricultural and automotive industry segments. They are the two largest suppliers of propane and propane equipment in Canada with a combined market share of about 73% on a national basis. In 26 local markets the proposed transaction would result in the merged entity attaining a monopoly or near monopoly position, with market shares exceeding 65% in 21 additional local markets. Post-merger, Superior would also be the only propane firm able to provide nation wide service to major and national accounts.

"The Bureau must step in to prevent the creation of local and national monopolies in this mature industry," said Konrad von Finckenstein, Q.C., Director of Research and Investigation for the Competition Bureau. "We must challenge this matter before the Competition Tribunal because we believe propane customers in many markets will suffer as a result of this transaction."

The Competition Bureau communicated to the parties on October 30, 1998 the preliminary conclusion that the proposed merger would raise grave competition concerns. The Bureau reconfirmed this in a meeting held on November 23, 1998.

The Bureau has conducted an intensive five month investigation, and received approximately 600 complaints from market participants including customers, competitors, suppliers, associations and governments. In reaching its conclusion, the Bureau considered the extremely high post-merger market shares, the significant barriers to entry including the mature nature of the industry and a customer base under restrictive, long term contracts. As well the Bureau looked at the lack of effective remaining competitors to constrain prices paid by customers in many local markets and by national accounts, following the merger. The Bureau has not accepted the parties' argument that alternative fuels such as fuel oil, natural gas, electricity and wood could offset the loss of competition resulting from the merger.

"The mandate of the Competition Bureau is to maintain competitive markets," explained Mr. von Finckenstein. "It is our view that the merger of the two dominant firms in the propane industry would result in a serious deterioration of competition, with resulting higher prices to many propane customers."

COMPETITION BUREAU FILES APPLICATION FOR INJUNCTION TO PREVENT MERGER BETWEEN SUPERIOR PROPANE AND ICG PROPANE

The following is a News Release issued by the Competition Bureau on December 7, 1998 and is reproduced with permission.

The Competition Bureau announced today that it has filed an application with the Competition Tribunal requesting that an order be issued to dissolve the merger or alternatively remedy the Bureau's competition concerns with respect to the proposed acquisition by Superior Propane of ICG Propane, a wholly owned subsidiary of Petro-Canada.

On December 6, following two days of hearings, the Tribunal dismissed the Director's December 1, 1998 application for an injunction to prevent the closing of the transaction.

"I was disappointed to learn that the Competition Tribunal has turned down my application to prevent the closure of the merger between these two companies in the propane industry," said Konrad von Finckenstein, Q.C., Director of Investigation and Research. "The Competition Bureau had ongoing discussions with the parties over the course of this review, and had hoped for a satisfactory resolution which would meet our concerns. However, the Hold Separate order which has been proposed by the parties would not prevent the integration of ICG into Superior. Consequently, the Bureau is submitting an application for the consideration of the Tribunal at its earliest convenience."

On July 16, 1998, Superior announced its intention to acquire all of the issued and outstanding shares of ICG. The merged entity would be the only national propane company, and would have a market share of about 73% including monopolies in many local and remote markets across Canada as well as the market for national accounts.

Documents are on the public record and available from the Tribunal.

THE FEDERAL COURT OF CANADA ISSUES A CONSENT PROHIBITION ORDER AGAINST THREE COMPANIES

The following is a News Release issued by the Competition Bureau on December 7, 1998 and is reproduced with permission.

On December 7, 1998, the Federal Court of Canada issued a consent prohibition order relating to misleading advertising against A&A Jewellers Limited ("A&A"), Summit Retail Services Inc. ("Summit") and 1012795 Ontario Limited ("1012795 Ontario"), formerly known as Silverman Jewelers Consultants.

A&A is a jewellery manufacturer, and Summit conducts going out of business sales on behalf of independent jewellery retailers across Canada. 1012795 Ontario was in the same business as Summit, and ceased its activities in July 1996. The order is the result of an investigation conducted by the Competition Bureau into certain marketing practices of the three companies. The relevant activities took place from November 1994 to January 1997.

During this time, 1012795 Ontario and Summit, on behalf of jewellers going out of business, advertised in print media and in-store signage, "Going out of Business", "Close Out", "Inventory Clearance" or "Bankruptcy" sales. They also made claims such as "Everything Must Go", and "Clearing out all inventory". During these sales, existing store inventory was augmented with inventory from outside sources, including A&A, on a consignment basis. For sales conducted by 1012795 Ontario before the Bureau's intervention in January 1996, this augmentation was not disclosed to consumers in the advertisements. For sales taking place thereafter, this disclosure was made, but it was not prominently displayed in the advertisements. In the case of sales conducted by Summit, while disclosure of the augmented inventory was made in the advertisements, it was not prominently displayed.

Also during this time, 1012795 Ontario and Summit made claims with respect to price discounts such as "Prices slashed", "Prices lowered", "Prices reduced", "Going out of business prices" and "You pay just 49 cents on the retail dollar". Despite these claims however, tagged prices on some consignment jewellery from A&A and some pre-existing store inventory were substantially greater than the regular prices of the same or similar items of jewellery in the market.

Under the order, 1012795 Ontario and Summit have agreed they will not make any misleading representations as to the nature of a sale being conducted on behalf of a particular retailer. They are also prohibited from augmenting the existing inventory of jewellery retailers at closing out sales unless it is prominently indicated who is conducting the sale on the retailer's behalf, and that the inventory has been augmented with inventory from outside sources.

A&A, 1012795 Ontario and Summit have also agreed not to make any misleading representations as to the ordinary selling price, and the relative savings to the consumer on jewellery being offered for sale.

The order was obtained on the consent of A&A, 1012795 Ontario and Summit, who cooperated fully with the Bureau at all times in the course of the investigation. As soon as the Bureau's concerns were made known to the companies, they modified certain of their activities, which may have inadvertently raised issues under the *Competition Act.*

APPLICATION FILED TO HOLD ASSETS SEPARATE IN THE MERGER BETWEEN SUPERIOR PROPANE AND ICG PROPANE

The following is a News Release issued by the Competition Bureau on December 10, 1998 and is reproduced with permission.

The Competition Bureau announced today that, after reaching agreement with Superior Propane, it has filed an application with the Competition Tribunal, which seeks a "hold separate" arrangement which will preserve ICG as an independent competitor. Petro-Canada has indicated that it will not oppose the application.

"I believe that we had to take the extra step of asking the Competition Tribunal to issue a consent order to hold separate certain assets in the merger of these two propane companies," said Konrad von Finckenstein, Q.C., Director of Investigation and Research. "It is important that Superior and ICG continue to operate as two separate firms until the Competition Tribunal has an opportunity to fully consider the serious competition concerns we have."

The filing of the consent Hold Separate order follows an earlier filing with the Tribunal, on December 7, 1998, of an application for an order to dissolve the merger or alternatively to address the Bureau's competition concerns with respect to the transaction.

On December 1, 1998 the Director had filed a request for an order restraining the closing of the merger for 21 days. This request was turned down by the Tribunal.

On July 16, 1998 Superior announced its intention to acquire all of the issued and outstanding shares of ICG, a wholly owned subsidiary of Petro-Canada. The merged entity would be the only national propane company and would have a market share of about 73% including monopolies in many local and remote markets across Canada as well as the market for national accounts.

EIGHT METRO QUEBEC CITY SNOW REMOVAL COMPANIES PLEAD GUILTY TO CONSPIRACY

The following is a News Release issued by the Competition Bureau on January 15, 1999 and is reproduced with permission.

The Competition Bureau announced today that eight snow removal companies have been fined close to $3 million following a conspiracy offence under the *Competition Act.* The decision was rendered by Mr. Justice de Blois of the Quebec Superior Court.

The eight companies are: Les Constructions du Saint-Laurent Ltée, Les Constructions Bé-Con Inc., Les Entreprises P.E.B. Ltée, Construction T.C.L. (1990) Inc., Pavage Rolland Fortier Inc., Jean Leclerc

Excavation Inc., Union des Carrières et Pavages Ltée and Henri Labbé et Fils Inc.

On January 13, 1999 the companies pleaded guilty to the charge of conspiring to share the market and lessen unduly competition in snow clearing, removal and transportation in the metropolitan Quebec City area. Following the guilty pleas, Mr. Justice de Blois issued a prohibition order requiring each of the companies and their executives to comply with the Act for a ten-year period.

The offence involved an agreement to share the so-called "private" snow removal market, which metropolitan Quebec City towns and municipalities north of the St. Lawrence River awarded to snow removal businesses, between November 1, 1994 and October 31, 1995. The agreement also encompassed certain area routes and highways managed by Le Ministère des Transports du Québec. During the period of the offence, this "private" snow removal market cost towns and municipalities in excess of $16 million.

An agreement between the competitors deprived metropolitan Quebec City towns and municipalities of competition in snow clearing, removal and transportation.

"We are very pleased to note that snow removal contract prices have gone down since the investigation began, resulting in substantial savings to metropolitan Quebec City taxpayers," said Mr. von Finckenstein, the Bureau's Director of Investigation and Research. "This case clearly shows that the public sector is particularly vulnerable to this kind of anti-competitive conduct and must be very careful when it calls for tenders," he added.

Shortly after searches were conducted, several companies took the initiative to meet with representatives of the Competition Bureau and the Attorney General of Canada to acknowledge liability, offer cooperation and discuss a possible guilty plea.

The investigation began in September 1995 based on information obtained from buyers who questioned significant increases in prices snow removal companies were offering when contracts came up for renewal. At the same time, a newspaper from the Quebec City area published a series of articles alleging that metropolitan Quebec City snow removal companies were engaging in anti-competitive behaviour.

Other businesses in the area continue to be investigated on these conspiracy charges.

THE COMPETITION BUREAU HAS COMPLETED ITS REVIEW OF SUN MEDIA CORPORATION — TORSTAR CORPORATION — QUEBECOR INC. TRANSACTIONS

The following is a News Release issued by the Competition Bureau on January 22, 1999 and is reproduced with permission.

The Competition Bureau has reviewed the following three transactions that involved Sun Media Corporation or its assets:

- Torstar Corporation's bid for all the outstanding shares of Sun Media Corporation;

- Quebecor Inc.'s subsequent bid for all the outstanding shares of Sun Media Corporation and;

- Torstar Corporation's proposed acquisition from Quebecor of *The Hamilton Spectator*, *The Cambridge Reporter*, Guelph's *Mercury* and Kitchener-Waterloo's *The Record*, these four dailies originally belonging to Sun Media Corporation.

Upon being informed by Torstar of its proposed acquisition of Sun Media, the Competition Bureau assembled a team of lawyers, experts and merger investigators and began its review. Following an intensive investigation, it was concluded that the proposed acquisition of Sun Media would lead to a substantial lessening of competition for retail and classified newspaper advertising in the Greater Toronto Area. Torstar's *The Toronto Star* and Sun Media's *The Toronto Sun* were identified as the two prime vehicles for such advertising and evidence showed that both dailies vigorously compete for advertising business and readers. The potential negative impact on reader choice and editorial diversity that would result from the consolidation under single ownership of Toronto's only two locally-focussed dailies was also taken into account.

The Competition Bureau took the position that, should Torstar pursue the acquisition, the Bureau would seek divestiture of *The Toronto Sun* and its sister publications, the other Sun Media tabloids in Ottawa, Edmonton and Calgary, in order to preserve *The Toronto Sun* as a strong competitor in the Toronto market.

Quebecor's acquisition of Sun Media, however, raised no issue under the *Competition Act* since Quebecor and Sun Media have no overlapping operations. Quebecor's daily newspapers are located in Quebec and Manitoba while Sun Media's are in Ontario and Alberta. Indeed, Quebecor's acquisition of Sun Media ensures that Toronto advertisers and readers will continue to enjoy the competitive benefits of two strong locally focussed dailies, and effectively removes the need for action by the Competition Bureau.

With respect to markets outside Toronto, the Bureau had not identified anti-competitive effects from Torstar's proposed acquisition of Sun Media. Consequently, the Bureau will not oppose Quebecor's upcoming sale to Torstar of Sun Media publications recently acquired in Hamilton (*The Hamilton Spectator*), Cambridge (*The Cambridge Reporter*), Guelph (*Mercury*) and Kitchener-Waterloo (*The Record*). Sun Media's acquisition of these same publications from Southam Inc. in September 1998 similarly was not opposed.

The mandate of the Competition Bureau is to maintain competitive markets. In the final analysis we must be sure that advertisers across the country have access to a range of media alternatives that they can use to efficiently reach their target audience at the best possible prices.

TELEMARKETING OPERATION FINED A RECORD $300,000 UNDER THE *COMPETITION ACT* FOR SCAMMING THOUSANDS OF VICTIMS

The following is a News Release issued by the Competition Bureau on February 2, 1999 and is reproduced with permission.

The Competition Bureau announced yesterday that 3076784 Canada Inc., carrying on business as National Clearing House-Nationwide Clearing House and The National Clearing House, and the company president, Jack Stroll a.k.a. Jack Strulovitch, pleaded guilty to the highest fine ever imposed against a deceptive telemarketing firm under the misleading advertising provisions of the *Competition Act*.

A fine of $290,000 against the corporate entity and a fine of $10,000 against Mr. Stroll were imposed by the Quebec Superior Court.

Prize-pitch deceptive telemarketing is a serious problem in the marketplace. This case demonstrates our commitment to attack the various forms of deceptive telemarketing in co-operation with other law enforcement agencies. The Bureau's law enforcement partners; OPP Project Phonebusters, The Montreal Metropolitan Urban Police Force and the R.C.M.P. provided valuable assistance that contributed to the successful conclusion for this matter.

The charges relate to deceptive telemarketing and direct mail practices carried out by the Montréal area operation during the period of November 1, 1994 to October 31, 1995. National Clearing House mailed "Official Claim Certificates" to consumers in every province of Canada with the exception of the province of Québec. The mail piece stated that they had been selected to receive at least one of five valuable awards, but stated that to be eligible to receive the awards they must call the firm within 72 hours. The odds of receiving the various awards, and that a purchase was required to receive the awards, was disclosed in very small print on the reverse side of the mail piece. Consumers responding to the mail piece were told that to be eligible to receive the awards they had to purchase grossly overpriced promotional items.

The awards offered ranged from a Ford Explorer to a diamond & sapphire pendant. Investigators did not uncover one winner of the Ford Explorer or of the other valuable award, the satellite T.V. dish. Consumers received the same three awards; the diamond & sapphire pendant, the airfare for two to Hawaii, and the cellular telephone. However, so many terms and conditions applied to the airfare to Hawaii and to the cellular phone, that they had essentially no value, and the diamond & sapphire pendant was comprised of a low value commercial grade diamond. The conditions applicable to the awards were either not disclosed or were only partially disclosed to the consumer at the time of the transaction.

In addition, the Court imposed a Prohibition Order to prevent the repetition of the anticompetitive conduct against the corporate entity, Mr. Stroll and against the following managers and telemarketers:

Joel Greenspoon (also known as Joel Green), Mark Francis, Leo Hackenbroch (also known as Leo Hack), Robert Martin Schwartz (also known as Robert Martin), Myra Kerzner Cohen (also known as Myra Kerzner), Ann Slodovnick (also known as Ann Slade), and Velna Bernice Griffith-Johnson (also known as Bernice Johnson).

$360,000 IN FINES PAID BY FUJISAWA PHARMACEUTICAL CO. LTD. FOR INTERNATIONAL CONSPIRACY UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on February 15, 1999 and is reproduced with permission.

The Competition Bureau announced today that Fujisawa Pharmaceutical Co. Ltd., a Japanese corporation based in Osaka and Tokyo, pleaded guilty to having participated in an international conspiracy to fix prices and share markets for sodium gluconate. The court imposed a fine of $360,000 to be paid immediately.

This conspiracy involved American, European and Japanese producers of sodium gluconate who met in Canada and abroad on a continuing basis during the period of the offence to fix prices and allocate market shares worldwide, including in Canada.

Sodium gluconate is a product whose main applications are as a cleansing and metal treatment agent in industry and as a means of controlling the setting of concrete. Based on evidence obtained by the Bureau, total sales of the product in Canada during the entire period of the offence were approximately $10.2 million. Fujisawa's sales between 1987 and 1995, the period of the offence during which it sold sodium gluconate in Canada, were approximately $1.8 million.

This conviction is the result of a series of extensive criminal investigations being conducted by the Competition Bureau into international arrangements designed to fix prices and allocate market shares of the suppliers of various products, in Canada, in the worldwide food and feed additives industries. It follows on the conviction of Jungbunzlauer International A.G., a Swiss Corporation, in October 1998, for price fixing and market allocation involving sodium gluconate and citric acid.

"In recent months, there have been a number of convictions and fines involving illegal cartels operating in Canada and other countries," said Konrad von Finckenstein, Q.C., Director of Investigation and Research. "These criminal cartels have harmed the Canadian economy and have forced Canadians to pay higher prices for goods. We have taken aggressive action to ensure that these criminal cartel activities are stopped and that stringent penalties are levied. We will continue to pursue these conspiracies as a matter of priority."

In addition, the Federal Court of Canada imposed a prohibition order on Fujisawa under the *Competition Act*, to deter and prohibit any repetition of this offence.

The inquiries involving sodium gluconate, citric acid and other products are continuing.

FOUNDER OF MULTI-LEVEL MARKETING COMPANY FINED $50,000

The following is a News Release issued by the Competition Bureau on February 23, 1999 and is reproduced with permission.

Konrad von Finckenstein, Q.C., Director of Investigation and Research for the Competition Bureau, announced today that Charles Barrie Press

was found guilty of seven charges under the *Competition Act* on February 12, 1999. Mr. Press was fined $50,000 yesterday on four of these charges in Alberta's Court of Queen's Bench in Calgary and the Crown entered a conditional stay of proceedings on the remaining three charges.

This fine is significant because it is the first fine imposed against an individual for an offence under the multilevel marketing provision of the *Competition Act*.

Mr. Press was a co-founder of The Integrity Group (Canada) Inc., a multi-level marketing firm that sold telephone services, a satellite dish, training programs and food products. In November and December 1995, recruitment meetings were held in Quebec, Ontario and Manitoba. The court found that while representations relating to compensation were made to prospective participants at these multi-level marketing meetings, there was no disclosure of actual compensation received, or likely to be received, by typical participants, contrary to section 55(2) of the Act. Under this section, if representations relating to compensation are made to prospective participants of a multi-level marketing plan, there must be fair, reasonable and timely disclosure of compensation earned by typical participants in the plan. The plan was also promoted on the Internet, where there was no disclosure of actual compensation received, or likely to be received, by typical participants.

The court determined that Mr. Press was the controlling and directing mind of the company, and as such, was guilty of the offences.

"We hope this case will send a clear message to participants and operators of multi-level marketing companies who make such claims and fail to disclose the amount of income actually received by typical participants in such plans", Mr. von Finckenstein said. "Such claims often mislead prospective participants into believing it is a quick and easy way to earn large amounts of money."

The Integrity Group (Canada) Inc. was found guilty in December, 1997 of eleven charges under section 55 of the Act and was fined a total of $150,000. Another co-founder, Ms. Debra Hurd, pleaded guilty to one charge under the Act last month.

PRISON TERMS IMPOSED AGAINST DECEPTIVE TELEMARKETERS

The following is a News Release issued by the Competition Bureau on March 11, 1999 and is reproduced with permission.

Konrad von Finckenstein, Q.C., Director for the Competition Bureau, announced today that the Bureau's investigation into a Montreal-based deceptive telemarketing firm has resulted in the first prison terms ever imposed by a Canadian court against deceptive telemarketers.

The firm, operating as American Family Publishers, Publishers Central and First Canadian Publishers and the companies' president, Mr. Vijay Sharma pleaded guilty to misleading advertising offences under the *Competition Act* and will face criminal sentencing on May 5, 1999. Telemarketers Donald Dubois, Maxime Julien, Adrian Rewjakin and André Zouvi, also pleaded guilty to charges of misleading advertising offences and received jail terms from the Quebec Superior Court ranging from two to six months, as well as 20 to 120 hours of community

work. In addition, Todd Miller pleaded guilty and was fined $5,000 and Nazneen Kapasi pleaded guilty and will face sentencing in June 1999.

An inquiry began after the Bureau and Project PhoneBusters, received hundreds of complaints from consumers who spent up to several thousand dollars buying promotional products in order to receive valuable prizes which were never sent. Seventeen companies and 18 individuals including the above-mentioned were charged in April 1997 with false and misleading advertising. Other individuals and their personal corporations are still awaiting trial.

In order to claim their valuable "mystery prizes," consumers were told that they would have to purchase various items, such as pen and letter opener sets or jewellery from the company at what turned out to be grossly-inflated prices. Many customers were contacted at a later time by a more aggressive telemarketer, who would convince them that they were eligible for even more valuable prizes under the company's "executive" prize promotion, if they made more purchases. This pattern of "re-loading" continued until either the customer ran out of money or simply refused to continue dealing with the company. The charges relate to deceptive telemarketing activities that occurred between December 1, 1995 and February 25, 1997.

"These prize-pitch deceptive telemarketing operations prey on vulnerable Canadians," said Konrad von Finckenstein, Director of the Competition Bureau. "Clearly the Court has recognized the serious nature of this crime by imposing these historic jail terms. In particular, the jail terms recognize the Court's intention to make individuals personally responsible for committing these crimes in addition to the companies they worked for."

This case demonstrates the Competition Bureau's commitment to attacking deceptive telemarketing. It also underscores our co-operation with our law enforcement partners, OPP Project PhoneBusters, and the Montreal Metropolitan Urban Police Force, who provided valuable assistance in this investigation.

In addition, the Court imposed a Prohibition Order to prevènt the repetition of the anti-competitive conduct against Donald Dubois, Maxime Julien, Todd Miller, Adrian Rewjakin and André Zouvi.

NOTIFIABLE TRANSACTIONS UNDER THE *COMPETITION ACT*: PRENOTIFICATION GUIDE

The following is an Information Bulletin issued by the Competition Bureau and is reproduced with permission.

Introduction

One of the significant reforms bought about by the passage of the *Competition Act* in 1986 is the change to the law dealing with mergers. The previous law, section 33, of the *Combines Investigation Act*, required that mergers be found detrimental to the public interest under the criminal law which requires proof of the offence beyond a reasonable doubt. This law was felt to be inadequate to deal with the competition issues raised by mergers.

The *Competition Act* contains a non-criminal provision, section 92, which allows for the review of mergers under a test of whether or not competition is, or is likely to be, prevented or lessened

substantially in a market. The Director of Investigation and Research under the *Competition Act* is empowered to investigate mergers and apply for remedial orders to the Competition Tribunal, a quasi-judicial body established under the *Competition Tribunal Act* to adjudicate the non-criminal provisions of the *Competition Act*. There are also provisions in sections 100 and 104 of the Act allowing the Director to apply to the Tribunal for interim orders to prevent the completion or implementation of a transaction. Such orders may be made by the Tribunal in cases where (a) the completion of a transaction that is reasonably likely to lessen competition substantially would substantially impair the ability of the Tribunal to order an effective remedy, (b) the parties have failed to comply with the prenotification provisions, or (c) the Director has made application for an order under section 92. The use of non-criminal law offers the advantage of flexible remedies that are more appropriate to deal with the effects of mergers in the marketplace.

The comments contained herein are intended to provide to interested persons an outline of the general position of the Director with respect to the Notifiable Transaction provisions. However, it should be understood that only the legislation and regulations govern any question which may arise in relation to prenotification.

Notifiable Transactions and Prenotification

Part IX (sections 108 to 124) of the *Competition Act* which deals with Notifiable Transactions came into force on July 15, 1987. The rationale for these provisions is that in the case of large, complex transactions it is important to have an opportunity to examine the competitive impact before the merger is completed. It is often difficult, if not impossible, to obtain effective remedies in those cases where the operations of formerly independent businesses have been combined. Section 114 of the Act requires that persons proposing a transaction which exceeds the thresholds set out in sections 109 and 110 must notify the Director in advanced of the completion of the transaction.

There are two threshold levels relating to the Notifiable Transactions provisions. First, the parties to the transaction, together with the affiliates, must have assets or annual gross revenues from sales in, from or into Canada that exceed $400 million. The second threshold varies depending on the nature of the transaction. The Director must be notified in cases where:

(a) in respect of a proposed acquisition of assets of an operating business, the value of the assets or the annual gross revenues from sales in or from Canada generated from those assets would exceed $35 million;

(b) in respect of a proposed acquisition of voting shares of a corporation carrying on an operating business, the value of the assets of the acquired corporation or the annual gross revenues from sales in or from Canada generated from those assets would exceed $35 million, and the persons acquiring the shares would acquire an interest in the corporation exceeding either 20% in the case of a public corporation, or 35% in the case of a private corporation. If the parties already surpass either the 20% or 35% threshold, and make a subsequent share purchase which results in their owning more than a 50% interest, then the subsequent transaction also requires notification. Exact conditions for the thresholds for share ownership in the case of public and private corporations are set out at subparagraphs 110(3)(b)(i) and (ii);

(c) in the case of a proposed corporate amalgamation where one or more of the corporations carries on a operating business, the value of the assets of the continuing corporation or the annual gross revenues from sales in or from Canada generated from those assets would exceed $70 million; and

(d) in the case of a proposed combination, the value of the assets of the continuing business or the annual gross revenues from sales in or from Canada generated from those assets would exceed $35 million.

Section 113 sets out general exemptions from the requirement to prenotify in the case of transactions between affiliates, those for which the Director has issued an advance ruling certificate pursuant to section 102, and those pursuant to an agreement entered into before the coming into force of the Notifiable Transactions provisions and which were substantially completed within one year after section 113 came into force.

Once notification is given, the parties to the merger are required by section 123 to wait from 7 to 21 days, depending on whether the filing is made under section 121 or 122 and whether the transaction is effected through a stock exchange, before completing the merger. This period can be shortened if the Director informs the parties he does not intend to make an application by the Director pursuant to either section 100 or 104 the Tribunal has issued an interim order preventing the completion of the transaction.

Examination of Proposed Transactions

All mergers, whether or not they exceed the prenotification thresholds, are subject to examination by the Director to determine if they have, or are likely to have, the effect of preventing or lessening substantially competition in a definable market. The assessment of the competitive effect of a merger is made with reference to the factors identified under section 93 of the Act. Subsection 92(2) of the Act specifically provides that a finding of the requisite prevention or lessening of competition cannot be made solely on the basis of evidence of market share or concentration. Although such evidence is significant, other qualitative and quantitative measures of competition must be taken into account.

Section 96 of the Act provides that the Tribunal shall not make an order if it finds that the merger will result in gains in efficiency that would more than offset the effects of any prevention or lessening of competition, and such efficiency gains would not likely be attained if the order of the Tribunal sought by the Director were made.

Application to the Tribunal

The Director may apply to the Competition Tribunal for a remedial order disallowing all or part of the merger pursuant to section 92 of the Act. The section also allows other forms of remedial orders with the consent of the Director and the parties against whom the order is directed. Consent orders are also available pursuant to section 105, which provides that the Tribunal may make an order, the terms of which are agreed to by the Director and the person in respect of whom the order is sought, without hearing such evidence as would ordinarily be placed before the Tribunal.

Section 97 of the Act provides that no application to the Tribunal may be made by the Director in respect of a merger more than three years after the merger has been substantially completed.

Who Must Notify

Subsection 114(1) requires the person or persons who are proposing a notifiable transaction to notify the Director and supply the relevant information before completing the transaction. However, subsection 114(2) allows one person to supply information on behalf of or in lieu of the others.

It is important to note that the obligation to notify arises before the transaction is completed. Therefore, in cases where notification is applicable, it is required to be completed prior to the transfer of the ownership of assets or voting shares, the effective date of articles of amalgamation, or the contribution of assets to a combination.

Which Form to Use

The Notifier has the option to file a "short form" under section 121 or a "long form" under section 122. Firms filing a short form shall not complete the transaction before the expiration of a 7 day waiting period after receipt of the information by the Director. For firms filing the long form this waiting period is 21 days. However, if a short form filing has been submitted, the Director may, within the seven-day waiting period, require that the long form filing be submitted. In the case of proposed transactions which are acquisitions of voting shares to be effected through the facilities of a stock exchange, and if the long form filing is used, the waiting period is 10 trading days or such longer period not exceeding 21 days as allowed by the rules of the exchange before the shares can be taken up.

Information Requirements of Prenotification Provisions

If parties to a transaction are unsure whether certain information is within the scope of a term used in the Act or the Regulations and, therefore, whether the information is required to be included as part of the prenotification filing, they should bear in mind that it is in the best interests to supply all information that may be considered relevant in order to permit the Director to complete the review in the shortest time possible. When the Director believes that the information provided is insufficient for the purpose of the review, further steps may be required to obtain more specific information, including application to the Competition Tribunal on the basis that there has been a failure to comply with the prenotification requirements. This will delay the review process.

Explanation of Terms

Agreement and substantially completed (paragraph 113(c))

Paragraph 113(c) of the Act exempts from the prenotification provisions a transaction pursuant to an agreement entered into before July 15, 1987, and substantially completed no later than July 14, 1988.

In the view of the Director the agreement between or among the parties must be binding and set out all the necessary terms and conditions for the completion of the transaction, such as would be found in a formal contract document. In some circumstances a detailed letter of intent signed by all parties, setting out the conditions of the transaction including a description of the assets, the price to be paid or a formula for determining the price, required actions of parties, penalty clauses, etc., could be considered an agreement.

Also in the Director's view, a transaction is considered to be substantially completed when there has been a closing where the title the assets is transferred for consideration. After closing there may remain some ancillary details of a minor or routine nature to be completed, such as filings or registrations. Once they have been attended to, the transaction will be finally completed. In normal circumstances the closing of the transaction means that the acquisition of control, to which the merger provisions of the Act apply, has been achieved.

Publicly Traded (paragraph 110(3)(b))

Publicly traded in respect of voting shares of a corporation would include shares that have been listed and posted for trading on any stock exchange in Canada that is recognized as such by the appropriate provincial securities authority or traded in any other market if the prices at which they have been traded are regularly published in a bona fide news, business or financial publication of general and regular circulation.

Short and Long Forms - Explanation of Terms

Description of the Transaction and Business Objectives

The description of the proposed transaction ought to identify the parties to the transaction, the type and value of transaction being proposed (e.g. acquisition of assets or shares, amalgamation, combination), the value of the transaction, the method of financing, the assets or shares being acquired, the businesses being amalgamated or combined, and the closing date. The description of the business objectives intended to be achieved ought to include an outline of the immediate plans for the acquired or continuing business. It should include any proposed changes in management, product lines, employment and assets.

Affiliates

The term "affiliate" is defined in subsection 2(2) of the Act. For the purpose of the Notifiable Transactions provisions, the definition of affiliates in the case of Crown corporations is limited by subsection 108(2). Essentially, corporations are affiliated if one is a subsidiary of the other or both are subsidiaries of the same corporation or controlled by the same person. A corporation is a subsidiary of another corporation if it is controlled by that corporation A corporation is controlled by a person if more than 50 percent of the voting shares in a corporation are held, directly or indirectly, by that person and the votes attached to those shares are sufficient to elect a majority of directors of the corporation, i.e. *de jure* control. It is suggested that the chart required under subparagraph 121(c)(iii) describing the relationship between affiliated corporations be in the form of an organizational chart showing the percentage of voting shares controlled by each corporation.

Significant

Only affiliates that have significant assets in Canada or sales in, from or into Canada have to be included in the filing. This should help to ease the reporting burden when a large number of corporations are affiliated with one or more of the parties required to prenotify.

It is recommended that parties use their own judgment of what constitutes "significant" assets in Canada or "significant" sales in, from or into Canada, bearing in mind that irrelevant information does not have to be supplied (subsection 116(2) and (3)) but failing to prenotify may give rise to sanctions under subsection 65(2) or the issuance of an interim order under subsection 100(1). Any plant or office in Canada would be considered a significant asset. Other assets, however, such as portfolio investments, inventories or marketable securities may or may not be considered to be "significant", depending on the relevant circumstances. Sales in Canada may also present some problems. Again, parties should use their best judgment.

Principal Businesses, Customers and Suppliers

The summary description of the principal businesses of the parties to the transaction and their affiliates does not have to be excessively detailed. It should identify product, markets, distribution methods, employment, major competitors, technology and any other relevant facts.

For the purpose of prenotification, current principal suppliers and customers, in the Director's view, ought to include customers or suppliers with which the parties have done business over the past fiscal year and which are important to the successful continuation of the business of the parties in question. This encompasses not only customers and suppliers that are important simply by virtue of the amount of goods and services exchanged, but should also include customers or suppliers that are vital to production even though the absolute dollar value of the services or purchases may be quite small. For example, crucial banking services or suppliers of inputs which, though insignificant as a cost factor, may be critical to the ongoing viability of the business will be relevant in this context. Also, volumes that represent sales or purchases between affiliates should be reported assuming, of course, that they can be characterized as being transactions with a principle customer or supplier.

Additional Information

Section IV of the form allows the Notifier, or other party, to provide additional information that may be relevant to the Director's analysis of the transaction under the Merger provisions of the Act. Such analysis is made with reference to the factors listed in section 93 and other specific provisions referring to concentration, market share, efficiencies, etc. Parties filing under the Notifiable Transactions provisions are encouraged to provide such information even though it is optional. The waiting periods under the Act for completion of the transaction are very limited. The provision of additional information relevant to the factors will greatly assist the Director to arrive at a conclusion as to whether or not the transaction should be the subject of further proceedings under the Act.

NOTIFIABLE TRANSACTIONS UNDER THE *COMPETITION ACT*: COMMENTARY ON THE REGULATIONS

The following is an Information Bulletin issued by the Competition Bureau and is reproduced with permission.

The Notifiable Transactions Regulations Under Part IX of the *Competition Act* which specify the method of, and the time or annual period for, calculation of aggregate value of assets and gross revenues from sales for the purposes of the various thresholds set out in sections 109 and 110 of the Act came into force on July 15, 1987. Specifically, these include:

1. subsection 109(1) party size
2. subsection 110(2) purchase of assets
3. subsection 110(3) purchase of shares
4. subsection 110(4) amalgamation
5. subsection 110(5) combination

Unless otherwise indicated, all references are to sections of the regulations.

General Principle

Valuation of Assets

Under sections 4, 6, 8, 10 and 12, the book value of assets is the standard for determining "aggregate value" for the purpose of sections 109 and 110 of the Act. This approach allows the use of readily available information on the valuation of assets from which aggregate value can be determined. Section 4 specifies the amounts to be deducted from the gross asset values to arrive at the aggregate value. Note that the liabilities of the pertinent entities may not be set off against the asset values to arrive at the aggregate value. Note that the liabilities of the pertinent entities may not be set off against the values for the purpose of the Act and Regulations. This is appropriate, given that competition policy is concerned with control or influence over assets, not the method of financing such assets.

Determination of Gross Revenues from Sales

The calculation of gross revenues from sales is necessary with respect to the thresholds for party size, assets, amalgamations and combinations. In most cases, the determination of gross revenues from sales will be made from the most recent audited financial statements of the entities in question (see subsection 9(2) and section 11). It is expected that such numbers are readily available, current and accurately reflect actual value of sales.

Comments on Specific Sections

Audited Financial Statements (section 3)

Paragraph 3(a) is intended to be broad enough to cover situations where the financial statements are prepared in accordance with generally accepted accounting principles used in a foreign country or as prescribed by statute (as in the case of banking and insurance).

Paragraph 3(b) allows the use of working papers and other documents which support the information reported in financial statements to calculate the required assets on revenue determinations. For example, a balance sheet will not differentiate between assets in Canada and those which are not in Canada, but such information may well be available from the underlying working papers.

Aggregate Value of Assets (section 4)

Paragraphs 4(1) and (b) permit the use of consolidated financial statements with respect to corporate groups and eliminate double counting which may arise when combining amounts from the financial statements of various entities.

Timing Considerations (sections 6 and 7)

Where information from financial statements forms the basis for the determination of aggregate value of assets of gross revenues from sales, sections 6 and 7 provide that the determination shall be made as at a date, or for a period ended, not more than 15 months prior to the reference date. This takes into account the 90-day following the close of the fiscal year, within which companies normally produce audited financial statements.

Provisions with respect to Parties to the Transaction (sections 8 and 9)

It should be noted that, with respect to the determination of the party size limit, sections 8 and 9 permit the aggregating of financial results from various entities having different fiscal years without adjustment for the timing differences. This approach recognizes that parties to a proposed transaction who are not related will often have different fiscal years and that it is difficult to restate the results for a common time of period.

Specific Circumstances (sections 12 and 13)

To the extent that the calculations cannot reasonably be made in individual cases on the basis referred to previously, it is necessary to include a general provision in the Regulations with respect to the determination of aggregate value in such circumstances. The approach taken is to allow the calculation to be made based on the data contained in the books of the entities concerned, with the relevant time for such determination being the most recent date, or the most recent annual period ended, not more than three months prior to the transaction at which such determination can reasonably be made.

Subsequent Material Change in Circumstances (section 14)

Section 14 is designed to allow for the adjustment of the aggregate value of assets or the gross revenues from sales when a material event or transaction has occurred after the close of the fiscal period for which audited financial statements are available. A material event is one which affects the determination of whether notification is required. To a lesser extent similar adjustments may be necessary to obtain the pertinent threshold values under the procedures set out in sections 12 and 13. The calculated values may either increase or decrease to reflect such subsequent material changes in circumstances.