CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

BOOK REVIEW: *COMPETITION POLICY FOR SMALL MARKET ECONOMIES* By: Michal Gal (Cambridge: Harvard University Press, 2003. 324 Pages)

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Michal Gal has written an excellent treatise on competition policy as it should be practiced in small market economies. Canada and Israel are the examples of small economies that come to mind and which have most influenced Dr. Gal's thinking, but the book is pitched at an abstract level that is applicable to any small market economy. *Competition Policy for Small Market Economies* begins with a summary of the economic characteristics of small market economies. It then discusses in separate chapters the special needs of a small market economy for: competition policy in general; regulation of single-firm dominance; regulation of natural monopolies and essential facilities; regulation of oligopoly markets; and merger policy. The project began as Dr. Gal's doctoral thesis at the University of Toronto Law School.

Many will read this book to learn the specific ways in which competition policy should differ between a small market economy such as Canada's and a large economy such as the United States. The concept of a "small market economy" includes barriers to trade, both natural and government erected, that prevent the geographic market in a competition case from including imports and therefore being international and large. (This useful concept should not be confused with the term "small open economy" that economists often use in describing a small country in a world with substantial trade. The latter term emphasizes trade; Dr. Gal's term emphasizes barriers to trade.) The feature of small market economies prominent in Dr. Gal's analysis is the concentrated nature of their markets. Economies of scale and the small size of the population served in these economies mean that the technically efficient size of a firm in many of the markets is a large fraction of the total industry output. That is, small markets can often support only a few firms.

Merger policy is the structural dimension and core of competition policy, so I will focus my remarks on Dr. Gal's treatment of this area. The theme that emerges from the book is that a small market economy should be more lenient in allowing potentially problematic mergers. In the introductory overview to the book, Dr. Gal offers one explanation of why a small economy should not adopt the relatively strict U.S. concentration-measure criteria for allowing a merger to escape antitrust scrutiny:

> The U.S. competition authorities have chosen a [concentration criterion that is violated]...by any merger in a market with five equal firms... Small economies

> would not achieve efficient results by applying the same concentration levels, as most of their industries would be caught under them, and a presumption of illegality, which is usually hard to combat, would arise in most mergers. [p. 6]

The concern that most mergers would be blocked by U.S. standards may be overstated; in Canada, for example, fewer than 2 percent of mergers in a typical year are challenged by the Competition Bureau.[1] However, Dr. Gal does develop in detail the argument against the application to small market economies of a strict merger criterion based only on competitive effects. The key point in her view is the need to enable firms in small market economies to capture economies of scale through merger, a benefit that is strong because of the inefficient size of many firms in small market economies.

> Given high concentration levels that are justified by scale...economies, protection of competition would blockade many mergers that have positive welfare effects. Producers would not, in many markets, be able to attain minimum efficient scales and thus reduce their costs, and consumers would not be able to enjoy lower prices that rest on lower costs. [p. 201]

Allowing firms to achieve efficient scale benefits these firms not only in domestic markets, sometimes in competition with foreign firms, but can enhance firms' abilities to compete in international markets as well. The international competitiveness goal is recognized in Canadian and Australian competition regimes, as Dr. Gal points out. Dr. Gal develops the arguments for a "balanced approach" in which the possibly negative impact of a merger on market competition is balanced against benefits such as increased efficiency in production. Canadian competition policy experts will recognize this approach as established in our *Competition Act* and at the heart of the dispute in *Superior Propane*.[2] Dr. Gal provides an articulate defense of this approach, a useful discussion of the actual policies in Canada (although the book preceded the final decision in *Superior Propane*), Australia and New Zealand, and a comparison with the narrower U.S. approach to merger policy. She favours an approach that is even more aligned with the goal of maximizing total surplus, or total benefits, consisting of both consumer and producer welfare, than Canadian merger law after *Superior Propane*. Dr. Gal expresses concern over the possibility of an excessively strict burden of proof on respondents to demonstrate efficiencies in a merger case. A particularly interesting suggestion in this regard is a sliding-scale approach in which, "as the danger of an increase in the exercise of market power rises, the burden of proof of efficiencies rises accordingly" (p. 248). Competition policy scholars, however, must resist the allure of rules or procedures that would in theory move each case towards an ideal cost-benefit analysis but which in practice would add excessive complexity to an already challenged system.

A more liberal competition policy in the structural dimension of merger policy, and simply the high concentration levels that inevitably characterize small market economies, mean that problems of anticompetitive conduct are potentially more severe in these economies. This links Dr. Gal's prescriptions for merger policy to her recommendations for competition policy in conduct dimensions: "Small economies should take the concentrated nature of their markets as a necessary evil while striving to reduce the occurrence of anti-competitive conduct by firms operating under such market conditions." (p. 251) Dr. Gal develops throughout her treatise a set of

changes to existing (large economy) doctrines, assumptions and modes of enforcement that are required by the effects of small market size.

Some of the policies that Dr. Gal recommends would apply equally to concentrated industries in large economies. For example: "Small size ... dictates that certain types of exclusionary conduct be analyzed differently than in large economies. To give but one example, price discrimination should be allowed when it is necessary for a firm to break down oligopolistic coordination." (p. 254) Why would this policy recommendation not apply to large economies as well? If price discrimination renders cartels more unstable then it should be encouraged whatever the size of the economy. Dr. Gal does discuss in the conclusion of the book the relevance of her general analysis for "small markets within large jurisdications", however. Other areas, such as her excellent discussion of the constraints against application of competition law to extrajurisdictional firms, are clearly most pertinent to small economies.

Dr. Gal relies too heavily in her set of recommendations on direct government intervention and regulation of conduct as a remedy to competitive problems, in my view. The familiar and vexing problem of conscious parallelism, for example, inspires Dr. Gal to suggest intervention through government support of a maverick in an oligopolistic industry (p. 188-192). Her theoretical model of equilibrium in such an industry involves the government paying a direct subsidy to one firm in return for the firm's agreement to reduce its price exactly to marginal cost. This section reads like something suggested by an industrial organization economist, if I may be so harsh. The practical difficulties and distortions involved in government participation in the marketplace, whether to bribe firms to reduce prices to marginal cost or to regulate prices directly, render this solution untenable. Dr. Gal supports price regulation in other circumstances where competition law is inadequate. For example, she criticizes the Canadian Competition Tribunal's decision in *Nielsen* simply to prohibit anticompetitive exclusionary contracts without more pro-active intervention to assure efficiency in the marketplace (p. 108-109). The intervention that she has in mind is apparently the establishment of a set of government institutions to regulate prices in industries where competition policy fails to elicit the ideal market outcome.[3]

This criticism aside, I recommend this book not just to those who would like to understand the challenges of competition policy in small market economies, but to those who would benefit from a well-written overview of the foundations of competition policy. The concise treatment of the main areas of competition policy, plus a particularly valuable extension to the regulation of natural monopolies and the essential facility doctrine, is a pleasure to read.

Notes

[1] For example, the Competition Bureau's most recent annual report [p. 20] states that 1457 notifiable acquisitions posed no issue under the *Competition Act*, and of course many hundreds of mergers were too small to be notifiable. Only 33 mergers involved restructuring, consent orders, contested proceedings or abandonment (either in whole or partial).

[2] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, 2000 Comp. Trib. 16; [2001] 3 FCA 185; [2002] C.C.T.D. No. 10; 2003 FCA 53.

[3] See also M.S. Gal, "The *Nielsen* Case: Was Competition Restored?" (1997) 29 Canadian Business Law Journal 17.

SECTION 11 OF THE *COMPETITION ACT*: TIME TO REVISIT AND RESET THE BALANCE IN CRIMINAL INVESTIGATIONS

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The last decade has seen a dramatic increase in competition law enforcement in many jurisdictions around the globe, especially in the areas of cartel enforcement and merger review during the merger wave of the late 1990's.[1] Canada has not been an exception in this regard and, as a result of this increased enforcement activity, naturally, the Commissioner of Competition has had greater occasion to use the broad investigatory powers conferred to him under the *Competition Act*.[2] For example, in the context of both criminal and civil matters (including mergers), the Commissioner has become increasingly reliant on the powers to compel testimony and the production of documents under section 11 of the Act.[3] Against this backdrop of heightened competition law enforcement, as this power is employed more often and in new circumstances, serious and sometimes novel issues of law and practice arise relating to the scope and the application of section 11.

A central and recurring issue with any investigatory power exercised by the state, such as that provided under section 11 in this case, is whether it strikes the appropriate balance between the public interest in allowing the Commissioner to investigate conduct harmful to competition and to maintain the operation of a free market economy, on the one hand, while ensuring that "the principles of fundamental justice... found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system"[4] are not compromised, especially in the criminal context, on the other. Accordingly, setting the appropriate balance between the powers of the state and the right of the individual is of the utmost importance in any democracy, and ensuring this balance is in check in the context of section 11 is no exception.

Also, it is important to keep in mind that ensuring that this balance is in check is not a static process, but rather an evolutionary and iterative process that must be sensitive to changing legal and social circumstances. In that sense, the balance at any point in time must be open to the potential for re-evaluation and refinement to ensure it remains in the proper proportions as times change.

Currently, it seems that the tension between the power granted to the Commissioner pursuant to section 11 and the rights of an individual under section 7 of the *Charter of Rights and Freedoms* is at a relatively high point in the existing enforcement environment. The purpose of this paper is to review the main components of section 11 and explore the issues raised in its application in today's world.

Overview of the Powers Under Section 11

Prior to discussing issues relating to the balance between the power of the state and the rights of the individual, it is helpful to review some of the key components of section 11 and the rights it impacts.

General

In the course of an investigation, including in criminal investigations, section 11 provides the Commissioner with some extraordinary powers to compel testimony, document production, and written returns. The Commissioner is entitled to seek a section 11 order even where he or she has previously seized documents and information pursuant to a search warrant granted under section 15 of the Act.[5]

More specifically, on the basis of subsection 11(1), the Commissioner is empowered to apply to either the Federal Court or to a provincial Superior Court for an order requiring any person to: a) appear before the Commissioner (or an authorized representative of the Commissioner) in order to be examined under oath; b) provide records specified in the order; and c) provide a written return under oath containing information required by the order.

In order for these powers to be legitimately exercised, two essential conditions must be satisfied:

1. the Commissioner must satisfy the presiding superior, county, or federal court judge, by information on oath or solemn affirmation, that an inquiry is being made under section 10; and

2. the presiding judge must also be satisfied that any person compelled to provide testimony or produce documents has or is likely to have information that is relevant to the inquiry.[6]

In addition, where a corporation is required to produce documents pursuant to paragraph 11(1)(b), subsection 11(2) of the Act provides that the presiding judge may, to the extent that he or she is satisfied that an affiliate of the corporation has records relevant to the inquiry, order the corporation to produce the records of those affiliates, regardless of whether or not an affiliate is located outside of Canada.[7]

Finally, subsection 11(3) provides that a person subject to such an order may not be excused from complying with it on the grounds that one's testimony, records, or written return may tend to incriminate him or her. This provision also provides that "use immunity" be accorded to individuals required to give oral testimony before the Commissioner pursuant to paragraph 11(1)(a) or provide written returns pursuant to paragraph 11(1)(c), according to which voluntary or compelled evidence tendered in the context of a Competition Bureau investigation is precluded from being used against the relevant individual in a subsequent criminal proceeding.[8]

The Legal Test for Obtaining a Section 11 Order

As pointed out above, pursuant to section 11, before granting an order, the issuing judge must be satisfied on the basis of the information provided to him or her under oath that (i) an inquiry is being made under section 10 of the Act, and (ii) the person subject to the order has or is likely to have information relevant to the Commissioner's inquiry.

Notwithstanding the relatively simple test outlined in subsection 11(1), recent case law has elaborated on this test and held that the Commissioner must provide the judge with more than a mere representation that an

inquiry under section 10 has been initiated. More specifically, in *Canada (Commissioner of Competition)* v. *Air Canada*[9], Reed, J. made it clear that section 11 orders should not be issued on the basis of a "bald assertion" that an inquiry under section 10 of the Act has been initiated, and explained as follows:

> Section 11 provides that a judge may, not shall, issue an order. Residual discretion exists. Also, I cannot conclude that section 11 authorizes the issuing of an order to produce information if the director were acting on a "whim". I cannot envisage a Court granting a section 11 order on the basis of a bald assertion by the Commissioner that an inquiry has been commenced. It seems to me that any judge would require more than that. He or she is likely to require some description of the nature of the alleged conduct that is the subject of the inquiry, the basis of the Commissioner's decision to commence an inquiry and his reason for believing that conduct to which the inquiry is addressed has occurred. Also, the judge must be satisfied that the person against whom the order is sought is likely to have relevant information. This does not mean that the Court second guesses the Commissioner's decision that he has reasons to believe that the conduct that is the subject of the inquiry in question occurred, but it does allow the Court to refuse to grant an order when there is insufficient evidence to support a conclusion that a bona fide inquiry has been commenced.[10] [emphasis added]

Although there remains some uncertainty regarding the level of disclosure required of the Commissioner, Reed J.'s comments in *Air Canada* seem to support the position that, at the very least, section 11 requires the Commissioner to provide the issuing judge with a sufficient level of disclosure in order to allow him or her to properly exercise their judicial discretion in assessing the matter which obviously must go much beyond a non-discretionary "rubber stamp" function.

Also, the fact that section 11 applications are brought *ex parte* is relevant to the assessment of whether the legal test for obtaining a section 11 order has been met. In general, *ex parte* motions demand an even greater obligation on an applicant to meet stringent disclosure standards before the court because of the uncontested nature of these proceedings. This obligation was addressed in *R.* v. *Araujo*, where the Court held that any person seeking an *ex parte* authorisation is obliged to provide "full and frank" disclosure of material facts[11] and must file materials in support of the application such that the issuing judge may satisfy him/herself that the statutory preconditions have been met.[12]

Section 11 and Issues of Balance and Limits

As the Commissioner increases the use of section 11 orders and employs them in new circumstances, novel factual and critical legal issues will arise. At the same time, although we are becoming more accustomed to the use of section 11 orders, it is crucial not to become desensitized to these extraordinary powers being exercised by the state and complacent regarding whether the proper balance is being struck between an individual's rights and the Commissioner's authority to investigate.

This balance must be upheld in individual cases, as well as in the general application of the law. Below we discuss some of the practical and legal issues to be explored in determining whether this balance is currently in check in both contexts. For example, on a case by case basis, one must consider whether the Commissioner has established the proper factual foundation for obtaining an order under section 11. On the level of general application, section 11 engages some significant constitutional issues to reflect upon in assessing the balance between the power of the Commissioner and the rights of individual and corporate targets of an investigation under the Act.

The Balance by Case

In each case, the power of the state is to be held in check by ensuring that the materials filed by the Commissioner in support of a section 11 order not only meet the sufficiency test, but also that they provide "full and frank" disclosure to the issuing judge as required in the context of an *ex parte* application. For example, failure by the Commissioner to disclose material facts, such as the existence of parallel legal proceedings pending in another jurisdiction or the fact that numerous section 11 orders have been previously issued in the investigation, could be deemed an attempt to "trick" the court or otherwise be considered an abuse of process and warrant that the order in question be set aside or stayed.[13]

Also, regarding scope, the examinations, records, and written returns sought by the Commissioner should pertain to specific allegations and time periods. For example, if the Commissioner is over-inclusive when requesting documents, it may be possible to have the scope of the document request circumscribed.[14] Such efforts are especially justified when a search and seizure, authorized pursuant to section 15 of the Act, has already taken place.

The Balance in General Application

On a general application level, there are some interesting legal issues that arise in the section 11 context, including issues relating to use and derivative use immunity and other developments that could prompt the need to reopen issues regarding the constitutional validity of section 11. The issue of "what [investigatory powers] may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context"[15] has been considered in previous cases, but changes in society's views pertaining to certain anti-competitive conduct and new legal developments may create the legal and practical need for this question to be re-examined by the courts.

Scope of the Section 11 Use Immunity

On a strict interpretation of subsection 11(3),[16] the provision seems to extend the benefit of use immunity only to "individuals" summoned to testify before the Commissioner and is unclear whether this immunity would apply to individuals who are compelled to testify in their capacity as representatives of a corporation.

This interpretation of subsection 11(3) is, if anything, reinforced by the text of the French version, which reads:

> Nul n'est dispensé de se conformer à une ordonnance visée au paragraphe (1) ou (2) au motif que le témoignage oral, le document, l'autre chose ou la déclaration qu'on exige de lui peut tendre à l'incriminer ou à l'exposer à quelque procédure ou pénalité, mais un témoignage oral qu'un individu [and not "qu'une personne"] a rendu conformément à une ordonnance prononcée en application de l'alinéa (1)a) ou une déclaration qu'il [and not "qu'elle"] a faite en conformité avec une ordonnance prononcée en application de l'alinéa (1)c) ne peut être utilisé ou admis contre celui-ci dans le cadre de poursuites criminelles intentées contre lui par la suite sauf en ce qui concerne une poursuite prévue à l'article 132 ou 136 du *Code criminel*. [emphasis added]

The issue of whether the right against compelled self-incrimination is available to individuals compelled to give testimony as representatives of corporations has been considered by the Supreme Court and LaForest, J., speaking as part of the majority on this issue, found as follows:

> ...the prejudice that can be suffered by those compelled to testify in a representative capacity is one they experience personally. An officer compelled to testify on behalf of his or her corporation may be subsequently charged under the Act, and it would be highly artificial to say that his or her compelled testimony could be used against him or her on the ground that its use did not amount to compelled self-incrimination on the ground that it was technically the testimony of the company. The reality is that once a person is compelled to give testimony, it makes no difference whether that person speaks on behalf of himself or herself, or on behalf of the corporation. So long as such persons are liable to subsequent prosecution they are susceptible, in the absence of sufficient protection, to the prejudice against which the right against self-incrimination is intended to guard.[17] [emphasis added]

Therefore, it is clear that the protections afforded under subsection 11(3) are available to both individuals as well as representatives of corporations that are subject to the Commissioner's investigation.

With respect to corporations, the right to be protected against self-incrimination has been held not to be applicable in a meaningful way to corporations in *Charter* cases.[18] Nonetheless, it is possible that a corporation is entitled to avail itself of the protection of subsection 2(d) of the *Bill of Rights* which also provides for a protection against self-incrimination[19]. For example, in the case of *Air Canada* v. *Canada (Attorney General)*[20], subsection 2(e) of the *Bill of Rights* (right to an impartial hearing and right to be heard) was successfully raised as grounds to declare section 104.1 of the Act (which authorized the Commissioner to issue temporary orders without prior judicial authorization and without allowing persons affected by the order to make representations) inoperative. Similarly, a corporation could submit that its right against self-incrimination, a right enshrined in subsection 2(d) of the *Bill of Rights*, protects it against the use of evidence that a witness may have been compelled to give in subsequent criminal proceedings.

Derivative Use Immunity and Section 7 of the Charter

Although subsection 11(3) of the Act explicitly provides for "use immunity" in relation to testimony or written returns ordered under paragraphs 11(1)(a) or (c) respectively, it is silent on the existence, scope and applicability of any "derivative use immunity". In this regard, it is also interesting that the analogous protection against self-incrimination guaranteed by section 13 of the *Charter* also does not provide for protection against "derivative use immunity", but only guarantees "use immunity". In these circumstances, section 7 of the *Charter* has been interpreted as affording a wider scope of protection that includes "derivative use immunity"[21] in addition to the "use immunity" granted within section 13.

Similarly, an individual subject to examination under section 11 of the *Competition Act* can rely on the derivative use immunity protection granted by virtue of section 7 of the *Charter* relating to incriminating evidence. Any such evidence that:

> ...could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness ought generally to be excluded under s.7 in the interests of trial fairness. Such evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet.[22] [emphasis added]

It is important to keep in mind that derivative use immunity does not amount to "absolute derivative use immunity", but only a "residual derivative use immunity" in connection with evidence that could not have been obtained "but for" the compelled testimony.[23]

The issue remains regarding whether corporations can also claim the benefit of derivative use immunity. In *Branch*, the Supreme Court discussed this issue and stated that derivative use immunity "depends on the applicability of section 7" of the *Charter* and reaffirmed that section 7 has been interpreted by the Supreme Court of Canada as not applying to corporations, suggesting that a corporation cannot benefit from derivative use immunity.[24] However, these observations were made in *obiter* as the Court prefaced these comments by acknowledging that "[a]n issue may arise in subsequent proceedings as to who can claim the benefit of derivative use immunity, the individuals or the corporations or both" and "this issue might be left to be determined when it arises in such proceedings..."[25] Also, the Court proceeded to point out in the next paragraph that "[i]t should be remembered that it will be up to the judge hearing the matter to decide the specific application of subsequent derivative use immunity having regard to all the circumstances."[26]

Despite the limitations on the use of section 7 of the *Charter* by corporations, however, this interpretation should not be understood to mean that a corporation cannot contest the constitutionality of the law on the grounds that it unjustifiably breaches individual rights protected under section 7 even though the corporation is not possessed of such individual liberty interests.[27]

Constitutionality of Section 11 Under Section 7 of the Charter

The constitutionality of section 11 was considered by the Supreme Court in the *Thomson Newspapers* case in 1990 wherein a divided Court did not strike down section 11 on the basis of a challenge under sections 7 and 8 of the *Charter*.[28] While on the surface it may seem that once the courts have considered a matter it should put the issue to rest, this static approach to legal development has been far from an absolute rule in the past.[29] As we discuss below, the time may be appropriate for the Court to revisit the issues regarding the use of section 11 orders in the context of a predominantly criminal investigation and whether this practice continues to be consistent with section 7 of the *Charter* in today's environment.[30]

This section of the paper will focus on the constitutionality of paragraphs 11(1)(a) and (c) of the Act under section 7 of the *Charter* in the criminal context. The issue of the constitutionality of paragraph 11(1)(b) under section 8 of the *Charter*, which protects one from unreasonable search and seizure,[31] will not be discussed in this paper, although paragraph 11(1)(b) has also been challenged on this basis, post-*Thomson Newspapers*, regarding its application in a case where the predominant purpose of the order to produce documents pursuant to paragraph 11(1)(b) was to pursue a criminal investigation.[32]

There are essentially three compelling reasons why paragraphs 11(1)(a) and (c) of the Act should be re-examined to determine if they continue to be consistent with section 7 of the *Charter* where the Commissioner's predominant purpose is to pursue a criminal investigation. These reasons are as follows:

1. the Court in *Thomson Newspapers* was extremely divided in connection with its ruling with respect to section 7 of the *Charter* and, as a result, there is no clear majority ruling on the merits of this issue;

2. in any event, to the extent that the decision in *Thomson Newspapers* is binding, the "majority" judgment's casual view of competition law crimes is now outdated; and

3. recent decisions of the Supreme Court have now clearly held that "when the predominant purpose of a question or inquiry is the determination of penal liability, the 'full panoply' of *Charter* rights are engaged".[33]

Divided *Thomson* Court

The first basis upon which it may be valid to re-examine the issue of the constitutionality of section 11 orders is that the Court in *Thomson Newspapers* was extremely divided on the issue of whether section 11 is consistent with section 7 of the *Charter*. In fact, there was really no majority opinion on the merits of this issue because the Court was split two to two with the fifth judge on the panel, namely Chief Justice Lamer (as he then was), choosing not to reply with regard to section 7. He took this position because he believed the appellants challenged the wrong provision of the Act and failed to challenge what he believed to be the relevant provision under the *Canada Evidence Act*.[34] Therefore, there was no majority ruling on the merits of the issue.

Modern View of Competition Act Crimes

In any event, to the extent that the decision in *Thomson Newspapers* is binding, LaForest, J., who wrote the decision for the "majority" that found section 11 of the Act consistent with section 7 of the *Charter*, largely based his conclusions on a currently outdated notion that "conduct prohibited by the [Competition] Act is far removed from what is the typical concern of the criminal law system...meriting disapprobation and punishment"[35] [emphasis added]. In today's world, criminal conduct under the Act, especially hardcore cartel behaviour such as price fixing, would not likely be considered "far removed" from the typical concerns of criminal law.[36]

For example, it would appear that the Commissioner and the Commissioner's representatives see competition crimes, especially criminal cartels, in a much more serious light today as evidenced by their recent statements and the penalties they have sought in these cases. The following is a sample of some recent statements made describing criminal cartel activity in Canada:

- "Every Canadian was affected by the international conspiracies in bulk vitamins," said Konrad von Finckenstein, then Commissioner of Competition. "Today's convictions send an important message to business that the Bureau will aggressively pursue the parties involved in international cartels that target Canadian consumers from outside the country. This type of criminal behaviour will not be tolerated."[37]

- "This is another significant fine in the ongoing investigation into illegal cartels that increased prices and controlled the volumes of sales of bulk vitamins," said Konrad von Finckenstein, then Commissioner of Competition. "The message to companies, in Canada and around the world, is loud and clear. We will not tolerate anti-competitive activities that affect Canadians."[38]

- "International cartels frustrate competition and cause inflated prices", said Johanne D'Auray, Deputy Commissioner of Competition, Criminal Matters. "The Competition Bureau will not hesitate to use the full force of the law against companies that prey on Canadian businesses and consumers."[39]

  "...[recent] fines [in criminal cartel cases] represent a quantum leap from what they were before. We have even had executives convicted and sentenced to community service or to jail. Our recent experience shows the gravity of cartel activity that takes place in Canada and the necessity to combat it in a comprehensive way."[40]

In addition to the statements of the enforcers, the increasingly serious nature of criminal cartel behaviour is reinforced by the level of fines that have been collected in recent years, such as, in one case, a fine of $48 million against one defendant.[41]

It is clear that attitudes and the enforcement climate have changed dramatically with respect to *Competition Act* crimes, especially criminal cartels, since the *Thomson Newspaper* case was decided. In fact, this new attitude is consistent with what appears to be an overall change in societal views regarding other "business" and "corporate"

crimes as generally reflected in the responses of the government and the public to recent scandals involving Enron and WorldCom, to name but a few.[42]

Accordingly, defendants or targets of investigations relating to "corporate" or "business" crimes, such as a criminal investigation under the Act by the Commissioner, should have their rights protected to the same degree as others being investigated for any other "real crimes", namely, they should not be subject to be compelled to testify or produce written returns pursuant to section 11 while they are the subject of a criminal investigation.

Recent Supreme Court Cases

In addition to the foregoing, another reason to re-examine the constitutionality of section 11 is because more recent decisions of the Supreme Court have now clearly held that "when the predominant purpose of a question or inquiry is the determination of penal liability, the 'full panoply' of *Charter* rights are engaged".[43]

More specifically, in its recent decision in *R.* v. *Jarvis*[44] (and the companion appeal in *R.* v. *Ling*[45]), the Supreme Court unanimously held that the *Charter* applies with full force to persons under investigation for "regulatory crimes" from the point at which officials have as their predominant purpose the determination of penal liability.

Jarvis and *Ling* settle the issue regarding the point at which persons under investigation by regulators benefit from full *Charter* protection. According to *Jarvis*, it is now clear that when penal liability is at issue, the full panoply of *Charter* rights are engaged at a far earlier stage in the course of a regulatory investigation than the case law had previously suggested.[46]

Moreover, in determining a regulatory official's "predominant purpose", *Jarvis* directs courts to consider the following non-exhaustive list of factors, none of which is, by itself, determinative:

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(c) Had the auditor transferred his or her files and materials to the investigators?

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?[47]

Adapting and applying these factors in the context of the *Competition Act*, for example, in situations where investigations are initiated under the criminal parts of the Act such as the criminal cartel provisions, it seems evident that the predominant purpose of such evidence gathering inquiries is, from the very outset, the prosecution of criminal behaviour and the eventual imposition of penal sanctions against the relevant actors.[48] In such circumstances, nothing less than the full panoply of *Charter* protections is appropriate and the constitutionality of compelled testimony ordered on the basis of section 11 can be expected to come under close *Charter* scrutiny.

Conclusion

The potential impact of the *Jarvis* decision, along with more contemporary attitudes to competition crimes, may now be that the use of section 11 orders by the Commissioner in investigations where the predominant purpose is to investigate criminal behavior, especially criminal cartels, may be unconstitutional and inconsistent with section 7 of the *Charter*. As a result, the time may be ripe for the courts to review and re-examine the decision in *Thomson Newspapers* on the basis that it did not provide a clear majority opinion regarding section 7, the decision was based upon an outdated view of the nature of *Competition Act* crimes, and has been superceded by more recent legal developments at the Supreme Court level.

In this regard, it is also interesting that Lamer, C.J. (as he then was) described the following hypothetical in the *R.J.S.* decision in 1995, as an example of when he believed section 7 should go beyond providing evidentiary immunity to protecting individuals from being compelled to testify:

> As an example of a situation where a judicial exemption from compellability would, in my view, be warranted, the following hypothetical case can be considered. Suppose that the members of a trade association in a particular industry met and agreed upon a scheme to fix the prices of the goods they produced, an indictable offence under s. 45(1)(c) of the Competition Act, R.S.C., 1985, c. C-34. Suppose further that the Director of Investigation and Research obtained documents clearly indicating the persons involved and the nature of their involvement — for example, an agreement to fix prices signed by the parties. If the Director commenced an inquiry and obtained subpoenas compelling the signatories to testify, it would, in my view, be open to the signatories to apply to the court for an exemption from compulsion to testify. In such a case, where the facts revealed that the Director had already concluded that an offence had been committed and had identified the parties to the offence,

> the court would be justified in concluding that forcing the suspects to testify would violate their s. 7 rights. In these circumstances, I believe the court would have the discretion to declare the subpoenas to be of no force and effect, thereby excusing the suspects from testifying.[49]

In general, it does not seem appropriate in the current legal and social environment to deny targets of investigations of serious crimes, such as hard core price-fixing, the same rights as those subject to investigation of other crimes, such as theft or fraud under the *Criminal Code of Canada*[50].

Only time will tell whether the courts will find that section 11, which does not distinguish criminal and penal investigations from mere civil investigations, is inconsistent with sections 7 and 8 of the *Charter*, as well as perhaps sections 1 and 2(d) of the *Bill of Rights*, in cases where the predominant purpose of an investigation is to gather evidence for use in a potential criminal prosecution.

Given that competition law enforcement activity is showing little signs of waning, with the Commissioner's use of section 11 of the Act likely only increasing going forward, it is foreseeable that our courts will soon be called upon to redefine the appropriate balance between the powers of the state in maintaining the public interest in the operation of a free market economy and protecting the *Charter* rights afforded to companies and individuals accused of serious crimes under the *Competition Act*. In this regard, section 11 may now be regarded as a powerful yet blunt tool, the force of which must be rebalanced and reset so that it is only used in the context of civil investigations and not employed in predominately criminal investigations.

Notes

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1 G.R. Spratling & D.J. Arp, "The Transformation of International Cartel Enforcement" (International Bar Association 2003 Conference, San Francisco, 14-19 September 2003).

2 Annual Report of the Commissioner of Competition for the year ending March 31, 2002, at 19. See also H. Chandler & R. Jackson, "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's *Competition Act*" (Roundtable on *Competition Act* Amendments, Insight Conference, Toronto, 25 May 2000) at 6.

3 Annual Report, *ibid.* at 33.

4 *R.* v. *R.J.S.*, [1995] 1 S.C.R. 451 (S.C.C.) [hereinafter *R.J.S.*] at ¶ 49.

5 *Ravenshoe Services Ltd.* v. *Commissioner of Competition* (2001), 15 C.P.R. (4th) 543 (Ont. Sup. Ct. Justice) [hereinafter *Ravenshoe*].

6 See the following section which discusses the onus that the Commissioner must meet.

7 This raises issues in itself because it compels a subsidiary to force a foreign parent company to comply where the subsidiary may have no authority to force such compliance. This issue is outside the scope of this paper.

8 Evidence tendered under oath may not be used in a subsequent proceeding, except in a prosecution for perjury or to the extent that contradictory evidence is given. See K.L. Kay, "Fundamentals of Criminal Anti-Competitive Conduct" in D.B. Houston, ed., *Papers of the Canadian Bar Association Annual Fall Conference on Competition Law - 2000* (Huntington, NY: Juris Publishing, Inc., 2001) 231 at 240.

9 (2000), 8 C.P.R. (4th) 372 (F.C.T.D.) [hereinafter *Air Canada*].

10 *Ibid.* at ¶ 31.

11 [2000] 2 S.C.R. 992 at ¶ 46.

[12] *Ibid.* at ¶ 46-48.

[13] A challenge of a section 11 order on the basis that insufficient information was provided to the issuing judge may be relatively more difficult to establish than in a similar challenge made under section 15 in light of the higher threshold required to grant a search warrant under section 15.

[14] It should be noted that section 19 of the Act sets out the procedure for initiating claims that confidential information, adduced by the Competition Bureau pursuant to either the powers of inquiry conferred under section 11 or seizure during the course of a section 15 search, is protected under the aegis of the solicitor-client privilege.

[15] *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation & Research) et. al.*, [1990] 29 C.P.R. (3d) 97 at 148 (S.C.C.) [hereinafter *Thomson*].

[16] The relevant text of subsection 11(3) reads:

> [N]o testimony given by an individual pursuant to an order made under paragraph (1)(a)...shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under Section 132 or 136 of the *Criminal Code*.

[17] See *Thomson, supra* note 15 at 185. See also *British Columbia Securities Commission* v. *Branch*, [1995] 2 S.C.R. 3 (S.C.C.) [hereinafter *Branch*] at 40.

[18] See *Branch, ibid.* at 39. See also *Thomson, ibid.* at 184.

[19] *Canadian Bill of Rights*, R.S.C. 1985, App. III. Section 2(d):

> 2. Every law of Canada shall, unless it is expressly declared by an *Act* of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, ...shall be construed or applied so as to ...
> (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;...

[20] 23 C.P.R. (4th) 129 (Que. C.A.). See also *R.* v. *McNamara*, (1981) 56 C.C.C. (2d) 193 (Ont. C.A.) and *R. v. Judge of the General Sessions of the Peace for the County of York, Ex parte Corning Glass Works of Canada Ltd.*, [1971] 3 C.C.C. (2d) 204 (Ont. C.A.) and *R.* v. *F.G. Lister & Co.*, [1986] O.J. No. 479 (H.C.J.).

[21] Derivative use immunity, which precludes the subsequent use, against an individual, of any evidence discovered as the result of that individual's testimony. See *R.J.S.*, *supra* note 4 and *Branch, supra* note 17 at 3. Section 7 of the *Charter* states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[22] *R.J.S, ibid.* at ¶ 454. This standard was subsequently adopted in the context of Canadian securities law in *Branch, ibid.*

[23] See *R.J.S.*, *ibid.* at 566.

[24] See *Branch, supra* note 17 at ¶ 37. See also *Irwin Toy, Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 which first held that section 7 of the *Charter* does not apply to corporations.

[25] *Branch, ibid.* at ¶ 36.

[26] *Ibid.* at ¶ 37.

[27] See *R.* v. *Wholesale Travel Group Inc.*, [1991] 38 C.P.R. (3d) 451 at 466-468 (S.C.C.).

[28] *Thomson*, *supra* note 15.

[29] For example, consider the Supreme Court's approach to the hearsay rules in *R.* v. *Smith*, 94 D.L.R. (4th) 590 (S.C.C.), where the Court unequivocally stepped away from the traditional common law hearsay rules and adopted a contextual approach to assessing the admissibility of hearsay evidence. The Court went on to state at 602 that this approach "should be understood as the triumph of a principled analysis over a set of ossified judicially created categories." [emphasis added] See also *Ares* v. *Venner* (1970), 14 D.L.R. (3d) 4 (S.C.C.). Also, in the antitrust area, in the GTE Sylvania case, the United States Supreme Court overruled its own decision in the *Schwinn* case to establish a rule of reason approach to vertical restraints in explicitly concluding that "the *per se* rule stated in *Schwinn* must be overruled". See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 at 58 (S. Ct. 1977).

[30] The Supreme Court has a long tradition of acknowledging the need for judge-made law to be, and acting to ensure that judge-made law is, restated from time to time to meet modern conditions. For example, see *Ares* v. *Venner*, *ibid.* at 15-16.

[31] See *Thomson*, *supra* note 15 at 494, 505 and 591.

[32] *Ravenshoe*, *supra* note 5.

[33] *R.* v. *Jarvis*, [2002] 169 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Jarvis*] at ¶ 96.

[34] Lamer, C.J. felt that the previous subsection 20(2) of the Act and its equivalent under subsection 5(1) of the *Canada Evidence Act* actually took away the common law right to refuse to give incriminating answers and should have been the challenged provisions. See *Thomson*, *supra* note 15 at 101.

[35] *Ibid.* at 158.

[36] In fact, the Competition Bureau finds such behaviour so abhorrent, that they are proposing to amend the *Competition Act* to make this conduct criminal on a *per se* basis. See Government of Canada Discussion Paper, *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (June 20, 2003).

[37] Competition Bureau, News Release, "Federal Court Imposes Fines Totalling $88.4 Million for International Vitamin Conspiracies" (22 September 1999).

[38] Competition Bureau, News Release, "Federal Court Imposes A Fine of $1 Million for International Vitamin Conspiracies" (30 March 2000).

[39] Competition Bureau, News Release, "Corporation Pleads Guilty to Participating in International Conspiracy to Fix Prices" (1 March 2001).

[40] Konrad von Finckenstein, "Address before the Canadian Bar Association Competition Law Section Annual Conference" (3 October 2002).

[41] Competition Bureau, News Release, "Federal Court Imposes Fines Totalling $88.4 Million for International Vitamin Conspiracies" (22 September 1999).

[42] For example, see "WorldCom's Financial Bomb" *CNN Money* (26 June 2002, http://money.cnn.com/2002/06/25 /news/worldcom/).

[43] *Jarvis*, *supra* note 33 at ¶ 96.

[44] *Ibid.* at ¶ 88, ¶ 96 and ¶ 98. In *Jarvis*, Revenue Canada conducted an audit of a taxpayer's affairs, pursuant to its powers under section 231.1 of the *Income Tax Act* ("*ITA*"). The auditor concluded that the taxpayer had grossly omitted to declare revenue and referred the matter to the Special Investigation Section to determine whether prosecution for tax evasion was merited. The auditor then sought to obtain additional information from the taxpayer without informing the latter of Special Investigation Section's involvement in the matter. The taxpayer was later charged with tax evasion. The facts in *Ling* (see note 45 below) are very similar but for the fact that the taxpayer had admitted after extensive questioning from Revenue Canada's auditors, that he had mistakenly failed to report income. The matter was then referred to the Special Investigation Section of Revenue Canada.

[45] 55 W.C.B. (2d) 117 (S.C.C.) [hereinafter *Ling*].

[46] One commentator asserts, for example, that the tax investigation in *Del Zotto* v. *Canada*, [1999] 1 S.C.R. 3 [hereinafter *Del Zotto*], a case wherein the Supreme Court held that the inquiry powers of tax officials under section 234.1 of the *ITA* did not violate sections 7 or 8 of the *Charter*, surely crossed the line drawn in *Jarvis*, such that *Del Zotto* can no longer be considered good law in respect of the point at which full Charter protection is triggered in the context of "regulatory investigations". See D. Stratas, "'*Crossing the Rubicon*' : The Supreme Court and Regulatory Investigations" (2002), 6 C.R. (6th) 74 at 74, 80.

[47] *Jarvis*, *supra* note 33 at ¶ 94.

[48] This can be a more difficult assessment under the *ITA*. See *Kligman* v. *Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 70 [F.C.T.D.], at ¶ 42:

> In a tax case such as the present case, the reasoning presented in the above cases should apply because the investigative powers laid out in the ITA serve a dual purpose; namely, they allow for the investigation of a tax evasion offence as well as a tax assessment on a civil basis.

[49] *R.J.S.*, *supra* note 4 at ¶ 6.

[50] R.S. 1985, c. C-46.

REVIEW OF RECENT DEVELOPMENTS IN CANADIAN PRICE MAINTENANCE POLICY AND ENFORCEMENT

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Introduction

As early as 1989, the Competition Bureau publicly indicated that its focus in criminal matters was on those cases that were likely to have the greatest economic harm, namely price-fixing and bid-rigging. The fact that price maintenance was not included in these ranks and an 88% decline in Bureau section 61 enforcement activity in 1996-2000 as compared to its peak in 1981-1985 suggested an implicit Bureau position that most price maintenance is relatively benign, a position in keeping with mainstream economic thought.[2] Among practitioners, that the Bureau took such a position became increasingly accepted. Recent events, however, suggest a renewed zeal on the part of the Bureau. In face of the possibility of legislative reform to the pricing provisions of the *Competition Act*, the Bureau has formally adopted a hard-line position that section 61 should remain criminal and *per se* illegal since it is "almost always anticompetitive".[3] In keeping with this, the Bureau's most recent discussion paper, "Options for Amending the *Competition Act*: Fostering a Competitive Marketplace",[4] excludes price maintenance from the proposed reforms to the pricing provisions. This is despite the fact that the House of Commons Standing Committee on Industry, Science and Technology recommended such reform in its April 2002 report (the "Standing Committee Report").[5]

This hard-line position on price maintenance is not restricted to policy but also appears to be reflected in increased enforcement activity. Price maintenance charges were laid against Regina gasoline supplier Sherwood Co-operative Association Limited and one of its managers in September 2001.[6] [7] In October 2002, the Stroh Brewery Company (Quebec) Ltd. paid a record fine of $250,000 for a section 61 violation.[8] In April 2003, Toyo Tanso USA Inc. paid a similarly large fine of $200,000 for attempting to maintain the price of isostatic graphite, an input to mold and die manufacturing.[9] In February 2003, Re/Max Ontario-Atlantic Canada Inc., Re/Max of Western Canada, and Re/Max International Inc. entered into a binding court order prohibiting it from engaging in policies that prohibit Re/Max franchisees from setting independent commission rates or advertising such rates.[10] In March 2003, Toyota Canada Inc. agreed to a Consent Prohibition Order requiring it to amend its sales, promotion, training and monitoring practices for its Access Toyota Program, a program that was said to have prohibited dealers from selling vehicles below a minimum price.[11]

Is the Bureau's increased interest warranted, suggesting an increase in anti-competitive price maintenance activity? Or is the Bureau eschewing mainstream economic thought in favour of easy wins? A study of the price maintenance enforcement patterns and public statements suggests the latter.

Status, Development and Enforcement

Between 1951, when price maintenance was first made part of the *Combines Investigation Act*, and 1986, the last time amendments were made to these provisions, price maintenance changed to include all services (not just

products), horizontal price maintenance, and attempts to influence upward or discourage the reduction of the prices at which goods are sold, rather than just a vertical setting of a minimum resale price.[12] While in 1960 the section was made somewhat less stringent, providing for several defences to the refusal to supply subsection (loss-leadering, "bait and switch", misleading advertising and inadequate level of servicing)[13], and in 1976 a new provision made clear that the section did not apply to communications between members of a firm or between affiliated companies, the broad-based, *per se* illegality of price maintenance was entrenched at a time when the economics literature advocated the possible pro-competitive effects of resale price maintenance.

Although the amendments made to the price maintenance provision in the 1986 *Competition Act* did not alter this broad-based, *per se* illegality that had developed since 1951, 1986 marked the decline in the Bureau's enforcement activity under section 61, as exhibited by the number of formal enforcement proceedings.[14] While the methods of counting enforcement proceedings differ, by any count the decline was precipitous.

Table 1 updates through to October 2003 W.T. Stanbury's review of section 61 activity between 1986 and 1996.[15] [16]

Table 1: Formal Enforcement Actions Under Section 61

Period (Fiscal year ending March 31)[1]	Number of Formal Actions Under Section 61
Five-Year Increments	
1966-1970	7
1971-1975	15
1976-1980	47
1981-1985	58
1986-1990	38
1991-1995	10
1996-2000	7
Yearly	
1995/1996	4
1996/1997	3
1997/1998	0
1998/1999	0
1999/2000	0
2000/2001	0
2001/2002	1
2002 - October 2003	4

[1] For years 1966-1996/1997, Stanbury 1998 (see note 15) at 228. For years 1997/1998 to 2002 – July 2003, based on a review of Competition Bureau annual reports, discussions with the Competition Bureau and media releases.

Enforcement proceedings declined by 88% in 1996-2000 from the five-year peak in 1981-1985. Between 1997/1998 and 2000/2001, a four year stretch, there were no formal proceedings.[17] In contrast, between April 2002 and October 2003, there have been four formal proceedings, two resulting in record fines and two in prohibition orders.

The VanDuzer Report, a report commissioned by the Bureau, also reviewed these numbers for the time period 1994/1995 to 1998/1999. It reports a total of only three formal enforcement proceedings under section 61 in the five-year period between 1994/1995 and 1998/1999.[18] This is compared to 461 price maintenance complaints made to the Bureau over that same period, implying that less than 1% of complaints resulted in formal proceedings. Of the 461 complaints, 26 or 5.6% were made into projects, a level of more intensive review; and, of the 26, the Bureau opened formal inquiries on seven or 1.5%.[19]

The period of observed decline in enforcement activity coincided with a change in the Bureau's publicly stated position on price maintenance throughout the 1990s. This position attributed price maintenance with lower economic harm and consequent low priority relative to price-fixing and bid-rigging, while nonetheless noting its *per se* illegal criminal status.

In less formal forums, the Bureau was less circumspect. In a 1989 public statement, the Bureau expressly acknowledged the debate with respect to the reasonableness of the *per se* prohibition of price maintenance: "In recent years there has been considerable debate in the United States concerning that country's laws on price maintenance. As a result, there have been developments in the jurisprudence to narrow the *per se* prohibition of the practice. While there has been similar debate in this country, it has not been as vigorous, in part because of differences in the Canadian law."[20] While the difference in the degree of debate is not apparent to the economics profession, the Bureau attributed this perceived difference to the defences available to refusal to supply (subsection 61(1)(b)) noting that "[t]hese defences respond to some of the procompetitive rationales for price maintenance which have been put forward in recent years."[21] These remarks fail to note that these defences are not available to subsection 61(1)(a), the actual price maintenance subsection.

With respect to enforcement, the Bureau again acknowledged "the debate in the literature over the appropriate legislation to deal with discriminatory and predatory pricing and price maintenance" and that "questions are sometimes raised as to the enforcement policy of the Bureau of Competition Policy with respect to these matters."[22] It concluded, however, that "the Bureau will vigorously enforce all provisions of the Act".[23]

The Bureau did note, however, that in times of resource pressures, priority will be given to those matters which have the greatest economic and precedential impact: "In the criminal areas of the Act, we have identified bid-rigging and price fixing conspiracies as our major priorities. These offences clearly have the potential for the greatest economic harm and may touch all consumers."[24] Price maintenance was not mentioned in this discussion.

In 1994 remarks by the head of the Bureau's Criminal Branch, the low priority given to price maintenance cases was made even more evident. The Bureau elaborated upon its method of prioritization, noting that the focus was on "those instances of anti-competitive behaviour which, because of their breadth of application, are the

most costly to the Canadian public and the economy at large."[25] In implementing this method of prioritization, "[a]lthough some price maintenance cases figure prominently, using the case screening criteria as a guide means that much more of the Bureau's criminal enforcement effort is directed towards conspiracy and bid-rigging cases, those very activities that strike at the heart of an otherwise dynamic and efficient market economy..."[26]

Moving even further towards a rule of reason approach, in a 1997 submission to the OECD, the Bureau provided a balanced discussion of the economic theoretical perspectives regarding price maintenance, acknowledging that:

> ...since the demand curve shifts outward increasing the total amount of consumer and producer surplus available, RPM [resale price maintenance] is generally welfare enhancing. The possibility remains that the privately optimal price-service combination is not socially optimal – that it entails too much service. This may not, however, be a problem if there are competing suppliers.[27]

Despite this acknowledgment, with respect to enforcement the paper noted that "resale price maintenance and related practices remain subject to strict criminal prohibition in Canada", while again noting the priority placed by the Bureau on conspiracy and bid-rigging cases.[28]

Review of Cases

If, in fact, the Bureau's position with respect to enforcement of section 61 since the late eighties has been to focus on particularly egregious cases resulting in the greatest economic harm, economic theory would suggest these cases would be those that contain a horizontal element. Price maintenance whose purpose is to facilitate either an upstream or downstream cartel is likely to be welfare-reducing. Price maintenance absent a horizontal element, meanwhile, has pro-competitive potential. This is because, given a fixed wholesale price, it is normally in the supplier's best interest to have a low retail price in order to maximize sales, unless the higher margins stemming from price maintenance encourages investment in demand-enhancing, non-price selling activities.[29]

If a case is strictly horizontal in nature, the case is more properly brought under the conspiracy provisions of the Act. Cartels may, however, use price maintenance as a tool to reinforce their anticompetitive activities. In the case of an upstream cartel, if retail prices are more readily observable than wholesale prices, it may be easier to fix downstream prices so that cheating can be more readily detected. Moreover, if retail prices cannot be easily reduced, suppliers have less of an incentive to cheat on a wholesale price fixing agreement since cheating would not necessarily result in increased market share. In the case of a dealer cartel, dealers may use the supplier to enforce downstream price fixing though a policy of price maintenance. A dealer's incentive to cheat on the cartel is reduced by the threat of having his/her supply cut. Consequently, the use of an implicit rule of reason in case selection, where the Bureau pursues only those cases that are anticompetitive but are arguably better suited to section 61 than section 45, would see the Bureau taking only those cases that have both horizontal and vertical elements.

More sophisticated products are more likely to have classic pro-competitive price maintenance theories associated with them, while homogeneous, commodity like products are more prone to successful price-fixing. Consequently, the use of an implicit rule of reason in case selection suggests that more products that are unsophisticated would be subject to formal action.[30] If the Bureau were using an internal rule of reason in case selection, one would expect few cases where there would be scope for pro-competitive arguments.[31]

In this regard, the details of 31 investigations undertaken by the Bureau between 1987 and July 2003 that culminated in enforcement activity were reviewed (the reviewed cases are summarized in Table 2).[32] Whether price maintenance cases with a horizontal element were in fact a Bureau priority is discerned, as is the consideration given to possible pro-competitive effects. In particular, the following factors are focused on:

(1) whether the case is strictly horizontal;

(2) whether the case is strictly vertical;

(3) whether the case has both horizontal and vertical elements; and

(4) the nature of the product.

(a) Results: 1987-1999

i. Vertical, Horizontal, Vertical/Horizontal

Of the 25 cases occurring between 1987 and 1999 for which there is documentation, only 14 had sufficient information to allow for a determination of their vertical and horizontal aspects. The results are summarized in Table 3.

Table 3: Classification of Bureau Section 61 Actions, 1987-1999

	Strictly Vertical	Strictly Horizontal	Vertical/Horizontal	Uncertain
Number of Actions	6	3	5	11

Given the dearth of information, it is impossible to draw any general conclusions; however, it is of note that for those cases that can be classified, the last case between 1987 and 1999 that was strictly vertical was brought in 1989. If the cases that cannot be classified follow a similar pattern to those that can, the classification would suggest that from the late 1980s to 1999, the Bureau focused on cases that were more likely to be anticompetitive in their effects as they contained a horizontal element.

Similarly, an internal Bureau study referred to in the 1997 OECD report found that of the 37 actions between 1986 and 1993, 27 contained both a vertical and horizontal element, while only nine cases were strictly vertical in nature.[33]

ii. Nature of the Product and Pro-Competitive Considerations

With respect to the nature of the products in the 25 cases for which we have information, only two are homogeneous commodities: gasoline in both instances. Of the differentiated products, a classification based on an impression of the products suggests that there is a fairly even mix of less sophisticated products such as clothing and more sophisticated products such as stereo and video equipment. Economic theory would suggest that suppliers of these types of sophisticated products are likely to have reasons why they may wish to have price maintenance provisions in place.[34]

A reading of the documents suggests that pro-competitive services have not played any role in any court's decision with regard to the merits of a case, with the possible exception of the 1989 case, *Les Must de Cartier Canada Inc.*[35] In that instance, the Court took into account a supplier's desire to protect its trademark when deciding why Cartier would require a jeweller to submit all advertisements with Cartier's trademark or name for approval. Essentially, the Court found that the intention of the agreement was not to control prices.[36] [37] The only case where the efficiencies associated with price maintenance were explicitly introduced as part of the sentencing is the 1987 *Epson (Canada) Ltd.* case where these arguments had no impact on the trial court's sentence but may have had some impact on reducing the fine on appeal.[38] Rather than attempting to introduce pro-competitive rationales for price maintenance, the focus of the defence has tended to be, in the case of refusal to supply, whether a low pricing policy was in fact the reason an order was not filled, and, in the case of price maintenance, whether an action taken by a person actually constituted an "agreement, threat, promise or any like means" to influence price.

iii. Implication

There is some evidence that suggests that the Bureau throughout the 1990s took more price maintenance cases that contained a horizontal, and thus anti-competitive, element relative to those cases that were strictly vertical in nature. This is in keeping with the Bureau's stated policy with respect to case prioritization that ranks price-fixing and bid-rigging cases highly as these cases are more likely to cause the greatest economic harm. Moreover, between 1990 and 1999, no cases that were strictly vertical were subject to formal enforcement proceedings.

b. Results: 2000 – July 2003

If the Bureau was, in fact, throughout the 1990's, implementing an implicit rule of reason through a system of prioritization that placed price maintenance cases with a horizontal element on top, recent enforcement activity suggests that this may be changing. The publicly available information suggests that only one (*Toyo Tanso*) of the six cases brought since 2000 – *Irving, Sherwood, Stroh Brewery, Toyo Tanso, Re/Max* and *Toyota* – clearly contains a horizontal element. There was insufficient information in the two cases involving gasoline to discern whether there was a horizontal element (both these cases were later dismissed in pre-trial). Of the three remaining cases, the *Stroh Brewery* guilty plea in 2002 was the first strictly vertical enforcement proceeding since 1989.

Recent Policy Developments with Respect to Price Maintenance

The increased section 61 enforcement activity has coincided with renewed public debate on the suitability of its *per se* illegality and the Bureau's dismissal of legal reform as premature.

The question of whether price maintenance is properly placed within the criminal provisions of the Act has been in debate since at least 1985. In that year, the Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission) recommended that the section of the *Combines Investigation Act* that makes it "illegal in any circumstances to require compliance with resale prices" be reviewed.[39] [40] The review was to determine whether price maintenance should be made illegal only in cases of proven anticompetitive impact. The Macdonald Commission further suggested that "RPM might be made a matter for review by an administrative tribunal."[41] The Macdonald Commission's recommendations were based on a background study that went further "in recommending that resale price maintenance should be made legal except where it facilitates the establishment of a manufacturers' or retailers' cartel."[42] As evidenced by the current form of section 61, the recommendations of the Macdonald Commission were not implemented.

More than 15 years later, the recommendations of the VanDuzer Report, a report commissioned by the Commissioner of Competition, and the Report of the parliamentary Standing Committee on Industry, Science and Technology, echo those of the Macdonald Commission. The VanDuzer Report found that the blanket *per se* prohibition of vertical resale price maintenance was not consistent with economic analysis.[43] The Standing Committee Report similarly recommended:

> That the Government of Canada repeal the price maintenance provision (section 61) of the *Competition Act*. In order to distinguish between those practices that are anticompetitive and those that are competitively benign or pro-competitive, that the Government of Canada amend the *Competition Act* so that: (1) price maintenance practices among competitors (i.e., horizontal price maintenance), whether manufacturers or distributors, be added to the conspiracy provision (section 45); and (2) price maintenance agreements between a manufacturer and its distributors (i.e., vertical price maintenance) be reviewed under the abuse of dominant position provision (section 79).[44]

In reaching this conclusion, the Standing Committee noted that all witnesses were in agreement with such a recommendation except for Bureau officials: "The Bureau, the lone dissenter, could only offer a higher success rate when prosecuting under a *per se* offence as its reason for departing from expert opinion."[45] In response, the Standing Committee noted that:

> ...competition policy is not about winning and losing cases; it is about designing a framework whereby an efficient business sector can deliver products and services at competitive prices. Moreover, the Committee sees no social benefit in risking convictions of, and a 'chilling effect' on, pro-competitive vertical price maintenance under the criminal section of the Act, when the civil section offers a more reasonable approach and a better result.[46]

The Bureau's Position

Public statements since 1997 to the fall of 2003 with respect to section 61 have been limited to those made before the Standing Committee in 1999. In the context of Bill C-235, Bureau representatives expressed the view that price maintenance is "almost always anti-competitive":

> The existing criminal price maintenance provisions found in s. 61 of the Act concern conduct which is almost always anticompetitive and which are well understood by the legal profession and industry. They have been effectively applied in the past. Creating a civil alternative will diminish the seriousness of criminal price maintenance and make this behaviour more likely to occur.[47] [48]

While this suggests a shift in the internal view with respect to price maintenance towards a more extreme position, it is interesting to note that the Bureau still qualified its position with "almost". This qualification alone would seem to be at odds with *per se* illegality.

Former Commissioner von Finckenstein, Mr. Chandler, Mr. Don Mercer, Deputy Commissioner of Competition (Amendments), and Mr. André Lafond, Deputy Commissioner of Competition (Civil Matters), appeared again before the Standing Committee on November 25, 1999 when tabling the VanDuzer Report.[49] In this appearance, the Commissioner offered three reasons for the Bureau decision not to endorse the recommendation in the VanDuzer Report that there be a civil review process for vertical price maintenance:

(1) criminal law is the most appropriate for the most egregious offences;

(2) criminal law acts as powerful deterrent; and

(3) there are rights of private access under criminal law.

This would suggest that the Bureau view of price maintenance has shifted from ranking it below price fixing and bid-rigging to ranking it among the most egregious offences. When asked to comment on the VanDuzer Report's finding that pricing practices tend to score low on case selection criteria, Commissioner von Finckenstein noted that the selection criteria would be examined, suggesting that it might be reworked to be more in keeping with the Bureau's position before the Committtee.[50]

However, as suggested by the Bureau's qualification that price maintenance is "almost" always anticompetitive, it appears that the Bureau has not quite yet come to terms with its new hard line position with respect to price maintenance and years of an implicit rule of reason approach. Commissioner von Finckenstein's exchange with a Committee member on the issue of pro-competitive price maintenance was as follows:

> Mr. Gurbax Singh Malhi: Could the Competition Act not be modified to distinguish between pro-competitive and anti-competitive price maintenance?
>
> Mr. Konrad von Finckenstein: Are you asking me whether it could be? Undoubtedly you could make such a distinction, but the way it works right

> now, if there is a price maintenance that's pro-competitive, on what basis would we prosecute? You wouldn't bring it for prosecution. You wouldn't be able to. For price maintenance, you have to prove that it has a negative effect on the competition. You wouldn't when it's pro-competitive.[51]

Commissioner von Finckenstein later, in even greater contradiction of the law and the Bureau's official position, said:

> Here we're talking about price competition, price discrimination, predatory pricing, and price maintenance. In all of those areas there is quite a difference, as Harry [Chandler] said. This conduct can be very pro-competitive and can in effect give consumers more choice, or it can be anti-competitive and can ruin competition. I don't think you can treat it on a *per se* basis.[52]

The Bureau, however, appears to be prepared to do just that.

Table 2:
Summary of Bureau Section 61 Actions[1]

	Parties	Section[2]	Outcome	Product	Details	Strictly Vertical Strictly Horizontal Vertical/Horizontal
	1987					
1	North Sailing Products Ltd.	38(1)(a), 38(1)(b)	Acquitted on 38(1)(b), Convicted on 38(1)(a)	Sailing equipment	The judge found that the retailer's low prices were not the basis for refusal	Strictly vertical
2	Pacific Energy Woodstoves Ltd.	38(1)(a), 38(1)(b)	Acquitted	Woodstoves		Insufficient information
3	Sony of Canada Ltd.	38(1)(a), (38)(1)(b)	Acquitted	Audio and video equipment	The judge found that there was reasonable doubt surrounding the reason for termination as there were a number of reasons other than price that Sony may have terminated supply, and the retailers in question had sold Sony products at a discount for years.	Strictly vertical
4	Barcana Inc.	N.A.	N.A.[3]	Artificial Christmas trees		Insufficient information
5	Epson (Canada) Limited	38(1)(a)	Guilty plea	Computers and printers	Fined $200,000; reduced to $100,000 on appeal.	Strictly vertical
6	Brave Beaver Pressworks Limited	38(1)(b)	Guilty plea	Advertising space	Refused to supply advertising space in its publications to retailers selling below manufacturer's suggested list price.	Insufficient information
	1988					
7	Raymond Lanctot Limitee and Diane Lanctot	38(1)(b)	Acquitted	Sunglasses	The judge found that it was not clear whether the order that was said to have been refused was actually ever received by the accused.	Strictly vertical
8	R.L. Crain, Lawson Mardon Group Limited, Moore Corporation Limited and Southam Printing Ltd	32, 38	Consent	Business forms	Competitor was offered a share of the market if it entered into a bid-rigging scheme	Strictly horizontal
	1989					
9	Toshiba of Canada Limited	61(1)(a)	Convicted	Any product manufacturer or distributed by Toshiba Canada Ltd	Toshiba is prohibited from engaging in price maintenance	Insufficient information
10	Hoffman-La Roche Limited	61(1)(a)	Guilty plea	Vitamins	Hoffman is prohibited from engaging in price maintenance	Insufficient information
11	Commodore Business Machines Limited	50(1)(a), 61(1)(a)	Convicted	Computers, Computer accessories	Commodore had demanded that a retailer's advertised price be increased.	Strictly vertical
12	Les Must de Cartier Canada Inc.	38(1)(a), 38(1)(b)	Acquitted	Wristwatches	The judge found that there were other possible reasons why supply was delayed. The judge also found that the agreement the retailer signed that required it to submit any advertising that contained the Cartier trademark for approval was to protect Cartier's legitimate interest in its trademark.	Strictly vertical

	Parties	Section[2]	Outcome	Product	Details	Strictly Vertical Strictly Horizontal Vertical/Horizontal
13	Shell Canada Products Ltd.	61(1)(a),	Convicted, Appeal not granted	Gasoline	The judge noted that the accused need not have been successful in its attempt to influence price.	Insufficient information
	1990					
14	A.G.F. Management Limited	N.A.	N.A.	Mutual funds	AGF is prohibited from attempting to influence any rebate or discount offered by dealers of securities.	Insufficient information
15	Wenger's Limited	38(1)(b)	Convicted	Wristwatches	No further documents so it is not clear if an appeal was granted.	Insufficient information
	1991					
16	E E. Lemieux Inc. and Simon Carmichael	61(6)	Convicted	Clothing	The accused made non-supply to a competing discount retailer a condition of it making purchases from certain suppliers.[4]	Vertical/Horizontal
	1992					
17	Beamscope Canada Inc., Morey Chaplick and Larry Wasser	61(1)(a)	Convicted	Nintendo video game hardware, cartridges, and accessories	Beamscope is prohibited from engaging in price maintenance.	Insufficient information
	1994					
18	Roberts Real Estate Co. Ltd.	61(1)(b)	Convicted	Real estate	Roberts refused to supply real estate product it had listed for sale and/or otherwise discriminated against another real estate company because of other company's low pricing policy.	Vertical/Horizontal
19	Royal LePage Real Estate Services Ltd., Ted Zaharko and John Bart Roche	61(1)(a), 61(1)(b)	Convicted	Real estate	LePage promised to co-operate with a discount realtor in Calgary if that company increased the commission rates that it charged to home sellers.	Vertical/Horizontal
	1995					
20	La Boutique L'Ensemblier Inc., Boutique Le Pentagone Inc., et Boutique Vagabond Inc.	61(1)	Guilty pleas	Clothing	The accused retailers illegally attempted to persuade by threat, promise or other like means certain clothing suppliers not to supply product to a retailer because of that retailer's low pricing policy.	Vertical/Horizontal
21	Tenneco Canada Inc.	N.A.	Consent	Auto parts	Tenneco is prohibited from engaging in price maintenance.	Insufficient information
	1996					
22	Jacques Perreault (Sherbrooke Driving School)	45(1)(c), 50(1)(b), 50(1)(c) 61(1)(a)	Convicted	Driving lessons	The accused was found to have intimidated other driving schools into maintaining certain price levels.	Strictly horizontal
	1997					
23	Federation des arpenteurs-geometres du Quebec	61(1)(a)	Guilty Plea	Surveying services	Agreement by members of the association to enhance and maintain certain fee levels. levels. Those fees were formerly regulated.	Vertical/Horizontal

	Parties	Section[2]	Outcome	Product	Details	Strictly Vertical Strictly Horizontal Vertical/Horizontal
24	Mitsubishi Corporation of Japan, Mitsubishi Canada Limited, Mitsubishi Paper Mills Ltd., and Rittenhouse Ribbons & Rolls Ltd.	45, 61(1)(b)	Guilty Pleas	Fax paper	As part of a conspiracy to fix fax paper prices, the defendants were fined for price-maintenance activities directed against a fax paper distributor selling at low prices.	Vertical/Horizontal
	1999					
25	Mr. Gas Limited	61(1)(a)	Convicted in 1996, acquitted in 1999	Gasoline	On the basis of the agreed statements of facts, the judge found that there was insufficient evidence to permit for the inference of a threat.	Insufficient information
	2000					
26	Irving Oil	61(1)(a)	Dismissed	Gasoline	In preliminary inquiry, the Judge found that elements of "threat" were not demonstrated by the facts before the Court.[5]	Insufficient information
	2001					
27	Sherwood Co-operative Association Limited	61(1)(a)	Dismissed	Gasoline	In preliminary inquiry, the Judge found there was insufficient evidence that influence was by one of the means prohibited by price maintenance.	Insufficient information
	2002					
28	Stroh Brewery Company	61(1)(a)	Guilty Plea	Beer	Price maintenance in convenience stores and other retail outlets in Quebec for the sale of bottled beer.	Strictly vertical
	2003					
29	Re/Max Ontario Atlantic Canada Inc. Re/max of Western Canada, Re/Max International Inc.	61(1)(a)	Prohibition Order	Real estate agency services	Re/Max had a policy prohibiting the advertising of its commission rates.	Strictly vertical
30	Toyota Canada Inc.	61(1)(a)	Prohibition Order	Automobiles	Program allegedly setting a minimum selling price for car dealerships.	Strictly vertical
31	Toyo Tanso USA Inc.	61(1)(a)	Guilty Plea	Isostatic graphite	Attempted to raise price at which product sold by independent distributor. In 2001, a competitor, Carbone of American Industries Corp., pleaded guilty to isostatic graphite price-fixing.	Vertical/Horizontal

[1] Actions for which public documents are available
[2] 38(1)(a) - price maintenance under the *Combines Investigation Act*
38(1)(b) -refused to supply under the *Combines Investigation Act*
32 - bid-rigging
45(1) - conspiracy
50(1)(a) and (b) - price discrimination
61(1)(a) - price maintenance
61(1)(b) - refusal to supply
61(6) - non-supply to competition a condition of supply
[3] Bureau annual report indicates conviction under section 61 in 1991.
[4] Bureau annual report indicates that E.E. Lemieux Inc. was acquitted and Simon Carmichael was discharged in 1991.
In 1992, the Crown filed an appeal on both the acquittal and the discharge. However, no information is available as to the result of the appeal
[5] Bureau annual report indicates that the case was appealed to Quebec Superior Court.
Based on the information provided by the Bureau, appeal was rejected by Quebec Superior Court in November 2001 (element of threat not proven).

Notes

[1] Lilla Csorgo is a Principal at Charles River Associates.

[2] See for example, F. Mathewson & R. Winter, "The Law and Economics of Resale Price Maintenance" (1988) 13 Review of Industrial Organization 157-184.

[3] Statement by Konrad von Finckenstein, Q.C., Commissioner of Competition, Competition Bureau to the Standing Committee on Industry (15 April 1999) at 2.

[4] Competition Bureau, June 2003.

[5] "A Plan to Modernize Canada's Competition Regime" Report of the House of Commons Standing Committee on Industry, Science and Technology (April 2002) Chapter 5.

[6] Competition Bureau, News Release, "Competition Bureau Investigation Leads to Price Maintenance Charge Against Regina Petroleum Supplier" (17 October 2001).

[7] The following year, the Judge declined to commit the accused to trial for reason of insufficient evidence (Competition Bureau website: Compliance & Enforcement, Court Proceedings/Judgements and Court Orders-2002: Sherwood Co-operative Association Limited, 20 November 2002, Saskatchewan Provincial Court (http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwgeneratedintere/ct02703e.html)).

[8] Competition Bureau, News Release, "Competition Bureau investigation leads to a $250,000 fine in a price maintenance case" (10 October 2002).

[9] Competition Bureau, News Release, "Competition Bureau Investigation Results in Guilty Plea for Price Maintenance of Isostatic Graphite" (15 April 2003).

[10] Competition Bureau, News Release, "Competition Bureau Settles Real Estate Case Involving Canadian Re/Max Franchisees" (17 February 2003).

[11] Competition Bureau, News Release, "Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program" (28 March 2003).

[12] "Resale Price Maintenance", submission by the Competition Bureau to the Organisation for Economic Co-Operation and Development (Paris, 1997) at 33 ("OECD 1997"). For further information, see T. Hunter, "History of Price Maintenance Legislation in Canada" in R.S. Khemani & W.T. Stanbury, eds., *Historical Perspectives on Canadian Competition Policy* (Halifax: The Institute for Research on Public Policy, 1991).

[13] OECD 1997, *ibid.* at 33.

[14] Formal enforcement proceedings include all convictions, acquittals, stays of proceedings, or dropped charges in a given fiscal year. Where more than one prosecution stemmed from the same investigation, they are counted as one case.

[15] W.T. Stanbury, "Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau, 1986-1996" (1998) 13 Review of Industrial Organization, nos. 1-2 at 228 ("Stanbury 1998").

[16] The data for the period fiscal year 1997/1998 and onwards is based on a review of the Bureau's annual reports and media releases supplemented by information verbally provided by the Bureau. These information sources are not necessarily complete and so may be deficient. The figures are, however, an accurate reflection of general trends.

[17] This trend is similarly exhibited in remarks made by the head of the Bureau's Criminal Branch in 1994. Corporate convictions under sections 50 and 61 in 1981-1984 are compared to those in 1991-1994. There were 81 convictions in 1981-1984 compared to only 12 in 1991-1994, an 85% decline. (H. Chandler, Deputy Director of Investigation and Research (Criminal Matters), Bureau of Competition Policy, "Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada" (Remarks to Insight and The Globe and Mail Conference, "Emerging Issues in Competition Law", Toronto, 10 March 1994, at Appendix 1).

[18] This differs from Stanbury's findings that there were a total of four formal actions in fiscal year 1995/1996 alone, and three more in 1996/1997. The VanDuzer Report is less clear than Stanbury in what is counted as a formal proceeding in what year. It is possible that the VanDuzer Report counted formal proceedings on the basis of the year in which they were commenced rather than the year in which they were completed. For consistency in year-over-year comparisons, Table 1 follows the Stanbury methodology.

[19] J.A VanDuzer & G. Paquet, "Anticompetitive Pricing Practices and the *Competition Act*: Theory, Law and Practice" (Report Commissioned by the Commissioner of Competition, 22 October 1999) at 56.

[20] W.D. Critchley, Deputy Director of Investigation and Research (Resources and Manufacturing), Consumer and Corporate Affairs Canada, "The Pricing Practices Provisions of the *Competition Act*: Notes for an Address to The Law Society of Upper Canada Program on The *Competition Act*" (Toronto, 16 May 1989) at 5.

[21] *Ibid.* at 5.
[22] *Ibid* at 5-6.
[23] *Ibid.* at 6.
[24] *Ibid.* at 6.
[25] Chandler, *supra* note 17 at 3.
[26] *Ibid.* at 3.
[27] OECD 1997, *supra* note 12 at 36.
[28] *Ibid.* at 37.
[29] Whether pro-competitive effects dominate the anticompetitive effect of higher prices depends on the facts of the case. In order to trade-off the effects of services and price, one would have to know the nature of the market failure which resulted in the non-socially optimal balance between the two.
[30] This is not strictly the case as price maintenance may also be imposed on simple products for pro-competitive reasons. The supplier may, for example, want to create an incentive for the retailer to maintain an inventory of the product.
[31] Given the *per se* illegality of price maintenance, it is possible that even where there are such considerations, it is not evident from the case material.
[32] Not all of the available documents were final decisions. Where possible, final outcomes were determined through other means as noted in Table 2.
[33] L. Csorgo & D. McFetridge, "The Economics of Resale Price Maintenance: Evidence from Canadian Cases", Competition Bureau, Draft 1995, as found in OECD 1997, *supra* note 12, at 37.
[34] It is possible that there are also legitimate pro-competitive reasons as to why a supplier of an unsophisticated product may wish to implement price maintenance.
[35] *R.* v. *Les Must de Cartier Canada, Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.)
[36] *Ibid.*
[37] The Court also found that even if the retailer misinterpreted the document as having had the intent of controlling prices, the retailer voluntarily signed the document. The signing was not as a result of an agreement, threat, or promise and so the document was not in violation of the Act.
[38] *R.* v. *Epson (Canada) Ltd.* (1987), 19 C.P.R. (3d), 197 (Ont. Dist. Ct.), aff'd (1990), 32 C.P.R. (3d) 78 (Ont. C.A.)
[39] *Royal Commission on the Economic Union and Development Prospects for Canada* [*Macdonald Commission*], Supply and Services Canada, 1985, at 224.
[40] Our research suggests that this review was never carried out. However, this could not be confirmed by the Competition Bureau.
[41] *Macdonald Commission, supra* note 39.
[42] R.D. Anderson & S.D. Khosla, "Recent Developments in the Competition Policy Treatment of Resale Price Maintenance" (1985) 6:4 Can. Comp. Rec. 1.
[43] VanDuzer Report, *supra* note 19 at 45.
[44] The Standing Committee Report, *supra* note 5 at Chapter 5, recommendation 22.
[45] *Ibid.* at chapter 5.
[46] *Ibid.* at chapter 5.
[47] Statement by Konrad von Finckenstein, Q.C., Commissioner of Competition, Competition Bureau to the Standing Committee on Industry (15 April 1999) at 2.
[48] A few weeks earlier, Harry Chandler, then head of the Criminal Matters Branch, made similar comments to the Standing Committee: "This has been a relatively simple section to enforce; is generally understood by businesses; concerns conduct which is almost always anti-competitive; and has been used successfully with respect to a wide variety of product." (Comments of Harry Chandler, Deputy Commissioner of Competition (Criminal Matters), Bill C-235, Standing Committee on Industry (24 March 1999) at 3).
[49] Standing Committee on Industry, Evidence, 25 November 1999 (www.parl.gc.ca/InfoComDoc/36/2/INDU/Meetings/ Evidence/ induev09-e.htm).
[50] *Ibid.* at 9:20.
[51] *Ibid.* at 9:35.
[52] *Ibid.* at 9:45.

INFORMATION NOTICES AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD SEPTEMBER 1, 2003 TO MARCH 31, 2004

The following Information Notices and News Releases are available on the Bureau's website at http://cb-bc.gc.ca.

September 4, 2003
NEWS RELEASE: Competition Bureau Fixes Home Improvement Merger Involving RONA-Réno-Dépôt

September 11, 2003
INFORMATION: Bureau Welcomes New T.D. MacDonald Chair in Industrial Economics

September 16, 2003
INFORMATION: Bureau Resolves Competition Concerns With Medical Equipment Merger

September 16, 2003
NEWS RELEASE: Competition Bureau Participates in the Creation of an Alberta Law Enforcement Partnership

September 18, 2003
NEWS RELEASE: Former UCAR Executive Robert Krass Pleads Guilty to Price-Fixing

September 18, 2003
INFORMATION: Competition Bureau Releases Information Bulletin on Private Access to the Competition Tribunal

September 23, 2003
NEWS RELEASE: Competition Bureau Investigation Leads to Criminal Charges Against Telemarketers of Toner Supplies

October 1, 2003
INFORMATION: Competition Bureau Concludes Winnipeg Commercial Waste Markets Investigation

October 10, 2003
INFORMATION: Competition Bureau Concludes Nova Scotia Snow Crab Inquiry

October 14, 2003
NEWS RELEASE: Cracking Down on Cross-Border Scams: Competition Bureau Signs Cooperation Arrangement with UK Counterparts

October 14, 2003
INFORMATION: Alcan's Offer for Pechiney Cleared by the Competition Bureau

November 5, 2003
INFORMATION: Competition Bureau Seeks Public Comment on its Bank Merger Enforcement Guidelines

November 10, 2003
NEWS RELEASE: Allan Rock announces appointment of Sheridan Scott as new Commissioner of Competition

CANADIAN COMPETITION RECORD

December 2, 2003
NEWS RELEASE: Promotional Contests Made Clearer to Consumers Through Competition Bureau Investigation

December 18, 2003
INFORMATION: Competition Bureau Concludes Examination of the Distribution Agreement for the Rolling Stones new DVD

December 22, 2003
INFORMATION: Revision to the Fee and Service Standards Handbook

January 16, 2004
INFORMATION: Competition Review Clears Merger of Printing and Publishing Firms in Atlantic Canada

February 5, 2004
INFORMATION: Beware of Bogus Jewellery Appraisal Values

February 27, 2004
INFORMATION: Competition Bureau Responds to Complaint Over Alleged Misuse of Canada's Drug Patent Rules

March 2, 2004
NEWS RELEASE: Competition Bureau to Spearhead First International Anti-Fraud Public Education Campaign

March 9, 2004
NEWS RELEASE: Competition Bureau Investigation Leads to Guilty Plea on Cross-Border Deceptive Telemarketing

March 16, 2004
NEWS RELEASE: Competition Bureau Reaches $750,000 Settlement on Prepaid Long-Distance Phone Cards

March 25, 2004
INFORMATION: Competition Bureau Seeks Public Comment on its Merger Enforcement Guidelines

March 30, 2004
INFORMATION: Food Processors can Merge Following Competition Review