

## CANADIAN COMPETITION RECORD

**CANADIAN COMPETITION LAW AND  
POLICY DEVELOPMENTS****PRIVATE ACCESS TO THE  
COMPETITION TRIBUNAL HAS BEGUN**

By: Jo'Anne Streckf  
Bennett Jones LLP

After lengthy debate, private parties now have limited direct access to the Competition Tribunal. The amendments to the *Competition Act* and the *Competition Tribunal Act* contained in Bill C-23, which enable private parties to seek leave to commence an application pursuant to sections 75 and 77 of the *Competition Act*, came into force on June 21, 2002.

The first application pursuant to section 103.1 was filed just six weeks later on July 29, 2002. The applicant, Robert Gauthier, carrying on business as The National Capital News Canada, sought leave to bring an application pursuant to section 75 against the Honourable Peter Milliken, M.P., Speaker of the House of Commons. The application alleges that Mr. Gauthier has been substantially affected in his business and significantly precluded from carrying on business due to his inability to obtain full access to substantial supplies of information and to essential services (including a listing on the Press Gallery journalist list) that are provided to his competitors by the Speaker of the House of Commons. The application seeks an order providing full access to Press Gallery facilities and services.

On July 31, 2002, the Commissioner certified to the Tribunal, as contemplated in section 103.1(3), that Mr. Gauthier's complaint was not the subject of an inquiry or an inquiry discontinued because of a settlement between the Commissioner and the targeted person.

As a result, the Tribunal notified the applicant and respondent on August 7, 2002 that it could hear the application for leave. The respondent, who had fifteen days to make written representations, did not file a response with the Tribunal.

The leave application was denied by the Tribunal on December 13, 2002. Justice Dawson interpreted the test contained in subsection 103.1(7) for the Tribunal to exercise its discretion to grant leave as requiring the leave application to be supported by sufficient and credible evidence to give rise to a bona fide belief that (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in sections 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section.

In the circumstances of this case, Justice Dawson concluded that the applicant had failed to satisfy the second element of the test on the grounds that the remedy sought involved matters that were subject to parliamentary privilege and, therefore, could not be the subject of an order under section 75.

On January 10, 2003, Mr. Gauthier applied for judicial review of the Tribunal's decision. The Commissioner of Competition filed a Notice of Appearance on January 20, 2003, and advised that its position was "that judicial review was not available in the circumstances, pursuant to section 18.5 of the *Federal Court Act*" and that the Commissioner intended to move to quash the application if it was not abandoned.

---

## CANADIAN COMPETITION RECORD

**BOOK REVIEW: *THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY***

**By: Michael Trebilcock, Ralph A. Winter,  
Paul Collins and Edward M. Iacobucci  
(Toronto: University of Toronto Press, 2002.  
782 Pages)**

By: Howard I. Wetston, Q.C., Vice-Chair, Ontario Securities Commission  
Brian A. Facey, Ogilvy Renault

The discipline of economics plays a major role in the competition laws of Canada, the United States, and – albeit to a lesser but increasing extent – the European Union.<sup>1</sup> Welfare economics permits the identification of the economic harms and benefits, as well as the redistributive effects of market power.<sup>2</sup> Industrial organization economics and game theory provide insight into understanding the ability and incentives of firms to engage in unilateral and interdependent exercises of anticompetitive conduct.<sup>3</sup> The economics of decision theory can be helpful in designing optimal legal rules for antitrust cases.<sup>4</sup> And the economics of public choice theory can help inform the motivation for legislative reform as well as enforcement and policy decisions.<sup>5</sup>

In short, today, any serious treatment of a nation's competition laws must explain and examine the role of antitrust economics and its complex interplay with competition law and policy. *The Law and Economics of Canadian Competition Policy* (the "Text") does exactly that. The Text is rich in both economic and legal theory. It is an excellent contribution to Canadian legal scholarship in this area.

That is not to say that the Text is solely an academic work. We believe it will appeal to students, lay persons, economists, and lawyers on a pedagogical as well as a practical level. It is no easy task to explain

economic theory to non-economists and legal concepts to non-lawyers. This is a challenge, however, we believe the authors have met. Moreover, the authors do not shy away from taking positions and making policy recommendations where appropriate throughout the Text.

In reading the Text, one observes that it is well organized and displays a deep understanding and analysis of law and economics, and provides practical guidance for the reader. The depth of its research also makes the Text a useful resource and it will no doubt be the starting point for additional Canadian scholarship in this area. Each significant chapter discusses the economics of the particular law being addressed. At first blush this can appear to be somewhat repetitive, but on balance makes the book more user friendly because each chapter in the book becomes largely self-contained.

Chapter One begins with a brief history of Canadian competition policy and sets out the categories of reviewable matters and criminal offences. This is an informative chapter that draws on the authors' insights and sets the stage clearly for the remaining parts of the Text. It updates previous work on the historical perspective of competition policy in Canada and captures more recent developments. The first chapter concludes with a discussion of the role of economic theory in the evolution of competition policy, and the authors' views here flow partially from the objectives outlined in section 1.1 of the *Competition Act*.

The discussion of the role of economic theory in Chapter One connects well with Chapter Two. This chapter is among the best discussions of the basic economic concepts in competition policy in Canada to date. The first part contains a very useful review of the core concepts from economic theory: monopoly, rents and rent-seeking behaviour, static and dynamic

## CANADIAN COMPETITION RECORD

oligopoly, and monopsony. The second part of the chapter is more factual. In it, the authors introduce the concept of market definition and market power, as well as the critical pitfalls involved in analyzing these concepts.

Chapter Three examines horizontal agreements. It examines the economic theories that undergrid the law in this area and then turns to the current law and the cases to date. This is the useful and effective approach followed in most of the subsequent chapters. In their analysis of the economics of horizontal agreements, the authors examine the types and impact of cartel agreements, as well as the marketplace conditions that favour such agreements. Concepts from game theory are implicit in their analysis of the incentives for cartelisation, detection concerns, the incentives to cheat, and punishment problems.

The ensuing legal analysis focuses on the classes of horizontal agreements under the Act and certain proposals for reform. The discussion on multi-firm conduct represents a very useful discussion of horizontal agreements in Canada. Besides relying on abundant references, there is a good discussion of the policy issues associated with a *per se* versus partial rule of reason standard for horizontal agreement enforcement. The authors make a recommendation for reform and provide an analysis of the treatment of *per se* restraints and rule of reason analysis. This is obviously a hot topic these days in Canada. It is a topic on which there is no clear consensus<sup>6</sup>, but the authors express their view in a clear manner.

Chapter Four examines mergers and the merger review process, and has an excellent economic foundation. The authors review economic theories on the effects of mergers on competition, including the balancing of efficiency gains against the effects of a lessening of competition, and the efficiency trade-offs involved

where there is and is not market power in the pre-merger market. The authors do not stop at the theoretical level, and go on to discuss empirical evidence regarding the competitive impact of mergers, geographic and product market definition, barriers to entry and efficiencies. Their subsequent discussion of the law and guidelines on merger review is just as detailed, and they finish the chapter with a detailed critique of the merger review process.

With respect to the efficiency exception, the authors could perhaps have elaborated on the arguments presented in *Superior Propane*<sup>7</sup> in greater detail. The arguments in that case are useful in at least presenting the opposing theories on the efficiency exception and how to measure efficiencies and anticompetitive effects. They do, however, develop the analysis of the efficiency defence which was adopted in the initial Tribunal decision in *Superior Propane*. Unfortunately the book was obviously published prior to the re-hearing in *Superior Propane* and the subsequent re-hearing of the Commissioner's appeal.<sup>8</sup>

The merger review process described in Chapter Four will be of assistance to practitioners since there is considerable detail as to the process involved in merger review. The chapter demonstrates the expertise of the authors in being able to manage a topic which requires such extensive development in order to properly present a useful discussion of the merger review process. The chapter usefully critiques the merger review process and as in other areas presents policy recommendations for reform.

Chapter Five deals with predatory pricing and price discrimination separately. The chapter usefully describes the different theories of predation, including strategic behaviour theory. There is not much case law in this area. As such most of the work has been in the academic arena and policy development. Therefore

## CANADIAN COMPETITION RECORD

this chapter tends naturally to be more theoretical than some of the other chapters in the Text. The authors support to a considerable extent the predatory pricing guidelines of 1992 and suggest that there is a need to have a law with respect to predatory pricing. The policy thrust associated with strategic behaviour becomes the focus of some careful analysis by the authors and represents an important contribution to this area of competition policy. The cut-off date for the book unfortunately fell before the release of the Bureau's draft *Unreasonably Low Pricing Guidelines*, as no doubt the authors would have offered valuable comments on the draft.

The portion of the chapter dealing with price discrimination is revealing. Economic thinking about price discrimination appears to be at odds with the law as set out in the Act. The authors appear to agree with the price discrimination guidelines in that they limit considerably the impact of the section in the Act. The economic analysis is extensive in this part of the Text. Once again, as in other parts of the book, the authors make policy recommendations here. As the authors note, an overall conclusion about Canada's price discrimination laws comes in "good news bad news" form. The bad news first. The law purports to address secondary line injury to competition. It offers no guidance as to what the injury to competition as opposed to competitors is. The law's considerable limitations provide the good news: the availability of numerous exceptions. The authors note that if the law is to exist at all, its limitations are welcome.

Price maintenance, market restrictions and refusals to deal are the subject of Chapter Six. The discussion on vertical restraints and intra-brand competition is helpful and insightful, and included in it is a discussion of the classic free rider problem. The authors also provide a thought provoking analysis of the correlation of product information costs and price information costs. The

partition of consumers into purchase decision sets contributes significantly to the discussion of intra-brand competition and the free rider problem.

The authors have also devoted considerable attention to refusals to deal. The recommendation that efficiency arguments play a role in refusal to deal and the policy recommendation that the statute be amended to contain a substantial lessening of competition test are compelling. Since publication, of course, a competitive effects test of sorts has been enacted; however, it has used the term "adverse" effect on competition, as opposed to the more well known concept of substantial lessening of competition.<sup>9</sup>

Chapter Seven focuses on exclusive dealing, tied selling and where relevant, abuse of dominance. The chapter describes in very precise terms the focus on exclusivity as a general vertical restraint. While the economics in the chapter is somewhat repetitive, that is not a negative comment. The Act is somewhat repetitive in a number of areas (hence the frequent call to lump these items into the abuse of dominance provisions) and as such the Text tracks some of that. Importantly, as noted by the authors: "In no area of competition law is economic analysis more important than in the area of vertical restraints on inter-brand competition, given the inherent ambiguity of the competitive impact associated with such conduct." While the economic theory of vertical restraints is important, it is by no means certain or without controversy.<sup>10</sup> This chapter will assist economists, lawyers and adjudicators alike to engage in the type of economic analysis that is essential to determine the impact of such conduct.

Abuse of dominance is the focus of Chapter Eight. Because exclusionary market power is harder to pin down in terms of economic theory than say, cartel behaviour or mergers, the authors concentrate more on legal questions. One strength of this chapter is the

## CANADIAN COMPETITION RECORD

discussion of anticompetitive acts not enumerated in section 78. The analysis of the enforcement guidelines on the abuse of dominance provisions provides an excellent overview of the law and policy in this area. The analysis of the so-called essential facilities doctrine is first class. A real strength of this chapter is not only the description of anti-competitive acts but also the theory underpinning them. Of great value to the reader is the fact that one gets a good sense of what may be found to be an anti-competitive act and what may not.

In the next three chapters the authors discuss three areas where Canadian competition policy overlaps with other economic regulation: intellectual property rights (Chapter Nine), international trade policy (Chapter Ten) and regulated industries such as telecommunications (Chapter Eleven). The chapter on regulated industries is particularly noteworthy and will appeal to those who have an interest in economic regulation, which, of course, is extensive in Canada.

The final chapter, Chapter Twelve, concerns enforcement. The chapter is perhaps out of place in a text such as this, but on balance it would have been an oversight not to include one. The chapter as presented is useful to the non-expert or student of competition law for its practical utility. It does not present an economic analysis of the enforcement tools or processes under the Act, except for a discussion of the theoretical debates surrounding private enforcement and private access to the Tribunal.

In general, the concepts in the Text are presented in a clear manner and are underpinned by a thorough analysis of the issues. The authors have in many areas not only presented their views of economic theory, legal theory, and their interrelationship, but also have provided helpful views as to the strengths and weaknesses of various policy statements and guidelines of the Commissioner of Competition. Moreover, it is

important to know not only the theory but also how in fact things have worked out in decided cases and decisions. Where appropriate, the authors have done an excellent job in this regard.

This work will appeal to a broad readership. Those with a serious interest in the subject, such as lawyers and economists, are an obvious audience. We include in this group, government officials. Due to the increasing interface between competition policy and other fields, such as intellectual property and trade policy, it will be useful for those who practice in those fields too. However, it will also be useful to students in the faculties of law, economics and business. Although the economic analysis of competition law and policy is itself in a constant state of flux,<sup>1</sup> the authors have demonstrated that the economic analysis of antitrust law is not a leap of faith, but is instead a rich and understandable paradigm within which to assess and define competition policy.

### Notes

<sup>1</sup> See ABA Section of Antitrust Law, *Competition Laws Outside the United States* (2001) at Canada-17 and European Union-16 (summarizing the role of economics in Canada and the European Union). The recent decision of the European Court of First Instance in *Airtours PLC v. Commission*, [2002] 5 C.M.L.R. 7, may signal a shift in Europe to a more economics-based approach, as the court seems to require that of the E.C. See also E. Gellhorn & W.E. Kovacic, *Antitrust Law and Economics*, 4<sup>th</sup> ed. (St. Paul, MN: West Publishing Co., 1994), for an excellent and concise treatment of this topic from a U.S. standpoint.

<sup>2</sup> See J. Church & R. Ware, *Industrial Organization: A Strategic Approach* (Boston: McGraw-Hill, 2000); and O. Williamson, "Economies as an Antitrust Defense: The Welfare Trade-Offs" (1968) 58 Am. Econ. Rev. 18 at 36.

<sup>3</sup> See A.K. Dixit & B.J. Nalebuff, *Thinking Strategically: The Competitive Edge in Business, Politics, and Everyday Life* (New York: Norton, W.W. & Company, Inc., 1991). See also T.G. Krattenmaker et al., "Airlie House Conference on the Antitrust Alternative: Monopoly Power and Market Power in Antitrust Law" (1987) 76 GEO. L.J. 241.

<sup>4</sup> See J.B. Baker, "Promoting Innovation Competition Through the Aspen/Kodak Rule" (1999) 7 Geo. Mason L. Rev. 495; T.J. Muris, "The FTC and the Law of Monopolization" (2000) 67

## CANADIAN COMPETITION RECORD

Antitrust L.J. 693; and C.F. Beckner III & S.C. Salop, "Decision Theory and Antitrust Rules" (1999) 67 Antitrust L.J. 41.

<sup>5</sup> See M.J. Trebilcock & R. Howes, *The Regulation of International Trade* (London: Routledge, 1995) at 14. See also R.A. Posner, *Economic Analysis of Law*, 3<sup>rd</sup> ed. (Boston: Little, Brown and Company, 1986) at 571-572. See also F. Mathewson, "Competition Policy in the Menu of Government Actions" in R.S. Khemani & W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) at 14.

<sup>6</sup> See B.M. Graham, "Reform of Section 45 is Unnecessary" in this issue of the Record. See also R.W. McCrone, Competition Bureau, "Reform of Section 45 of the *Competition Act* – A Bureau Review" (Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, Ontario, October 2002). See also Bill C-472, *An Act to Amend the Competition Act* (conspiracy agreements and right to make private applications), the *Competition Tribunal Act* (costs and summary dispositions) and the *Criminal Code* as a consequence 48-49 Elizabeth II, 1999-2000, available at the Competition Bureau's website <http://strategis.ic.gc.ca/SSG/ct01252e.html>

<sup>7</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.*, (2002), 18 C.P.R. (4<sup>th</sup>) 417 (Comp. Trib.), (2001), 11 C.P.R. (4<sup>th</sup>) 289 (F.C.A.), rev'g (2000), 7 C.P.R. (4<sup>th</sup>) 385 (Comp. Trib.).

<sup>8</sup> The Commissioner's appeal was heard during the week of November 25, 2002, in Ottawa, Ontario.

<sup>9</sup> See Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act* 49-50-51 Elizabeth II, 2001-2002 which amended *inter alia* Subsection 75(1) of the Act by adding the following after paragraph (d): "(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market," available at the Competition Bureau's website <http://strategis.ic.gc.ca/SSG/ct01252e.html>

<sup>10</sup> See R.H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978); see also M.H. Riordan & S.C. Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach" (1995) 63 Antitrust L.J. 513.

<sup>11</sup> See, for example, O.E. Williamson, "The Merger Guidelines of the U.S. Department of Justice – In Perspective" (20<sup>th</sup> Anniversary of the 1982 Merger Guidelines, 10 June 2002) (noting the now firmly established role of economics in antitrust, but observing that "[a]ntitrust economics cannot settle for the quiet life but needs to remain in the vanguard").

---

## CANADIAN COMPETITION RECORD

### INFORMATION NOTICES AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD JULY 1, 2002 TO DECEMBER 31, 2002

The following Information Notices and News Releases are available on the Bureau's website at <http://strategis.ic.gc.ca/SSG/ct02003e.html>

**July 3, 2002**

NEWS RELEASE: Direct Mail Firms and their Directors Charged for their Role in Deceptive Lottery Promotions

**July 4, 2002**

NEWS RELEASE: Further Charges Against Yellowbusiness.ca Operator

**July 15, 2002**

NEWS RELEASE: Charges Laid Against Modugno-Hortibec Inc.

**July 16, 2002**

NEWS RELEASE: Competition Bureau Seeks Corrective Notices to Warn Consumers of Gas-Saving Device Scam

**July 18, 2002**

NEWS RELEASE: Further Charges Against Telemarketers

**July 19, 2002**

NEWS RELEASE: Directors of Multi-level Marketing Firm Charged for Misleading Participants

NEWS RELEASE: Competition Tribunal Orders Canadian Divestitures in Bayer's Acquisition of Aventis CropScience

**July 23, 2002**

NEWS RELEASE: Competition Bureau Seeks Order Against Sears - Alleges Tire Prices Inflated

**July 26, 2002**

NEWS RELEASE: Further Charge Against Telemarketer

**August 2, 2002**

INFORMATION: Special Provincial Constable Status Granted to Competition Law Officers

**August 19, 2002**

INFORMATION: Competition Bureau Seeks Comments on Fee Increase Proposal and Proposed Threshold Increase for Merger Notification

**August 21, 2002**

NEWS RELEASE: Individuals Charged for their Role in Alleged Deceptive Lottery Promotions

**August 26, 2002**

INFORMATION: Government Review of Lawful Access Laws Includes the *Competition Act*

## CANADIAN COMPETITION RECORD

**August 28, 2002**

INFORMATION: Competition Bureau Part of Award-Winning Partnership Targeting International Scams

**August 29, 2002**

NEWS RELEASE: Multi-level Marketing Firm Charged for Misleading Participants

**September 3, 2002**

INFORMATION: Competition Bureau Participates in 'Hang Up On Fraud' Campaign

NEWS RELEASE: Competition Bureau Resolves Concerns in Astral-Télémedia Radio Merger

**September 4, 2002**

INFORMATION: Competition Bureau Invites Comments on its Strategic Alliances Bulletin

**September 29, 2002**

NEWS RELEASE: Canada Maintains Leadership Role in the International Competition Network

**October 1, 2002**

INFORMATION: Government Responds to Industry Committee Report on Canada's Competition Regime

**October 4, 2002**

INFORMATION: Diageo plc Completes Divestiture of Canadian Whisky Brand as Required by the Competition Bureau

**October 10, 2002**

NEWS RELEASE: Competition Bureau Investigation Leads to a \$250,000 Fine in a Price Maintenance Case

**October 16, 2002**

NEWS RELEASE: Competition Bureau Investigation Leads to over \$4-million in Fines for International Bulk Vitamin Conspiracies

**October 17, 2002**

NEWS RELEASE: Grain Case Settled: Agricore United Agrees to Divest Port Terminal

**October 22, 2002**

NEWS RELEASE: Charges Laid Against Toronto-based Telemarketers

**October 28, 2002**

NEWS RELEASE: Internet Registry of Canada Charged

**October 29, 2002**

INFORMATION: Organisation for Economic Co-operation and Development (OECD) Praises Canada's Regulatory Reforms and Encourages Sustained Momentum

**November 1, 2002**

NEWS RELEASE: Competition Bureau Files an Application with Competition Tribunal Against Plumbing Manufacturer

## CANADIAN COMPETITION RECORD

**November 6, 2002**

NEWS RELEASE: Voluntary Code of Conduct for Authenticating Canadian Diamond Claims is Launched

**November 15, 2002**

NEWS RELEASE: Competition Bureau Investigation Leads to Deceptive Telemarketing and Fraud Charges Against Office Supplies Telemarketers

**November 18, 2002**

INFORMATION: Deceptive Telemarketing of Office Supplies

**November 19, 2002**

NEWS RELEASE: Competition Bureau Investigation Leads to Charges Against Telemarketers of Office Supplies

**November 21, 2002**

INFORMATION: Consumers Should Take Precautions When Purchasing Prepaid Long Distance Phone Cards

**November 27, 2002**

INFORMATION: Competition Bureau Obtains Undertakings to Resolve Concerns in Cendant Acquisition of Budget Rent a Car

**December 2, 2002**

INFORMATION: Competition Bureau Releases Interpretation Bulletin on Abuse of Dominance in the Canadian Grocery Sector

**December 5, 2002**

INFORMATION: Variation to Consent Order Expands Access to the Interac Network

**December 10, 2002**

INFORMATION: Competition Bureau Responds to Jetsgo Complaint Regarding Air Canada-Québec Agreement

**December 12, 2002**

INFORMATION: Competition Bureau Discontinues Inquiry into Motion Pictures Industry

**December 16, 2002**

NEWS RELEASE: Abtronic Muscle Stimulators Removed from Market by Competition Bureau

**December 17, 2002**

INFORMATION: Competition Bureau Releases Information Bulletin on the Regulated Conduct Defence

**December 18, 2002**

NEWS RELEASE: Competition Bureau Investigation in International Price Fixing Conspiracy Leads to \$100,000 Fine

**December 20, 2002**

NEWS RELEASE: Competition Bureau Stops Bogus Jewellery Sales

---

---