

## CANADIAN COMPETITION RECORD

# REGULATORY AND TRADE DEVELOPMENTS

## RECENT TRENDS IN REGULATORY INTERVENTIONS (1991-1998)

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### Introduction

The introduction of competition in the traditionally regulated sectors of transportation and communications has increased the role of competition policy over the last decade. The persistent advocacy activities of the Director of Investigation and Research of the Competition Bureau, is one of the factors responsible for an increase in this role.<sup>1</sup> It is expected that his advocacy role is likely to continue in the other regulated sectors such as resources, finance and agriculture which are now being subject to increasing pressures to expose them to competitive market forces. This is evident in the statistical evidence on his advocacy activities in these remaining regulated areas but also in the overall prominence and description of these activities in the recent Annual Reports of the Director.

The provisions of the *Competition Act* that empower the Director to make representation to federal boards are contained in section 125. In addition, the potential for making representations before provincial boards is embodied in section 126.<sup>2</sup> A distinction worthwhile noting between the two sections is that under the latter, the Director requires the permission of the

provincial board to intervene or he may intervene only when requested by the provincial board. These sections provide the Director with statutory and formal channels for intervening. So far very few difficulties have been encountered with the interpretation of these sections, apart from the early period when section 125 was added to the *Competition Act* (formerly section 27.1 of the *Combines Investigation Act*).

This paper is divided into three basic sections. The first reviews the interventions by regulated sector with some statistics, the issues in the interventions, and the nature of the issues. The second examines the recent emphasis on the resource sector, the financial services sector and the international sector. The third section briefly reviews the continued emphasis of interventions in the telecommunications sector. Finally, a few concluding remarks are offered. The Appendix contains a list of interventions for the period 1991-1998 by sector and year.

### Interventions for the Period 1991-1998

*Sectors Covered:* Over the period 1991-1997, a total of 45 interventions were presented to federal, provincial and various other bodies. The interventions by sector and sub-sector over the period 1991-1997 are presented in Table 1. The number in brackets after the sub-sector indicates the number of interventions that were made in

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these sub-sectors. While the interventions in the traditionally regulated sector of communications continues to occupy the spotlight, the number of interventions in the other regulated sectors have been growing in importance. In percentage terms, the latter account for forty-two percent of all interventions which is an increase of eight percent from the earlier period 1976-1991. The majority of these interventions were made to Federal agencies i.e., seventy-eight percent (or thirty-five of the forty-five interventions) compared to twenty-two percent to provincial agencies. *See Table -1 on page 58.*

*The Nature of Issues in the Interventions:* The major issue in these representations was to assist in policy development (fourteen), followed by modification of regulations (nine), licence and access applications (nine), dumping/imports (four), rate/tariff applications (two), merger-agreement applications (two), supply-management (two), and general (three).

Submissions on policy addressed a wide variety of competition issues together with the implications of proposed policy changes mainly in telecommunications and the electricity sectors. Some examples are submissions to the DTH Policy Review Panel, the Information Highway Proceedings and the Advisory Committee in Ontario's Electricity System. The Director has generally advocated a free competitive regime in these sectors and indicated the benefits arising to the public.

Submissions on regulations in the telecommunications sector have addressed a wide variety of issues such as regulations relating to exemption from licensing for qualified Master Antenna Television Systems, regulations relating to the distribution of television broadcasting, regulatory forbearance on long distance services, etc. The basic

thrust of these submissions was to minimize or eliminate regulations to encourage the development and provision of new services and to facilitate the entry of new firms. In particular, these interventions argued that regulators should rely on competitive market forces as much as possible.

The interventions concerning licence applications have sought to promote entry into various sectors; the Director's submissions on access applications by competing carriers have sought to promote access to facilities or information of regulated companies.

The representations in the international sector dealt with imports and alleged dumping activities. These representations emphasized the positive influence that imports have had on competition, filling in a niche in the Canadian market. Further, these representations have pointed out that the setting of quotas have had an inimical influence on competition and resource allocation in the industry.

### **Recent Emphasis on the Resource, Financial Services and International Sectors**

As mentioned earlier, there has been quite a bit of activity in sectors other than transportation and telecommunications, in particular the resource, financial services and international sectors. The major developments in these areas will be briefly described.

*Resource Sector:*<sup>3</sup> A number of major milestones were reached in the electricity sector during the 1991-1998 period. The Ontario Energy Board held hearings on the reorganization of Ontario Hydro and the British Columbia Utilities Commission (i.e., BCUC) held hearings on the British Columbia Electricity Market Structure Review. At the former,

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the Director's intervention focussed on aspects of the internal restructuring relating to the enhancement of competition both among Ontario Hydro's generating units and between Ontario Hydro and the independent power producers in Ontario. The findings of the OEB were generally pro-competitive and consistent with the thrust of the Director's submission. In particular, the Board concluded that "a review of the legislation governing the regulation of Hydro should be undertaken ... to address shortcomings in the current regulatory system which have emerged from the evidence in the hearing."

While these developments were occurring in Ontario, the Province of British Columbia also began undertaking a review of the electricity sector. It held the BCUC Electricity Market Structure Review in January 1995, in which the Director intervened. The purpose of the Review was to provide policy advice to the Government of British Columbia regarding benefits and options of opening the British Columbia electricity market to competition. The BCUC submitted its report and recommendations to the Lieutenant Governor in Council on September 11, 1995. The Commission recognized the forces for change, one of which was technology which has eroded the justification of continued monopoly in electricity generation and has been a driving factor in the call for competitive electricity generation markets. The Commission also recognized that separation of generation from dispatch, transmission, distribution and customer service functions dramatically reduces the concerns about a level playing field. It also considered the potential for retail competition and wholesale competition. In light of these factors, the Commission made a number of short-term and medium term recommendations. One of these was to transfer generation assets of utilities into separate operating

divisions and later into separate corporate entities so as to eliminate cross-subsidies.<sup>4</sup>

A representative of the Director sent his comments on the Report to the Ministry of Energy, Mines and Petroleum Resources, B.C. on October 30, 1995. He noted that the recommendations in the Commission's Report was an important step towards creating a more efficient and competitive environment for electricity production in B.C. He supported: the creation of an open, competitive and independent power pool; the effective separation of generation assets from transmission and distribution assets; and horizontal reintegration of generation assets to promote competition while retaining B.C. customers' entitlement rights and ensuring the appropriate operation of hydro power facilities. He also noted that the *Competition Act* could play a role in facilitating pro-competitive restructuring of the B.C. electricity industry.<sup>5</sup>

Simultaneously in Ontario, debate about the reform of Ontario Hydro began to heat up. A two-day conference was held at the University of Toronto on June 5, 1995. Maurice Strong, the Chairman of Ontario Hydro made sweeping calls for deregulation of Ontario's electricity market and for the privatization of the giant Crown corporation. While the Chairman was unable to convince the Ontario government to accept his proposal<sup>6</sup> he has succeeded in streamlining the operations of Ontario Hydro. He froze Hydro rates for the balance of the decade, slashed its workforce by thirty percent and turned a record \$3.5 billion deficit in 1993 into a surplus of \$587 million in 1994. Ontario Hydro also commissioned a private study by three Bay Street executives, known as the Farlinger Report.<sup>7</sup>

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Shortly, thereafter, the Progressive Conservatives came into power. On November 2, 1995, the Government of Ontario appointed William Farlinger as the Chairman of Ontario Hydro and also indicated that it was setting up an Advisory Committee on Competition in Ontario's Electricity System to advise it on issues pertaining to regulatory and structural reforms in the electricity sector. The Committee received submissions and heard representations from a large number of parties including the Director of Investigation and Research. In his submission, the Director called for the introduction of effective competition at the retail level of the electricity market and made related recommendations regarding the horizontal break-up of generating assets, competitive access to transmissions facilities, and other matters.<sup>8</sup>

Following the representation to the Advisory Committee in May 1996, the Committee released a Report of its findings. The report basically recommends splitting Ontario Hydro into two parts: a power generation company and a transmission company, as a way of opening the province's electricity market to competition. The Bureau submitted its comments on the Report to the Ontario Ministry of Environment and Energy. It noted that the Report provides a sound framework for building a competitive and efficient electricity system in Ontario and suggested a number of refinements<sup>9</sup> to the recommendations of the Advisory Committee that would maximize the benefits of competition in the restructured Ontario electricity industry.

The Government of Ontario, however, was not persuaded to restructure Ontario Hydro along the lines of the above report and appointed its own panel to study the matter which produced the White Paper. The White Paper made several recommendations in an effort to create a competitive electricity market

by the year 2000. The paper proposes splitting Ontario into three Crown-owned parts: one to generate power; one to transmit it; and one to sell it to rural customers. Further, it will permit private companies to produce and sell electricity and allow consumers and companies to choose their supplier of electricity. Furthermore, it will allow private capital into Ontario Hydro in the form of joint ventures and partnerships. Matters such as privatization have yet to be resolved<sup>10</sup> and the question of whether to maintain generation into one corporation has been left in the hands of the Market Design Committee created in January 1998 to recommend a framework for the Ontario electricity market.

On January 31, 1998, the Bureau delivered a presentation to senior officials of the Ontario Department of Energy, Science and Technology and the OEB outlining its views concerning the White Paper. While noting that the White Paper provides many necessary elements for open and competitive electricity, it pointed out there are a number of unresolved issues: excessive market power in generation; clarification of the roles and responsibilities of the OEB and Independent Market Operator; participation of municipal electric utilities in retail markets; design of the market to promote new entry; and stranded cost recovery methodology. Finally, the presentation provided recommendations required for a competitive and efficient electricity system.

A few months later, the Ontario government tabled legislation on June 9, 1998.<sup>11</sup> Shortly, thereafter the Market Design Committee published its report on June 30, followed by two other reports.<sup>12</sup> The legislation is expected to become law in the next few months and details on how the electricity system

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will be regulated are still being worked out. While some of these events were occurring, external developments have been exerting pressure for change. The US Federal Energy Regulatory Commission (or FERC) has indicated that if entry is to be obtained by Canadian utility companies into the deregulated US power markets, these utilities will have to meet the requirements laid down in the U.S. guidelines. While steps are being taken by Canadian utilities to comply with the U.S. guidelines, so far, Québec Hydro appears to have been the most successful in satisfying their requirements.

The extent to which new domestic players will enter, for the moment, is not expected to increase dramatically.<sup>13</sup> Interventions and policy advice have created an awareness of the need for competition. Perhaps, these activities may have been one of the factors that have contributed to creating a more competitive environment. A degree of flexibility for the market by the year 2000 is likely to arise which, to many, was unthinkable just a few years ago. At last, the warning in 1916 of James Mavor, a University of Toronto Professor, decrying the consolidation that created Ontario Hydro has at last been heeded.

*Financial Sector:*<sup>14</sup> This period also witnessed important developments in the financial sector which have not yet concluded. A confidential submission to the Department of Finance expressed the Competition Bureau's concern about competition policy.<sup>15</sup> The Department of Finance after consultation with various parties released its White paper '1997 Review of Financial Sector Legislation: Proposals for Changes' in June 1996. The White paper recommended that important adjustments to the financial system be made to: 1) strengthen consumer protection; 2) ease the regulatory burden

on financial institutions; and 3) fine tune the 1992 legislation. The Paper also indicated that it believes that a comprehensive review of the payments system is warranted.<sup>16</sup>

The 1997 Review led to the tabling of a bill in the House of Commons by the Secretary of State for Finance in early 1997, covering consumer and insurance matters. It dealt largely with consumer protection measures and Mutual insurance companies. Though the bill drew mixed reaction from industry and consumer groups, the review had a much greater impact on a matter dealing with foreign bank rules that was not scheduled for reform. The latter led to the tabling of a second bill which would make it easier for foreign banks to do business in Canada through branches.<sup>17</sup> Banks were not provided entry into the field of direct selling of insurance and auto leasing as a result of the 1997 review of the *Bank Act*.

A review of the financial and banking sector is continuing so that changes to the *Bank Act* slated for 2002 can be addressed.<sup>18</sup> In November 1997, the Bureau made its submission to the Task Force on the Future of the Canadian Financial Service Sectors, releasing its draft Merger Enforcement Guidelines as Applied to a Bank. After consultation with the public, the final draft of the Guidelines was released on July 15, 1998. In assessing bank mergers, the Bureau will continue to use: the existing 35% and 65%/10% market share and industry concentration thresholds; certain principles for assessing the future competitive significance of developments in electronic delivery of banking products and services; certain factors used to assess a firm's incentives and abilities to exercise market power; the current approach for dealing with supply substitution and barriers to entry; an analytical framework for foreign financial

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institutions to compete in Canada should certain regulatory barriers be removed; and the total welfare approach to efficiencies analysis. Three areas that were modified after consultation relate to: dealing with multiple mergers; calculation of market shares; and use of a screening test. In addition, the procedural interaction between the Director of Investigation and Research and the Minister of Finance has been spelled out.

On September 15, 1998, the Task Force released its report (*Change, Challenge, Opportunity*) and on September 30, 1998, an amendment to the *Bank Act* banning tied selling became law. The Senate Committee on Banking, Commerce, and Trade released its own Report in December 1998.

*International Sector:* The international sector includes those interventions that have occurred in relation to anti-dumping of goods or legislation on imports. The Competition Bureau made submissions on anti-dumping concerns relating to insulation pipe, beer, sugar and caps and played a role in amendments to the *Special Import Measures Act* (regarding protection to Canadian producers and on trade remedy measures so as to ensure that they do not limit competition in Canada or raise prices).

The Competition Bureau's submission to the House of Commons' Joint Sub-Committee of the Standing Committees on Finance and on Foreign Affairs and International Trade and arguments by members of the Bureau before the Sub-Committee supported a better balance between: (a) providing protection to Canadian producers against injurious dumped or subsidized imports; and (b) the need to ensure that trade remedy actions (anti-dumping and countervail actions) do not unnecessarily limit competition in Canada or raise prices for consumers and

downstream industries which must compete in both Canadian and foreign markets. The Competition Bureau also urged that the public interest provision be made effective by defining a list of factors for consideration, including competition. Further, it advocated that a lesser duty test be used which would require duties no greater than what is necessary to remove injury done to domestic industry from dumped or subsidized imports.

The Committee's Report endorsed the approach of the Government to work towards the elimination of antidumping remedies in the context of free trade areas. The Committee recommended improvements to the public interest provision and the introduction of a lesser duty rule. It acknowledged that the question of remedies has been addressed compellingly by the Competition Bureau. On April 18, 1997, the Government tabled its reply to the Committee and adopted the competition enhancing recommendations of the Committee.

Overall, the electricity and financial sectors are witnessing rapid changes in the 1990s. Most of these details have not yet been fully worked out and it appears that the Bureau's task of advocating a more competitive market will continue.

### **Continued Emphasis on the Telecommunications Sector**

The 1991-1998 period was perhaps one of the most exciting and dramatic periods for competition in the telecommunications sector as the development and convergence of technologies opened up possibilities that a decade ago defied the imagination.

*The Long Distance Telephone Market:* In the long distance telephone market, the two applications

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(Unitel Communications Inc. and B.C. Rail Telecommunications / Lightel consortium) to interconnect with the networks of several Canadian telephone companies set the ball in motion for facilities based competition. At the hearings on these applications, the Director emphasized that interconnection would create competition where members of Telecom Canada currently enjoy a monopoly. Further, he pointed out that it would stimulate increased productivity and efficiency gains. In June 1992, the CRTC released its decision wherein it determined that the public interest would be best served by allowing competition in the provision of long distance telephone service. The CRTC explicitly accepted an 'open entry model' as opposed to a 'regulated duopoly model' as the basis for implementation of competition in long distance service. This signalled that the Commission was seriously committed to the implementation of competition and that long distance competition would eventually develop.

The Commission's commitment was confirmed with its Decision on December 17, 1997, whereby it eliminated most restrictions<sup>19</sup> on how Stentor members<sup>20</sup> could price their long distance services. The decision eliminated the need for Stentor members to file tariffs for long distance rates, further they could reduce long distance prices, offer new promotions or launch new services without the regulators permission.<sup>21</sup> The removal of these pricing restrictions has increased price competition between the Stentor members and the alternative long distance carriers. Numerous similar long distance saving plans<sup>22</sup> are now being marketed which have resulted in a drop of rates between 30 to 60 percent compared to their 1992 levels. Competition is not only exerting pressure on the Stentor consortium to unravel or restructure but is also leading to increased mergers.

During the course of the two decisions, one of the important legislative developments in which the Director participated was Bill C 62 An Act Respecting Telecommunications by testifying before the Senate Standing Committee on Transport and Communications. This finally led to the enactment of the *Telecommunications Act* in October 1993.<sup>23</sup>

*Cable Television Market and the Local Telephone Market:* By the mid 1990s, the cable industry had matured into a three billion dollar a year industry. The prospects for meaningful competition in this market came from two sources: satellite companies and local telephone companies. In September 1994, the Government announced its intention to undertake a review of DTH satellite policies. A panel (DTH Policy Review Panel) was set up for this purpose and the Director made a submission indicating that the cable industry has dominated the distribution of television entertainment without facing competition for many years. Further, vigorous competition to cable which will be of benefit to consumers and Canadian suppliers is possible by using DTH technology. Furthermore, the regulation of DTH technology should not discourage its entry into Canada. The DTH Panel Review published its report in April 1995, recommending a competitive model<sup>24</sup> by permitting competition at three levels: among DTH distributors, between DTH distributors and cable; and among programming services, such as pay-per-view, carried by competing DTH distributors.

Around the same time (i.e., October 1994), the Government issued directives to the CRTC to study and report on issues regarding facilities, and competition as they relate to the development of Canada's Information Highway.<sup>25</sup> At the hearings on the matter, the Director urged the CRTC to open up the cable television industry immediately to competition (including competition from telephone companies),

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through the removal of all regulatory and statutory barriers. After reviewing the evidence, the CRTC in May 1995, issued its report on *Competition and Culture on Canada's Information Highway: Managing the Realities of Transition*. In its recommendations, the CRTC consistent with the Director's views, urged the federal government to move rapidly to full competition on the information highway by allowing telephone and cable-television companies to compete head on. Later in September 1995, the Information Highway Advisory Council released its own report embracing a pro-competitive approach.

In late December 1997, the Commission issued its final rules on cable in preparation for head-to-head competition expected to begin in January 1998. One of the rules would give cable operators the right to set their own prices for basic service (or permit pricing deregulation) if they lose five percent of the customers after they begin competing with phone companies. Other provisions include prohibiting a distributor from giving undue preference; revenue contributions to encourage Canadian production; provision for digital boxes in homes before cable companies qualify for further deregulation; and the possibility of customer purchase of existing home wires.

In the local telephone market, competition was first introduced to a limited extent by a CRTC ruling in September 1994 requiring phone companies to lease portions of their local networks to other providers. Later in 1995, in response to the CRTC notice on implementation of a regulatory framework, local interconnection and network component unbundling, the Director made a submission with respect to the opening of the local telephone market to competition. The central theme of the Director's argument was that the objective of interconnection and unbundling must be the maximization of the benefits to the public that

flow from competition. He advocated a regulatory environment that would promote efficient pricing, avoid managed competition, remove all barriers to local competition, etc. In May 1997, the CRTC released its decision. The basic goal of the Commission's decision was to introduce competition in the local telephone market. The main features in this regard were: a) equal access to new entrants; and b) promoting competition in all areas.

As a result of the above, the stage has been prepared for competition. However, to this date, local phone competition has been slow to take-off due to technical problems in developing 'local number portability' (i.e., technology which allows customers to retain their old phone numbers when they switch to the services of a new competitor) and delays in establishing a tariff for the use of local loops of established local phone companies by their competitors. Further, wireless and mobile phone services could develop into an alternative service for local phone users. Prospects for competition in the local telephone and TV cable markets therefore appear to be improving.<sup>26</sup> Cable companies that already have network connections to homes are developing an Internet-based technology for carrying voice phone conversations on their networks.

*Overseas Telephone Market:* Attempts to introduce some competition in the overseas telephone market began in December 1990, when the CRTC initiated a proceeding on the regulation of Teleglobe Canada Inc., a crown corporation till 1987. At this proceeding, the Director intervened indicating that an important first step in introducing competition would be to permit resale and sharing. In its December 1991 decision, the CRTC approved the resale and sharing of Teleglobe's international private lines on a joint use basis, subject to certain conditions. Later, in an application to the CRTC,

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Teleglobe Canada Inc. and Stentor proposed to enter into a market exclusivity arrangement. The Bureau intervened and was concerned that the agreement would reduce actual and potential competition and that Stentor's decision not to enter the market would extend Teleglobe's monopoly until 2003. Nevertheless, the CRTC approved the Agreement. In late 1995, a review of Teleglobe's mandate was conducted by the Telecommunications Policy Branch and the Director submitted his comments addressing a number of issues.

A decision on the above matter was rendered by the Government of Canada and not the Telecommunications Policy Branch around the same time. The Government signed the WTO Agreement in Basic Telecommunications in Geneva in February 1997 that would have a profound impact on overseas telecommunication and the global telecommunications market. As part of this Agreement, Teleglobe would end its monopoly on overseas telecommunication on October 1, 1998. Further, routing restrictions on international telephone calls in Canada would be removed by March 1, 2000. Finally, Canada agreed to allow foreign ownership and control of overseas underwater cable landings needed to deliver long-distance traffic as of October 1, 1998, however, it would maintain its foreign ownership restrictions in telecommunications to 46.7 percent (direct and indirect).

Teleglobe's monopoly would have ended earlier than the date set in the formal international agreement as a result of the CRTC December 1997 decision which reversed parts of its May 1997 decision prohibiting 'switched hubbing' (i.e., use of a private line leased from Teleglobe to a foreign country from where the call is rerouted to its final destination).<sup>27</sup>

However, a petition by Teleglobe to Cabinet for a reversal of the December CRTC decision and a request to the CRTC to delay implementing its decision pending Cabinet review attempted to delay opening the market. Numerous submissions were filed with the CRTC requesting it to deny Teleglobe's attempt to protect its monopoly. Teleglobe later withdrew its petition. On October 1, 1998, the CRTC released a decision removing a ban on routing, at the same time it tabled a framework governing new overseas market carriers in Canada. It will impose licensing requirements for carriers providing international service from Canada and eliminate rate approval for Teleglobe on service within Canada and between Canada and the US. However, rate approval on overseas service will continue. At the same time, as result of the international agreement, the monopoly came to a formal end. Thus, the last barrier to full competition in the overseas telephone market will come down on January 1, 1999 when licences will be issued.

In summary, the telecommunications sector that was once dominated by monopolies has become more competitive as technology and the regulatory tenets that governed this industry have changed. The old monopoly or economies scale argument that was once used to justify the retention of the old market structure has been displaced in favour of greater advancement through technological change.

### Concluding Remarks

Before concluding, a few observations will be noted. First, as noted in several studies, the Director's approach to competition advocacy has continued to be marked by significant interventions contributing to fostering more competition based solutions.<sup>28</sup> His success in this regard has been increasing as noted

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by an increase in the number of favourable decisions on the matters in which he has intervened.<sup>29</sup> This is particularly noteworthy as a number of favourable decisions were in the relatively heavily regulated areas, where experience indicates that it may be difficult to get a favourable decision.

Second, real competition in the telecommunications sector has finally emerged and interventions in this sector have been instrumental in achieving this objective. The Director and his staff have played a special role in advocating change in proceedings before the CRTC. It was not uncommon during the proceedings that the Director's intervention has become the focal point of attention, often becoming the spearhead or champion of intervenors seeking to enter the market or seeking pricing freedom. His effort and contribution in this regard have not gone unnoticed as has been noted in many scholarly publications.<sup>30</sup>

Third, the interventions in the other regulated sectors is beginning to have an effect. In these other sectors, attempts are being made to introduce competition through regulatory reform. News on these developments in banking and electricity appears in the major Canadian newspapers nearly everyday. In banking, the Competition Bureau has played a major role in obtaining the banning of tied-selling and the development of the Merger Guidelines for Banks. Similarly, in electricity the Ontario government has accepted some recommendations for the introduction of competition after numerous attempts and proposals in the past have been rejected. Even the notion that Ontario Hydro would always have a dominant position in the market is perhaps, now beginning to change.

Finally, the competition advocacy approach of the Director is changing in the traditionally regulated areas. His approach in these areas is occurring through informal channels rather than through the use of statutory and formal powers. This usually takes the form of letters of policy advice or opinion. The popularity of this method of intervening tends to increase as regulated agencies are increasingly willing to address competition issues or are mandated to do so under their respective legislation. It is also particularly suitable in light of budgetary constraints. An area that would perhaps introduce greater clarity to section 125 of the *Competition Act* is with regard to the Director's powers to cross-examine and his right to have access to confidential information of intervenors.<sup>31</sup>

## Notes

\* The views expressed are those of the authors and are not necessarily those of the Competition Bureau or Industry Canada. The authors thank Sofia Civettini, John Simpson and Gwill Allen for their comments, and Mark Ronayne for providing some of his work in the electricity sector, however, they are not responsible for any deficiencies.

<sup>1</sup> Robert D. Anderson, Abraham Hollander, Joseph Monteiro and W. T. Stanbury, "Regulatory Reform and the Expanding Role of the Competition Policy in the Canadian Economy, 1986-1997" (1998) 31:1-2 *Rev. of Ind. Org.* at 177-204.

<sup>2</sup> For example see Joseph Monteiro, "Representations by the Bureau of Competition Policy: The First Fifteen Years" (1994) 15:1 *Can. Comp. Rec.* at 18-38; and Joseph Monteiro, "Regulatory interventions by the Bureau of Competition Policy" in R.S. Khemani & W.T. Stanbury, eds., *Canadian Competition Policy And Law At the Centenary* (Halifax: The Institute for Research on Public Policy, 1991) at 451-461.

<sup>3</sup> In the resource sector, eight interventions were made between 1991-1997.

<sup>4</sup> The British Columbia Electricity Market Review, Report and Recommendations to the Lieutenant Governor in Council (September 1995).

<sup>5</sup> In November 1996, a paper prepared for the Fraser Institute called for the privatization of B.C. Hydro and a restructuring that would break the utility into a number

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of companies. However, there was no indication that the B.C. government was considering privatization, as the Premier Glen Clark was against privatization of the Hydro. Subsequent developments regarding the B.C. Hydro Rawind project and the firing of all the Directors of B.C. Hydro have overshadowed attempts to deregulate the B.C. electricity market.

<sup>6</sup> This move was not palatable to the Ontario New Democrats, the government of the day. Following the election, the Progressive Conservatives came into power and were more receptive to the idea.

<sup>7</sup> This report was a private study, however, since the OEB requested a copy of the report from the Hydro it became public. The report called for some form of partial privatization with generation remaining a monopoly.

<sup>8</sup> Director of Investigation and Research, Bureau of Competition Policy, *Restructuring the Ontario Electricity System to Promote Competition and Efficiency* (Submission to the Advisory Committee on Competition in Ontario's Electricity Submission, January 26, 1996).

<sup>9</sup> These include: (1) full separation of nuclear facilities into competing companies; (2) the establishment of guidelines on interim regulation in competitive segments of the electricity system; (3) a more limited role for municipal electric utilities during and after the transition to retail competition; (4) the use of location-related transmission tariffs for customers as well as generators; and (5) consideration of measures to speed the introduction of retail competition.

<sup>10</sup> While the Energy Minister, Jim Wilson, hinted that he wanted to sell Ontario Hydro the stated government policy does not indicate any such intention. See Greg Crone, "Harris plans to privatize Ontario Hydro" *The Financial Post* (June 23, 1998) at 3. Further, newspaper articles indicating that British Energy PLC and PECO Energy Co., a U.S. partner, were interested in buying a stake in Ontario Hydro also seemed to imply that Ontario Hydro or part of it may be privatized.

<sup>11</sup> The two key amendments are: 1) splitting Ontario Hydro into four government-owned companies: a generating company (Genco); a services company holding the transmission and distribution operations (Servco); a Crown corporation (Independent Electricity Market Operator) to supervise the operation of the transmission system; and a Crown corporation (Ontario Hydro Financial Corp.) to hold the stranded debt; and 2) strengthening the Ontario Energy Board which would regulate the electricity system. The bill also gives cabinet broad powers to proceed with regulations on important matters such as market rules behind closed doors.

<sup>12</sup> The Market Design Committee expressed concern that if the generating company is set up under the current legislative proposal, it would have the capability of exercising market power and it could drive electricity

prices higher than would otherwise have existed in a truly competitive market. To avoid this (since the Ontario government does not wish to break up the generating company for the moment) the Committee is recommending 'vesting' (i.e., locking in non peak capacity below market price) and 'decontrol' (i.e., swapping plants/leasing). In addition, the OEB would have increased powers to set prices under vesting during a transition period. The report also wants the OEB and the Competition Bureau to set up a regime to deal with abuses, such as collusion, bid-rigging and predatory pricing. In subsequent reports, the Committee has also recommended an end to pricing based on 'postage stamp rates' (i.e., uniform pricing throughout the province) allowing different prices in different parts of the province (in other words, it will permit pricing based on congestion in transmission). Further, auctioning off access to its transmission grid, payment for grid expansion by those planning to transmit electricity and a transition surcharge on all electricity consumed are other possibilities raised by the Committee.

<sup>13</sup> In 1995, Ontario Hydro purchased \$418 million worth of power from private sources. This is expected to reach \$680 million by 2000. The competitive threat appears to come more from neighbouring U.S. states than from small domestic independent power producers.

<sup>14</sup> One representation was made in the financial sector over the period 1991-1997.

<sup>15</sup> In 1992, the Federal Government completed its far reaching changes to various Acts governing the Financial Sector (the *Bank Act*, the *Trust and Loan Companies Act*, the *Insurance Act* and the *Cooperative Credit Associations Act*). Sunset clauses required the government to enact new legislation by March 31, 1997. As part of the review process, the Department of Finance prepared a paper 'Enhancing the Safety and Soundness of the Canadian Financial System' which was presented to the Senate Standing Committee on Banking Trade and Commerce ("SSCBTC"). In response to an invitation from the Department of Finance, the Competition Bureau presented its submission on a confidential basis. The SSCBTC invited submissions from interested parties on the paper and in August 1995 published an 'Interim Report on the 1992 Financial Institutions Legislation'.

<sup>16</sup> The public was given until August 30, 1996 to make submissions on the White Paper. Both the House of Commons Finance Committee and the Standing Senate Committee on Banking, Trade and Commerce held hearings on the White Paper. They both resulted in reports. The Government in August 1996 set up the Payments System Advisory Committee and on December 19, 1996 announced the mandate and makeup of the Task Force on the Future of the Canadian Financial Service Sector. The latter made recommendations to the Minister of Finance in September 1998. On June 13, 1997, the

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latter released its Discussion paper. It identified four areas for discussion: i) industry conduct; ii) structural considerations; iii) regulation, compensation arrangements and related matters; and iv) other matters.

<sup>17</sup> Under the present *Bank Act*, foreign banks are required to operate as separately capitalized and incorporated subsidiaries. This is not only costly but also has restricted their business activities in Canada. For example, foreign banks are unable to avail themselves of their parents' capital which would enable them to lend more in Canada making banking more competitive in Canada. The present restriction that they will not be allowed to take consumer deposits in Canada will continue. Both the House and Senate Committee Reports on the matter favour easing the restrictions on foreign banks. As a result, even domestic banks have dropped their opposition to it, a position they were using as a lever to broaden their powers.

<sup>18</sup> A major contribution made by the Director of Investigation and Research in promoting competition in banking that did not occur through interventions but through enforcement was his success in the Interac case. Access to electronic banking was under the control of members of the Interac Association (i.e., Interac), and for practical purposes was not accessible to others. On June 25, 1996, the Competition Tribunal issued a Consent Order against Interac Inc. and nine charter members of the Interac Association. The Order was issued under the abuse of dominance provisions of the *Competition Act*, to create incentives for the introduction of new services and a broader distribution of automated banking machines. The Order also ensures that neither consumer convenience nor network security will be jeopardized. Further, the Order sought to prohibit a number of anti-competitive acts and to put into place other changes necessary to restore competition. It dealt with three major areas of concern: access, fees and innovation.

<sup>19</sup> Pricing regulations were not completely eliminated as the Commission instituted a four-year price cap on overall long-distance rates to ensure that Stentor's rates are just and reasonable. See Lawrence Surtees and Robert Brehl, "Local phone bills rise-again," *The Globe and Mail* (December 19, 1998), pp. 1/29.

<sup>20</sup> Stentor members, formerly members of Telecom Canada, are members of a consortium called Stentor Telecom Policy Inc. providers of interprovincial and international services by principal full service telephone companies.

<sup>21</sup> The long distance competitors were not required to ask for permission to change prices since they were allowed into the market in 1992.

<sup>22</sup> Sprint Canada Inc.'s 'The Most by-the minute savings plan' and 'The Most unlimited savings plan' compete against Bell Canada's 'FirstRate Savings Plan'

and 'Real Plus Extra' which are alternatives to AT&T Canada's 'True Choice Anywhere' and 'True Choice Anytime' and 'True Choice North America'. These are a few of the plans of the major competitors. Further, it has also been predicted that not only will voice-over-IP flourish, but that it and other data network services will eventually overwhelm traditional telephone companies. IP stands for Internet Protocol or Internet telephony. See Rob Carrick, "Long-distance firms step up bid for your bucks" *The Globe and Mail* (July 11, 1998), p. B6 and Paul De Groot, "Free long distance, the Internet way" *The Globe and Mail* (October 13, 1998), pp. 1C/8C.

<sup>23</sup> It contained a few new features: Foreign investment in telecommunications carriers is restricted to 20% of voting shares, this however does not apply to resellers. The CRTC can exempt classes of carriers from the Act, for example wireless carriers. Where competition is or will be sufficient to ensure just, reasonable, and non-discriminatory rates, the CRTC can forbear from applying the Act's tariff-approval-based regulatory scheme. Federal Cabinet now has new power to issue binding policy directions to the CRTC. The Act also sets out seven separate objectives of the Canadian Telecommunications Policy.

<sup>24</sup> Competition among DTH (direct-to-home) service providers was substantially limited by an earlier order of the CRTC on satellite distribution.

<sup>25</sup> The term information highway is generally taken to mean convergence or melding of telecommunications, cable, computer and entertainment technologies. It has been described as a "network of networks". The concept includes the full interconnection and interoperability of existing and planned public networks (including cable, broadband and narrowband telephone networks, satellite and wireless networks) as well as value-added computer and communications networks. See Elisabeth Angus and Duncan Mckie, *Canada's Information Highway: Services, Access and Affordability* (May 1994), pp. 12-14.

<sup>26</sup> For example, see the challenge by Pacific Place Communications Ltd. (a joint venture between BC Tel and Concord Pacific Developments Ltd.) to bypass Canada's largest cable-TV company by installing a fibre-optic system to serve 13,000 apartments and condos. The Director supported Pacific Place Communications and the CRTC approved the application.

<sup>27</sup> See Terrence Corcoran, "CRTC's secretive policy reversal" *The Globe and Mail* (January 20, 1998), p. B2. The author notes that a significant point in the reversal of the decision could have been when Bell and Stentor which formerly supported protecting Teleglobe reversed its position by supporting switched hubbing. Also see Terrence Corcoran, "Cabinet should ignore Teleglobe" *The Globe and Mail* (March 11, 1998), p. B2. The author notes that the combined effect of the two legal ploys (i.e.,

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petition to Cabinet to reverse the CRTC decision and request to the CRTC to delay implementing its decision pending Cabinet review) could send the opening of the market into regulatory limbo, and protect Teleglobe from competition.

<sup>28</sup> Of the total number of interventions (excluding pending or withdrawn) 69.0% were favourable; 11.9% were partially favourable; and 19.0% were unfavourable. These numbers are similar to those undertaken in Monteiro, 15:1 Can. Comp. Rec., *supra*, note 2, and have not been published.

<sup>29</sup> In the 1991-1997 period, 69% of the decisions were favourable compared to 61% for the period 1976-91 (see first reference page 22 in footnote 2).

<sup>30</sup> For example, see Gordon E. Kaiser, "Regulation or Competition: Where do we go from Here" in R.S. Khemani and W.T. Stanbury, eds., *Canadian Competition Policy And Law At the Centenary*, (Halifax: The Institute for Research on Public Policy, 1991), p. 435, and N.J. Schultz, "Competition Advocacy in the Deregulation Era" (1989) 10:3 Can. Comp. Pol. Rec. 42.

<sup>31</sup> The Director at least in one intervention has taken the position that permitting intervenors to play a wider role than simply presenting their submission is called for.

**TABLE - 1**  
**Regulatory Interventions by Sub-Sector 1991-1997\***

Sector	Sub Sector							Total
<b>Transportation</b>	Air(1)					General(1)		2
<b>Communications</b>	Telephone (15)	Teleglobe (3)	Cable Tel. (2)	Telesat/Satellite (2)			Radio Broadcasting (2)	24
<b>International</b>	Sugars & Sweeteners (1)			Beer (1)	Insulation Pipe (1)	Caps (1)	General (1)	5
<b>Resources</b>	Natural Gas (2)		Electricity (5)		Petroleum (1)			8
<b>Agriculture</b>			Chicken (1)		Sugar Beets (1)			2
<b>Finance</b>		General (1)						1
<b>Services</b>					Postal Services (1)	Real Estate Brokerage Acts (1)		2
<b>Other</b>				Beer (1)				1

\* The preliminary information for 1998 indicates that there were six interventions in telecommunications: telephone (2), teleglobe (1), broadcasting (2) and telesat (1); and one in resources (natural gas).

**Source:** Compiled from information in *Annual Reports of the Director of Investigation and Research, 1991-1997*.

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## Appendix I

**REPRESENTATIONS BY THE DIRECTOR OF INVESTIGATION AND RESEARCH BY YEAR  
AND SECTOR FOR 1991-1998**

(For the period 1976-1991 please refer to the Canadian Competition Record, Volume 15, No. 1  
(March 1994) at pages 28-38)

**1991-1992**

## Communications

172. [Canadian Radio-Television and Telecommunications Commission] Competitive Telecommunications Alliance.
173. [Canadian Radio-Television and Telecommunications Commission] Teleglobe Canada Inc.

## Resources

174. Nova Scotia Law Amendments Committee.

## Agriculture

175. Submission to the Ontario Chicken Producer's Marketing Board — 1991.

**1992-1993**

## Transport

176. Submission to the National Transportation Act Review Commission.
177. [National Transportation Agency] NTA Review of AMR Corporations proposed investment in Canadian Airlines International.

## Telecommunications

178. Bill C 62 — An Act Respecting Telecommunications — Senate Standing Committee on Transport and Communications.
179. [Canadian Radio-Television and Telecommunications Commission] CRT — Application by ITN Corporation.
180. [Canadian Radio-Television and Telecommunications Commission] CRTC — Teleglobe Canada Inc./ Stentor Interconnection and Operating Agreement.

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### Resources

181. [National Energy Board] Submission to the National Energy Board — Review of Inter-utility Electricity trade.

### Agriculture

182. Special Measures Committee on Sugar Beets.

### 1993-1994

#### Telecommunications

183. [Canadian Radio-Television and Telecommunications Commission] Telecommunications Regulatory Framework.
184. [Canadian Radio-Television and Telecommunications Commission] Terminal Equipment.
185. [Canadian Radio-Television and Telecommunications Commission] Directory Database Information.

#### International

186. [Canadian International Trade Tribunal] Fiberglass Pipe Insulation Imports

### Resources

187. [Ontario Energy Board] Reorganization of Ontario Hydro.

### 1994-1995

#### Telecommunications

188. [Canadian Radio-Television and Telecommunications Commission] Balloting Proceeding.
189. [Government of Saskatchewan] Long Distance Competition — Saskatchewan.
190. DTH Policy Review Panel.
191. [Canadian Radio-Television and Telecommunications Commission] Information Highway Proceeding.
192. [Canadian Radio-Television and Telecommunications Commission] Forbearance of Non-Dominant Carriers.
193. [Canadian Radio-Television and Telecommunications Commission] Satellite Master Antenna Systems.

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## International

194. Beer — Canadian International Trade Tribunal.

## Resources

195. [British Columbia Utilities Commission] British Columbia Electricity Market Structure Review.

## Services

196. New Brunswick Association of Real Estate Appraisers — Standing Committee on Private Bills.

## Other

197. Beer — Régie des alcools, des courses et des jeux.

**1995-1996**

## Telecommunications

198. [Canadian Radio-Television and Telecommunications Commission] Local Phone Submission (CRTC 95-36).

199. [Canadian Radio-Television and Telecommunications Commission] Local Service Pricing Options (CRTC 95-49/56).

200. [Canadian Radio-Television and Telecommunications Commission] Rebalancing Local and Long Distance Telephone Rates (CRTC 94-58).

201. [Telecommunications Policy Branch, Industry Canada] Teleglobe Mandate Review Submission.

202. [Canadian Radio-Television and Telecommunications Commission] Radio Station Intervention (CRTC 1995-204).

203. [Canadian Radio-Television and Telecommunications Commission] Vancouver (Pacific Place) Competitive Cable Television Licensing Proceeding (CRTC Notice of Public Hearing 1996-1).

204. [Canadian Radio-Television and Telecommunications Commission] CRTC Cable Access Rules (CRTC 1995-128).

## International

205. [Canadian International Trade Tribunal] Sugar Dumping.

206. [Canadian International Trade Tribunal] Caps, Jars Lids — CITT

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## Finance

207. [Department of Finance] 1997 Financial Markets Legislation Review##

## Services

208. [Canada Post Office Corporation Mandate Review Commission] Canada Post Mandate Review

**1996-1997**

## Telecommunications

209. [Canadian Radio-Television and Telecommunications Commission] Regulatory Forbearance on Long Distance Services (CRTC 96-26).

210. [Canadian Radio-Television and Telecommunications Commission] Tariff Review (CRTC 96-27).

211. [Canadian Radio-Television and Telecommunications Commission] Broadcast Distribution (CRTC 1996-69).

## International

212. Review of the Special Import Measures Act (SIMA).

## Resources

213. [National Energy Board] Transportation of Natural Gas Liquids — NEB.

214. Ontario Electricity — Advisory Committee in Ontario's Electricity System.

215. [British Columbia Utilities Commission] Retail Access and Unbundled Tariffs (Electricity) — BCUC Market Structure Review.

216. Manitoba Public Utilities Board — Natural Gas Local Distribution Companies.

**1997-1998** (Preliminary)

## Telecommunications

217. [Canadian Radio-Television and Telecommunications Commission] International Telecommunications (CRTC 97-34).

218. [Canadian Radio-Television and Telecommunications Commission] NBTel Application for a Broadcasting Licence.

219. [Canadian Radio-Television and Telecommunications Commission] Local Pay Phone Competition (CRTC 97-26).

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220. [Canadian Radio-Television and Telecommunications Commission] Satellite Relay Distribution Licensing (CRTC 97-14).
221. [Canadian Radio-Television and Telecommunications Commission] Allocation of Satellite Capacity (CRTC 97-13).
222. [Canadian Radio-Television and Telecommunications Commission] Joint Marketing and Building (CRTC 97-14 and 97-21).

## Resources

223. [Ontario Energy Board] Ontario Natural Gas — OEB.

**Note:** The number of formal representations listed in each year may marginally differ from those reported in the *Annual Report, Director of Investigation and Research, Combines Investigation Act*, because the basis of classification here, is the year in which the representation is reported in the *Annual Report*. ## Not recorded in the *Annual Report*.

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