CANADIAN COMPETITION RECORD

CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

NEW MERGER PRE-NOTIFICATION REGIME PROCLAIMED IN FORCE

By: Susan M. Hutton*

Editors' Note: The Competition Bureau's News Release announcing the coming into force of the changes to the notifiable transactions provisions is reproduced at page 29 of this issue of the *Record*.

The final stage of the 1999 amendments to the *Competition Act* (the "Act"),[1] relating to the changes to the merger pre-notification regime, came into force on December 27, 1999, along with accompanying amendments to the *Notifiable Transactions Regulations* (the "Regulations").[2] As mentioned in a previous article in the *Record*, other changes to the Act had come into force on March 18, 1999, but the amendments to the pre-notification regime had awaited public comment and finalization of the new Regulations.[3]

A number of draft "Interpretation Guidelines" were also issued in 1999, illuminating the manner in which the Commissioner of Competition (the "Commissioner") interprets various provisions of Part IX of the Act as well as of the Regulations (e.g., "operating business", joint venture exemption, "substantial completion" of a merger, etc.). These Interpretation Guidelines do not reflect a change in policy or in the legislation and are beyond the scope of this article, but interested readers should refer to the Competition Bureau web-site for a copy (http://strategis.ic.gc.ca/SSG/ct01503e.html).

The most significant changes from the point of view of their impact on the largest number of transactions will undoubtedly be the doubling of the statutory waiting periods, to 14 days for a short-form filing, and 42 days for a long-form filing,[4] as well as the changes to the information required to be submitted in such filings. Moreover, it is now clear that <u>both</u> parties to a proposed transaction have an obligation to file, and provision is made for the Commissioner to require such information from a hostile takeover target.

In addition, a new category of notifiable transaction has been added to section 110 of the Act, pertaining to the acquisition of more than a 35% interest (or more than 50% if the acquiror already owned more than 35%) in a combination (other than a corporation) that carries on an operating business, and the Canadian assets of which, or the gross revenues from sales in or from Canada generated by such assets, exceed $35 million (Cdn.) in value. This addition obviates the need to file in respect of the acquisition of insignificant interests in combinations where the value of the Canadian assets or revenues acquired

nonetheless exceeded the $35 million (Cdn.) threshold. The 35% and 50% interest thresholds are the same as those which trigger notification in the acquisition of voting shares in a privately held corporation.

Other significant features of the new notification regime include a new exemption for asset securitization transactions and specification of the exchange rate to be used in converting foreign currencies to Canadian dollars.

The principal difference between the Regulations as proclaimed in force and those proposed in draft form in May, 1999[5] is the expansion of the definition of an "asset securitization transaction", and related definitions. Such changes were necessary in order to capture all of the various forms of this financing transaction which have developed in recent years.

Each of the most significant changes to the pre-notification regime will be discussed briefly below, from the point of view of its impact on the parties seeking to merge.

Waiting periods doubled – implications for the choice between short-form and long-form filings

As before, the notifier can choose to submit either short-form or long-form information, but the Commissioner has the option, at his sole discretion, at any time during the short-form waiting period, to "bump" the transaction into a long-form filing by requesting the additional information required to complete a long-form filing. The long-form waiting period will not commence in that case until such additional information has been supplied.

With the old waiting periods of 7 and 21 days respectively, the combined waiting period – even if the transaction was "bumped" into a long-form (which was very rare) – was 28 days, and the additional information required in a long-form could be gathered fairly easily. Given that most transactions large enough to be notified do not close within a month of an agreement being signed – and often much longer – the threat of being "bumped" was not likely seriously to delay closing. Moreover, the information required to be submitted with a long-form filing and a short-form filing alike was not terribly germane, often, to the Commissioner's assessment of the likely competitive impact of the proposed transaction. Thus, there was very little incentive for the Commissioner to require a long-form filing, and very little risk to the notifier if such a request were made. Long-form filings were extremely rare.

Now, however, if the Commissioner waits until the last day of a short-form waiting period to require additional long-form information, the combined waiting period will amount to at least 56 days – and longer unless the long-form information is filed immediately. As discussed in detail below, the information and documents required to be submitted in a long-form filing are much more detailed than before and will in fact be quite time consuming to gather. In addition, they are more relevant to the Commissioner's assessment of the likely competitive impact of the proposed transaction. The downside of being "bumped" into a long-form filing is therefore now all the greater, in view of the longer waiting periods and the delay incurred in gathering long-form information, and the Commissioner might be more tempted to require such information, as it will be more relevant to his assessment of the proposed transaction. Indeed, in the draft *Procedures Guide*

to Notifiable Transactions and Advance Ruling Certificates under the *Competition Act* (the "Procedures Guide"),[6] the Bureau takes the position that the more complex the transaction (*i.e.*, the more serious and numerous the overlaps and competitive issues raised and the higher the post-merger market share), the more likely the Commissioner is to request the long-form information rather than issue a detailed "voluntary" information request requiring, essentially, the same information. That said, where the parties submit additional information along with a short-form filing, the Procedures Guide recognizes that a long-form filing might not be necessary.

Together with the amendments which rendered interim injunctions to delay closing easier for the Commissioner to obtain, the doubled waiting periods and the increased information requirements for a long-form filing serve to put additional pressure on notifying parties voluntarily to provide detailed information relating to the likely competitive impact of the transaction. If the proposed transaction raises serious issues, and the information is not provided voluntarily, it may be required by the Commissioner, and the waiting period significantly extended as a result. Parties need seriously to consider whether to file a short-form (plus, if appropriate, additional information relevant to the Commissioner's assessment of the likely competitive impact of the proposed transaction) or a long-form filing.

Expanded information requirements

As mentioned above, the information required to be submitted with a long-form filing has been significantly expanded. On the other hand, the information required to be submitted with a short-form filing has in some senses been narrowed, and in both cases the information is much more likely to be relevant to the Commissioner's assessment of the likely competitive impact of the proposed transaction than was previously the case. In addition, should the Commissioner wish to revise the list of information and documents requested, he can do so more readily, as the list of required information and documents is now contained in the Regulations and is no longer found in the Act itself.

For a short-form filing, the new information that was not previously required includes the following:

1) a list of foreign authorities which have been notified of the proposed transaction and the date of notification;

2) a summary description of each of the principal categories of products produced, supplied or distributed by the party supplying the information, and

3) the geographic region of sales for the notifier and its affiliates.

In addition, whereas the notifier previously was required to provide a list of "principal" customers and suppliers of each principal business with significant assets in or sales in or into Canada, the Regulations now specify that 20 of each are required, and that they are required in respect of each principal category of product (rather than for each business, if the business is involved in multiple products).

The burden on the notifier is at the same time decreased, however, by virtue of the fact that copies of legal documents related to the transaction are no longer required, nor are copies of all securities documents filed or sent to shareholders in the past

two years, nor *pro forma* financial statements or the jurisdiction of incorporation of the notifier.

It is with respect to a long-form filing that the burden on notifiers has been significantly increased. To complete a long-form filing, in addition to the information required in a short-form filing, the following information will be required:

1) a list of the 40 most important current suppliers and customers for each of the principal categories of products (*i.e.*, double the number of suppliers and customers as for a short-form, and for each category of product, rather than each business as was previously the case);

2) the location of principal offices and the location of all plants, warehouses, retail establishments or other places where business is conducted (formerly, only principal offices were required);

3) detailed information regarding categories of product sold by both the notifier and its affiliates, including information regarding, for each such category, the production capacity at its various facilities, geographic regions of sales, sales revenues and volume of sales, costs and transportation modes;

4) identification of any corporation carrying on an operating business in Canada, in which the notifier owns, directly or indirectly or otherwise, more than 20% of the votes attached to all outstanding voting shares of the corporation, and the number of votes held (and similar information in respect of an interest in a combination if the interest entitles the notifier (or its affiliates) to more than 35% of the profits or more than 35% of its assets on dissolution);

5) copies of documents filed with securities regulators or sent to shareholders in the past two years;

6) *pro forma* financial statements of the post-merger entity, prepared as if the transaction had already been concluded;

7) a copy of all reports, surveys and analyses that were prepared or received by a senior officer, together with the date of preparation and the name and title of the author, where such documents were prepared for the purpose of evaluating or analyzing the transaction with respect to the principal categories of products produced, distributed or supplied by the notifier (or its affiliates), or its potential impact on prices, market shares, competitors or competition, innovation and the potential for sales growth or expansion into new products or geographic regions;

8) copies of all marketing, business or strategic plans, and similar documents that were prepared or received by senior officers, and that have been implemented in Canada over the previous three years or are to be implemented in Canada, for each of the principal categories of products of the notifier (and its affiliates); and

9) a summary description of any decision, commitment or undertaking to make significant changes in the business.

Clearly, the information required in a long-form

filing is much more relevant to the Commissioner's assessment of the likely competitive impact of the proposed transaction than was previously the case. The fact that the Commissioner can obtain such information as of right without having to go to the trouble of obtaining a court order to subpoena information and documents under section 11 of the Act, as was previously the case, will clearly assist in the analysis of cases by the Bureau. Essentially, what was provided voluntarily by the parties in a great many cases, can now be required by the Commissioner, without a great deal of extra time and trouble on his part.

In some senses, the information required to be filed with a long-form is now a cross between the market analysis required to be filed in a Form CO with the Mergers Task Force in Europe, and the documents required to be filed under section 4(c) of the form submitted pursuant to the *Hart-Scott Rodino Antitrust Improvements Act of 1976* ("HSR") in the United States. As such, preparation of a long-form filing will be quite a task. Depending upon how parties keep their information, for instance, transportation costs by product category, or the geographic region of sales by product category, may well not be readily available. On the surface, the information required appears to be objective, but inevitably subjective aspects are involved in, for instance, the allocation of costs among product categories, the determination of the geographic region of sales, the definition of "principal" product categories themselves, *etc.*

The documentary production required in a long-form filing is, in particular, more than is required in either the United States or by the European Commission. Even an HSR filing does not require copies of marketing, business and strategic plans, and it is clearly open to interpretation as to what is "similar" to such plans. Reports, studies, surveys and analyses prepared or received by a senior officer for purposes of evaluating the impact of the transaction on its business and competition in general will be similar to those documents required in section 4(c) of an HSR filing. That said, the scope of the search required to be made for such documents may not be the same. The Regulations include a definition of "senior officer" which is quite extensive[7] – depending upon the company, a "general manager" may have overall responsibility for the company or may be several rungs down the ladder and not thought of as senior management at all. Just as this definition obviously is meant to include only the executive appointed as Secretary to the Board, and not administrative assistants commonly referred to as "secretaries", a "general manager" who is not in fact part of senior management and so does not "perform the functions" of the other people in the list (CEO, Vice President, managing director) – would arguably not be caught by the definition. Clearly, with such subjective elements entering into the selection of documents and the provision of information regarding principal categories of products, special care and attention will have to be made to the scope of searches for documents and the drafting of affidavits confirming the completeness and accuracy of the information supplied.

Who is obligated to notify?

Before these latest amendments, the "parties proposing the transaction" were required to submit pre-notification materials. In a friendly transaction, both parties would typically provide materials. In a hostile transaction, however, the target could take the position that it most definitely was not proposing the transaction and so did not have to file pre-notification materials.

Clearly, now, both parties must file. In the case of an acquisition of shares, where notification materials are received from a party other than the target of the acquisition, the Commissioner has an obligation, pursuant to subsection 114(3) of the Act, immediately to notify the target corporation that pre-notification materials have been received, and the target then has a statutory obligation to provide its own pre-notification materials. The deadline for the target to do so is also specified: 10 days for a short-form filing or 20 days for a long-form filing. In addition, subsection 123(2) makes it clear that the waiting period for closing the transaction commences when all other parties required to file information – other than the target corporation – have done so. In other words, delay on the part of the target in providing the required information cannot prolong the waiting periods.

Asset Securitization Transactions Exempted

According to the Commissioner, asset securitizations accounted for about 15% of all filings, yet rarely, if ever, posed a concern from a competition point of view. The draft Regulations had included a definition of an "asset securitization transaction" and proposed exempting them unless as a result of the transaction any person acquired control over a business or an operating segment of a business.

The Regulations as issued contain a much more detailed definition of an asset securitization transaction. It is now clear that, if the financial assets will be administered, serviced and operated by someone who owns or controls more than 10% of the securities or debt exchanged for the financial assets (essentially, anyone with a significant interest in the financing exchanged for the financial assets), the transaction will not qualify for the exemption. Thus, it is envisioned that either the corporation who is obtaining the financing by leveraging their receivables, contracts and other financial assets, or an agent or trustee for the financiers who itself does not have a significant interest in the transaction, will continue to administer those assets. Accordingly, control over an operating business cannot possibly follow the acquisition of those assets.

The Regulations therefore provide that the acquisition of financial assets undertaken to give effect to an asset securitization transaction is provided a blanket exemption from the merger pre-notification requirements of Part IX of the Act, and the acquisition of non-financial assets undertaken to give effect to an asset securitization transaction is exempted unless any person would, as a result of the transaction, acquire all or substantially all of the assets other than financial assets of a business or an operating segment of a business carried on by the person disposing of the assets.

Foreign Currency Conversions

The parties were previously free, within reason, to chose the relevant exchange rate for the conversion of foreign currencies into Canadian dollars for the purpose of a pre-notification filing. In close cases, notifiability could depend upon the exchange rate chosen. To avoid subjective selection of applicable exchange rates and to provide certainty to merging parties, the Regulations now specify that the value of assets is to be converted using the daily noon exchange rate published by the Bank of Canada on the day on which the value of the assets is to be determined (usually, the close of the most recently completed fiscal year of the

business in question). Similarly, revenues are to be converted using the daily noon exchange rate published by the Bank of Canada on the last day of the period for which such revenues are reported (again, usually, the last day of the most recently completed fiscal year of the business in question).

Other changes to the pre-merger notification regime

The changes described in detail above include those with the most significant implications for merging parties. In addition, however, some other changes – some in effect since March, 1999 and others in effect only since December, 1999 – are worth mentioning.[8]

- Interim injunctions to delay the closing of merger transactions[9] can now be obtained more easily. The Commissioner now needs only to certify to the Competition Tribunal (a special purpose federal tribunal charged with merger review) that an inquiry is being conducted into the competitive impact of a proposed transaction and that more time is required to complete the inquiry. The Tribunal must also find that, in the absence of the injunction, a party is likely to do something that will substantially impair the ability of the Tribunal to remedy the effect of the merger on competition because the action will be difficult to reverse. No likelihood of anti-competitive impact needs to be shown, merely irreversible steps to merge the businesses. Injunctions on these grounds will be granted for an initial maximum of 30 days, but can be granted to a maximum of a total of 60 days if the Commissioner certifies that he has not been able to complete his review within an additional 30 days due to circumstances beyond his control. In addition, injunctions to permit more time can no longer be obtained *ex parte* but must be brought on at least 48 hours' notice to the parties.[10]

- The Commissioner now has the explicit power to waive the requirement to file formal pre-notification materials when essentially the same information has been supplied pursuant to a request for an Advance Ruling Certificate (an "ARC") in respect of the same transaction. Previously, if such an ARC request was denied, the parties would still have to file notification materials, and the Commissioner could then waive the waiting period. Now, if the Commissioner does not wish to oppose the transaction but is also not willing to issue an ARC (and so retains the right to challenge the transaction for the usual three years after closing), he can relieve the parties of the technical need to file formal pre-notification materials.

- Parties are expressly permitted to incorporate information contained in previous filings by reference in a later filing. Curiously, such information, even though already in the Commissioner's possession, is treated as omitted information that can nonetheless be requested by the Commissioner in order to complete the filing.

- The exemption from pre-notification for underwriting transactions was expanded in March, 1999 to cover not only those in respect of which a prospectus was required or exempted pursuant to Canadian securities legislation, but also those similarly covered by foreign securities legislation.

- "Control" of a partnership is now expressly

defined in the Act in terms of an interest which entitles the owner to more than 50% of the assets of the partnership on dissolution, or to more than 50% of the profits of the partnership.

Conclusion

Many of the changes to the merger pre-notification regime will assist to provide certainty to the business community and competition law practitioners alike as to their obligations under Part IX of the Act. The most significant changes, however, namely the doubling of the waiting periods and the expansion of the long-form information requirements – coupled with the easier access of the Commissioner to obtaining interim injunctions to delay closing – increase the leverage of the Commissioner to obtain the information he requires to investigate transactions, and potentially to delay closing of contentious transactions.

Notes

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

2 SOR/87-348, as amended by SOR/2000-8, *Canada Gazette,* Part II, Vol. 134, No.1, p.62 (2000-01-05).

3 Hutton and Gudofsky, *"The Commissioner is "In": An Overview of the March, 1999 Amendments to the Competition Act and Draft new Merger Pre-notification Regulations"* (1998-99) 19:3 Can. Comp. Rec. 72.

4 The minimum waiting period applicable to a long-form filing for a transaction to be effected through a Canadian stock exchange has been extended, similarly, from 10 to 21 trading days or as otherwise provided by the stock exchange, to a maximum of 42 days.

5 *Canada Gazette*, Part I, May 15, 1999.

6 The draft Procedures Guide can be found on-line at the Competition Bureau's web-site at: http://strategis.ic.gc.ca/SSG/ct01499e.html.

7 Section 2 of the Regulations states that "senior officer" means the chairperson, president, chief executive officer, vice-president, secretary, treasurer, chief financial officer, chief operating officer, general manager, managing director or any individual who performs their functions.

8 See *supra*, note 4, at 73-79, for more detail.

9 Note that injunctions can delay implementation of any merger, not just those that are pre-notifiable.

10 As before, interim injunctions to prevent a merger from closing are also available where the Competition Tribunal finds there has been a failure to notify a notifiable transaction. In such circumstances, an injunction can be obtained *ex parte*, but is limited to 10 days (as opposed to 30 days if obtained on notice).

THE BOEHRINGER CASE: A TONIC FOR PREDATORY PRICING LAW

By: James Musgrove, Lang Michener

Editors' Note: The author of the following case comment is preparing a commentary on the VanDuzer Report (see Competition Bureau News Release at page 28 of this issue of the *Record*) that will appear in a forthcoming issue of the *Record*.

On October 9, 1998 the Ontario Court (General Division) (Mr. Justice Dambrot) released a decision[1] which has helped clarify at least one aspect of predatory pricing law in Canada. At its simplest, the case stands for the proposition that a price cannot be found to be predatory if it simply meets the price charged by a competitor, or attempts in a reasonable fashion to do so.

This case involved various disputes between Boehringer Ingelheim (Canada) Inc. ("Boehringer")

and Bristol-Myers Squibb Canada Inc. ("Bristol-Myers") with respect to an anti-cancer drug which Bristol-Myers sold under the name Taxol, and Boehringer sold under a generic name, Paclitaxel. There had been various disputes between the parties with regard to alleged breach of trade marks and copyright, misleading advertising, etc. The dispute in the present case involved alleged misleading advertising and predatory pricing.

Predatory Pricing

Boehringer alleged that Bristol-Myers was selling its Taxol product below its average total cost. Mr. Justice Dambrot reviewed the provisions of section 50(1)(c) and section 36 of the *Competition Act* and noted that there are five elements to a predatory pricing claim in a civil context:

a. the defendant is engaged in a business;

b. the defendant is engaged in a policy of selling products;

c. pursuant to the policy, the products are being sold at prices which are unreasonably low;

d. the policy has the effect or tendency of substantially lessening competition or eliminating a competitor; and

e. the defendant's unreasonably low prices cause loss or damage to the plaintiff.

It is submitted that a policy with the intent of substantially lessening competition or eliminating a competitor could substitute for item (d) in the above list.

Mr. Justice Dambrot stated that "The essence of predatory pricing is well-described in the 1992 Predatory Pricing Enforcement Guidelines used by the Director of Investigation and Research, *Competition Act*, as follows:

> "The concept of predatory pricing is best illustrated by a dominant firm in a market setting its prices so low, over a long enough period of time, that it may drive one or more of its competitors from the market, or deter other companies from entering the market, or both. Following the exit of competitors from the market, or upon successfully deterring new entry, the predator is expected to raise prices significantly in an attempt, in the now less-competitive market it had created, to recover the costs incurred (i.e., losses or forgone profits) during the period of predation."

The evidence was that Bristol-Myers met the new much lower (typically about 35 percent lower) price that Boehringer offered in the marketplace almost immediately upon Boehringer entering the marketplace. Boehringer's accountant offered evidence that if Bristol-Myers' price met Boehringer's price in most instances, and undercut it in perhaps ten percent of the cases, Bristol-Myers would be selling below its average total cost in Canada. Boehringer had anticipated that it would acquire about a 25 percent market share after a year (and Bristol-Myers itself had predicted that an entrant would pick up about 20 percent of the market). However, Boehringer only had a six percent market share after one year. Boehringer's evidence was that if it did not have 25 percent market share by the end of the current (1998) year

it would leave the market.

Boehringer sought an injunction preventing this predatory pricing. Bristol-Myers cross applied for summary judgment dismissing the predatory pricing claim against it.

One of Bristol-Myers' principal arguments was that it only engaged in price matching, and that by definition price matching with a competitor - even a new entrant competitor - cannot constitute an unreasonably low price under the *Act*. Bristol-Myers asserted that it was not selling below cost, but that even if it were found to be selling below cost, but price matching with its competitor, that cannot constitute predatory pricing.

The evidence of undercutting Boehringer's price was that in one bid situation Bristol-Myers may have marginally undercut the price offered by Boehringer. However, they were sealed bids such that Bristol-Myers could not have known Boehringer's bid price when it made its own bid.

Mr. Justice Dambrot referred to the judgment of Mr. Justice Linden in *R.* v. *Hoffmann-LaRoche Ltd.* (1980) 28 O.R. (2d) 164. There Mr. Justice Linden noted that the concept of an unreasonably low price is intentionally a flexible concept to permit courts to consider all relevant circumstances. The court found that sales below cost would generally be unreasonable, but in some circumstances would not be. One such circumstance is the need to meet a lawful, equally low price of a competitor. Mr. Justice Dambrot then referred to various U.S. cases dealing with the question of whether a price below cost can be predatory if it is to meet competition. He quoted a statement from the case of *ILC Peripherals* v. *IBM*; affd. *Memorex* v. *IBM*, where District Court Judge Conti stated:

> "A company should not be guilty of predatory pricing, regardless of its costs, when it reduces prices to meet lower prices already being charged by its competitors. To force a company to maintain non-competitive prices would be to turn the antitrust laws on their head. Such a price cut cannot create the kind of market position that the prohibition of predatory pricing was meant to preclude."

In regard to this quote Mr. Justice Dambrot stated:

> "I am of the view that this is also the law in Ontario. It accords with the few Canadian trial decisions, and makes good sense from a policy perspective... One of the fundamental purposes of the *Competition Act*, as provided in s. 1.1 of the *Act*, is "to maintain and encourage competition in Canada... in order to provide consumers with competitive prices". While the predatory pricing provision, properly applied, undoubtedly furthers the goal of providing competitive prices in the long term, it nevertheless is the sole provision in the *Act* that prohibits price reductions. If it could be used, in certain circumstances, as the plaintiff argues, to prevent one competitor from meeting the prices offered by another, then it would be capable of being used to achieve an anti-competitive effect. It could be used to impede legitimate competition. I do not believe such a result is intended, or authorized, by the provision."

As a result of this finding, Mr. Justice Dambrot

granted the motion for summary judgment dismissing the predatory pricing claim.

The Court also indicated that, even if a case had been made out that predatory pricing was likely ongoing, it would have been reluctant to set a floor price by way of an injunction, as that is a dangerous undertaking for courts which are ill-suited to monitor the price at which a competitor may offer a product or changes in the marketplace.

Misleading Advertising

The moving party sought an interlocutory mandatory injunction to send corrective notices to recipients of the alleged misleading advertisements. The misleading advertising allegations were grounded on four bases:

a. injurious falsehood or slander of goods;

b. false or misleading statements contrary to section 7(a) and (d) of the *Trade-Marks Act;*

c. false or misleading statements contrary to section 52 of the *Competition Act*; and

d. unlawful interference with economic relations.

A. Slander of Goods

The court noted that slander of goods/injurious falsehood occurs when a person maliciously publishes a false statement, orally or in writing, disparaging another person's goods or services, and thereby causes that person damage. The elements are:

i. that the statement was made of and concerning the plaintiff's goods and services;

ii. that it was false;

iii. that it was published maliciously (i.e. with dishonest or other improper motive); and

iv. that the plaintiff has suffered special damages as a result. The plaintiff must prove the actual fact of damages or loss of business.

B. The Trade-Marks Act

In an action based on section 7 of the *Trade Marks Act* the complainant need only prove the act complained of, and that damage occurred as a result. There is no requirement to prove special damages, only resulting damage. Also there is no requirement to prove that the false or misleading statement was made maliciously.

C. Competition Act – Section 52

A prerequisite to a claim based on section 36 of the *Competition Act* is that the person must have suffered loss or damage.

D. Intentional Interference with Economic Relations

The elements of this cause of action include:

i. the intention to injure the plaintiff;

ii. that the defendant employed unlawful means to do so; and

iii. the plaintiff suffered economic loss or related injury.

Mr. Justice Dambrot found that the correct test for an interlocutory mandatory injunction is found in the decision of Mr. Justice Megarry in *Shepherd Homes* v. *Sandham*, [1970] 3 All E.R. 402 (Ch. D.) at 409, where he stated: "At the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted." (Adopted in *Ticketnet* v. *Air Canada* (1987), 21 C.P.C., 2d 38 and *Canadian Tire* v. *DuFrat* (1993), 108 D.L.R. (4th) 363.) In the present case the court found that there was not "unusually strong and clear" evidence of harm to the plaintiff as a result of the false or misleading statements which the court was prepared to assume had been made.

Conclusion

The Boehringer case, it is submitted, is important for a couple of reasons. The first is that, with relation to predatory pricing, the decision constitutes clear authority for a *meeting the competition* defence. It also represents judicial approval of the Predatory Pricing Enforcement Guidelines.

On the misleading advertising side, the case represents a convenient summary of the various causes of action, and a caution that in any attempt to obtain injunctive relief, clear evidence of harm – not just speculation as to harm – should be adduced.

Note

1 *Boehringer Ingelheim (Canada) Inc.* v. *Bristol-Myers Squibb Canada Inc.* (1998) 83 C.P.R. (3d) 51.

COMPETITION BUREAU REACHES DECISION IN INTERNET INQUIRY

The following is a News Release issued by the Competition Bureau on March 17, 1999, and is reproduced with permission.

The Competition Bureau announced today that, after an extensive examination of the Canadian Internet industry, it has concluded that there are no grounds to warrant an application to the Competition Tribunal for a remedial order.

The Bureau commenced a formal inquiry on August 20, 1998 following a complaint by six Canadian residents. The inquiry involved extensive third party contacts and information gathering.

Internet service providers (ISPs) require access to network connections and facilities from Bell Canada to offer high speed residential Internet services. The complaint alleged that subsidiaries of Bell were pricing high speed Internet service using Asymmetric Digital Subscriber Line (ADSL) technology to residential customers at rates substantially below the tariffed rates available to ISPs for access to the network. The complaint requested an order from the Tribunal prohibiting Bell from selling its ADSL Internet service below cost.

The Bureau addressed three essential questions in its inquiry under the abuse of a dominant market position provisions of the *Competition Act*. First, whether Bell has a dominant market positionin the supply of retail Internet services. Second, whether Bell has engaged in a practice of anti-competitive acts for the purpose of impeding competition.

Third, whether the effects of such practice are likely to result in a substantial prevention or lessening of competition.

"The results of the inquiry demonstrated that the Canadian retail Internet market is highly competitive and characterized by low barriers to entry," said Raymond Pierce, Acting Director of Investigation and Research. "The cable industry competitors offer similar high speed Internet services at prices comparable to Bell."

"On the basis of these facts, there are simply no grounds to proceed with an application to the Tribunal," added Mr. Pierce. "Moreover, seeking an order of the Tribunal prohibiting Bell from selling its ADSL Internet service below cost would impede the introduction of this new technology and deny consumers the benefits of price and service competition between alternative suppliers. This certainly would not be in the best interest of consumers."

The conclusions reached in this inquiry indicate very clearly that there is robust competition in the Canadian Internet market and demonstrate that the Bureau can address competition concerns in the telecommunications industry in a timely fashion and ensure that Canadians receive the benefits of a competitive marketplace in dynamic high technology markets. Should future competition issues arise in this sector, the Bureau will not hesitate to take the appropriate action.

RECORD $30 MILLION FINE AND RESTITUTION BY UCAR INC. FOR PRICE FIXING AFFECTING THE STEEL INDUSTRY

The following is a News Release issued by the Competition Bureau on March 18, 1999, and is reproduced with permission.

The Competition Bureau announced today that UCAR Inc. pleaded guilty to having participated in price-fixing and will pay a record fine of $11 million, the largest fine ever imposed under section 46 of the *Competition Act*. The Bureau would have sought even greater penalties if UCAR had not cooperated in the investigation, demonstrated a limited ability to pay and negotiated restitution in excess of $19 million with Canadian steel companies.

The conviction is for an offence which occurred between May 1992 and at least June 1997 and concerns a scheme designed to coordinate worldwide prices of graphite electrodes used primarily in the steel industry. UCAR Inc., one of two principal producers and suppliers of graphite electrodes in Canada, was convicted of implementing pricing directives from its parent company, UCAR International Inc. of the United States, giving effect to the price-fixing agreement in Canada.

> "This fine brings the total in the last year, for cases involving price-fixing cartels to about $40 million," said Raymond Pierce, Acting Commissioner of Competition. "It illustrates that these offences will not be tolerated and that enforcement of the *Competition Act* cannot be thwarted by

those who initiate illegal conduct outside the country."

Graphite electrodes are used primarily in the production of steel in electric arc furnaces, the steelmaking technology used by all "mini-mills", and for steel refining in ladle furnaces. Since the onset of the conspiracy in 1992, graphite electrode prices in Canada have almost doubled.

Between 1992 and 1997 operators of electric arc and ladle furnaces in Canada are estimated to have consumed at least $440 million of graphite electrodes.

The Bureau's investigation into the graphite electrode industry continues.

CHANGES TO THE *COMPETITION ACT* TARGET DECEPTIVE TELEMARKETING

The following is a News Release issued by the Competition Bureau on March 18, 1999, and is reproduced with permission.

Changes to the *Competition Act* which came into force today give the Competition Bureau new powers to use in the investigation of scam artists who use the telephone to exploit the trust of unsuspecting consumers.

Provisions making deceptive telemarketing a new criminal offence and allowing the Bureau to use wiretapping to investigate phone fraud are the centrepiece of Bill C-20. They include a number of changes that clarify competition law, streamline legal processes and give the courts more flexibility in dealing with anti-competitive conduct.

"The changes included in Bill C-20 provide the tools we need to fight the demeaning crime of deceptive telemarketing," said John Manley, Minister of Industry. "The new law ensures that we enter the 21st century with sound competition laws that encourage compliance, and yet ensure that those who break the law can be brought to justice."

The new provisions:

- make deceptive telemarketing a criminal offence punishable by a maximum of five years in prison and a fine within the discretion of the court, on conviction on indictment;

- require telemarketers to disclose who they work for, the value of the products they are promoting, and other specified information that will help potential victims distinguish legitimate telemarketers from the criminals and

- permit the Bureau to apply for judicial authorization to intercept private communications without consent (wiretap) to investigate the most serious cases involving price fixing and market sharing, bid rigging, and deceptive telemarketing.

The new *Competition Act* also:

- creates a civil process which enables the Bureau to use court orders to stop misleading advertising and deceptive marketing practices quickly;

- retains deliberate or reckless misrepresentation as a criminal offence and increases the potential penalty;

- revises and clarifies the law concerning ordinary price claims by retailers;

- streamlines the merger review process to reduce the regulatory burden on business while ensuring that the Bureau gets the information it needs to assess the effect of the transaction on competition;

- enables the Bureau to apply for court orders prohibiting persons from engaging in criminal offences under the *Competition Act*, and requiring them to take positive steps to prevent future offences;

- provides for the protection of the identity of persons ("whistleblowers") who report offences under the Act to the Bureau, and makes it illegal for employers to take reprisal against employees who make such reports on reasonable belief and in good faith;

- changes the title of the head of the Bureau from 'Director of Investigation and Research' to 'Commissioner of Competition' to better reflect the dual law enforcement and policy functions of the position, and

- confirms the Commissioner's authority for the administration and the enforcement of the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*.

The coming into force of the provisions of Bill C-20 relating to deceptive telemarketing will also bring into force a provision of Bill C-51. This provision is a recent amendment to the Criminal Code which targets the proceeds of deceptive telemarketing for seizure and forfeiture on the same basis as the proceeds of other types of fraud.

COMPETITION BUREAU OBTAINS RECORD FINE IN DECEPTIVE TELEMARKETING CASE AND LAUNCHES PUBLIC EDUCATION CAMPAIGN TO FIGHT PHONE FRAUD

The following is a News Release issued by the Competition Bureau on May 5, 1999, and is reproduced with permission.

Konrad von Finckenstein, Commissioner of Competition for the Competition Bureau, announced today that the Bureau's investigation into a Montreal-based deceptive telemarketing firm has resulted in the highest fine ever imposed against a deceptive telemarketing operation under the misleading advertising provisions of the *Competition Act*.

Record fines of $1,000,000 against the corporate entities that operated as American Family Publishers, Publishers Central and First Canadian Publishers and $100,000 against the company's president, Mr. Vijay Sharma, were imposed today by the Quebec Superior Court following the accused entering a guilty plea on March 5, 1999. In addition, the Court imposed a Prohibition Order to prevent Mr. Sharma from repeating the anti-competitive conduct.

"These record-breaking fines shout a loud and clear message to phone scam artists that deceptive telemarketing remains a high priority for the Bureau. Let it be known to them that we will continue to fight phone fraud with the full force of the law," said Konrad von Finckenstein,

Commissioner of the Competition Bureau. "Moreover, the sentence handed down today illustrates, beyond any doubt, that the courts now recognize the serious criminal nature of deceptive telemarketing."

The charges laid in this case relate to deceptive telemarketing activities that occurred between December 1, 1995, and February 25, 1997. 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 to receive valuable prizes which were promised but were never delivered. Seventeen companies and 18 individuals including the above were charged in April 1997 with false and misleading advertising and many of these telemarketers received jail terms and orders to carry out community work on March 11th of this year. 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 later 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 the customer either ran out of money or simply refused to continue dealing with the company.

While in Montreal, the Competition Bureau, represented by Nicole Ladouceur, Assistant Deputy Commissioner, took the opportunity as Chair of the Deceptive Telemarketing Prevention Forum, to launch a national education campaign aimed at preventing deceptive telemarketing. The Forum consists of members from government, the private sector and non-profit organizations who share an interest in preventing and combating telephone fraud.

In addition to the release of a series of radio and television public service announcements, Canadians will soon find STOP PHONE FRAUD pamphlets and posters on display at telephone centres, postal outlets and libraries across the country. The Forum also unveiled an upgraded web site for PhoneBusters, the national call centre for reporting deceptive telemarketing; consumers will now enjoy on-line information on how to spot a phone scam, what to do about it and how to report it. Upcoming public education tools include an education and training video package.

"The Competition Bureau is a proud participant in the Forum's public education campaign," said Ms Ladouceur, Assistant Deputy Commissioner of the Competition Bureau.

"The Bureau has always been convinced that deceptive telemarketing cannot be eliminated through the prosecution of cases alone; our enforcement activities must be combined with strong effective public education initiatives such as this one. The Forum is empowering Canadian consumers, and seniors in particular, with the information and education materials that will assist them in identifying, resisting and fighting deceptive telemarketing."

The Deceptive Telemarketing Prevention Forum

consists of members from government, the private sector and non-profit organizations who joined forces with the Competition Bureau in May of 1996 to develop public education initiatives aimed at preventing and combating telephone fraud.

CONSENT ORDER SOUGHT FROM COMPETITION TRIBUNAL IN TOBACCO CASE

The following is a Statement issued by the Competition Bureau on May 13, 1999, and is reproduced with permission.

In order to solve potential concerns raised by the Competition Bureau, British American Tobacco p.l.c. ("BAT") has agreed to sell all of the interest it is acquiring in Rothmans in Canada as part of the proposed international merger between BAT and Rothmans International B.V.("Rothmans").

Today the Competition Bureau filed an application for a Consent Order with the Competition Tribunal to ensure that the sale by BAT will take place within one year from the merger's closing.

After a thorough review of the proposed transaction, the Commissioner of Competition has concluded that the proposed merger will likely lead to a substantial lessening or prevention of competition in the Canadian manufactured cigarette market and fine cut tobacco market due to: a high level of concentration; high barriers to entry; the lack of effective competition remaining; and the virtual absence of import competition.

As a result of the proposed merger, BAT (through its 42% share in Imasco) would have an indirect interest in Imperial Tobacco and control of Rothmans in Canada. Together these two firms account for approximately 88% of manufactured cigarette sales and 81% of the sales of fine cut or "roll your own" products in Canada.

This application and draft Consent Order are on the public record and available from the Competition Tribunal.

$700,000 IN FINES PAID BY ROQUETTE FRERES FOR INTERNATIONAL CONSPIRACY UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on May 25, 1999, and is reproduced with permission.

The Competition Bureau announced today that Roquette Frères, a French corporation based in Lestrem, France, pleaded guilty to having participated in an international conspiracy to fix prices and share markets for sodium gluconate. The court imposed a fine of $700,000 to be paid immediately.

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

This conspiracy involved American, European and Japanese producers of sodium gluconate who met in Canada and abroad on a continuing basis between 1987 and 1995 to fix prices and allocate market shares worldwide, including in Canada.

"This prosecution once again demonstrates that we are effectively taking action against these cartels even when they operate outside Canada," said Konrad von Finckenstein, Commissioner of Competition. "This type of cross-border criminal conduct affects all Canadians and will not be tolerated."

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. Roquette Frères' sales of sodium gluconate for the Canadian market, were approximately $2.5 million in the relevant period.

This conviction is the result of a series of extensive criminal investigations being conducted by the Competition Bureau into international conspiracies to fix prices and allocate market shares among 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 citric acid and sodium gluconate and Fujisawa Pharmaceutical Company Ltd. in February 1999, for price fixing and market allocation involving sodium gluconate only.

The inquiries involving sodium gluconate and other products are continuing.

PRIME MINISTER ANNOUNCES CANADA-EU AGREEMENT ON COMPETITION LAW

The following is a News Release issued by the Prime Minister on June 17, 1999, and is reproduced with permission.

Prime Minister Jean Chrétien today announced the signature of a new Canada- European Union (EU) agreement on competition law, as well as progress in trade cooperation.

"All Canadians will benefit from closer cooperation between our competition authorities. In a truly competitive economy, Canadians can enjoy low prices, product choice and quality services," said the Prime Minister. "We look forward to the benefits that will result on both sides of the Atlantic for our businesses and consumers."

The announcement followed today's Canada-EU Summit in Bonn, Germany, between the Prime Minister, President of the European Council and German Chancellor Gerhard Schröder and President of the European Commission, Jacques Santer. Summit discussions covered a broad range of bilateral and international issues, including the situation in Kosovo, the Stability Pact for the Balkans, and trade issues such as beef hormones, asbestos and genetically-modified organisms.

The results of the Canada-EU Summit include:

The **Canada-EU Competition Agreement**, which is designed to enhance economic and trade relations between Canada and the EU by increasing cooperation and coordination in the enforcement of competition laws and in anti-competitive

activities in their respective jurisdictions. This agreement will be beneficial to Canadian consumers and will ensure clear rules of the game for business.

Progress in the **EU-Canada Trade Initiative (ECTI)**, a framework to facilitate bilateral and multilateral trade cooperation. The ECTI was developed under the 1996 Canada-EU Joint Action Plan, and was launched following the last summit meeting, held in Ottawa in December 1998. Leaders reviewed ongoing efforts to enhance cooperation in the World Trade Organization, on multilateral trade issues and, bilaterally, in the seven areas identified at the last summit: standards and regulations, professional services, culture, business-to-business contacts, government procurement, intellectual property rights and competition issues.

Summits are held approximately twice per year, as part of a regular schedule of meetings between Canada and the European Union at the head-of-government, ministerial and senior official levels. Also attending the Summit were: International Trade Minister Sergio Marchi; German Minister of the Economy Werner Müller and acting Vice-President of the European Commission Sir Leon Brittan.

NO EVIDENCE FOUND OF COLLUSION BETWEEN CANADA'S MAJOR AIRLINES

The following is a Statement issued by the Competition Bureau on July 12, 1999, and is reproduced with permission.

The Competition Bureau announced today that it has completed its examination of an alleged agreement between Canadian Airlines International Ltd. and Air Canada to share domestic routes. The Bureau is satisfied that there is no evidence of an arrangement between the carriers with respect to domestic routes.

The Bureau's examination stemmed from remarks allegedly made by Mr. Kevin Benson, President & Chief Executive Officer for Canadian, at the company's annual general meeting held on June 29, 1999.

In the course of its examination, the Bureau reviewed Mr. Benson's written remarks and found that they were reported out of context. As well, the Bureau contacted company representatives and others in attendance. The Bureau has been advised in writing by counsel for both Canadian and Air Canada that there have been no discussions or arrangements between the carriers which would lessen competition on domestic routes. All that took place were limited discussions on subjects, other than domestic routes, at the request of Transport Canada. In addition, the Bureau has received written assurances from both corporations that its officers are well aware of, and comply strictly with, their legal responsibilities under the *Competition Act* to avoid entering into any agreements or undertakings which could have the effect of unduly lessening competition.

Consequently, in the absence of any evidence indicating conduct contrary to the *Act*, the Bureau has closed its investigation.

Both carriers have been reminded of the provisions of the *Competition Act* and of the existence of the

Bureau's Program of Compliance, designed to assist members of the business community to conform with the *Act*.

COMPETITION BUREAU SEEKS COMMENTS ON DRAFT INTELLECTUAL PROPERTY GUIDELINES

The following is a Statement issued by the Competition Bureau on July 15, 1999, and is reproduced with permission.

On June 11, 1999 the Competition Bureau released draft **Intellectual Property Enforcement Guidelines** for public comment and consultation. This document outlines the principles governing the policy of the Bureau in dealing with issues involving both intellectual property rights and competition law. These Guidelines are being released to promote transparency in the enforcement of the *Competition Act* and to increase the level of certainty in business matters involving intellectual property issues.

The Guidelines explain the analytical approach the Bureau will use to determine if conduct involving intellectual property is anti-competitive. In general, the Bureau will take enforcement action if the conduct involved is proscribed by the *Competition Act* and the conduct goes beyond the IP owner's statutory or common law IP right.

$700,000 IN FINES PAID BY AKZO NOBEL AND GLUCONA FOR PRICE-FIXING UNDER THE *COMPETITION ACT*

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

The Competition Bureau announced today that Akzo Nobel Chemicals B.V. and Glucona B.V., both Dutch companies, pleaded guilty to having participated in an international conspiracy to fix prices and share markets for sodium gluconate.

The Federal Court of Canada imposed fines totalling $700,000 to be paid immediately. Akzo and Glucona B.V. will each pay fines of $350,000. In addition, the court imposed a prohibition order on Glucona B.V. under the Competition Act to deter and prohibit any repetition of this offence. Akzo is no longer engaged in the sodium gluconate business.

This conspiracy involved American, European and Japanese producers of sodium gluconate who met in Canada and abroad on a continuing basis between 1987 and 1995 to fix prices and allocate market shares worldwide, including in Canada.

During the period when the agreement was in place, Akzo and Avebe B.V., another Dutch company, produced and supplied sodium gluconate for the Canadian market through a joint venture called Glucona v.o.f. In 1995, Akzo sold its interest in the joint venture to Avebe which formed a wholly owned subsidiary named Glucona B.V.

"This conviction concludes the inquiry relating to sodium gluconate by the Competition Bureau," said

Konrad von Finckenstein, Commissioner of Competition. "However, we are continuing inquiries into other food and feed additives which we expect will lead to additional prosecutions in the near future. We are determined to investigate the parties engaged in international cartels that target the Canadian consumer and the Canadian economy from abroad, and to proceed against them as aggressively as the law permits."

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. Akzo and Glucona's sales of sodium gluconate in Canada were approximately $2.6 million in the relevant period.

This conviction is the result of a series of extensive criminal investigations being conducted by the Competition Bureau into international conspiracies to fix prices and allocate market shares among 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 citric acid and sodium gluconate, Fujisawa Pharmaceutical Company Ltd. in February 1999 and Roquette Frères in May 1999 for price fixing and market allocation involving sodium gluconate only.

DIVESTITURES KEY TO RESOLVING COMPETITION CONCERNS IN LOBLAW TRANSACTIONS

The following is a News Release issued by the Competition Bureau on August 12, 1999, and is reproduced with permission.

The Competition Bureau announced today that it will not challenge the acquisition by Loblaw Companies Limited of Provigo Inc. and of the grocery assets in Atlantic Canada of The Oshawa Group (known as "Agora Food Merchants").

Due to competition concerns raised during the Bureau's investigation, Loblaw agreed to divest its interests in markets in Ontario, Quebec, Nova Scotia, New Brunswick and Newfoundland. As a result of these significant divestitures, the Competition Bureau has concluded that these mergers will not likely cause a substantial lessening or prevention of competition. There will also be significant new competitors in many markets.

"History has shown that whenever a major new player enters a market, consumers benefit from lower prices, improved service and product choice," said Konrad von Finckenstein, Commissioner of Competition. "As a result of these transactions, Métro-Richelieu becomes a major player in Ontario and Loblaw enters Quebec and increases its presence in Atlantic Canada."

The acquisition of Provigo Inc., one of the leading grocery retailers in Quebec, was completed on December 9, 1998. It also included the acquisition of the Loeb chain of grocery stores, which is located primarily in Ontario. Competition concerns were identified in a number of Loeb markets. Consequently, on June 19, 1999, Loblaw divested

its interest, in 24 markets in Eastern and Northern Ontario, two warehouses and the Loeb trademark to Métro-Richelieu (Métro). As a result, Métro became a significant new player in the grocery business in Ontario.

To address the remaining competition concerns in Ontario and Quebec, Loblaw has agreed to divest its interests in stores in an additional eight markets. Should Loblaw be unable to divest these stores by December 31, 2000, the Bureau retains the right to have these assets placed with a Trustee for divestiture.

Loblaw will continue to face effective competition in Ontario from such chains as Sobeys, A&P/ Dominion and Métro along with several strong regional players including Costco, Longo's and Commisso's.

With the acquisition of Provigo, Loblaw becomes a major food retailer in Quebec where prior to the merger, it only had four stores. The Quebec retail grocery market will see Loblaw competing through Provigo with Métro and Hudon et Deaudelin (recently acquired by Sobeys from the Oshawa Group).

In Atlantic Canada, Loblaw acquired three warehouses and the rights to supply 80 stores in 68 markets supplied previously by Agora Food Merchants under the names IGA, Traditions and Omni. This acquisition firmly establishes Loblaw as the second largest wholesaler in Atlantic Canada after Sobeys and in many local markets, the acquisition represented new entry for Loblaw.

Agora's grocery division was incurring significant losses and was not seen as a vigorous and effective competitor. To alleviate competition concerns, Loblaw agreed to divest its interests in stores in Halifax, Dartmouth and New Minas, Nova Scotia, and St. John's, Newfoundland. In addition, the Bureau will monitor the impact of the merger in Marystown, Newfoundland, Grand Falls, New Brunswick and Antigonish, Nova Scotia.

Should Loblaw be unable to divest these stores by December 31, 2000, the Bureau retains the right to have these assets placed with a Trustee for divestiture.

THE COMPETITION BUREAU COMPLETES REVIEW OF THE ACQUISITION BY PEARSON plc OF THE EDUCATIONAL AND REFERENCE BUSINESS OF VIACOM INTERNATIONAL INC.

The following is a Statement issued by the Competition Bureau on August 27, 1999, and is reproduced with permission.

The Competition Bureau has concluded that the acquisition by Pearson plc of the educational and reference business of Viacom International Inc is not likely to substantially lessen competition in Canada following the divestiture of some of its Canadian assets.

On November 30th, 1998, Pearson plc, a British company focussing on information, education and entertainment acquired the educational and reference publishing affiliates of U.S. based Viacom International Inc., which also is involved in entertainment and publishing. In Canada, the

transaction brought Pearson plc, which operates Copp Clark Limited, Addison-Wesley Longman and Les Éditions du Renouveau Pédagogique together with Viacom International Inc., which operates Prentice Hall Canada.

Following a review of information from competitors, provincial Departments of Education and various school boards, the Bureau took the position that the proposed acquisition from Viacom may lead to a substantial lessening of competition for textbooks in French as a Secondary Language (FSL) for elementary and high school grades and in Mathematics for elementary grades.

To address these competitive concerns, Pearson plc agreed to divest titles in French as a Second Language and Mathematics, thereby introducing new competitors into those important educational markets.

The mandate of the Competition Bureau is to maintain competitive markets. In this case, the solution arrived at should provide a greater opportunity for teachers and educators as well as parents and children across the country to have access to quality textbooks and educational material at the best possible prices.

EXECUTIVE CONVICTED AND SENTENCED TO NINE MONTHS IMPRISONMENT FOR PRICE FIXING UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on September 17, 1999, and is reproduced with permission.

The Competition Bureau announced today that Mr. Russell Cosburn, former Vice President Sales, Chinook Group Limited, of Toronto, Ontario, was sentenced to nine months imprisonment for his part in an extended international conspiracy to fix prices and allocate or share markets for choline chloride. This conviction and sentence arose from an ongoing investigation by the Competition Bureau.

Choline chloride, also known as vitamin B4, is an important additive used in the animal feed industry, primarily for chickens and pigs.

"I trust this conviction will send the clear message to business that the Competition Bureau will not tolerate any price fixing among suppliers to business," said Mr. Konrad von Finckenstein, Commissioner of Competition. "It is our policy to prosecute both the companies and senior executives involved in such offences."

In addition to fixing prices and allocating sales volumes in Canada, the conspiracy insulated a very significant proportion of the Canadian market from foreign competition. It also allowed Chinook to maintain its position as the dominant supplier in Canada.

The Superior Court of Ontario ordered Mr. Cosburn

to serve the nine month term in the community, having regard to his age and on finding that he posed no risk of re-offending and no danger to the community. Mr. Cosburn was also ordered to perform 50 hours of community service.

FEDERAL COURT IMPOSES FINES TOTALLING $88.4 MILLION FOR INTERNATIONAL VITAMIN CONSPIRACIES

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

The Competition Bureau announced today that the Federal Court of Canada imposed fines totalling $88.4 million for multiple conspiracies to fix prices and allocate market shares for ten vitamin and food additive products sold in Canada.

These are the largest fines ever imposed under the *Competition Act* and the largest criminal fines in Canadian legal history.

F. Hoffmann-La Roche Ltd of Switzerland, BASF AG of Germany, Rhône-Poulenc S.A., of France and two Japanese corporations, Eisai Co. Ltd. and Daiichi Pharmaceutical Co., Ltd., pleaded guilty and were each convicted for having participated in international conspiracies from January 1990 to February 1999 in breach of Canada's *Competition Act*.

In addition to these fines, the court imposed a Prohibition Order on each firm prohibiting the commission or repetition of these competition offences for a period of ten years in Canada.

"Every Canadian was affected by the international conspiracies in bulk vitamins," said Konrad von Finckenstein, Commissioner of Competition. "Today's convictions send an important message to business that the Bureau will aggressively pursue the parties involved in international cartels that target Canadian consumers from outside the country. This type of criminal behaviour will not be tolerated."

F. Hoffmann-La Roche Ltd was sentenced to pay a total fine of $50.9 million, of which $48 million was for offences relating to bulk vitamins. The company was also convicted for its role in an unrelated conspiracy on citric acid between 1991 and 1995 and fined $2.9 million for that offence. The conviction on citric acid follows that of ADM, Haarmann & Reimer and Jungbunzlauer who were fined a total of $8.6 million, last year, for their participation in the citric acid conspiracy.

BASF AG was fined $18 million in connection with the vitamin conspiracies. In addition, the Court imposed a $1 million fine for its participation in the choline chloride conspiracy. This conspiracy involved an agreement with other parties not to supply the Canadian market with choline chloride, a feed additive for poultry and swine, from 1992 to 1995.

The Court imposed a fine of $14 million on Rhône Poulenc S.A. with respect to conspiracies relating to vitamins A and E. Two Japanese corporations; Daiichi Pharmaceutical Co., Ltd. and Eisai Co. Ltd. were sentenced to fines of $2.5 million and $2 million respectively for their participation in vitamin conspiracies involving B5 and B6, for Daiichi, and vitamin E in the case of Eisai.

The conspiracies were designed to allocate the sale and artificially raise the prices of certain vitamins and related products, including vitamins A, B2, B5, B6, C, E, Betacarotene and vitamin premixes, the most widely used vitamins in food, animal feed and pharmaceutical products. Sales in Canada of bulk vitamins by the above noted producers were between $650 and $700 million over the period of the conspiracies.

The conviction with respect to citric acid concludes the inquiry relating to this product. However inquiries into choline chloride and bulk vitamins are continuing.

PUBLICATION OF INFORMATION BULLETINS

The following is a Statement issued by the Competition Bureau on September 22, 1999, and is reproduced with permission.

The Competition Bureau has published four Information Bulletins that outline the approach that the Commissioner of Competition is taking in enforcing key new provisions of the *Competition Act*, which came into effect on March 18, 1999.

The Bureau sought comments from stakeholders on four draft guidelines relating to these new provisions. The consultation process with interested parties including the business and legal communities, as well as consumer interest groups – was recently completed. The guidelines have been finalized, and have been incorporated into the following Information Bulletins:

- Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*;
- Section 52.1 of the *Competition Act* – Telemarketing;
- Subsections 74.01(2) and 74.01(3) of the *Competition Act* – Ordinary Price Claims; and
- Interception of Private Communications and the *Competition Act*.

FIRST EVER INTERIM ORDER UNDER NEW CIVIL PROVISIONS ISSUED BY COMPETITION TRIBUNAL AGAINST UNIVERSAL PAYPHONE SYSTEMS INC.

The following is a News Release issued by the Competition Bureau on September 27, 1999, and is reproduced with permission.

The Competition Bureau announced today that the Competition Tribunal has, for the first time under new civil provisions, granted the Commissioner of Competition's application for an interim order to prevent Universal Payphone Systems Inc. of Mississauga, Ontario from continuing to use certain marketing practices in the promotion of its payphone business opportunity. The civil misleading representations provisions were added to the *Competition Act* in recent amendments.

The application, which was filed on September 15, 1999, asked the Tribunal to order Universal to cease marketing its payphone business using misleading representations relating to matters such as: the type and quality of payphone the investor

can expect to receive, the income potential for investors, the "turn key" nature of the investment, and its membership in any consumer protection agency or bureau that is not a recognized and fully independent consumer protection agency. The Bureau argued that serious harm would be suffered by investors if the representations continued to be made.

"I am pleased to see that these new provisions of the Act can be applied quickly to promote fair competition in the marketplace and at the same time ensure that Canadians are protected from misleading representations" said Konrad von Finckenstein, Commissioner of Competition.

The order is in effect for a period of twenty-eight days, in which the Bureau will consider the filing of an application for a permanent order with the Tribunal.

Universal is engaged in the sale and promotion of a business opportunity to set up individual payphone businesses. Universal promotes its business through the use of radio and print advertising on a national basis. The market for payphones in Canada was opened to competitive entry following a decision by the CRTC in July, 1998.

FEDERAL COURT IMPOSES $3.28 MILLION IN FINES FOR INTERNATIONAL CONSPIRACY UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on October 26, 1999, and is reproduced with permission.

The Competition Bureau announced today that the Federal Court of Canada imposed fines totalling $3.28 million under Canada's *Competition Act* for an international price fixing and market sharing conspiracy relating to sorbic acid and potassium sorbate (known together as "sorbates"). Sorbates are chemical preservatives used primarily as mold inhibitors in high moisture and high-sugar foods such as cheese and other dairy products, bakery products, and other processed foods.

Hoechst AG of Germany pleaded guilty and was convicted for having participated in a price fixing and market sharing conspiracy involving sorbates that spanned 17 years – from 1979 until 1996. Eastman Chemical Company, of the United States also pleaded guilty and was convicted for price fixing in the same conspiracy for the years 1995 until 1997. Hoechst will pay a fine of $2.5 million and Eastman a fine of $780,000.

In addition to these fines, the court imposed a Prohibition Order on each firm prohibiting them from committing or repeating these offences in Canada.

These charges are the result of an extensive criminal investigation of a worldwide conspiracy among the major producers of these products, all foreign entities, who agreed to artificially raise prices and allocate their sales. A co-conspirator was

granted immunity from prosecution in exchange for evidence in furtherance of the Commissioner's investigation.

"This conviction is an example of how the Competition Bureau's Co-operating Parties Program is effective in fighting international conspiracies that target Canadian consumers", said Konrad von Finckenstein, Q.C., Commissioner of Competition. "The Bureau has been, and will continue to be, vigilant in pursuing convictions against companies involved in this type of anti-competitive behaviour."

Total sales of sorbates in Canada during the period of the offence were approximately $37 million, with Hoechst's sales at approximately $12 million. Eastman's sales were approximately $3.9 million during the period of its involvement.

These convictions are the first in the sorbates industry and the inquiry is ongoing.

FORMER ROCHE EXECUTIVE CONVICTED AND FINED FOR INTERNATIONAL CONSPIRACIES UNDER THE *COMPETITION ACT*

The following is a News Release issued by the Competition Bureau on October 27, 1999, and is reproduced with permission.

The Competition Bureau announced today that Mr. Andreas Hauri, a Swiss national and former Head of Global Marketing for the Vitamins and Fine Chemicals Division of the Swiss company F. Hoffmann-La Roche Ltd, was convicted and fined a total of $250,000 for his part in two international cartels to fix prices and allocate markets in the bulk vitamins and citric acid industries.

From 1990 until mid 1994, Mr. Hauri conducted conversations and met with senior executives of other multi-national vitamin producing companies, including BASF, Rhône- Poulenc and a number of other Japanese and European companies. The parties entered into illegal agreements to fix prices and allocate sales volumes for numerous bulk vitamins and related products. These products are widely used in food, animal feed and pharmaceutical products. Mr Hauri was fined $175,000 for his role in the bulk vitamins cartel.

Between 1991 and mid-1994, Mr. Hauri also took part in an international conspiracy to fix prices and sales volumes for citric acid, an additive found in a wide range of products including foods, beverages and detergents. During the relevant period there were no Canadian producers of citric acid and all supplies to the Canadian market were imported from a small number of foreign producers. The majority of these imports were directly affected by the conspiracy. Mr Hauri was fined $75,000 for his role in the conspiracy on citric acid.

"It is the Bureau's policy to pursue executives who engage in anticompetitive activities that affect the Canadian market," said Konrad von Finckenstein, Q.C., Commissioner of Competition. "It does not matter whether these individuals are Canadian citizens or foreign nationals, residents or non-residents in Canada, we will go after them to the full extent of the law."

Last month, major vitamin producers were convicted and fined a total of $84.5 million for their role in these offences, including Mr. Hauri's former

employer, F. Hoffmann-La Roche Ltd, which was sentenced to a fine of $48 million for its involvement in the international vitamin cartel and $2.9 million for its role in the citric acid cartel. Also, earlier this week, Mr. Hauri's former supervisor, Dr. Roland Brönnimann was convicted and fined $250,000 for his participation in the bulk vitamins cartel.

COMPETITION BUREAU AND CRTC INTERFACE

The following is a Statement issued by the Competition Bureau on November 19, 1999, and is reproduced with permission.

The Competition Bureau and the Canadian Radio-television and Telecommunications Commission (CRTC) have agreed on a document which describes the authority of the CRTC under the *Telecommunications* and *Broadcasting Acts* and that of the Bureau regarding the telecommunications and broadcasting sectors.

This interface document follows discussions between the two organizations on their respective responsibilities and authorities. The purpose of this document is to provide industry stakeholders, including the general public, with greater clarity and certainty as to the overall regulatory and legal framework governing the telecommunications and broadcasting sectors which are undergoing rapid change and transition from detailed regulation to greater reliance on market forces.

The interface document deals with a range of competitive issues including access, merger review, competitive safeguards and various marketing practices. The document does not deal with matters, unrelated to competition, to which the CRTC's mandate extends.

PUBLIC RELEASE OF THE VanDUZER REPORT – ANTICOMPETITIVE PRICING PRACTICES AND THE *COMPETITION ACT*, THEORY, LAW AND PRACTICE

Editors' Note: A commentary on the VanDuzer Report will appear in a forthcoming issue of the *Record*.

The following is a Statement issued by the Competition Bureau on November 25, 1999, and is reproduced with permission.

Today, the Commissioner of Competition has tabled before the Standing Committee on Industry a report prepared for the Bureau by Professor J. Anthony VanDuzer, Associate Professor, Common Law Section, University of Ottawa in collaboration with his colleague, Professor Gilles Paquet. The report is entitled Anticompetitive Pricing Practices and the *Competition Act*, Theory, Law and Practice.

Following the review of Bill C-235 (now Bill C-201) by the Standing Committee on Industry, last spring, Committee members expressed concerns that the *Competition Act* may not give consumers and independent retailers adequate protection against predatory pricing. On April 20, 1999, the Standing Committee on Industry voted: "that at its earliest convenience the Industry Committee review the anti-competitive pricing practices within the *Competition Act* and any related enforcement guidelines and operations of the Competition

Bureau"

In order to inform the debate and facilitate the work of the Committee, the Bureau has commissioned Professor VanDuzer to undertake this study which assesses:

- the adequacy of the pricing provisions in the Act;
- the appropriateness of the Bureau's interpretation and pricing enforcement guidelines with respect to the pricing provisions and;
- the suitability of the Bureau's administrative practices, enforcement policy and case selection criteria regarding the pricing provisions.

COMING INTO FORCE OF THE CHANGES TO THE NOTIFIABLE TRANSACTIONS PROVISIONS

The following is a News Release issued by the Competition Bureau on December 17, 1999, and is reproduced with permission.

The amendments to the notifiable transactions provisions of the *Competition Act* and the related amendments to the Regulations which have just been approved, will come into force on *December 27, 1999.*

The amendments allow the Competition Bureau to promote competition in the Canadian marketplace in a more transparent, fair and timely manner. These amendments, which are part of the initiative to modernize the *Competition Act*, also ensure that the legislation remains relevant and effective.

The notifiable transactions provisions of the *Competition Act* require that parties to certain transactions which exceed prescribed thresholds notify the Bureau and provide specified information, before the transactions are completed. In this way, the Bureau is able to assess the competitive impact of the transactions and take appropriate action, if necessary.

"Competition law is a key component of Canada's economic framework and, with these amendments, the tools used to protect and promote competition have been improved," said John Manley, Minister of Industry. "The amendments represent the government's commitment to foster innovation, ensure competitive prices and consumer product choice in order to strengthen the economy."

These amendments are the result of extensive consultations and retain the positive features of the current system while improving the efficiency and flexibility of the process.

The Amendments to the Regulations include:

- An exemption from the notification provisions for a category of benign transactions called asset securitization;
- New provisions which specify the basis for converting assets or revenues reported in foreign currency into Canadian dollars;
- The information required for short and long form filings which is now set out in the Regulations instead of the Act and has been revised to be more relevant.

COMPETITION BUREAU ANNOUNCES IT WILL NOT OPPOSE ACQUISITION OF CANADIAN AIRLINES

The following is a News Release issued by the Competition Bureau on December 21, 1999, and is reproduced with permission.

The Competition Bureau has announced that it will not oppose the proposed acquisition of Canadian Airlines Corporation by Air Canada and its partner 853350 Alberta Ltd.

After tough negotiations, Air Canada has signed enforceable Undertakings designed to enhance the competitive climate in the airline industry in Canada.

Having determined that Canadian is facing imminent insolvency, the Commissioner of Competition decided that the merger, with undertakings, is more pro-competitive than a liquidation through bankruptcy proceedings.

The undertakings substantially address the possible terms of restructuring outlined in the Commissioner's letter to the Minister of Transport on October 22, 1999.

"The outcome of this transaction, and the concessions made by the two firms in response to the Bureau's concerns provide the best solution possible for consumers, under the circumstances," said Konrad von Finckenstein, Commissioner of Competition. "Opening the market to competition from other airlines across the country will provide a valuable discipline on air fares."

In the Undertakings, Air Canada has agreed to:

- sell its new interest in Canadian Regional Airlines Limited, at reasonable terms and subject to a timetable set out by the Commissioner;
- surrender slots at Pearson International Airport for assignment to other Canadian carriers;
- in the event that a Canadian discount carrier begins to serve Eastern Canada, Air Canada will refrain from establishing its own discount airline service until September 30, 2001.
- surrender key facilities (loading bridges, gates, counters etc.) at airports across the country.

"Taken together, these undertakings will make it much easier for an existing airline to expand its network and for new entrants to establish themselves in the market," von Finckenstein added.

DIVESTITURES RESOLVE COMPETITION CONCERNS IN SOBEYS' ACQUISITION OF THE OSHAWA GROUP

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

The Competition Bureau announced today that it will not challenge the acquisition of The Oshawa Group Limited by Sobeys Inc. Sobeys is a wholly-owned subsidiary of the Empire Company Limited of Stellarton, Nova Scotia.

To address the competition concerns raised during the Bureau's investigation, Sobeys will divest its interests in certain assets in two Ontario markets, three Quebec markets, and a food service operation

in Atlantic Canada.

The Competition Bureau has concluded that these significant divestitures will ensure sufficient competition in the above markets. Should Sobeys be unable to divest the stores by December 31, 2000, the Bureau retains the right to have these assets placed with a Trustee for divestiture.

"This major expansion of Sobeys in the grocery business should result in more head-to-head competition among the major grocers in Canada, benefitting shoppers in the areas of service and pricing," said Konrad von Finckenstein, Commissioner of Competition.

With this acquisition, Sobeys becomes a significant grocery wholesaler and retailer in many markets where it previously had little or no presence. As a result, Sobeys will provide effective competition in Ontario, Quebec and Western Canada to such chains as A&P/Dominion, Loblaw, Métro-Richelieu, Overwaitea and Safeway.

This transaction with Oshawa Group also expands Sobeys' food service business. It has acquired the national food service distribution network (SERCA Foodservice Inc.), previously operated by Oshawa.

"In the Maritimes, competition in the food service industry has been maintained with the entry of Moncton-based MFS Foodservice Inc., in alliance with Gordon Food Service Canada," added von Finckenstein. "This alliance combines a strong management team, an in-depth knowledge of the market and its requirements, with the expertise of an established North American food service operation".

Prior to the acquisition, Sobeys and Oshawa Group were the two major full-line food service distributors in Atlantic Canada. To alleviate competition concerns, Sobeys will divest to MFS Foodservice Inc. the SERCA facility in Moncton, New Brunswick. MFS Foodservice Inc., in alliance with Gordon Food Service Canada, will serve hotel, restaurant and institutional accounts in New Brunswick, Nova Scotia and Prince Edward Island.