COMMENT & ANALYSIS

COMPETITION TRIBUNAL DISMISSES APPLICATION FOR CONSENT ORDER FOR ULTRAMAR/COASTAL CANADA PETROLEUM MERGER

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The Competition Tribunal recently dismissed an application by the Commissioner of Competition for a consent order relating to a proposed acquisition by Ultramar Ltd. of the petroleum product terminal facility and the wholesale supply business of Coastal Canada Petroleum, Inc.[2] This article summarizes the Commissioner's case and the Tribunal's reasons and discusses the implications of this matter on:

(1) interdependency as a factor in merger analysis;

(2) mergers in vertically integrated industries;

(3) the significance of a competitively preferable purchaser to an analysis of whether a proposed merger is likely to substantially prevent competition; and

(4) the consent order process as a means of resolving competition issues arising in the context of future mergers.

The Commissioner's Filing

On July 29, 1999, Ultramar publicly announced that it had signed an agreement with Coastal. Following a detailed investigation, including information requests, facility tours and oral examinations under oath pursuant to section 11 of the *Competition Act*, and negotiation of a resolution with Ultramar,[3] the Commissioner applied to the Tribunal on February 16, 2000 for a consent order under the merger provisions in section 92 of the Act.

The Parties to the Merger

Coastal operated a terminal and a wholesale supply business in the Ottawa area, but did not own any refineries or retail outlets.[4] It was the only non-vertically integrated terminal operator in the Ottawa region and was the largest wholesale supplier of gasoline and other refined petroleum products to independent marketers in that region.[5] Most refined petroleum products in the Ottawa region came from Montreal,[6] and petroleum products were delivered to Coastal's terminal from Montreal via the Trans-northern Pipeline ("TNPL"). Coastal had no direct access to a TNPL link in Montreal and was

dependent on receiving product from a supplier with such a link. Coastal also received some product via tank truck, and its fuel ethanol was received via railcar.

Coastal's facility was built in 1952. Due to its age and condition, as well as new safety and environmental standards coming into force on December 31, 2000, significant capital expenditures would be required to keep the Coastal facility operational.

Ultramar was a vertically integrated refiner, wholesaler and retailer of refined petroleum products in Canada and the United States. In the Ottawa region, Ultramar owned, operated or acted as principal supplier to, approximately 63 retail outlets and sold refined petroleum products to industrial, commercial and residential accounts, including independent marketers. Ultramar shipped refined petroleum product principally through an Ottawa region terminal owned and operated by Imperial Oil.[7] Ultramar owned and operated a refinery in St-Romuald, Quebec, near Quebec City, and also owned a dormant refined petroleum products terminal in the Ottawa area adjacent to the Coastal facility.[8] Ultramar mothballed its Ottawa terminal in 1995 primarily because of excess capacity in the Ottawa region terminal facilities market.[9]

Ultramar's Plans for the Coastal Facility

Ultramar pursued the Coastal acquisition as part of a strategy that included increasing the capacity of its St-Romuald refinery by 20% and "eventually [supplying] its entire requirements for the combined Ultramar/Coastal terminal business from its [St-Romuald] refinery thus expanding the refinery orbit into Ontario and landing products into Ottawa and other points in eastern Ontario at a competitive cost".[10] A reasonable prospect of retaining the Coastal terminal customer base was central to Ultramar's proposed acquisition.[11] The Commissioner agreed that closing or keeping closed both the Coastal and Ultramar terminals in Ottawa, and operating in Ottawa via a throughput agreement with another terminal operator, such as Imperial Oil, would be the most efficient choice for Ultramar. He also concluded that "the next most efficient course of action would be for Ultramar to close the Coastal facility ... once Ultramar has refurbished its own facility". However, in the Commissioner's view, either of these options would "reduce the negotiating leverage and security of supply for the independent marketers".[12]

Relevant Markets

The Commissioner's filings focussed on the following two product markets: (1) "the provision of terminal facilities for persons who want to store refined petroleum product and/or [to] wholesale refined petroleum product without operating a terminal themselves", and (2) "the wholesale supply of refined petroleum product to independent third party purchasers" in the Ottawa region.[13] Integrated marketers were excluded from the relevant wholesale supply market because they received product either from their own refinery or from a terminal operator designated by their refinery and did not purchase in the open market.[14]

The relevant geographic market was confined to the Ottawa region. The Commissioner said "the fact that all of the integrated refiners have, or use, a terminal in both Montreal and Ottawa indicates that Montreal and Ottawa are separate markets for terminal facilities".[15] With respect to wholesale supply, most of the customers of the independent marketers operating in the Ottawa region were located within 100 kilometres of the terminal they were using.[16] The Commissioner acknowledged that Ottawa region wholesalers were "somewhat constrained by Montreal area wholesalers with respect to the price they can charge independent marketers, but only to the extent to which the independent marketers can competitively acquire product from other refiners or terminal operators in Montreal and transport it themselves to Ottawa".[17] The cost of transporting refined petroleum product into the Ottawa region terminals from Montreal through the TNPL was about 0.35 cents per litre ("cpl"). For an Ottawa region purchaser at the wholesale level, the posted rack prices (at the terminals) were historically 0.57 cpl higher than those in Montreal, and the additional average cost of delivery to the retail station from an Ottawa region terminal was 0.25 cpl. Thus, the total average delivered cost of obtaining gasoline via a terminal operator with access to the TNPL to retail stations in the Ottawa region was about 0.82 cpl above the Montreal rack price (0.57 cpl + 0.25 cpl), compared to a cost of between 0.80 and 1.1 cpl above the Montreal rack price when the trucking option was exercised. Accordingly, the Commissioner found that the Ottawa region wholesale suppliers were setting prices close to the lowest cost of obtaining refined petroleum product from Montreal terminals by truck, and that the more efficient pipeline option (i.e., 0.35 cpl plus 0.25 cpl, for a total delivered cost of 0.60 cpl) was not similarly constraining wholesale prices.

Market Shares

In his Statement of Grounds and Material Facts, the Commissioner's only comment with respect to market shares in the terminal facilities market was that:

> Post-transaction, all four terminal operators will be integrated refiners. Ultramar, an integrated refiner, will control the Coastal facility which has represented the storage capacity utilized by the independent marketers.[18]

In essence, the transaction did not change the market shares in the terminal facility market since Ultramar did not currently operate a terminal. The merger did change the characteristics of the owner of one of the terminals.

With regard to wholesale supply, the Commissioner commented that "post-transaction the combined shares of the sales of the integrated wholesalers to the independent marketers would rise from 53% to 99% ... [and] the independent marketers would only have integrated refiners as possible sources of supply".[19] As noted above, the Commissioner defined the market to include only sales to independent marketers and not wholesale sales to retailers affiliated with terminal operators. The Commissioner did not, in his filings with the Tribunal, indicate the unilateral post-merger share of a combined Ultramar/Coastal in this defined market.

Barriers to Entry

The Commissioner found that barriers to entry were significant and included the high cost of constructing and insuring a terminal, zoning and environmental regulatory requirements, and the need for a large customer base. He found that the cost of constructing a terminal similar to the Coastal facility was at least $15 million, most of which represented sunk costs. The Commissioner also pointed out that any prospective operator that does not have a captive retail network would face a heightened risk of entry because most purchases by independent marketers are made on a spot basis, which means that the customer base is unstable.[20]

Interdependency

The Commissioner stated that the presence of the following characteristics in the Ottawa region wholesale supply market provided an opportunity for the exercise of market power by the wholesale suppliers:

(5) homogeneity of refined petroleum products;

(6) repeated and frequent interaction among suppliers;

(7) a small number of firms engaged in wholesale supply;

(8) posted price transparency;

(9) multi-market contact among integrated wholesalers; and

(10) common vertically integrated structure.[21]

The Commissioner added that, prior to the merger, such exercise of market power would be limited by (1) excess terminal capacity, (2) high fixed costs in refinery and terminal operations, which provide an incentive for high throughput, and (3) the presence of Coastal as a vigorous, non-integrated competitor. In the Commissioner's view, the proposed merger would diminish two of these factors by eliminating Coastal as a vigorous competitor and leaving Ultramar with an incentive to reduce capacity.

Lessening of Competition

The Commissioner's filings with the Tribunal did not indicate any concern that Ultramar would acquire unilateral market power to raise prices as a result of the merger, even if it closed the Coastal facility. Rather, the essence of the Commissioner's concern with regard to the terminal market was that, following the transaction, all the terminal operators would be vertically integrated. The focus of the concern in this product market therefore appears to have been on the fact that Ultramar operated refineries and a local retail network, rather than the fact that it had a dormant terminal facility in Ottawa.

As noted above, the Commissioner found that the Ottawa region wholesale suppliers were pricing close to the lowest cost of obtaining refined petroleum product from Montreal terminals by truck and that the more efficient pipeline transportation option was not constraining wholesale prices. The Commissioner added that the total cost savings to the integrated wholesalers of the more efficient mode of transportation were not being passed on to the independent marketers. The Commissioner considered that the proposed transaction would likely remove two competitive elements which inhibited the interdependent exercise of market power: (1) excess capacity, and (2) control of a terminal by a vigorous non-integrated competitor. The Commissioner considered that the removal of these factors could cause a wholesale price increase by as much as 0.28 cpl, namely the difference between (i) the maximum cost of obtaining refined petroleum product from Montreal by truck (1.1 cpl) and (ii) the sum of the historical average of the wholesale price differential between Ottawa and Montreal (0.57 cpl) and the average local delivery cost of 0.25 cpl (i.e., 1.1 cpl 0.82 cpl = 0.28 cpl).[22] Further, price increases at the wholesale level were likely to be passed on to consumers.[23]

Coastal was also the only supplier of fuel ethanol in Ottawa and its terminal was equipped with top loading arms required to supply some of the tank trucks of some independent marketers. The Commissioner was concerned that, following the merger, Ultramar might stop supplying fuel ethanol or remove the top loading arms, thereby removing a niche product from the independents or raising their costs.[24]

Prevention of Competition

The Commissioner also asserted that the proposed transaction would prevent competition substantially by precluding the possibility that independent marketers could have bought the Coastal terminal and assured themselves of independent storage capacity.[25] According to comments filed by MacEwen Petroleum Inc., an independent distributor with service stations in the Ottawa area, MacEwen Petroleum and a group of other local independent marketers had offered to purchase the Coastal terminal.[26] MacEwen Petroleum said that it complained to the Competition Bureau after learning of the proposed sale to Ultramar in the hope that the Ultramar purchase would be thwarted and that its bid would be revived.

The Commissioner added that the merger would likely result in a substantial prevention of competition because the removal of "the possibility of independent marketers obtaining direct access, or access through a non-integrated terminal operator, to competitively priced product ... would prevent a potential price decrease in the Ottawa region wholesale market"[27] Presumably, the Commissioner believed that ownership of the terminal by independent marketers might further reduce the level of interdependency and move prices lower and closer to the delivered cost of shipping via pipeline, although the foregoing statement is not explained in the Commissioner's filings.

Summary

The Tribunal said that the Commissioner's position was summarized by the following paragraph in his Statement of Grounds and Material Facts:

> The proposed transaction would remove the only non-integrated terminal operator and the largest non-integrated wholesale supplier, of refined petroleum product in the Ottawa region. It will remove Coastal's pro-competitive impact on the relevant markets and prevent the pro-competitive effects which would have stemmed from Coastal's sale to a non-integrated purchaser.[28]

Draft Consent Order

To address the Bureau's concerns, Ultramar agreed to a draft consent order ("DCO") which would have required it to, among other things:

(a) offer to supply to independent marketers a minimum volume of refined petroleum products for seven years at wholesale prices to be negotiated, but no greater than a price determined from time to time pursuant to a formula based on posted Montreal rack prices[29] plus 0.5 cpl (section 5(f)); following the hearing, the DCO was amended to require Ultramar to negotiate prices with the independent marketers "in good faith" (but still subject to the formula cap);[30]

(b) offer to supply fuel ethanol to independent marketers at wholesale prices to be negotiated in good faith (section 5(g));

(c) within two years, refurbish and reactivate its Ottawa terminal, continue to operate the Coastal facility to at least 40% of its capacity; maintain at least three top loading arms and at least two loading arms dedicated to blending fuel ethanol and gasoline for the sale of ethanol blended gasoline (as long as demand remains at 50% or more of average annual demand over the last three years), and preserve the Coastal facility for three years;

(d) offer for sale for relocation off-site any tanks at the Coastal facility which may be decommissioned; and

(e) offer the Coastal facility for sale at fair market value if Ultramar failed to abide by the foregoing provisions of the DCO. (Fair market value was to be determined by an independent third party appraiser appointed by the Commissioner.)

Sections 2(b) and 6(b) specifically provided that Ultramar would not be in breach of the DCO in respect of any short-fall in the actual sales to independent marketers or its obligation to continue to operate the Coastal facility which was "attributable to force majeure, normal maintenance requirements,

rearrangement of the tankage at the [Coastal facility] and at the Ultramar terminal ..., underliftings or other similar circumstances".[31]

Process Issues

Pursuant to the Tribunal's rules, public notice of the Commissioner's application was published and the Tribunal received comments on the DCO from three persons. The Tribunal specifically commented that it "welcomed" the written comments, adding that it was "useful to the Tribunal to have the benefit of receiving such comments and to seek the Commissioner's explanation of his replies to some of the comments". The Tribunal suggested that one of the commenters be asked if it wished to appear, but no such request was made because the Commissioner and Ultramar "were of the view that this might delay the proceedings".[32]

Another commenter made a motion to answer some of the allegations in the replies to its comments filed by the Commissioner and Ultramar. The Tribunal dismissed this motion because the Tribunal's rules did not contemplate such a further response and the commenter had not set out any grounds or extraordinary circumstances which justified departing from the rules.[33] Following the hearing, the Commissioner sought leave to have one of the Assistant Deputy Commissioners of Competition in the Mergers Branch provide evidence to the Tribunal as to how the Bureau would enforce the DCO in the event that different scenarios that might be contemplated were to arise. Ultramar consented to this request, but the Tribunal declined to hear further evidence. [34]

Tribunal's Decision

The Tribunal held hearings on April 3 and 7, 2000. After considering the material filed by the Commissioner and Ultramar, oral evidence of representatives of the Bureau and Ultramar, and the comments filed, the Tribunal released a decision on April 26, 2000 refusing to issue the DCO requested by the Commissioner.

The Tribunal referred to the prior case law and summarized the test for approving a DCO as follows:

> the Tribunal must be satisfied 'that the measures proposed in the consent order are *sufficiently well defined to be effective and to be enforceable*' (emphasis added) ... and that the proposed remedy meets the objectives of the Act. The Tribunal is only determining if the measures proposed are adequate to eliminate the substantial lessening of competition that would arise from the merger. The Tribunal is not determining whether other remedies might be more likely to achieve the elimination of a substantial lessening of competition.[35]

In essence, the Tribunal found that the supply obligations in the DCO did not meet this test because they were unenforceable beyond establishing a maximum price and an obligation to negotiate with independent marketers in good faith, which was not sufficient to effectively remedy the concerns identified by the Commissioner. Although wholesale suppliers normally sold at a discount off posted rack prices, the Commissioner asserted that the DCO would "impose behavioural obligations that

would ensure that Ultramar continues to offer wholesale supply to independent marketers at commercially reasonable wholesale prices", as Coastal had done.[36] The Commissioner also asserted that section 5(f) of the DCO would ensure that the independent marketers would not be put at a "competitive disadvantage" as a result of the proposed transaction. [37]

The Tribunal specifically rejected the Commissioner's position that the DCO would have these effects. It found that the terms of the DCO did not require Ultramar to negotiate discounts or to do anything other than offer to sell refined petroleum products at the maximum price contemplated in section 5(f), which was based on posted prices in Montreal. The Commissioner had pointed out that the DCO would set a maximum price 0.7 cpl below the historical average posted price in Ottawa. The Commissioner expected this to be no more than the starting point for negotiation on prices and discounts. He said that "the major improvement is that the framework for the negotiations [by the independent marketers] with Ultramar will start at a lower posted price than in the past".[38] The Commissioner was also of the view that:

> The economic considerations which apply to Ultramar's activities under the DCO will provide clear incentives to ensure that it will maintain the requisite availability of supply and competitive pricing for the duration of the order. The Commissioner considers that the economic incentives that apply to Ultramar, together with the risk of a compelled divestiture, are sufficient to ensure that there will be an adequate supply of refined petroleum product on reasonable terms, to enable the independent marketers to maintain their competitive presence in the market.[39]

The Commissioner further noted that Ultramar's investment in the Ottawa terminal facilities required under the DCO would represent sunk costs which would give Ultramar an incentive to stay in the market and to provide supply over an extended period of time in order to recoup its investment. Further, the obligations to refurbish its own facility and maintain the Coastal facility "will require Ultramar to maintain excess terminal capacity in the Ottawa region, and therefore will create a strong incentive to supply the volumes required by the independent marketers".[40]

Finally, the Commissioner argued that an obligation to sell, as opposed to offer, product would risk distorting markets and that it was unnecessary to do so. He added that "combined with the excess capacity at the combined Ultramar and Coastal terminals, the investment of Ultramar and the throughput pressures resulting from Ultramar's expansion of production at the St-Romuald refinery, the Commissioner considers that, Ultramar will have clear incentives to comply with this requirement throughout the period of the DCO". [41]

However, the Tribunal found that "once Ultramar has petroleum products available for sale to the independent marketers and the maximum price is offered, Ultramar would be considered as having complied with the order".[42] In particular, it would have no obligation to offer discounts, or to negotiate credit or delivery terms, for example. Further, the Tribunal was not prepared to "enforce or embrace

economic theory" to conclude that the economic incentives of the transaction and the DCO would impose a discipline on Ultramar to offer competitive prices to independents. [43]

The Tribunal suggested that incorporating an obligation for Ultramar to negotiate "reasonable commercial terms" might have been a solution to this DCO. However, the parties did not take up this invitation and said that they were concerned that such a provision would provide an incentive to independent marketers for constant negotiations with the Commissioner or hearings before the Tribunal.[44] The Tribunal also suggested that a price formula or incorporation of a reference to fair market value might have constituted a justiciable guideline to determine prices.[45]

The Tribunal was also concerned that the DCO may have permitted Ultramar to remove itself from its obligations in some circumstances that were under its control. The Tribunal said that the protections established in sections 2(b) and 6(b) with respect to Ultramar's obligations to continue to operate the Coastal facility and offer a minimum volume of refined petroleum products for sale "may go further than necessary and provide Ultramar with the possibility to remove itself from its obligations in various circumstances, which include 'underliftings or other similar circumstances'".[46] The Tribunal pointed out that such underliftings[47] could occur because Ultramar's offered price is higher than the price offered by competitors. Since underliftings result in a reduction of the minimum volume of refined petroleum products required to be offered pursuant to the DCO, Ultramar could have reduced its obligations under the DCO and still avoided a breach. While the Commissioner conceded that it was theoretically possible for Ultramar to extricate itself from its obligations by, for example, filling its tanks and offering to supply on terms on which no one would buy, he argued that this was speculation not supported by any rational economic theory.[48] However, the Tribunal remained concerned that the underlifting exemption could be invoked by Ultramar based on underliftings caused by Ultramar's own actions.

Implications for Future Cases

Interdependency

Although the Bureau's Merger Enforcement Guidelines (and Bank Merger Enforcement Guidelines)[49] discuss both unilateral and interdependent anti-competitive effects that may result from a merger, the Bureau's focus in merger analysis since the current provisions were enacted in 1986 has been on unilateral effects. This is in contrast to the situation in the United States where, until recently, most cases were based on theories of interdependent behaviour.[50] Arguably, however, consideration of the effects of a merger on the possible interdependent exercise of market power has been attaining greater prominence in the Bureau's recent merger analysis. For example, the Commissioner expressly discussed this issue in the context of the bank mergers proposed in 1998, finding, for example, that the proposed merger of Royal Bank of Canada and Bank of Montreal would "increase the risk for reduced competitive vigour among the remaining major banks", a risk that would be compounded if the then proposed merger of CIBC and Toronto Dominion Bank had also proceeded.[51] As noted in the Merger Enforcement Guidelines, enhanced ability for tacit collusion was also one factor underlying the

challenge by the Director of Investigation and Research (the former title of the Commissioner) to the merger of Imperial Oil and Texaco Canada.[52] However, the *Ultramar* case would appear to be the first instance where, based on the public record, interdependent exercise of market power appears to be the primary, if not the sole, basis for concern.

As evidenced by the numerous gasoline price investigations that the Commissioner has undertaken, either on his own initiative, or in response to complaints from industry participants, Members of Parliament, or the public at large, parallel pricing (or "conscious parallelism"), as well as alleged predatory pricing, has been of particular concern in this industry.[53] Accordingly, it is unclear whether the focus on interdependency in this case signals a similar focus by the Bureau in future merger analyses in other industries.

Vertical Integration

The Commissioner concluded that Coastal was in a distinct category from other competitors in the Ottawa region because it was not vertically integrated into refining or retailing. In his view, ownership of the Coastal terminal by a vertically integrated firm would be anti-competitive:

> The integrated wholesalers and terminal operators which will remain in the Ottawa region post merger have a common structure. They all have refineries, terminals, wholesale and retail networks. Generally speaking, and with the exception of Ultramar, they have supplied independent marketers only to a limited extent taking into account their available terminal capacity after their own supply requirements. Their common economic interests may therefore be inimical to continued long term supply to the independent marketers.[54]

Similarly, the Commissioner said that, to be timely, effective and sustainable, new entry in the wholesale supply market would have to be by a non-integrated wholesaler.[55]

The Commissioner also pointed out that none of the integrated terminal operators in the Ottawa region, i.e., Imperial Oil, Petro-Canada and Shell, had provided storage to independent marketers.[56] However, the Commissioner did acknowledge that both Ultramar and Sunoco had storage arrangements with some of these local terminal operators and used that space to supply independent marketers in the Ottawa region.[57]

It is not clear, however, from the Commissioner's filings why all of the integrated firms in Ottawa should have been considered to have the same incentives, let alone incentives not to supply the independent marketers at competitive prices, particularly when the Commissioner acknowledged that the integrated terminal operators had varying degrees of captive network markets.[58] The Commissioner viewed Ultramar's retail network in the Ottawa region as not "substantial".[59] Ultramar itself said that it was the largest supplier to independent marketers in Quebec and the Atlantic provinces and sold over half of its Canadian refinery production to customers outside of its own network (before taking into account its planned expansion at St-Romuald). In summary, Ultramar

said it "needs the independents as much as the independents need a competitive wholesaler" [60] The Commissioner's filings did not comment on the relative degrees to which the capacity of the other competitors was required for their captive networks, but the mere fact that a refiner/terminal operator has some captive retail outlets would not necessarily closely align its interests with those of competitors whose capacity is exclusively or almost exclusively required for their captive networks.

The theory articulated in his filings suggests that the Commissioner would also have objected if Coastal had proposed to acquire Ultramar's retail network in the Ottawa area and its St-Romuald refinery, or possibly a different refinery in Montreal, as Coastal would then have become a vertically integrated supplier. In other words, there would not appear to be any basis for distinguishing upward integration by Coastal from downward integration by Ultramar. Similarly, if a group of some but not all of the Ottawa region independent marketers had acquired the Coastal terminal, would the terminal then be considered integrated and would the same issue arise with respect to any local independent marketers who were not part of the group owning the Coastal facility? It may be questioned whether competition policy should limit the expansion by a smaller competitor, such as either Ultramar or Coastal, into related markets, particularly when their major competitors are already vertically integrated, and presumably achieving efficiencies as a result.

Efficiencies

The number of independent marketers in the Ottawa region and the volume of business that the Commissioner believed would be affected by the proposed merger, and therefore the magnitude of the substantial lessening of competition, is not clear from the public versions of the documents filed by the Commissioner; nor is the anticipated magnitude of the efficiency gains anticipated by Ultramar had it been able to complete the merger or undertake its original plan of closing the Coastal terminal.

Particularly given that section 96 of the *Competition Act* provides that the Tribunal shall not make an order under the merger provisions in section 92 if it finds that the merger is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition (and that such gains would not likely be attained if the order were made), it may have been appropriate for the Commissioner to comment on the impact of the DCO on efficiencies in his Consent Order Impact Statement. One might have thought that this would be particularly called for in light of indications by the Commissioner in his filings that the DCO would require Ultramar to maintain excess terminal capacity[61] and prevent Ultramar from achieving the more efficient result of closing both terminals. At least some discussion of the efficiencies trade-off contemplated by section 96 may have been helpful. In this regard, it may be noted that the test for approval of a DCO articulated by the Tribunal includes an assessment of whether the DCO meets the objectives of the *Competition Act*, which presumably include the promotion of efficiency and, in the context of mergers, section 96. Nevertheless, the Tribunal did not comment on this aspect of the DCO in its decision.

Market Definition

In itself, the exclusion of captive, vertically integrated customers and suppliers from the relevant market does not break new ground. This was the approach accepted by the Tribunal in *Hillsdown*.[62] However, the *Ultramar* case serves as a reminder that the exclusion of integrated firms can lead to small and narrowly defined markets, and high market shares, in contexts where business people may consider that they compete in much larger and broader markets, in which they would clearly not have market power. In addition, whether captives are excluded or included ought to depend on the more substantive issue of whether they can offer a competing service "quickly and with small investments", in which case they should be included in the relevant product market.[63]

Impact on Prices

As noted above, the Commissioner concluded that the removal of Coastal as a non-integrated wholesale supplier of petroleum products would likely increase prices in Ottawa by up to 0.28 cpl, which was the difference between (1) the maximum cost of transporting refined petroleum product by truck from Montreal (1.1 cpl) and (2) the historical average of the wholesale price differential between the Ottawa and Montreal rack prices (0.57 cpl) plus the average cost of transportation from the terminal to the retail station in the Ottawa region (0.25 cpl)[64] [i.e., 1.1 (0.57 + 0.25) = 0.28]. However the Commissioner indicated that the cost of trucking from Montreal varies between 0.80 and 1.1 cpl, such that the sum of the historical Ottawa/Montreal price differential and the average cost of local transportation, namely 0.82 cpl, already exceeded the minimum cost of transporting refined petroleum product by truck from Montreal. The Commissioner did not explain in his filings why he expected that, post-merger, prices would be set off the maximum rather than the minimum cost. In fact, one might expect increased efficiencies and lower costs if more volume was trucked from Montreal (e.g., more efficient delivery routes), or that the minimum cost of the trucking option would continue to discipline the price in Ottawa if more volume actually moved by truck to Ottawa.

Perhaps more fundamentally, the relevance of the foregoing analysis may be drawn into question by the fact that the posted rack prices do not reflect actual transaction prices. This was confirmed by the Bureau[65] and the commenters.[66]

Prevention of Competition

The Commissioner took the position that "the proposed transaction will preclude non-integrated ownership of the [Coastal] terminal", thereby denying independent marketers direct access to the TNPL and denying them the ability to participate in the terminal facilities or wholesale supply markets in Ottawa.[67] In the Commissioner's view, "independent ownership of the terminal would have enhanced the pro-competitive impact of supply from Montreal by providing independent marketers with direct access in Ottawa to the TNPL" and "would have eliminated the ability of the Ottawa region wholesale suppliers to charge a wholesale price limited only by the Montreal trucking option" [68] The more typical instance of an allegation that a merger substantially prevents competition is in

circumstances where, in the absence of the merger, one of the parties would have engaged in some conduct that the merger would preclude. The Merger Enforcement Guidelines, for example, indicate that a merger might prevent competition where a potential entrant acquires an existing business instead of establishing new facilities, or where a firm acquires an increasingly vigorous competitor or a potential entrant and thereby impedes the development of greater competition in the relevant market.

However, the Merger Enforcement Guidelines also cite as an example "situations where a market leader pre-empts the acquisition of the acquiree by another competitor" [69] In *Southam*, the Director of Investigation and Research alleged that the acquisition by the owner of the Vancouver daily newspapers of two community newspapers in the Vancouver area substantially prevented competition by precluding the possibility of another person acquiring one of those community papers and using it as a "springboard" to launch a new daily newspaper in Vancouver. The Tribunal was not convinced that this was a likely scenario because the Director led very little evidence in support of this allegation.[70]

Nevertheless, this appears to be the first instance, apart from circumstances where the merging parties are relying on a failing or exiting firm defence,[71] where the Commissioner has alleged a substantial prevention of competition based in large measure on the availability of a competitively preferable purchaser. It could add significant uncertainty to the merger review process if a smaller competitor could effectively block a larger firm's proposed acquisition of a third competitor by making its own bid and asserting that its merger would be competitively preferable to that proposed by its rival.

Further, in the context of the *Ultramar* case, the Commissioner's filings did not discuss the viability of the Coastal facility under ownership by the independent marketers that had expressed an interest in acquiring it. In fact, some findings by the Commissioner would appear to raise issues in this regard. For example, in the context of barriers to entry, the Commissioner discussed the importance of having a stable customer base in the form of a captive network. The Commissioner also noted that extensive investment (and presumably sunk costs) would be required before the end of the year to comply with environmental regulations and keep the Coastal facility in operation.

Presumably, in the context of a contested hearing, the Commissioner, to establish the substantial prevention of competition he alleged in *Ultramar*, would have had to prove at least that (1) the independent marketers were bona fide prospective purchasers, (2) they were likely to have continued to operate the Coastal facility as a viable operation, and (3) they were likely to charge lower prices, prevent future price increases or provide better service or other non-price elements of competition than would exist in the market had the sale to Ultramar not proceeded. The last point, in particular, may be difficult to prove in a contested hearing. Also, any prospective purchaser seeking to disrupt a competitor's deal on the basis of this approach would itself be exposed to another potential purchaser who may claim a significantly superior competitive outcome if it were to be the purchaser.

If the Commissioner were to adopt this approach to prevention of competition on a more widespread basis, it could lead to a significantly greater degree of "industrial engineering" in the implementation of competition law in Canada than has been the case in the past. From the seller's perspective, the field of potential purchasers of a given business could be limited and the expected proceeds reduced if this approach were adopted in the context of a particular merger.

Role of Economic Theory

As noted above, in declining to issue the requested DCO, the Tribunal stated that its "role in the context of consent orders is not to enforce or embrace economic theory". The Tribunal added that, in contrast, its role is to be satisfied that the order is effective and legally enforceable, which requires that the terms used in the order are justiciable and the remedy proposed meets the objectives of the Act.

The Tribunal acknowledged that "Ultramar [may have] economic incentives to negotiate prices with the independent marketer"; however, the Tribunal said that it "cannot rely on casual economic theory alone to satisfy the requirement of enforceability of the order".[72] "In the Tribunal's view, the novel approach submitted by both counsel for the Commissioner and the respondent 'that the consent order can rely on the market for its effectiveness' cannot be endorsed in the absence of clear legal terms. ... If the market could alleviate the concerns raised by a likely substantial lessening of competition without enforcing an obligation on the respondent, then the parties will have no reason to seek the approval of a DCO from the Tribunal."[73]

It seems unlikely that the Tribunal meant literally that economic theory has no role in its consideration of consent orders. If economic theory were not relevant, the justification for a specialized tribunal to hear consent orders would be less apparent.[74] What seems more likely is that the Tribunal was struggling to understand how the DCO met the objective stated by the Commissioner of ensuring that Ultramar would offer the independent marketers commercially reasonable wholesale prices and that such independent marketers would not be put at a competitive disadvantage. To the extent that market forces would be relied upon, the DCO appeared unnecessary. Arguably, however, the requirement in the DCO that Ultramar refurbish its facility and maintain part of the Coastal facility in the market created a context in which economic incentives to maximize throughput in these facilities were likely to motivate Ultramar to sell to the independents and keep Ultramar's prices competitive. As noted above, this rationale was suggested in the Commissioner's reply to one of the commenters, but was not clearly articulated in the Consent Order Impact Statement or explicitly considered by the Tribunal in its Reasons. Even if that was the rationale, however, the role of the proposed obligation to offer to sell at prices subject to a formula cap was not clear. It would appear to have been unnecessary if the Commissioner was relying on the economics of the mandated excess capacity to keep Ultramar's prices competitive.

Consent Orders

The appropriate role of consent orders in the merger review process has been a subject of some controversy since the first such filing with the Competition Tribunal in the *Palm Dairies* case in 1986.[75] In that case, the Tribunal refused to issue a DCO which it found to be vague and unenforceable. The efficacy of the consent order process was brought into question again in the *Imperial Oil* case, where the Tribunal allowed numerous intervenors to participate and initially declined to issue the DCO because of concerns about the adequacy and enforceability of certain aspects of a supply assurance in relation to a refinery in Ontario. The proceedings lasted eight months, in many ways taking on the characteristics of a contested proceeding. In other instances, however, such as *Asea Brown Boveri*[76] and *ADM*,[77] consent orders have proceeded expeditiously. Similarly, in the United States, the antitrust authorities frequently resolve concerns relating to mergers with consent decrees that are almost always approved by the court.[78]

The Tribunal's decision in *Ultramar* could certainly be read as reflecting a disposition to engage in a wide-ranging review of a DCO and its competitive effects, and to encourage more extensive public participation in the consent order process. The consequent risk of not only delay, but also a failure of the Tribunal to issue the DCO, may discourage private parties from making use of the consent order process, possibly abandoning transactions that, as modified by the DCO, may have been efficiency enhancing. Alternatively, rather than apply to the Tribunal for a consent order, the Commissioner may accept undertakings as he did in the recent grocery mergers, although they lack the express statutory enforceability of consent orders.[79] One practitioner has suggested that the Tribunal's decision in *Ultramar* takes the consent order process "back to ground zero" and undermines confidence in the Tribunal's process.[80] It has also been suggested in the context of the current round of proposed amendments to the *Competition Act* that, instead of consent orders, undertakings made to the Commissioner, filed by him at the Tribunal, be given the force of an order of the Tribunal.[81]

It is not clear, however, that this decision has such broad implications for the consent order process. The *Ultramar* case involved a complex behavioural remedy in circumstances where it was difficult to ascertain from the Consent Order Impact Statement the theory of competitive harm underlying the Commissioner's application, and precisely how the various objectives that the Commissioner articulated for the DCO were accomplished by its various provisions. A more straightforward and typical divestiture remedy would likely not have the same level of difficulty in meeting the criteria of effectiveness and enforceability. Indeed, behavioural remedies have met this criteria in the past, such as the supply agreement included in the *ADM* consent order. Similarly, the Tribunal's discussion of the usefulness of the comments filed and its suggestion that one of the commenters be invited to give evidence may have been more a reflection of its struggle to understand the implications of the particular DCO before it, rather than any general desire to encourage more extensive comments or intervention.

Conclusion

Both the positions taken by the Commissioner and the decision of the Tribunal raise a number of red flags for parties contemplating a merger subject to the *Competition Act*. It remains to be seen whether the *Ultramar* case is an anomaly or whether it signals a significant change in the practice of the Commissioner or the Tribunal with respect to some key aspects of merger review, such as the role and significance of interdependency, vertical integration and prevention of competition in merger analysis. Similarly, the broader effect of *Ultramar* on the consent order process will have to be assessed in light of subsequent cases (or the lack of them). In the meantime, merging parties may be well advised to consider and anticipate the types of competition concerns raised by the Commissioner in this case and, in agreeing to any consent order proceedings, be prepared for the type of scrutiny by the Tribunal to which the DCO in *Ultramar* was subjected.

Notes

1 The author would like to acknowledge the helpful comments and assistance of Brian Facey, Partner, and Simon Lockie, Student-at-Law, Davies, Ward & Beck.

2 *The Commissioner of Competition* v. *Ultramar Ltd.*, CT-2000/001 (Comp. Trib.).

3 *Ibid.*, Ultramar Reply to MacEwen Petroleum Comments, March 27, 2000, par. 2.

4 Coastal purchased its Ottawa facility from Imperial Oil in 1991. Imperial Oil was required to divest the terminal by the consent order issued by the Competition Tribunal on January 29, 1990 in respect of the Imperial Oil/Texaco Canada merger.

5 *Supra*, note 2, Statement of Grounds and Material Facts, February 15, 2000 (SGMF), par. 19.

6 *Supra*, note 2, Consent Order Impact Statement, February 15, 2000 (COIS), par. 23.

7 *Ibid.*, Par. 9.

8 *Supra,* note 2, SGMF, par. 8.

9 *Ibid.*, Ultramar Reply to MacEwen Petroleum Comments, March 27, 2000, par. 3.

10 *Ibid.*, par. 5. See also *supra*, note 2, SGMF, par. 7.

11 *Supra*, note 2, Ultramar Reply to MacEwen Petroleum Comments, March 27, 2000, par. 3.

12 *Supra*, note 2, SGMF, par. 56, and COIS, par. 31.

13 *Supra*, note 2, Reasons and Order, April 26, 2000 par. 11. The members of the panel were McKeown J. (presiding), C. Lloyd and L. P. Schwartz. See also *supra*, note 2, SGMF, par. 27.

14 *Supra*, note 2. SGMF, par. 34.

15 *Ibid.*, par. 40.

16 *Ibid.*, par. 41.

17 *Ibid.*, par. 42.

18 *Ibid.*, par. 49.

19 *Ibid.*, par. 50.

20 *Ibid.*, pars. 67-70.

21 *Ibid.*, par. 39 and *supra*, note 2., COIS, pars. 21, 22 and 41.

22 *Supra*, note 2, SGMF, par. 57.

23 *Ibid.*, par. 75.

24 It is unclear why the loss of a fuel ethanol supplier was a concern since the Commissioner stated that an independent distributor could blend fuel ethanol with gasoline to produce an ethanol blend of gasoline on its own with minimal capital expenditure: *supra*, note 2, Commissioner's Reply to Comments of W. Allan MacEwen, March 27, 2000, par. 20.

25 *Supra*, note 2, SGMF, pars. 58-61.

26 *Supra*, note 2, Letter from MacEwen Petroleum Inc. to the Registrar of the Competition Tribunal, March 10, 2000.

27 *Supra*, note 2, COIS, par. 35.

28 *Supra*, note 2, Reasons and Order, par. 17 and SGMF, par. 73.

[29] The Commissioner considered that the Montreal wholesale market was disciplined by the availability of imported refined petroleum product and therefore was an appropriate benchmark for the determination of a posted rack price for supply, subject to negotiation for discounts, in the Ottawa region: *supra*, note 2, Commissioner's Reply to Comments of Democracy Watch, March 27, 2000, par. 8.

[30] *Supra*, note 2, Letter from counsel to the Commissioner to the Registrar of the Competition Tribunal, April 12, 2000, with revised Draft Consent Order ("DCO") appended.

[31] "Underliftings" are purchases by a given customer in respect of a certain time period falling below a minimum volume commitment in a variable price contract with a terminal operator - i.e., the operator sets the price from time to time. A purchaser may have several sources of supply and elect to purchase from the least expensive source at any given time. Apparently, as a matter of industry practice, contracts are not cancelled when underliftings occur, although a terminal operator may be reluctant to renew a customer's contract if its underliftings have been persistent and substantial. See *Director of Investigation and Research* v. *Imperial Oil Ltd.*, CT-89/3, #390, January 26, 1990 (Comp. Trib.), unreported, at 89-90, note 60 (reproduced in Davies, Ward & Beck, *Competition Law of Canada* (New York: Juris Publishing, 1999) at App. E3).

[32] *Supra*, note 2, Reasons and Order, par. 29.

[33] *Supra*, note 2, Order Regarding Motion of Democracy Watch Inc., April 5, 2000.

[34] *Supra*, note 2, Letter from counsel to the Commissioner to the Assistant Registrar, Competition Tribunal, April 25, 2000, and letter from the Acting Registrar of the Competition Tribunal to counsel for the Commissioner, April 25, 2000.

[35] *Supra*, note 2, Reasons and Order, par. 33.

[36] *Supra*, note 2, COIS, par. 42, emphasis added.

[37] *Ibid.*, par. 45.

[38] *Supra*, note 2, Commissioner's Reply to Comments of W. Allan MacEwen, March 27, 2000, par. 5.

[39] *Ibid.*, par. 3.

[40] *Ibid.*, par. 4.

[41] *Ibid.*, pars. 7-8.

[42] *Supra*, note 2, Reasons and Order, par. 41.

[43] *Ibid.*, par. 47. The Tribunal also described the Commissioner's position as relying on "casual economic theory": *ibid.*, par. 48.

[44] *Ibid.*, pars. 42 and 45. In the context of the Imperial Oil/Texaco Canada merger, the Tribunal initially raised concerns about the adequacy and enforceability of a supply assurance in the DCO in relation to a refinery in Ontario that required Imperial Oil to "make available", or offer to sell, a certain quantity of gasoline on reasonable commercial terms. The consent order finally approved by the Tribunal included an obligation to sell certain amounts of gasoline for a specific period of time, subject to the qualification that the order would not oblige Imperial Oil to sell on commercially unreasonable terms. See *Director of Investigation and Research* v. *Imperial Oil Ltd.* (1989), 45 B.L.R. 1 (Comp. Trib.), at 9-12 [provisional decision]; and *supra*, note 31, at 64-98.

[45] *Supra*, note 2, Reasons and Order, par. 48.

[46] *Ibid.*, par. 51.

[47] See *supra*, note 31.

[48] *Ibid.*, par. 36.

[49] Merger Enforcement Guidelines, Director of Investigation and Research, *Competition Act*, Information Bulletin No. 5, March 1991, Part 2; and Merger Enforcement Guidelines as Applied to a Bank Merger, July 14, 1998, pars. 19-20.

[50] See C. Shapiro, "Mergers with Differentiated Products", (1996) *Antitrust* 10(2), at 22-30.

[51] Letter from the Commissioner of Competition to the respective Chairmen and Chief Executive Officers of the Royal Bank of Canada and Bank of Montreal, December 11, 1998, at 13.

[52] Merger Enforcement Guidelines, *supra*, note 49, section 2.2, note 8; and *Director of Investigation and Research* v. *Imperial Oil*, *supra*, note 31, at 36 and 54.

[53] See, for example, the Competition Bureau's report issued on February 4, 2000 on the July 1999 Gasoline Price Increases. This investigation was prompted by "a flood of calls made to the Bureau from consumers and businesses about price increases at gas pumps in a number of markets across the country". The Commissioner commented that "people believe that gas prices increased by too much or occurred too much in unison for the activity to be a coincidence" and said that he would acquire the facts necessary to establish whether the behaviour raised issues under the *Competition Act*. (Competition Bureau news release, July 22, 1999.) The report concluded that there was no evidence of a co-ordinated price increase. For other recent examples of the Bureau's activities in the oil and gas industry see: "Competition Bureau Concludes There is No Evidence To Support Allegations Against Gasoline Suppliers in Conception Bay South, Newfoundland", Information document issued by the Competition Bureau, March 3, 2000; "Gasoline prices in

Kenora, Ontario", Information document issued by the Competition Bureau, February 4, 2000; "Low Gasoline Prices in the Greater Vancouver Market are the Result of Vigorous Competition", Information document issued by the Competition Bureau, January 28, 2000; "Competition Bureau Finds No Evidence to Support Allegations of Anti-Competitive Behaviour in Chatham Ontario Gasoline Market", Information document issued by the Competition Bureau, December 30, 1999; "Competition Bureau Finds No Lack of Competition In Saskatchewan Gasoline Industry", Information document issued by the Competition Bureau, November 30, 1999; "Charges Laid Against Gasoline Supplier and Retailers In the Sherbrooke, Quebec Area", Information document issued by the Competition Bureau, September 29, 1999, [alleged price maintenance]; price maintenance proceedings against Mr. Gas Limited, an independent gas retailer in the Ottawa region: *R.* v. *Mr. Gas Ltd.*, [1999] O.J. No. 3686, October 7, 1999 (Ont. C.A.) and Reasons for Judgment, August 11, 1995 (Ont. Ct. of Justice (Prov. Div.)), unreported; and Private Member's Bill C-235, which received second reading in Parliament in October 1998 and was designed to regulate price discrimination by vertically integrated wholesale gasoline suppliers to independent marketers (see Davies, Ward & Beck, *Competition Law of Canada*, Legal Letter, No. 11 (February/March 1999) (New York: Juris Publishing, 1999), at 20).

[54] *Supra*, note 2, SGMF, par. 65.

[55] *Ibid.*, par. 71.

[56] *Ibid.*, par. 62.

[57] *Ibid.*, pars. 35-36.

[58] *Ibid.*, par. 50.

[59] *Supra*, note 2, COIS, par. 47.

[60] *Supra*, note 2, Ultramar Reply to MacEwen Petroleum Comments, March 27, 2000, par. 8.

[61] *Supra*, note 2, COIS, par. 47.

[62] *Director of Investigation and Research* v. *Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), at 311. See also Calvin S. Goldman and John D. Bodrug, "The *Hillsdown* and *Southam* Decisions: The First Round of Contested Mergers Under the *Competition Act*" (1993), 38 *McGill L.J.* 724, at 727-735.

[63] See, for example, *Director of Investigation and Research* v. *Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), at 178.

[64] *Supra*, note 2, COIS, par. 32.

[65] "[S]imilarity in ... the wholesale prices of different suppliers ... is not evidence of an agreement to fix prices ... as posted wholesale gasoline prices are not what customers actually pay. The final transaction prices paid by many customers are usually lower than the published wholesale prices - they are discounted on volume purchases. The final price and terms are confidential, and the occasional differences in wholesale prices [provide] further evidence of the absence of a price-fixing agreement. The gasoline companies do attempt to track the wholesale prices of their competitors, but the companies did not have completely accurate information about the actual wholesale prices charged by their competitors.": July 1999 Gasoline Price Increases, A Competition Bureau Examination Report, February 4, 2000, at 14. Cited in *supra*, note 2, Ultramar Reply to MacEwen Petroleum Comments, March 27, 2000, par. 10.

[66] *Supra*, note 2, Letter from MacEwen Petroleum Inc. to the Registrar of the Competition Tribunal, March 10, 2000.

[67] *Supra*, note 2, SGMF, par. 58.

[68] *Ibid.*, par. 59.

[69] Merger Enforcement Guidelines, *supra*, note 49, at section 2.3.

[70] *Southam*, *supra*, note 63, at 287-88. See also, Goldman and Bodrug, *supra*, note 62, at 743.

[71] See Merger Enforcement Guidelines, *supra*, note 49, at section 4.4.

[72] *Supra*, note 2, Reasons and Order, par. 48.

[73] *Ibid.*, par. 49.

[74] For example, in *Director of Investigation and Research* v. *Southam Inc.* (1997), 71 C.P.R. (3d) 417 (S.C.C.), at 432-33, the Supreme Court of Canada indicated that the Tribunal was entitled to curial deference based in part on its expertise in economics and commerce.

[75] For a detailed discussion of the early consent order cases considered by the Tribunal and related policy considerations, see: Calvin S. Goldman, "The Merger Resolution Process Under the *Competition Act*: A Critical Time In Its Development" (1990), 22 *Ottawa Law Review* 1.

[76] *Director of Investigation and Research* v. *Asea Brown Boveri* (September 6, 1989), CT-89/1, #101(a).
Reasons for Consent Order dated June 15, 1989 (Comp. Trib.), unreported, at 16.

[77] *Director of Investigation and Research* v. *ADM Agri-Industries, Ltd.* (May 8, 1997), CT 97/2, Consent Order, unreported.

[78] Goldman, *supra*, note 75, at 38.

[79] For a discussion of the use of undertakings to resolve *Competition Act* issues with regard to mergers, see Calvin S. Goldman and John D. Bodrug, "The Merger Review Process: The Canadian Experience" (1997), 65 *Antitrust Law Journal* 573, at 601.

[80] Warren Grover, "Pricing Practices: The Van Duzer Report", paper delivered to Roundtable on *Competition Act* Amendments, Insight Conference, Toronto, May 25, 2000, at 14-15.

[81] *Ibid.*

ACQUISITION OF CANADA TRUST BY TD BANK - A COMMENTARY ON THE COMPETITION BUREAU'S CONCLUSIONS REGARDING COMPETITIVE IMPACT IN THE MARKETS FOR BRANCH BANKING SERVICES

By: R. Jay Holsten[1]
Torys

Introduction

The conclusions reached by the Competition Bureau in assessing the competitive impact of the Canada Trust acquisition on branch banking raise a number of competition policy issues. These include the Bureau's articulation of its conclusions regarding competitive impact in quantitative, rather than qualitative, terms. While there may be circumstances in which market share levels are sufficiently high to establish a *prima facie* substantial lessening of competition, the Canada Trust acquisition was clearly not such a case. As a result, the Bureau's analysis departs from its articulated framework for merger review and, thereby, adds uncertainty to the merger review process in Canada.

Background

On January 28, the Bureau completed its review of the acquisition of Canada Trust by TD Bank. In its letter (the "Reporting Letter") to Charles Baillie, the Chairman and CEO of TD Bank, and Edmund Clark, the President and CEO of Canada Trust, the Bureau stated:

> After a comprehensive review, the Bureau has concluded that, as proposed, the merger is likely to substantially lessen or prevent competition, and that this would lead to higher prices and lower levels of service and choice for branch banking consumers in three local markets: Kitchener-Waterloo-Cambridge-Elmira; Port Hope; and Brantford-Paris. The Bureau has also concluded that the merger will substantially lessen or prevent competition in the general-purpose credit card networks market in Canada.

The Bureau noted that, in response to its concerns, TD Bank proposed to sell branches in the three identified (*i.e.*, problematic) markets. The bank also proposed to either sell the Canada Trust MasterCard credit portfolio or convert its VISA credit card portfolio to MasterCard. The Bureau stated that, in its view:

> [t]hese proposed remedies, once fully implemented, will address the anti-competitive impact of the proposed merger.

Based on the recommendations of the Bureau and OSFI, the Minister of Finance announced on January 31 that the Government had approved the Canada Trust acquisition.

Commentary

Like its assessment of the proposed 1998 bank mergers (the "Bank Mergers"), the Bureau expressed its conclusions regarding the competitive impact of the Canada Trust acquisition on branch banking with reference to the parties' post-merger combined share of certain business lines in the geographic markets affected by the transaction. After a fairly high-level discussion of the evaluative criteria in Section 93 of the *Competition Act*, the Bureau stated that the acquisition:

> will result in a substantial lessening of competition in the markets for either personal or business transaction accounts where the parties' combined market share would be 45% or more in the local geographic market.

The Bureau also stated more generally that a merger will be likely to prevent or lessen competition substantially where it "is likely to result in higher prices, less choice or reduced service" in other words, where the merging parties will be in a position to exercise market power.

However, the Bureau's analysis of the Canada Trust acquisition (as set out in the Reporting Letter) does not establish the link between market share and market power that must necessarily underlie the Bureau's conclusions. [2] This is problematic for three reasons. First, there would appear to be little economic support for the view that market share alone is necessarily indicative of market power, and there is no reference to any such presumption in the *Merger Enforcement Guidelines as Applied to a Bank Merger* (the "BMEGs"). Second, the Act makes it clear that conclusions regarding the competitive impact of a merger cannot be based solely on evidence of concentration or market share. Third, to the extent that the Bureau's published analysis in a high profile merger transaction departs from the review framework articulated in its own enforcement guidelines, the Bureau undermines its stated objective of providing a "clearer view of how the merger review process will be applied....in keeping with the Bureau's open, transparent, and predictable approach to enforcing the Act".

The BMEGs describe the framework which the Bureau uses to assess the competitive effects of a bank merger. In general, this framework involves defining the relevant markets, conducting an initial screening test to identify markets affected by the merger which do not require further analysis and, where a market fails to pass the initial screening test, conducting a more thorough review of the merger on a market-by-market basis. With respect to the second and third stages of the analysis, the BMEGs provide as follows:

> The [second] stage in the analysis is the application of market share and concentration thresholds, which distinguish mergers that are unlikely to have anti-competitive consequences from mergers that require further analysis...The purpose of such a screen is to quickly eliminate from further review the products and geographic areas which are not likely to give rise to competition concerns in order to focus the Bureau's review....The products and geographic areas which "fail" the initial screen are then subject to a complete competitive effects analysis.

The BMEGs are clear both in their words and intent that, once the initial screening test has been completed, it is the evaluative criteria that are to be used to assess the likelihood that a bank merger will prevent or lessen competition substantially. While evidence of concentration or market share may be an important preliminary evaluation tool (*i.e.*, at the initial screening stage), and while market share information may be a relevant starting point for a more thorough competitive effects analysis, the focus of merger assessment, both as set out in the Act and as described in the BMEGs, is and should be on the likely post-merger competitive environment and the likelihood that the merging parties will be in a position to exercise market power. This requires the Bureau to consider other competitive factors, such as the excess capacity of other firms in the market, barriers to entry and the effectiveness of remaining competitors, that are likely to either off-set or reinforce any preliminary conclusions regarding competitive impact which the Bureau may reach based on its market share observations alone.[3]

With respect to the Canada Trust acquisition, the Bureau stated in the Reporting Letter that its analytical approach presumes a merger will not harm competition when markets are unconcentrated, entry is easy and effective competition remains. While the Bureau concluded (as it did during its review of the Bank Mergers) that, in general, barriers to entry into retail banking on a "bricks and mortar" basis are high, nowhere in its analysis of the Canada Trust acquisition does the Bureau state its conclusions with respect to the issue of effective remaining competition in specific geographic markets. As a result, we are left to conclude by implication that, following the transaction (and absent a divestiture remedy), concentration in the problematic markets would be high, effective competition would not remain, and an unacceptable degree of market power would exist. However, this conclusion is not at all apparent on the facts.

Consider, for example, Port Hope, Ontario. In this market, each of Royal Bank, Bank of Montreal, CIBC and Bank of Nova Scotia operates one branch, as does each of TD Bank and Canada Trust. There is also one credit union branch. In these circumstances, absent the one branch divestiture required by the Bureau in Port Hope, the Canada Trust acquisition would have increased TD's market presence from one to two branches, which would have faced competition post-merger from one branch of each of the other major Schedule I banks ("Major Banks") and a credit union. While, based on the Bureau's market share information, the transaction would have resulted in an increase in TD Bank's post-merger market share in Port Hope to something in excess of 45% (precise information was not provided to the parties nor is it set out in the Reporting Letter), the Bureau makes no attempt in the Reporting Letter to explain how, given the number of effective competitors[4] that would remain in the market, this level of market share would or might translate into an ability to exercise market power.

One might have argued that, absent the required divestiture, TD Bank's market share in Port Hope likely would have been eroded by competition from the other Major Banks if, post-merger, TD Bank attempted to increase the prices of its retail banking products or reduce service levels. However, the Bureau's analysis does not address the likely post-merger competitive dynamics in the Port Hope market. Rather, the Bureau appears to conclude that, since TD Bank would have a post-merger

market share in excess of 45% (based on pre-merger market share information), market power should be presumed and a divestiture must be required.

It is also worth mentioning that the Bureau's conclusions regarding the competitive impact of this transaction (expressed, as they were, as conclusions relating to market share) appear somewhat difficult to reconcile with its conclusions regarding the competitive impact of the Bank Mergers. Specifically, the Bureau's conclusions regarding the competitive impact of the Bank Mergers (also expressed as conclusions relating to the merging parties' combined post-merger market shares) were made in the context of a proposed consolidation in the number of Major Banks from five to three. The Canada Trust acquisition, on the other hand, combined Canada's fifth largest bank with a trust company one quarter its size. As such, the Canada Trust acquisition had a limited impact on the number of effective competitors in most geographic markets affected by the transaction (in Port Hope, for example, the number of clearly effective competitors declined from six to five). Nevertheless, the Bureau appears to have applied to its analysis of the Canada Trust acquisition the "guidelines" which it developed during the Bank Merger review (*i.e.*, market share guidelines, which reflected the Bureau's general assessment of the section 93 evaluative criteria). The Bureau stated in the Reporting Letter:

> In assessing competitive criteria, the Bureau relied on the conclusions it reached during its reviews of the proposed bank mergers in 1998. There have been no significant developments since then and no evidence presented that suggests those conclusions would not be applicable to this transaction.

This is a somewhat curious statement, at least insofar as it relates to the issue of effective remaining competition, given that the Bank Mergers did not proceed.

* * * * * * * * *

By expressing its conclusions regarding the competitive impact of the Canada Trust acquisition on branch banking as conclusions relating to market share, rather than market power, the Competition Bureau's analysis departs from its articulated framework for merger review. Unless the Bureau wishes to be seen to have based its decisions either primarily or solely on evidence of market share - which is inconsistent with both the Act and the BMEGs and, as a result, with the Bureau's stated policy objectives of transparency and predictability in the enforcement of the Act - the Bureau's future merger decisions should more clearly relate its conclusions regarding competitive impact to the Section 93 evaluative criteria.

Notes

1 Jay Holsten is Chair of the Antitrust and Competition Law Group at Torys. He advised TD Bank on the competition law aspects of its proposed 1998 merger with CIBC and the acquisition of Canada Trust.

2 The BMEGs provide that a prevention or lessening of competition can only result from a merger where the parties to the merger are, or would likely be, able to exercise a greater degree of market power, unilaterally or interdependently with others, than if the merger did not proceed.

3 In *Hillsdown*, the Competition Tribunal noted that the various market share calculations relied upon by the Bureau in that case indicated that the merger "[increased] market share considerably in an already highly concentrated market and [gave] rise to at least an initial concern that the merger [would] likely substantially lessen competition in that market" However, the Tribunal went on to state that "[a]s has already been noted, market share is not necessarily a reliable determinant of market power. As an indicia of such it may either overstate or understate a firm's market power"

4 The Bureau concluded during its review of the Bank Mergers that, as the first and third-largest banks in Canada, Royal Bank and Bank of Montreal are "obviously effective competitors" (Royal Bank/Bank of Montreal letter, page 11). The Bureau also concluded that, as the second-largest bank in Canada, CIBC is an "obviously effective competitor" (TD Bank/CIBC letter, page 15). Given that the Bank Mergers did not proceed, Bank of Nova Scotia would also presumably be regarded as an effective competitor today in the various markets in which it competes.

VANDUZER CONSIDERED: A PRELIMINARY COMMENTARY ON "ANTICOMPETITIVE PRICING PRACTICES AND THE *COMPETITION ACT*: THEORY, LAW AND PRACTICE"

By: James Musgrove and Stephan Luciw
Lang Michener

Introduction

On November 25, 1999, the Competition Bureau released the report "Anticompetitive Pricing Practices and the *Competition Act*: Theory, Law and Practice" which it had commissioned from Professors Anthony VanDuzer and Gilles Paquet of the University of Ottawa.[1] The Report had its genesis in the review, by the Industry Committee of the House of Commons, of Bill C-235. Bill C-235 was a private member's bill aimed at controlling the pricing practices of integrated suppliers. Problematic pricing practices were thought to be prevalent particularly in the retail gasoline industry. The Commissioner of Competition opposed Bill C-235 and appeared before the Industry Committee to do so.

Arising out of the Bureau's participation in the Bill C-235 hearings, on April 20, 1999 the Industry Committee entertained a motion that it thoroughly review the *Competition Act* and the activity of the Bureau. The motion was then amended to provide, instead, that the Committee would review the anticompetitive pricing provisions of the Act, the related enforcement guidelines, and the operations of the Bureau in respect of pricing matters. The Commissioner at that time committed to commission an independent study of these issues. The Report is that study.

The terms of reference for preparation of the Report were as follows:

> The purpose of the review is to study some of the provisions of the *Competition Act* dealing with anticompetitive pricing practices by suppliers and powerful competitors and the practices and procedures of the Competition Bureau relating to these provisions. The provisions subject to review are those dealing with predatory pricing, price discrimination and price maintenance and, to the extent that it concerns pricing, abuse of dominance. These provisions are set out in sections 50(1), 61 and 79 of the *Competition Act*.
>
> In particular, the review will focus on the following four areas:
>
> 1. Are the provisions of the *Competition Act* adequate in light of today's economic forces?
> 2. With respect to the Bureau's interpretation of these provisions:
>   (a) is the Bureau's interpretation appropriate?
>   (b) is the Bureau's interpretation consistent with international practice?
>   (c) are the Bureau's enforcement guidelines (s.50(1)) adequate?

(d) is there a need for additional enforcement guidelines?

3. Have the Bureau's practices, procedures and guidelines led to the appropriate administration and enforcement of these provisions?

4. Are the Bureau's case selection criteria sufficient to ensure that an adequate number of cases are pursued?

The Report, in its 112 pages, together with a 21 page executive summary, canvases these topics, in some cases in considerable detail. The purpose of this note is to provide a summary of the Report and its conclusions, as well as to provide some preliminary commentary on some of the conclusions and recommendations reached.

It would be fair to note that insofar as commentary is concerned, we come at the task with some preconceived ideas.[2] Whether one agrees or disagrees with all aspects of the Report, however, there can be no doubt that it is a key contribution to the thinking on these important topics. To date the pricing provisions of the *Competition Act* have not enjoyed significant academic study. It is to be hoped that as a result of the Report they will be subject to such scrutiny and, perhaps, to real improvement.

The Purpose of the Act

The Report notes that section 1.1 of the *Competition Act* contains within it certain inconsistencies which make enforcement of coherent and economically rational competition policy a challenging undertaking. It notes that the Competition Bureau has interpreted section 1.1 of the *Competition Act* as endorsing the principle that competition law is geared to the promotion of competition as a process, and not the protection of competitors. This recognizes that through the competitive process some firms will fail, and that this dynamic effect is essential to ensure that the efficiency benefits of competition are realized. In some situations, protecting the competitive process will mean protecting competitors where they are threatened by anticompetitive behaviour or their elimination would result in insufficient remaining competition. However, distinguishing anticompetitive behaviour from acceptable behaviour, and determining what level of competition is sufficient is extremely difficult.[3] The Report notes that because section 1.1 refers to providing opportunities for small and medium sized enterprises to have an equitable opportunity to participate in the Canadian economy, "some competitors may legitimately expect broader protection through this law than a single minded commitment to the competitive process based solely on efficiency considerations would dictate. In other words, the purpose clause may be interpreted as expressing an intention to proscribe anticompetitive behaviour, even where the outcome is the removal of a less efficient competitor and sufficient competition remains in the market place. In this way, protecting fair and equitable opportunities for small and medium sized enterprises could lead to difficult tradeoffs with the promotion of efficiency.[footnote omitted]"[4]

The Report correctly notes the potential inconsistencies caused by the purpose section of the *Competition Act*. We cannot, however, agree with the statement quoted above, that behaviour which

has the effect of removing a less efficient competitor, where sufficient competition remains in the marketplace, could ever be accurately characterized as "anticompetitive". That being said, the difficulties inherent in the purpose clause, and the attempt to create a statute which speaks primarily to economic efficiency but also seeks to provide protection to small and medium sized enterprises, are in our view appropriately criticized in the Report. However, the Report does not recommend amendment to section 1.1 to correct the problem by deleting the reference to small and medium sized enterprises. In our view that would be an appropriate recommendation, as would be the deletion of reference to the promotion of exports,[5] which strikes us as a mercantilist and anachronistic policy. Given political realities, however, amendment to section 1.1 is unlikely. Nevertheless, we suggest that the Bureau's interpretation, which gives precedence to economic efficiency, and the protection of competition rather than competitors, is the correct approach in the face of this somewhat troublesome provision. Not only is this economically rational, it is also consistent with the wording of the provision. Section 1.1 begins with the overall statement "The purpose of this Act is to maintain and encourage competition in Canada", with the other statements in the provision being subsidiary goals. Finally, while there has been only limited jurisprudence, Madam Justice Reed's statement in *Hillsdown*[6] suggests that consumer welfare is intended to be the key goal of the Act:

> The tribunal has not been referred to any jurisprudence which indicates that in a listing of objectives in the purpose clause of a statute that which is listed first is to be given greater weight than those which follow. Also, there is nothing in the text of the purpose section which indicates that such preference is to be given. Indeed, in debates in the House of Commons, the Minister responsible for the Act indicated that it was the fourth objective which was of overriding concern:
>
> > The fourth but not the least objective is to provide consumers with competitive prices and product choices. As such, this objective becomes the common denominator in what we are trying to achieve. This is the ultimate objective of the Bill.[7]

Price Discrimination

The Report commences its review of the substantive pricing provisions of the *Competition Act* with a consideration of price discrimination. It first reviews the economic definition of price discrimination. This analysis suggests that there are three conditions necessary for a firm to engage in price discrimination, as defined by an economist:

1. the firm must have sufficient market power to set price. Otherwise, customers charged higher prices would simply purchase from a competing supplier;

2. the firm must be able to identify different classes of customers with different levels of sensitivity to the price of the product, or, more precisely, different price elasticities of demand. These differences may arise because of different needs, income levels or uses of the product; and

3. there must be limited opportunity for customers to resell to each other (arbitrage product). It must not be possible for customers paying a low price to sell to those for whom the products are priced more expensively.

Whatever the legal definition of price discrimination, the Report notes that unless these economic tests are met there is in fact no price discrimination in any economic sense. The Report also notes that price discrimination is commonplace and may well be economically advantageous. Where it results in expanding demand there will be a welfare benefit.

The Report argues that any competition law provision with respect to price discrimination should be restricted to situations in which the alleged price discriminator has market power, where customers may not arbitrage products, and where price differences are not explained by differences in transaction or information costs. The Report argues that temporary expedients ought not to be part of any definition of price discrimination.

Even when the definition of economic price discrimination is met, given price discrimination's frequent welfare enhancing effects, the Report notes that any prohibition should only apply if the conduct has negative welfare effects. Such a test will, of course, vary from case to case. The Report notes that "assessment of the competitive effects of discrimination will be difficult, imposing a need for significant data and difficult microeconomic forecasts of demand and other variables"[8] That is, any economically rational prohibition of price discrimination will be highly fact specific, and therefore uncertain and expensive to determine on a case by case basis.

The Report notes, critically, the various anomalies within section 50(1)(a) of the Act with respect to price discrimination. Key amongst the anomalies are the fact that the provision focuses only on sale transactions, and that it applies to articles only. The Report's fundamental critique of the statute, however, as foreshadowed by its discussion of the economic underpinnings of price discrimination, is that the statute's definition of price discrimination is very different from an economist's understanding of the practice, and that the statute does not apply an economic effects test.

The Report notes that the law does not focus on truly discriminatory behaviour and does not require market power for there to be an offence. It does not give sufficient scope to differential pricing motivated by considerations that are not anticompetitive. The Report also notes that there is no provision in the statute which requires that price differentials be cost justified to be lawful nor does the Act expressly permit price discrimination based on cost differences other than quantity supplied. The statute does not expressly recognize a "meeting competition" defence, although the Guidelines appear to read in at least a partial meeting competition defence based on an interpretation of the word "practice".[9]

The Report comments on the 1992 *Price Discrimination Enforcement Guidelines* (the "PDE Guidelines")[10], noting "the approach of the *Guidelines* is helpful and moves interpretation of the provision in the direction indicated by the economic analysis in Part I [of the Report]".[11] The PDE

Guidelines do not, however, have binding effect on the Commissioner, the courts, or on private plaintiffs, and the Report argues that certain aspects of the PDE Guidelines are inconsistent with the statutory language. In particular, the PDE Guidelines' approach to the word "available" may impose a more onerous requirement on vendors than does the law. The PDE Guidelines indicate that when a vendor, on its own initiative, offers concessions to one customer, it should make the same offer to competing similarly situated customers; whereas if a purchaser initiates the negotiations leading to a concession, the vendor need not do so. The Report notes that this suggests that the word "available" be interpreted as requiring an offer to be made. This would arguably be inconsistent with section 51 of the Act which, when it requires an offer to be made, expressly states that requirement.

In this regard, we are of the view that the Report is correct. Section 50(1)(a) does not specifically require the seller to make an "offer" as does section 51, nor does it even use the phrase "make available", although one frequently sees the provision paraphrased in that way. "Make available", we submit, would suggest a greater obligation to take positive action than does simply requiring that something be "available" Thus, in our view, the Report correctly notes that the PDE Guidelines may, incorrectly, impose a burden not imposed by the statute.

The Report also notes that the price discrimination provision of the *Act* does not exempt sales between affiliates, but the PDE Guidelines effectively provide for an exemption by, in the words of the Report, "consider[ing] transactions between affiliates as being something other than sales and so outside the price discrimination prohibition" [12] The Report states that the jurisprudence as to what is and is not a sale is reasonably well settled, and that therefore the PDE Guidelines' interpretation may not be correct. It is submitted, however, that the PDE Guidelines do not seek to argue that transactions between affiliates are not sales, but rather that the price charged in sales between affiliates is not, in the language of the price discrimination provision, "in respect of a sale" The PDE Guidelines argue that the price is not a market price, but rather a price which takes into account not merely the transfer of title but also the corporate or other affiliation between the parties.

While the PDE Guidelines' interpretation has not been tested, and may or may not be found to be consistent with the statutory wording, the Report's criticism of the PDE Guidelines in this regard does not, in our view, accurately articulate the PDE Guidelines' rationale, and therefore is not as persuasive as it might otherwise be. The Report contains similar criticisms with regard to the Guidelines' treatment of franchise system purchases.

Interestingly, the Report notes that during the period of its review (January 1994 to the end of March 1999), the Bureau received a total of 939 pricing complaints, but only 9% of those complaints, or 88 complaints, involved price discrimination. Given the amount of time and effort which firms devote to attempting to conform their distribution practices to the price discrimination provisions of the Act, that is a surprisingly small percentage.

With regard to its discussion of enforcement priorities, the Report notes that because it is difficult to make a strong economic case against price discrimination, the Bureau should not over-invest in

enforcement. It notes that the approach adopted in the PDE Guidelines reflects a limited emphasis on enforcement of the price discrimination provisions. As well, the case selection criteria used by the Bureau which focus on the seriousness of anticompetitive effect, suggest that a lower priority is given to enforcement respecting this offence.

The Report suggests that price discrimination might well be dealt with under section 79 of the Act (abuse of dominant position), although there would be a number of challenges to such a use of section 79. The most significant is the inherent uncertainty, and the need for intensive, fact-specific inquiry, with regard to any market power or substantial lessening of competition test. As well, the authors note that the approach to market power in the abuse provision might have to be adapted for price discrimination cases and that consideration would have to be given to an appropriate market share threshold. The Report notes, somewhat obscurely, that "a test which specifically takes into account the availability of alternative sources of supply, as in the refusal to deal provision, [footnote omitted] may need to be developed for assessing competitive effect"[13]

While the Report, which also contains a separate discussion of the application of the abuse of dominance provision to pricing cases, suggests that the abuse of dominance provision may provide a useful framework for dealing with price discrimination, it seems to recommend, although it is not entirely clear, that the price discrimination provision be amended to deal with the specific shortcomings identified above, and that it be made a civil reviewable provision. The Report is somewhat unclear as to whether it believes the provisions should be simply dealt with as an aspect of section 79, or whether the criminal section should be reworked as a specific standalone reviewable practice. The Report's full recommendations are attached as Appendix A.

In summary, the Report concludes that there is no question that the current criminal price discrimination provision is not adequate to address anticompetitive price discrimination and that in its present form, the provision is not an accurate tool for addressing anticompetitive behaviour. It notes that given that price discrimination is commonplace and typically not anticompetitive, the law needs to focus on situations in which there is an anticompetitive effect. In this regard, the law fails in a number of respects. Firstly, the statutory distinction between sales and other transactions, and between articles and services, is difficult to justify. More fundamentally, the Report notes "the price discrimination provision in the *Competition Act* may be considered to be out of step with contemporary economic thinking on competition policy and much of the rest of the *Act*...[it] focuses on protecting particular competitors from being discriminated against rather than protecting competition in the marketplace. In most circumstances, price discrimination is not anticompetitive and yet, unlike the American *Clayton Act*, nothing in the provision requires any assessment of the effect of price discrimination on competition"[14] The Report notes "as it stands, it is probable that the [price discrimination] provision discourages pricing practices which are not harmful to competition, imposing unnecessary compliance and monitoring costs on business. Because breach of the price discrimination provision carries the stigma of a criminal offence it may strongly deter behaviour which approaches price discrimination but which would be pro-competitive. This criminal stigma is not appropriate,

even where price discrimination is anticompetitive, because it is not inherently criminal in the way that an agreement to fix prices is".[15]

The provision imposes excessive compliance and monitoring costs on businesses. Because price discrimination is a criminal offence, this chilling effect is exacerbated. The Report concludes that given the weaknesses in the criminal price discrimination provisions, it is likely appropriate that the Bureau has not taken significant enforcement action under the existing provision.

Predatory Pricing

The Report commences its discussion of predatory pricing with a review of the basic economic requirements for predation. These are:

1. market power, defined by reference to market shares and barriers to entry;
2. a policy of selling at prices below some measure of the predator's cost
   (a) where sales are at prices below average total cost and the predator has no pro-competitive explanation, such as:
      (i) meeting competition or changes in demand conditions; or
      (ii) excess supply; or
   (b) where sales are at prices below average variable costs; and
3. evidence of predatory intent.[16]

The Report notes that the predatory pricing provision is startlingly broad. It criminalizes the intention to eliminate a competitor, or the elimination of a competitor, or the intent to lessen competition, without any of these things having had any economic effect in lessening competition where prices are "too low" That is, it prohibits low pricing policies designed to substantially lessen competition or eliminate a competitor, whether or not they are likely to actually do so, and prohibits policies which do eliminate a competitor, whether or not they substantially lessen competition.[17] As the Report notes,

> In the absence of an analytical framework for determining when prices are unreasonably low, the provision is potentially extremely broad. Any intention to eliminate a competitor or the elimination of a competitor in fact, combined with low prices may be sufficient for liability. While efficiency concerns might argue in favour of a regime which prevented below cost pricing which had the effect of eliminating a more efficient, vigorous or innovative competitor, the existing provision protects all competitors, regardless of the overall effect on competition or efficiency. To this extent, the provision is in conflict with the economic analysis of predation based on efficiency.[18]

Indeed, this is a criticism which has been advanced previously.[19]

The Report notes that, as in many other areas of competition law, problematic predatory pricing is difficult to identify. It may have the effect of deterring entry or discouraging price competition, but low prices are very often also the very essence of aggressive competition.

The Report states that traditional economic thinking has been that predatory pricing is likely to be very rare. However, there is recent thinking which argues that because information is not complete and because capital markets are not perfectly efficient, predation may be more likely to be effective than was previously thought, particularly if the predator has better access to capital than does the victim. As well, there is an argument that recoupment of losses incurred by predation is possible if the predator establishes a "reputation for toughness" which either deters entry or deters aggressive pricing competition.

The Report examines in some detail the difficulty in identifying predatory pricing conduct and distinguishing it from a normal competitive response. This involves consideration of the appropriate cost standard against which prices are measured (average total cost; marginal cost/average variable cost; or prices in the "gray zone" between these two). As well, evidence of intent is often used or attempted to be used to prove predation, although as the Report notes, "the difficulty with such an approach is that it is often impossible to produce reliable evidence of intent. On the one hand, the language of the marketplace is not precise and aggressive competition may be expressed in language which sounds predatory. On the other hand, sophisticated business people may be able to disguise intent effectively."[20]

The Report comments, as it did with respect to the PDE Guidelines, on the *Predatory Pricing Enforcement Guidelines* (the "PPE Guidelines").[21] It briefly summarizes the approach outlined in the PPE Guidelines. In that regard it notes that the two year time period for entry, articulated in the *Merger Enforcement Guidelines*[22] and adopted in the PPE Guidelines for the purpose of assessing barriers to entry (that is, are barriers sufficiently low that price increases following the predatory campaign will invite entry into the industry on a sufficient scale, within two years, to ensure that price increases could not be sustained) has been criticized as unduly rigid. The time period should, in the view of the authors, depend on the facts of the particular case.

The Report notes that while the PPE Guidelines specifically support a market power test in enforcing the predatory pricing provision, there is no market power test enunciated in the statute. The importation of that test is justified by the "unreasonably low" language of the statute. While this may be an economically sensible approach to the statute, it is not the interpretation which one would have given it as a matter of first impression.

With regard to the cost/price comparison (that is, in deciding if prices are unreasonably low one compares the price charged to some measure of cost), the Report notes that the PPE Guidelines do not indicate what time frame will be employed in determining the relevant level of costs against which one

should measure price. It argues that the only economically rational time frame in which to examine this question is the reasonably anticipated long run costs, but that the PPE Guidelines do not articulate such a time frame for costs.

The Report is broadly supportive of the approach taken in the PPE Guidelines. However, it notes that to some degree the PPE Guidelines have had to stretch the language of the statute in order to achieve an economically rational result. The Report notes that if there were an intent to eliminate a competitor, but on any rational analysis the effort could not succeed, or could not result in any economic harm, the PPE Guidelines would conclude that there was no offence, but the statute as written is not so clear.

With regard to the new economic theories of predation noted above, the Report notes that the PPE Guidelines do not consider questions of reputational effects created by predation, or the possible leveraging of predation across various markets. The Report argues that these should be reflected in the PPE Guidelines.

As well, the Report argues that the question of predation and below cost selling may not translate particularly well into the information economy, where up-front investment costs are very high but marginal costs are trivial. The Report also argues that the possibility of recoupment through non-price predation strategies ought to be considered by the PPE Guidelines. Establishing a product standard by gaining market share which can be used in other markets, may make predation a rational strategy, even absent traditional recoupment.

Dealing with predation under section 79 of the Act (abuse of dominant position) may be appropriate, according to the Report, because there is a market power test as part of the abuse of dominance provision. The lower burden of proof in a civil matter is appropriate given the contestable nature of claims regarding predation. However, given the Tribunal's unwillingness to set pricing by way of its Orders, finding a remedy for predatory pricing under the reviewable practices provision may be difficult. As with price discrimination, the Report is not entirely clear as to whether it would be preferable to create a new reviewable conduct provision to address predation specifically, or to address predation under the existing abuse of dominance provision.

With regard to the Bureau's predatory pricing enforcement practices, the Report notes that during the period of investigation, 382 complaints (or 41% of the total pricing complaints reviewed by the Bureau) were with respect to predatory pricing, but that there were virtually no formal enforcement proceedings taken by the Bureau. It suggests that the Bureau might wish to be somewhat more aggressive in its pursuit of predatory pricing cases. Formal enforcement proceedings would be of benefit because they would increase the level of jurisprudence related to the provision. Greater certainty as to the provision through the development of jurisprudence would encourage more private actions.

Private parties, however, are free to initiate predatory pricing cases with or without public enforcement. Further, the criminal burden of proof, about which the Report expresses concern, is not present in a civil case. The fact that there are relatively few civil predatory pricing cases may provide argument that predatory pricing, at least as defined by the Act as it now stands, is in fact rare. Consequently, while we agree with a number of the Report's observations with respect to predatory pricing, we express some skepticism that more aggressive enforcement of the existing provision is likely to improve economic efficiency.

Price Maintenance

The third broad topic addressed by the Report is the price maintenance offence.

A central feature of the Report, in relation to price maintenance, is its strong endorsement of the use of the price maintenance provision in respect of horizontal conduct. It states that "horizontal price maintenance is unambiguously anticompetitive and it is appropriate to prohibit it on a *per se* basis as in the present provision, though consideration should be given to developing an enforcement policy and possibly guidelines to address the relationship between horizontal price maintenance and the conspiracy provision".[23] In further recognition of the potential inconsistency between sections 45 and 61 of the Act, the Report states that "dealing with horizontal price maintenance under a *per se* rule, however, would appear to undermine the operation of the conspiracy provision, which subjects price fixing to a competitive effects test. An assessment of the relative merits of the two approaches is beyond the scope of this study".[24] The Report suggests guidelines to address the interaction of sections 45 and 61.

It is submitted that this inconsistency is deserving of more than merely guidelines, but in fact statutory amendment. Since the Report clearly recognizes the issue, it is unfortunate that it did not offer some suggestions to address the dichotomy. It has been argued that it is improper, for reasons of appropriate statutory interpretation, to apply section 61 in a horizontal context at all.[25]

We may see a proposal to amend the conspiracy provisions of the *Competition Act* in the next round of proposed statutory amendments. That may, indirectly, address the issue of inconsistency between sections 61 and 45, although we fear that the problem is likely to persist. While the Bureau's use of section 61 in a horizontal context has not given rise to significant issues to date, because in our view the Bureau has been sensitive to the potential inconsistency between sections 45 and 61, the wording of the provision and the fact that it can be the subject of civil actions gives rise to significant potential for conflict.

Turning to vertical price maintenance, the Report points out that this represents a difficult area of economic and legal analysis. It notes that the rationale for prohibiting vertical resale price maintenance is that it lessens competition by restricting the ability of resellers to compete on price, thereby potentially leading to high margins for retailers. As well, there may be resource mis-allocation as retailers direct excessive resources to non-price competition. Also, price maintenance

may be instituted by a supplier, under pressure from a large customer or customers, and thus may be a mechanism for achieving a horizontal pricing arrangement (the cartel ringmaster theory).

On the other hand, the Report notes that price maintenance may be engaged in by suppliers wishing to encourage competition on matters other than price so as to achieve an economically efficient outcome. For example, it may be designed to eliminate free rider problems or it may be undertaken to maintain brand image.[26] Suppliers may also engage in price maintenance in order to encourage an expansion of distribution for their product.

A reason not expressly articulated by the Report, but which is illustrated in the Multitech Warehouse case,[27] is that goods which tend to be discounted are less attractive to retailers (or distributors) and therefore retailers or distributors will tend to sell the higher margin product and perhaps use the lower margin product as loss leader or quasi loss leader items.

The Report notes that the lack of a substantial lessening of competition test or other market power or economic screen in the definition of price maintenance means that the blanket prohibition in the *Competition Act* is not consistent with any meaningful economic rationale for the provision. The Report also notes that the offence, as a *per se* offence, is defective in that it does not permit suppliers to take advantage of efficiency-based defences such as encouraging customers to devote more resources to the provision of customer service. It also notes the anomaly that the "defences" (which are not full defences in any case) in section 61(10) apply only to the refusal to supply offence and not to the basic price maintenance provision itself. Further, the "defences" in section 61(10), while helpful, are not sufficiently wide to accommodate a full economic rule of reason defence. Ultimately, the Report notes that the provision is economically irrational in that it does not require market power for there to be an offence.

With regard to enforcement, the Report notes that approximately half of the total pricing complaints received during the period of inquiry dealt with price maintenance. While relatively few formal enforcement proceedings were taken under any of the price maintenance, price discrimination or predatory pricing provisions, a significant number of price maintenance complaints were resolved through alternate case resolutions. Of 461 price maintenance complaints during the period of study, there were three formal proceedings, but 77 alternate case resolutions.

Further, the Report notes that formal enforcement of the price maintenance provisions (by way of criminal prosecutions) used to be quite common, but that that has changed significantly. The Report questions the relative lack of formal prosecution, particularly given the significant number of price maintenance cases in the past. It suggests that formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law and would signal the seriousness of the Bureau's intent to enforce it. More cases would also expose the weaknesses in the law which would, in turn, be an important catalyst for law reform.[28] However, as noted above, alternate case resolution approaches have become common in respect of price maintenance, and are apparently successful. Given the existing substantial case law with regard to price maintenance, while the Report suggests that more

formal enforcement would be appropriate, it also states that the Bureau's focus on alternate case resolution appears to be appropriate. In this regard it is not clear whether the Report suggests that more prosecutions would be desirable, given that the substance of the provision, except in its horizontal aspect, is subject to significant criticism in the Report.

The Report concludes that it would be appropriate to treat price maintenance as a reviewable practice, assessed under a rule of reason as are other vertical restraints in the *Competition Act*. This might be possible under the abuse of dominant position provision of the Act, as this section contains within it a requirement to assess market power and anti-competitive effects, or it might be the subject of a specific reviewable practice provision.

Challenges of the New Economy

In addition to reviewing the three primary pricing provisions of the *Competition Act* (price maintenance, price discrimination and predatory pricing) and the abuse of dominance provision, the Report focuses to a significant degree on what it refers to as "challenges of the new economy". These include, in the authors' view, accelerating technological change, low marginal costs, short lived market dominance and the importance of industry standards. That is, intellectual property is expensive to develop but cheap to reproduce (computer software being a paradigm example). Firms will invest a great deal of money, losing money in the short-term, in order to make their software a standard and achieving significant rewards by selling huge volumes of the product at prices well above its marginal cost but at declining absolute prices given the significant fixed but very low marginal cost of production. At the same time, new standards may come along displacing the dominant provider with another dominant provider of a competing standard at any time.

The Report notes that given these significant developments in the economy, the Competition Bureau's job in enforcing antitrust rules, including those with respect to pricing, is increasingly challenging. As well, given the rapidity of change, the Bureau's ability to enforce the law in a meaningful way and in a meaningful time frame is being challenged. This suggests that competition authorities should increasingly emphasize dynamic efficiency goals in their enforcement analysis. This is a view with which we strongly concur.[29] However, as always, the devil is in the detail. The Report does not offer views as to how the Bureau is to determine, in a rapidly evolving environment, when a supplier is entrenching a standard through anti-competitive means, thereby preventing the dynamic development of replacement standards, and when there is simply the proper unfolding of standards-based competition. We do not suggest that this is a deficiency of the Report, as these are matters of tremendous complexity. We simply note that the challenges which face antitrust officials in this so called new economy are significant, and that while dynamic efficiency concerns are critical, recognition of that fact does not necessarily suggest an appropriate enforcement response in any given circumstance. It does, however, help to ensure that a sufficiently broad survey of the marketplace conditions is undertaken.

Miscellaneous Comments

The Report touches on a number of other areas which are worthy of note. One of these, as the Report states, is that "the central debate regarding the design of competition law rules is what behaviour should be simply prohibited *per se* as opposed to dealt with on the basis of all the circumstances of each particular case".[30] That is, whether the *per se* or rule of reason approach is better suited to dealing with alleged anticompetitive pricing or indeed antitrust issues more generally. This discussion involves assessing the well known trade-off between the certain and relatively simple analysis involved in a *per se* approach, with its concomitant disadvantages of being either under or over inclusive; as against a rule of reason analysis, which tends to be very fact specific, complex, expensive and uncertain, but more appropriately targeted to anticompetitive conduct. The Report leans strongly to a rule of reason approach, noting that *per se* rules tend to catch more conduct than an economically efficient analysis would suggest is appropriately challenged. This results in punishment of behaviour which competition policy seeks to promote, and also has a chilling effect on the marketplace more generally, discouraging pro-competitive behaviour where there is a risk that there will be a criminal prosecution. In resolving this debate the authors lean to a rule of reason approach because bright lines are harder and harder to draw as economic understanding of anticompetitive practices develops.

This conclusion is also supportive of the second general thrust of the Report, which is to suggest a reviewable practice rather than criminal treatment for the pricing provisions. This suggestion is made both in order to apply a lower standard of proof appropriate to rule of reason conduct and also because a criminal stigma, associated with a rule of reason analysis, seems to the authors to be inappropriate. The Report notes that price discrimination, predation and price maintenance are not inherent criminal activities as "none involves the moral turpitude associated with conspiracy or bid-rigging".[31] Finally, the Report notes, in our view correctly, that it is inconsistent and illogical to deal with some vertical practices (price maintenance or price discrimination) on the basis of criminal provisions but other vertical practices (such as tied selling, market restriction, exclusive dealing or refusal to deal) on the basis of a reviewable practice.

Another conclusion of the Report is that the Bureau has not, of late, attempted in any significant way to develop a focussed expertise respecting the various pricing provisions, or with respect to industry areas. The Report suggests that greater efforts need to be made to capitalize on industry specific wisdom developed within the Bureau. It argues that more effective marshalling of industry specific expertise is important to ensuring that the Bureau can make accurate judgements with respect to the high volumes of complaints received, particularly with respect to alleged predation. While this may be true as a formal matter, our practical experience is that the Bureau does have fairly good expertise developed with respect to many important areas of the economy.

The Report concludes that the guidelines with respect to price discrimination and predatory pricing have been very effective in determining enforcement priorities and providing guidance to the business community in a much more cost effective way then litigation would have been. However, as the

Report notes, guidelines are not binding either on public or private litigants, nor can they correct underlying problems with the law as written. The Report argues that in order for guidelines and other voluntary compliance strategies to be successful, they must be accompanied by formal enforcement activity in order to show that formal enforcement is a credible threat and in order to clarify the law. This formal enforcement activity may also encourages law reform, insofar as enforcement activity demonstrates weakness in the law as it now exists. On the other hand, the Report notes that increased litigation would impose an enormous resource demand on the Bureau which would have to be addressed if the Bureau is to undertake more formal enforcement.

As noted above, the area which the authors believe to be most appropriate for increased enforcement activity is predatory pricing. The Report notes that one possible solution may be to permit private access to the Tribunal, as recommended by Roach and Trebilcock.[32] Presumably this is in the context of the pricing provisions having been made reviewable practices. We have argued elsewhere[33] that private access to the Tribunal is not in the public interest. However, in relation to the pricing provisions which were the focus of the Report, private enforcement is already an option. Consequently, it is unclear to us why transforming the existing criminal provisions into reviewable practices which might be taken before the Tribunal, and allowing private parties the right to do so, would likely significantly increase private enforcement activity in respect of these provisions.

The Report also notes that "the Bureau needs to find a more effective communications strategy to make the *Act* and the role and practice of the Bureau better understood by the business community and the public. [footnote omitted] In particular, the independent business community seems to feel that the Bureau is not enforcing the *Act* in a manner which lives up to the promise of the purpose clause and the language of the pricing provisions".[34] The Report acknowledges that the Bureau's work has become more transparent of late, but takes the view that additional work has to be done.

While it is difficult to argue that better communication would not be a good thing, in our experience the Bureau has significantly improved the communication of its work over the last few years. However, neither the public, nor the press, nor political actors, nor the small business community, it seems to us, are listening, or are particularly interested in listening. Detailed technical analysis is necessary for the work of the Bureau, as the Report itself notes. That detail will become more technical, not less, if the Report's recommendation of a greater application of rule of reason analysis is adopted. In our view it is not so much a lack of communication that is the problem, but rather the fact that the *Competition Act* is not designed to and, in our view and the view of the Report's authors, ought not protect certain economic actors from changes in the economy and their displacement in the distribution chain. No matter how many inquiries into gasoline pricing occur, for instance, it seems impossible to convince the press, the public and indeed politicians that there is not some ongoing impropriety. This is not, we submit, as a result of insufficient or poor communications by the Bureau, but rather the unwillingness in certain constituencies to accept the logic of the very economic analysis the authors of the Report argue must underlie enforcement of the Act.

Conclusions

It is difficult to summarize the Report in any abbreviated form. Nevertheless we have attempted to reflect some of its most significant conclusions in this note, and also to provide our commentary on aspects of the Report.

As an overall matter, the recommendations call for specific improvements to remove anomalies in the various pricing provisions; suggest amendments to the enforcement guidelines; suggest some changes in enforcement practices (particularly with respect to predatory pricing); call for the application of civil rather than criminal law to the pricing provisions; and suggest that price maintenance, price discrimination and predatory pricing could be dealt with under the abuse of dominance provisions.

It is frankly not entirely clear, at least in our reading of the Report, whether the authors favour revised but specific reviewable practice provisions in respect of each of price maintenance, price discrimination and predatory pricing, or prefer that they be dealt with under the general abuse of dominance provision. Assuming the abuse provision to be the vehicle, as the Report acknowledges, this vehicle may not be ideal in some cases, particularly given the indication in *NutraSweet*[35] that typically at least competitors are the "victim" in abuse cases. That analysis works quite well with regard to predation, but not as well with respect to price maintenance and price discrimination.

We believe that the geographic price discrimination provision (section 50(1)(b)), more so even than the price discrimination or predatory pricing provision, cries out for reform, as it requires only that there be differential prices in different regions of the country in order for there to be liability. This section does not benefit from the flexibility which the word "unreasonably" in the predatory pricing provisions gives to the enforcement provision. In our view, therefore, the Report missed a golden opportunity to address this provision. The Report, somewhat disappointingly, does not refer to any significant degree to either the geographic price discrimination provision (section 50(1)(b)) or the discriminatory allowances provision (section 51).

We have argued that significant reform of the pricing laws is appropriate. Our views are set out elsewhere in some detail,[36] but in summary we believe an efficient approach would simply be to repeal the price discrimination, discriminatory allowances and geographic discrimination provisions. With regard to predatory pricing, while we do not take serious issue with the approach in the Report, we think a more focussed and perhaps more achievable amendment would simply be to make it an offence to engage in predatory pricing, as currently defined, which has the effect or tendency of substantially lessening competition. We would delete the offence of eliminating a competitor, and the offence of intending to lessen competition or eliminate a competitor.

With regard to price maintenance, we agree with the authors of the Report that there exists a fundamental inconsistency between the Act's approach to other vertical practices and vertical price maintenance. We would seek to have that inconsistency remedied by making vertical price

maintenance also a reviewable practice. We also agree with the Report's authors that there is a need to clarify and improve some aspects of the price maintenance law.

As noted at the outset, whatever particular comments or minor caveats one might offer with respect to the Report, there is no doubt that the Bureau, and the authors of the Report, have done everyone interested in competition policy in Canada a significant service in stimulating debate on this very important topic. It may be that by the time this article is published the Bureau's proposals for the next round of *Competition Act* amendments will have been made public. At the time of writing the proposals were not public, but it was not anticipated that the pricing provisions of the Act, except by way of amendment to section 45, were likely to be the focus of such proposals. Nevertheless, as the Report points out, there are very significant issues raised by the existing pricing provisions. These are likely not, dare we say, the issues which the members of the House of Common's Industry Committee anticipated might be the focus of consideration when they proposed a review of the Bureau's practices in this area. Nonetheless, we think that the Report has indeed focused on the key issues, and by so doing has done us a great service. To the extent that we may quibble with minor aspects of the Report, nevertheless the overall thrust and importance of the work is beyond question. It is our hope that the Report may lead to a serious re-examination of the pricing provisions as part of the ongoing debate respecting *Competition Act* amendments.

APPENDIX A

Recommendations

Price Discrimination

1. In order to target anticompetitive conduct accurately, competition rules dealing with price discrimination

   (a) should apply to
   (i) all products, including articles and services,
   (ii) all forms of transactions, not just sales,

   (b) should not apply to
   (i) differential pricing by a supplier justified by differences in the cost to the supplier of serving different customers,
   (ii) price differences which are a temporary expedient or a defensive competitive response,

   (c) should take into account
   (i) the market power of the supplier, including the availability of alternative sources of supply, and
   (ii) the competitive effects of the price discrimination.

2. Price discrimination should not be a criminal offence but should be subject to civil review.

3. Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 1, but revision of the criminal price discrimination provision, section 50(1)(a), should be considered in the next round of amendments to the *Competition Act*.

4. The *Price Discrimination Enforcement Guidelines* should be revised to

   (a) provide guidance regarding the application of the abuse of dominance provision, section 79, to price discrimination, including an analytical framework for the assessment of market power and competitive effect under section 79,

   (b) modify the analysis of the circumstances in which price concessions are considered to be available to competing customers in a manner more consistent with the *Act* by revising the requirement that any concession unilaterally offered to one customer be offered to all others and

   (c) modify the analysis of transactions between affiliates, sales to franchise systems and international volume discounts to more accurately reflect the commercial law definition of sales.

Predatory Pricing

5. In order to target anticompetitive conduct accurately, competition rules dealing with predatory pricing should take into account

   (a) the market power of the alleged predator including the prospect for the predator to recoup the costs of its low pricing policy,

   (b) the degree to which the predator is selling below its costs and

   (c) evidence of predatory intent.

6. Predatory pricing should not be a criminal offence but should be subject to civil review.

7. Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 5, but revision of the criminal predatory pricing provision, section 50(1)(c), should be considered in the next round of amendments to the *Competition Act*.

8. The *Predatory Pricing Enforcement Guidelines* should be revised to

   (a) provide guidance regarding the application of the abuse of dominance provision, section 79, to predatory pricing, including an analytical framework for the assessment of market power and competitive effect under section 79,

   (b) expand the discussion of how firms may create strategic barriers to entry by their behaviour, such as by creating a reputation for predation, to reflect current economic thinking regarding the broader range of circumstances in which predation may occur and

   (c) provide guidance on the application of the *Guidelines* to industries most affected by the accelerating pace of innovation and the other characteristics of the new economy.

9. The Bureau should consider adopting a more aggressive approach to initiating formal enforcement actions in predation cases, taking due account of budgetary implications and competing priorities.

Price Maintenance

10. In order to target anticompetitive conduct accurately, competition rules dealing with vertical price maintenance should take into account

    (a) the market power of the supplier, including the availability of alternative sources of supply, and

(b) the competitive effects of the price maintenance, including any efficiency based explanations.

11. Vertical price maintenance should not be a criminal offence but should be subject to civil review.

12. Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 10, but revision of the criminal price maintenance provision, section 61, should be considered in the next round of amendments to the *Competition Act*.

13. Consideration should be given to the development of guidelines regarding the application of section 79 to price maintenance cases, including an analytical framework for the assessment of market power and competitive effect under section 79.

14. Consideration should be given to developing guidelines to address the relationship between the current criminal provision, section 61, as it applies to horizontal price maintenance, and section 45, dealing with conspiracies and agreements to lessen competition.

General Recommendations

15. The apparent conflicts between the promotion of efficiency and the protection of competitors which exist in some circumstances under the existing criminal provisions dealing with price discrimination, predatory pricing and price maintenance should be resolved by the courts, the Competition Tribunal or through legislative reform.

16. The Bureau should ensure that its guidelines, policies and practices regarding enforcement give appropriate emphasis to dynamic efficiency considerations and the characteristics of the new economy including (i) high rates of innovation, (ii) marginal costs declining or zero for additional units of output, (iii) the possible desirability of market dominance by a firm where it sets a new industry standard and (iv) the increasingly fragility of dominance.

17. The Bureau should increase its efforts to develop industry specific expertise in order to ensure that officers are equipped to make accurate assessments in a timely manner.

18. The Bureau should develop a more effective communications strategy to promote better understanding of the *Competition Act* provisions and the activities of the Bureau regarding anticompetitive pricing, with a view to encouraging compliance, enhancing the legitimacy of the Bureau's activities and providing an informed basis for public discussion.

Notes

[1] VanDuzer, J.A. and Paquet, G. "Anticompetitive Pricing Practices and the *Competition Act*: Theory, Law and Practice" October 22, 1999 (hereinafter the "Report").
[2] See Musgrove, J.B. "The Change of Price: Some Modest Proposals to Amend Canada's Pricing Laws", (1995-96) 16:4 Can. Comp. Rec. 66; Musgrove, J.B. "Pricing in the Distribution Chain: Re-righting Canada's Pricing Laws" Insight Conference, June 12, 1996; and Musgrove, J.B. and Hughes, R. "Pricing and the Canadian Competition Act" Insight Conference - Competition Practices for Canadian Companies, Dec. 2–3, 1999.
[3] Report, at 3.
[4] *Ibid.*
[5] Section 1.1 provides that a purpose of the Act is to "expand opportunities for Canadian participation in world markets"
[6] *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition. Trib.)
[7] *Ibid.* at 339.
[8] Report, at 8.
[9] It may be argued, as well, that a meeting competition defence may arise through the use of the word "available", in that competitors which have received a *bona fide* third party offer will obtain a lower price, and that lower price is available to any such competitor who has such third party offer. This interpretation has not received judicial sanction but, we submit, is consistent with the wording of the provision, and the approach of the *Price Discrimination Enforcement Guidelines*.
[10] *Price Discrimination Enforcement Guidelines* (Ottawa, Competition Bureau and Industry Canada, 1992).
[11] Report, at 26.
[12] Report, at 27.
[13] Report, at 72.
[14] Report, at 30.
[15] Report, at 31.
[16] Report, at 12.
[17] Report, at 37-38.
[18] Report, at 40.
[19] *Supra*, note 2.
[20] Report, at 11.
[21] *Predatory Pricing Enforcement Guidelines* (Ottawa, Competition Bureau and Industry Canada, 1992).
[22] *Merger Enforcement Guidelines* (Ottawa, Competition Bureau, 1991).
[23] Report, at 78.
[24] Report, at 46.
[25] See Graham, B. "Horizontal Restraints – Canada and the United States" Insight Competition Law Conference, March 10, 1994.
[26] See *R.* v. *Must de Cartier Canada, Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Ct. Prov. Div.)
[27] *R.* v. *Multitech Warehouse (Manitoba) Direct Inc.* (1993), 51 C.P.R. (3d) 195 (Man, Q.B.)
[28] Report, at 69.
[29] See. D. H. MacOdrum and J. B. Musgrove "The Canadian Competition Bureau's Draft Intellectual Property Enforcement Guidelines: Implications for Canadian Intellectual Property Holders" Strategy Institute Conference, October 21, 1999.
[30] Report, at 19.
[31] Report, at 20.
[32] K. Roach and M. Trebilcock, "Private Party Access to the Competition Tribunal" (Ottawa, Industry Canada, 1996).
[33] Musgrove, J.B. "Remedies for Reviewable Conduct: Adjusting the Balance?", (1995) 16:2 Can. Comp. Rec. 34.
[34] Report, at 82.
[35] *Director of Investigation and Research* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.)
[36] *Supra*, note 2.

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