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THE 2009 AMENDMENTS TO THE *COMPETITION ACT*: REFLECTING ON THEIR IMPLEMENTATION AND ENFORCEMENT, AND LOOKING TOWARD THE FUTURE

Melanie L. Aitken[1]
Commissioner of Competition

INTRODUCTION

Three years have elapsed since most of the 2009 amendments to the *Competition Act* (the "Act") were enacted (two years in the case of the criminal and civil competitor collaboration provisions). As such, it is a good time to reflect on the Competition Bureau's (the "Bureau") implementation of the amendments, including how the amendments have allowed the Bureau to become a more effective, efficient and predictable antitrust enforcer, and to consider the extent to which the amendments have realized their objective. The amendments have had a very positive impact on the Bureau's mandate; looking forward, the Bureau must build upon these important amendments to promote the goal of delivering to Canadians the vigorously competitive markets needed to prosper.

The 2009 amendments were significant not just in their specific terms and scope, but in the challenge and, indeed the opportunity, they presented. Prior to 2009, the Bureau's ability to discharge its responsibility to foster competitive markets had been handicapped in several key aspects, with legislation that ill-supported a robust enforcement programme. Most obvious among these deficiencies were a market effects test for the criminal cartel offence - effectively gutting the cornerstone criminal provision - and a cumbersome and very limited tool for accessing relevant information to support sufficiently thorough and timely merger reviews. In addition, there were insufficient or, in some cases, none at all, consequences for anti-competitive behaviours that can have devastating consequences for competition and the Canadian businesses and consumers who depend on healthy markets.

Parliament's introduction of the 2009 amendments began a new chapter in Canadian competition law and enforcement. I saw a real opportunity for the Bureau and Canadians. Specifically, the time was ripe for the Bureau to step up

its enforcement efforts and communicate in clear and understandable terms our willingness to pursue offenders; to my mind, this was essential if we hoped to be relevant to Canadian businesses and consumers. The challenges were multifaceted - including inspiring confidence in a business community taken aback by significant changes in the law, building an enforcement-minded capacity and culture at the Bureau, identifying the right litigation risks to take on, and simply digesting the newly configured provisions. Some of these challenges have been met; candidly, the Bureau's adaptation to others remains a work in progress. What I believe is palpable three years in is a broad recognition that the Bureau will pursue enforcement if required, and will fight for competition. Over time, this will ensure that Canadian markets subject to Bureau oversight will function competitively, and thereby enhance productivity for all Canadians.

My goal in this paper is to consider, first, where we were prior to these very significant amendments; next, to highlight the principal amendments, and examine and evaluate the Bureau's response to these amendments in the key affected areas (tainted as it necessarily is by my perspective); and, finally, to consider what lies ahead.

1. THE AMENDMENTS IN HISTORICAL CONTEXT

Since Canadian competition law was introduced in 1889, the Act and its various predecessor statutes have been amended frequently, sometimes subject to complete overhaul, and at other times subject to more modest change. It is fair to say that the amendments passed by Parliament in 2009 were significant, as they introduced fundamental changes to key provisions of the Act, including: a two-stage review process for notifiable transactions, increased pre-merger notification thresholds and a reduced merger review limitation period; a dual-track approach to agreements between competitors, with a limited criminal hard-core cartel offence and a civil provision to address certain other anti-competitive agreements; repeal of the criminal pricing provisions and a new civil price maintenance provision; and, new remedies and increased penalties under both the criminal and civilly reviewable practices provisions of the Act.

The 2009 amendments had as their immediate source the June 2008 report of the Competition Policy Review Panel (the "Panel"), which observed that "a number of provisions of the *Competition Act* are either ineffective or obsolete," such that "the legislation deviates in some respects from internationally accepted best practices."[2] Nonetheless, the subject of most of the amendments (excepting merger review) had been the subject of formal and informal consultations among stakeholders for nearly a decade, and the ultimate amendments

can be traced in large part to recommendations made by the House of Commons Standing Committee on Industry, Science and Technology (the "Industry Committee") in 2002.[3]

The 2009 amendments reflect some general trends in Canadian competition law over the past century, including: a) a move away from criminal prohibitions toward reviewing conduct under a civil standard; b) a focus on applying competition law as framework legislation with limited sector-specific provisions; c) increased remedial flexibility and vigour, to address and better deter prohibited conduct, both in terms of the types of remedies available and the severity of penalties; and d) improved access to information during merger reviews.

(a) Shift from Criminal to Civil Review

Competition legislation in Canada was, until 1976, overwhelmingly criminal in nature. We have seen this trend reverse, most recently reinforced by the 2009 amendments, with many practices now subject to review by the courts and/or the Competition Tribunal (the "Tribunal") on a civil standard.

For example, while the 1976 amendments to the *Combines Investigation Act* created new criminal competition offences, they also introduced new civilly reviewable practices provisions. Subsequent amendments in 1986 repealed the criminal offences relating to mergers and monopolies, and replaced them with new civil merger and abuse of dominance provisions, under the jurisdiction of the Tribunal.[4]

The 2009 amendments continued this trend. The introduction of a dual-track approach to agreements between competitors reserves section 45 for hard-core cartel agreements that fix prices, allocate markets or restrict output, while certain other forms of competitor collaborations, such as joint ventures and strategic alliances, will now be reviewed civilly under the new section 90.1 if they substantially lessen or prevent competition. In addition, the amendments repealed the criminal *per se* price maintenance offence and replaced it with a new civil provision that allows the Tribunal to issue a remedial order where competition is adversely affected. Finally, the amendments repealed the price discrimination, predatory pricing and promotional allowances offences, with such conduct now subject to civil sanction under the general abuse of dominance provision.

(b) Limiting Sector-Specific Provisions and Exemptions

While the Act is often referred to as marketplace framework legislation, policymakers have long struggled with the extent to which certain industries

should be exempt from the Act or, conversely, be subject to special industry-specific provisions. The Act contains a number of such industry-specific exemptions and provisions, including: exemptions for certain collective bargaining activities; an exemption from section 45 for certain types of securities underwriting; and exemptions under sections 90.1 and 92 for certain agreements and mergers between federal financial institutions that have been approved by the Minister of Finance and agreements that constitute a merger under the *Canada Transportation Act*. In addition, other federal statutes, such as the *Shipping Conferences Exemption Act, 1987*, expressly exempt certain conduct from the Act, and conduct that is authorized or required by legislation may not be subject to challenge under the Act pursuant to the judicially developed regulated conduct doctrine.

The wisdom of exempting specific industries or conduct from application of the Act, or of subjecting them to dedicated competition law provisions, can certainly be debated as a matter of industrial policy; however, as a matter of pure antitrust, there is no principled basis for such exemptions.

In 1999, the Act had been amended to include a number of airline-specific provisions following the acquisition of Canadian Airlines by Air Canada, designed to address the reduced state of competition in the Canadian airline industry post-merger. The 2009 amendments accepted the recommendation of the Competition Policy Review Panel and repealed those sector-specific provisions – a welcome development given that the momentum to remove such customized treatment can be hard to inspire.

(c) Increasing Remedial Flexibility

The 2009 amendments also continue a trend to widen the array of remedies available under the Act and to provide for increased maximum penalties, including in the form of prison terms, fines and administrative monetary penalties ("AMPs").

The 2009 amendments increased both the level of fines and the term of imprisonment for criminal conspiracies, with the maximum fine increasing from $10 million to $25 million and the maximum prison term increasing from 5 years to 14 years. Canada now has, on the books, among the most serious sanctions for cartel conduct; what our prosecutors and courts do with these provisions will be the real test of Canada's commitment to condemn this unambiguously harmful criminal conduct.

In addition to increased penalties for criminal conspiracies, the 2009 amendments strengthened the incentives to comply with the abuse of dominance provision by empowering the Tribunal to impose AMPs as an additional

remedy, in an amount of up to $10 million for a first order and up to $15 million for each subsequent order in respect of the prohibited conduct.

The amendments also introduced greater remedial flexibility under other sections of the Act, including a new restitution remedy for non-criminal false and misleading representations, increased AMPs for civilly reviewable deceptive marketing practices, and significantly increased prison terms for the criminal offences of bid rigging, misleading advertising, deceptive telemarketing and deceptive notice of winning a prize.[5]

(d) Improved Access to Information during Merger Review

Traditionally, in Canada, in contrast to our major trading partners, particularly the U.S., there had been an accepted notion that, in the design of competition laws, there should be a so-called 'balance' struck between the public interest, on the one hand, and the burden on business, on the other. What that framework ignored, while responsive to a vocal stakeholder bias, was the fact that the public interest in the enforcement of sound, principled competition laws must necessarily trump some inchoate notion of a 'burden on business' in the context of a scheme of economic regulation to which participants in the market must be subject if the law is to be coherently conceived and applied.

With the 2009 amendments to the merger review process, Parliament refreshingly dispensed with this ill-conceived notion of a 'balance', in favour of unambiguously putting the public interest first, but importantly, with certain checks on the investigative body (e.g., parties can close their proposed mergers 30 days after compliance with a Supplementary Information Request). In my view, the reworked investigative model, aligning the incentives of merging parties with those of the Bureau in conducting sufficiently thorough merger reviews, puts the emphasis in the right place. There is now a meaningful ability for the Bureau to access relevant information in a timely way, while there are, at the same time, disciplines in the scheme to ensure the Bureau is strongly motivated to conduct its reviews expeditiously, keenly aware of the importance to its credibility of minimizing the burden on those implicated in its work.

2. THE BUREAU'S RESPONSE TO THE AMENDMENTS

When the competitive process fails to discipline market actors in their decision-making, Canadian consumers and legitimate businesses must have confidence that the Act can be invoked to protect them from anti-competitive conduct and to create the conditions that will allow them to prosper in a competitive and innovative marketplace. The 2009 amendments were intended to

ensure that the Bureau has the necessary tools to better protect consumers and business from the most egregious types of anti-competitive conduct, while still encouraging pro-competitive behaviours in the marketplace, and to sufficiently thoroughly, and in a timely way, review potentially anti-competitive mergers, among other things.

My immediate priority as Commissioner when the amendments were passed was to successfully implement the changes, and to seize the opportunity to reinvigorate the Bureau's enforcement of the Act. Accordingly, in addition to an extensive program of stakeholder outreach to consult upon the implementation of the amendments and design and publicize the best enforcement approaches, we also examined our internal capacity and processes, to facilitate our adaptation to the new provisions and to respond in the way I understood Parliament to intend in providing us the enhanced mandate.

A. Merger Review

I. Highlights of the Amendments

Consistent with the recommendations of the Panel, the 2009 amendments implemented significant changes to the merger review provisions of the Act, by increasing pre-merger notification thresholds, introducing a new two-stage review process for notifiable transactions, and reducing the limitation period within which the Commissioner may challenge a completed merger from three years to one.[6]

Most significant among the amendments was the replacement of the previous short-form and long-form pre-merger notification filing process with a new two-stage process. The Panel's rationale for recommending this change was that "using an analytical approach and regulatory process that is convergent with our major trading partners should not only help the Competition Bureau conduct its work but also reassure international investors that Canadian competition laws in respect of mergers are modern and transparent."[7]

Under the old system, unless the Commissioner secured an injunction against closing, parties were free to close after the 14- or 42-day waiting period expired, regardless of whether the Commissioner had obtained the information necessary to properly assess the transaction. The Panel found serious deficiencies with this process,[8] and concluded that "it would be beneficial to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the U.S."[9]

Consistent with that recommendation, under the new review process, an initial 30-day waiting period begins once parties to a notifiable transaction file the prescribed information. At any time during this waiting period, the

Commissioner may issue a request to the parties for additional specified information relevant to an assessment of the proposed transaction (a so-called "supplementary information request," or "SIR"), following which a second 30-day waiting period begins once the Commissioner receives all of the requested information.

II. Enforcement Experience

My experience with the pre and post amendment merger review rules is that the creation of a two stage merger review scheme corrected a serious misalignment of incentives, introduced a coherent framework where the risk that an anti-competitive merger will close before the Bureau can review relevant information does not turn on the risk tolerance of the parties, and allows the Bureau to responsibly and efficiently review the very few mergers that risk substantial harm to the Canadian economy.

Indeed, since the 2009 amendments came into force, the changes have allowed for a timely, focused review of proposed mergers. Notably, there has been a significant reduction in the amount of time taken to conclude complex cases in the three years following the coming into force of the amendments. In that period, the Bureau completed its review of "complex" transactions in an average of 36 days, compared to an average of 49 days in the three years pre-amendments. In non-complex cases, the Bureau concludes on average 92% of its reviews within two weeks.

Importantly for the competitiveness of our markets, we have also been able to secure robust remedies in the few cases where remedies have been required. I think it is fair to say that our successful results are related to both the extensive stakeholder consultation we embarked on immediately following the amendments (and the revised guidance that flowed from that consultation) and to our clearly stated willingness to litigate where necessary.

While we have certainly been informed by the U.S. experience as we implemented, in particular, the supplementary information request procedure, I believe that we adopted a distinct "made-in-Canada" approach. By that, I refer to an approach that is sensitive to our context and tradition, where flexibility and creativity (necessities under our former merger regime, in particular, which did not fit the demands of the process for parties or the Bureau) continue to play an important role, but where predictability is much greater owing to clearly articulated principles and expectations.

(a) Supplementary Information Requests (SIRs)

Under the two-stage merger review process, the SIR has effectively replaced

orders under section 11 of the Act as the primary method the Bureau uses to compel the parties to a merger, who have submitted a pre-merger notification filing, to provide additional information required by the Bureau to conduct its review. The Bureau has issued a total of 18 SIRs in the three fiscal years since the 2009 amendments; on average, we have issued six SIRs per year, a small fraction (approximately 3%) of the 200 to 225 transactions that we review annually.

The average time required for full compliance with a SIR has declined significantly over the past three years, as we benefit from all sides' increased familiarity with the process, and owing to the Bureau's tailored approach to SIRs, as outlined in the *Merger Review Process Guidelines*, already issued in a revised form to reflect our experience to date.[10] The average time to full compliance in 2009-10 was 91.4 days, and this has improved by a significant 51.2% in 2011-12, falling to 44 days.

Immediately following the amendments, some stakeholders voiced concern that the Bureau would issue unjustifiably broad SIRs with a corresponding devastating burden imposed on affected businesses. To the contrary, through our clear and early guidance, and our commitment to confining our requests to only that information which is necessary, we have demonstrated this is not the case. During the 30-day period leading up to the issuance of a SIR, the Bureau works diligently to advance its review as much as possible. We generally engage in a pre-issuance dialogue intended to ensure parties understand the information being sought, to narrow and refine information requests, and ascertain whether there are issues that may impair a party's ability to comply with the SIR, such as technological barriers to production. This pre-issuance dialogue is not a negotiation, but provides parties with the opportunity to identify ways that they may assist in reducing the scope of a SIR by, for example, identifying particular categories of employees with responsive information, or reports that are prepared in the ordinary course of business that may contain information responsive to the Bureau's needs.

Further, we certainly recognize the value of aligning our SIR processes with those of other jurisdictions, particularly the U.S., where appropriate. Accordingly, we frequently align our default time limits for search periods with those in the U.S. and, in appropriate cases (such as where the parties operate on a North American basis and, in the Bureau's view, there are no competition issues that are unique to Canada), the Bureau may consult with the parties to examine the prospect of limiting custodians (to the extent possible) to those custodians to which U.S. authorities have agreed for purposes of a second request.

(b) Timing Agreements

It is not uncommon for parties to offer the Bureau unilateral commitments regarding the provision of information or the timing of closing. The Bureau does not consider unilateral commitments, on their own, to be a timing agreement. For our purposes, a timing agreement is an agreement where the Bureau has also made a commitment.

There are limited circumstances where the Bureau may consider an appropriately worded timing agreement as an acceptable means of obtaining additional information. For example, in non-notifiable transactions and where information is required from third parties, the Bureau may proceed by way of timing agreement or section 11 order. In the context of a hostile transaction, where the Bureau requires supplementary information from the target, it will typically issue a SIR to the target in combination with either a timing agreement or an order under section 11. As the second statutory waiting period in a hostile transaction is determined by the bidder, the Bureau must be assured that it will receive the required information from the target in a timely manner.

(c) Consent Agreements

As of March 31, 2012, the Bureau had registered a total of 10 merger consent agreements with the Tribunal since the 2009 amendments, an increase over the seven agreements registered in the preceding three-year period. It is difficult to link the volume of registered consent agreements to the 2009 amendments; the number of transactions in which a remedy is negotiated is a function of the nature of the competition concerns raised by the particular transaction, and the tolerance of parties to the transaction to litigate identified competition issues. That said, it may be relevant that, since 2009, we have been explicit about our willingness to litigate matters, mergers and otherwise, where necessary. While we have challenged only two mergers in that time period, the Bureau's renewed enforcement activities - including more, and more robust, consensual resolutions as well as litigated matters - are having a salutary effect, not only *ex post*, in securing the necessary meaningful remedies, but also, *ex ante*, by clarifying the bounds of conduct that violates the Act, such that parties are better aware whether competition issues requiring redress are likely to arise.

(d) Increased Notification Threshold and One-Year Limitation Period

The increase in the thresholds for the mandatory notification of mergers brought about by the amendments was a low risk change on its own, and followed the recommendation of the Panel. The change was designed to ensure that these provisions "do not impose regulatory obligations on parties to

proposed mergers that are disproportional to their potential to raise substantive competition issues."[11] While strictly speaking, the financial size of a transaction has no bearing on the likelihood of substantive competition concerns arising (think of a merger to monopoly in a small market), it is fair to identify low value transactions with lower affected volumes of commerce.

However, the shortening of the limitation period during which the Commissioner can challenge a transaction from three years to one has the potential to be problematic in practice. While in keeping with the Panel's recommendation, it cannot be said that this amendment aligns our laws with our major trading partners. In the U.S., for example, there is no limitation period whatsoever on challenging a merger for anti-competitive consequences. While to the extent this change was necessary to effect Parliament's overwhelmingly positive overhaul of the merger review provisions, it was well worth it, I do believe that Canadians could be better protected from anti-competitive mergers if the Bureau had the ability, in those few cases where it would be necessary, to challenge a merger more than one year post-closing. The competitive effects of a transaction are not always immediately apparent or knowable in advance. Indeed, particularly in dynamic, rapidly changing markets, it can be exceedingly difficult to predict effects; in such cases, it is preferable to have the ability to stand back and wait to see how the market dynamics will unfold, before having to make a final decision on whether the merger should proceed or not.

In response to these emerging issues, the Bureau's Mergers Branch has recently begun to actively monitor merger transactions in the Canadian marketplace. The objective of the process is to identify completed transactions that should have been notified to the Bureau and/or that may raise serious competition issues, before the one-year limitation period expires. The Bureau's challenge of a non-notifiable merger in the CCS/Complete case demonstrates, among other things, that the Bureau is willing to take a meritorious case, regardless of size.

(e) International Cooperation and Coordination

As was anticipated when the 2009 amendments were announced, the shift to a two-stage merger review process has brought the timing of Bureau merger investigations into greater alignment with that of the U.S. competition authorities. In cases of multi-jurisdictional merger reviews, this closer alignment has had a positive impact on the ability of the Bureau and the U.S. competition authorities to coordinate investigations, particularly with respect to the issuance and receipt of SIRs and second requests. This alignment is beneficial to all involved, as it permits reviews to be conducted in tandem with other jurisdictions in a timely manner, allowing everyone to get down to business in a

constructive manner, with a view to clearing, or remedying if and as necessary, as expeditiously as possible.

B. Agreements Between Competitors

I. Highlights of the Amendments

The criminal conspiracy provision in section 45 of the Act remained largely unchanged in its most fundamental aspect from 1889 to 2009. With the exception of a one-year period at the turn of the twentieth century, the provision always required establishing, to the criminal standard of proof of "beyond a reasonable doubt" that the alleged conspiracy "unduly" prevented or lessened competition.[12] This "undueness" requirement came to be interpreted by the courts as requiring a showing of anti-competitive effects from the conspiracy, which involved assessing the market power and behaviour of the conspirators.[13]

The "undueness" element of the former conspiracy provision has been characterized as a "design flaw" and as posing "the greatest obstacle to a successful conviction under section 45."[14] This is owing to the difficulty of establishing, to the criminal standard of beyond a reasonable doubt, that the conspiracy unduly lessens or prevents competition. Thus, in its 2002 report, the Industry Committee concluded that section 45 was under-inclusive in its scope, because it was difficult to enforce in a contested trial even when applied to hard-core cartel activities. At the same time, section 45, at least in theory, risked being over-inclusive; as characterized by the Industry Committee, it risked a "chilling effect" on pro-competitive strategic alliances through the potential for criminal sanction.[15]

The 2009 amendments address the over- and under-inclusiveness of section 45 by replacing it with a dual-track criminal and civil approach to agreements between competitors. Under the new section 45, the hard-core cartel activities of price-fixing, market allocation and output restriction are *per se* illegal (subject to an ancillary restraints defence), without a requirement to show anti-competitive effects. Certain other forms of competitor collaborations, such as joint ventures and strategic alliances, are now subject to review and prohibition by the Tribunal under the new civil section 90.1 if the agreements are likely to lessen or prevent competition substantially and an available efficiencies defence is inapplicable. It is worth noting that the agreements potentially caught under section 90.1 are restricted to those between competitors, and therefore do not include vertical agreements.

II. Section 45 Enforcement Experience

The 2009 amendments to the criminal conspiracy provision were intended to

make it easier to investigate and prosecute harmful forms of egregious cartel agreements while not discouraging potentially beneficial strategic alliances or other agreements that may be efficiency-enhancing or otherwise pro-competitive.

Following the amendments, we made a conscious decision to exercise our powers in a manner that is appropriately aggressive to the criminal nature of the conduct at issue, consistent with a more coherent criminal standard where the "effects" requirement has rightfully been removed, and where the Bureau has been given powerful investigative tools to pursue this harmful conduct. To support this shift, we critically assessed how we prioritize and select our criminal cases.

(a) Volume and Nature of Cases

In the two years following the coming into force of the new section 45, while the number of complaints received by the Bureau under the conspiracy provision declined, the Bureau commenced (and concluded) more inquiries, and has become considerably more efficient at investigations.[16]

The number of inquiries commenced by the Bureau in the two years following the coming into force of the new section 45 increased 150% over the previous two-year period. As time passes, not surprisingly the Bureau's cases have shifted from "former" section 45 cases (where the alleged conduct occurred entirely prior to the amendments, and therefore must satisfy the elements of the old section 45) to more "hybrid" investigations (where the alleged conduct occurred both pre- and post-amendments) and, most recently, pure new section 45 cases.

Particularly noteworthy since the amendments is the Bureau's considerable achievement in advancing section 45 cases more quickly. In the three years before the new section 45 took effect, the average length of an investigation, from inquiry commencement to closure or referral for prosecution, was nearly two years. Two years post-amendment, the average investigation length decreased to just six months. While the Bureau has expended considerable effort in re-engineering its day-to-day practices (and resolved all legacy cases through referral or closure by discontinuance), the improved pace of investigations is also owing to the conversion of section 45 to a *per se* offence, as we are no longer required to gather the considerable evidence required to establish the undue lessening of competition effect.

(b) Use of Formal Powers

Consistent with my conviction that the way the Bureau was approaching criminal enforcement was not taking full advantage of our tools (understandable to an appreciable extent owing to the frailties of the prior provision), our focus

has been on making greater use of the formal powers of investigation available under the Act, where appropriate, to more effectively advance cases. In particular, we have markedly increased our use of wiretaps, section 15/16 searches and section 11 orders as investigative tools, to compel production of documents and to require targets to provide written returns of information. Not only are we advancing our targeted investigations more expeditiously, we are training our staff to consider their cases through the lens of a readiness for prosecution.

Not only has the Bureau made greater use of formal powers, it has advanced cases more rapidly to the formal powers stage. In a recent case under the new section 45, the time between marker to court authorization of formal powers was just 12 days. This is a noteworthy development. This new pace at the Bureau is taking hold; we can expect it to continue.

(c) International Coordination of Investigations and Prosecutions

Amending section 45 of the Act to create a *per se* conspiracy offence has brought Canada's approach to hard-core cartels in line with that of most mature antitrust jurisdictions around the world and, as a result, has allowed the Bureau to more effectively coordinate its investigations and cooperate with foreign antitrust enforcers. In the past several years, we have been able to liaise more effectively owing in considerable part to the recognition that our law now has coherence – meaning both that the law corresponds to others' anti-cartel provisions, and that conviction for violations is now a legitimate threat.

That said, my perspective is that international cooperation and coordination, particularly with those agencies with whom we do not deal as regularly, is occurring primarily during the covert stage of an investigation, with more limited cooperation in the later stages. This is owing to several factors, not connected to the substantive elements of Canada's criminal competition offences, but rather to limitations on the sharing of confidential information (particularly from immunity applicants), timing issues and different settlement procedures across jurisdictions that constrain the ability to coordinate in the later stages of multi-jurisdictional investigations. Our counterparts are likewise conscious of these limitations and there are initiatives in the works to try to address them, so as to enhance the international pursuit of this unambiguously harmful conduct.[17]

III. Section 90.1 Enforcement Experience

Section 90.1, the so-called civil agreements section, was the civil half of the fix to the anomalies of the prior cartel provision. Section 90.1 provides for the review of agreements between competitors if they substantially lessen or

prevent competition. Notably, particularly when compared to the prohibitions in the U.S., EU, and elsewhere, agreements subject to challenge are confined to agreements "between competitors" rather than "any agreement in restraint of trade."

Since agreements between competitors, even strategic alliances or joint ventures, are frequently not public, the number of complaints received by the Bureau under section 90.1 almost certainly underrepresents the incidence of conduct that could raise issues under the provision. While the Bureau has received relatively few complaints under section 90.1, a significant proportion of the complaints received have raised potential competition issues. Moreover, 2011 saw the Bureau bring its first challenge to the Tribunal of agreements under section 90.1, in the airlines case.[18]

C. Price Maintenance

I. Highlights of the Amendments

The 2009 amendments converted the criminal *per se* price maintenance provision into a civil provision requiring a demonstration of adverse anti-competitive effects. As in other jurisdictions, there has been for some time a lively debate in Canada about the wisdom of a criminal offence in the context of price maintenance conduct. By way of example, the Industry Committee opined in 2002 that there is "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."

The new civil price maintenance provision, in section 76, is different from the previous section 61 criminal offence in several significant ways. First, whereas section 61 applied to both resale price maintenance (vertical relationships between suppliers and their customers) and horizontal price maintenance (between potentially competing suppliers at the same level of the distribution chain), section 76 is confined to resale price maintenance. Second, section 76 introduces a competitive effects test, requiring that the price maintenance have an "adverse effect on competition in a market." Third, the Act's private access regime was extended to section 76, allowing private parties "directly affected" by price maintenance to bring an application to the Tribunal (with leave). Finally, remedies under section 76 are now limited to prohibition orders and orders requiring the offending party to accept another party as a customer; the Tribunal cannot impose financial penalties.

II. Enforcement Experience

The first challenge under the new civil price maintenance provision was filed

in December 2010 against Visa and MasterCard. The challenge seeks to strike down anti-competitive rules that Visa and MasterCard impose on merchants who accept their cards that discourage a reduction in the fees that merchants must pay, adversely affecting competition in the supply of credit card network services in Canada.[19] The hearing concluded in June 2012; while the Tribunal's order allowed considerable and active intervention on issues that appear to extend beyond the parameters of those raised in the Application, we remain hopeful that the Tribunal's decision will clarify the scope of section 76.

D. New Remedies and Increased Penalties

I. Highlights of the Amendments

It had been widely recognized for some time that the remedies previously available to censure conduct violating the Act were insipid; in those cases where AMPs were authorized, the level was so low as to amount, at most, to a license fee for conduct that would substantially enure to the offender's benefit. In others, there was no AMP or penalty at all, effectively gutting any incentive to comply with the law. For example, for abuse of dominance, the offender could continue to profit from anti-competitive conduct through the many months necessary for the Commissioner to investigate and prosecute; *even if* the Commissioner was ultimately successful, the most the Tribunal could mete out was an order to stop the violating conduct going forward.

As described earlier, the 2009 amendments introduced new remedies to the merger and civil provisions of the Act, and strengthened the level of existing penalties available under the Act's criminal provisions. The increased flexibility created by the amendments enhances the ability of the Tribunal and courts to fashion remedies more suited to the offending conduct and, to send a message to the marketplace of some deterrent value.

II. Enforcement Experience

(a) Conspiracy and Bid-rigging

Since the 2009 amendments, and consistent with my concern to use the new provisions to signal to the marketplace the seriousness with which we view competition law offences, we have pursued a deterrent message by obtaining record fines. For example, in January 2012, the Bureau obtained its first conviction under the current section 45, relating to a conspiracy in the polyurethane foam industry. The corporate defendant and its affiliate were fined a total of $12.5 million.[20]

Going forward, the Bureau anticipates recommending higher penalties for individuals, and seeking terms of imprisonment, where appropriate. In the meantime, we are taking steps to signal clearly that the era of an inactive

Bureau, hampered in its ability to refer charges and recommend meaningful fines and other sanctions, is over. To the same end, we are developing strategies to resist, more suitably aggressively, the games counsel have played with some success in the past, inappropriately exploiting our immunity and leniency programs and effecting unjustifiable delay, to the prejudice of important investigations.

(b) AMPs for Abuse of Dominance

The fact that it was important to introduce AMPs into the abuse of dominance context was recognized by many, including the OECD. The OECD found that "[d]eterrence of unlawful practices by dominant firms [in Canada] would be enhanced by permitting the Tribunal to impose monetary fines."[21]

The Bureau has brought applications or obtained remedies on consent under section 79 in three cases since the 2009 amendments: Waste Services (consent agreement);[22] CREA (contested, but settled before trial);[23] and TREB (contested).[24] The Bureau did not seek AMPs in CREA or Waste Services; my concern in these cases was, most immediately, to expedite meaningful results for Canadians rather than get bogged down – in delay and distraction – by the constitutional challenge we knew was inevitable when first we sought AMPs. Indeed, this delay has been our experience in the first such case, albeit in the misleading advertising context.[25]

(c) Civil Deceptive Marketing Practices

As we have sought to signal the importance with which we regard misleading advertising, we have sent a message of deterrence to the business community by seeking the maximum amount of AMPs available under section 74.1 in appropriate cases. In addition to other remedies, the Bureau has sought or negotiated payment of the new maximum AMP available, $10 million, in the Rogers challenge,[26] Bell Canada,[27] and Yellow Page Marketing.[28] That said, we recognize that an AMP (and the level thereof), is not our only tool, nor is it always the most appropriate or meaningful.

To Bell Canada's credit, it agreed to the maximum AMP; Rogers continues to resist our case including with multiple procedural delays and a constitutional challenge. In the Yellow case, the Ontario Superior Court of Justice recently imposed an AMP of $8 million against the corporate entity, and AMPs against the three individual respondents totalling $1.035 million.[29]

(d) Restitution Remedy

The Bureau has sought an order of restitution in each of its two contested

false or misleading representation cases since 2009 – Rogers and Yellow. As noted above, the Rogers case continues; the Court in Yellow ordered the corporate and individual respondents to pay full restitution to victims of the scheme. The Court ordered the respondents to provide any information they held about the identity of, and amounts paid by, victims. The Yellow case also represents the first time the Bureau applied for and successfully obtained an interim property disposition injunction under section 74.111 of the Act, to protect assets available to effect the restitutionary remedy.

In this context, in evaluating whether restitution is appropriate (the Bureau has long required restitution in consensual resolutions), the Bureau will consider, among other factors: whether consumers have suffered loss as a result of the conduct; whether the target exercised due diligence to prevent the occurrence of the reviewable conduct; and whether the target has paid or been ordered to pay refunds or other compensation in respect of the affected products.

3. A GLANCE AT WHAT IS AHEAD

While significant progress has been made in ensuring we make the most of the extraordinarily positive amendments to promote competition in Canadian markets, not surprisingly, we have yet to fully realize upon their full potential. The principal area where our progress has been slower is cartel prosecutions. I hasten to add that there are good reasons for the slower pace – not only did the new law only come into effect in March 2010, there is necessarily a longer lag period in criminal investigations owing in particular to the work associated with meeting the appropriately high standard of proof for criminal convictions. Moreover, owing to the frailties of the former provision, the Bureau has not had much recent experience actively pursuing conspiracy charges to trial.

Nonetheless, the Criminal Matters Branch has made considerable strides in enhancing the enforcement experience and capacity in the Branch, and shifting the culture to a focused enforcement agenda, referring on or leaving legacy cases behind, and driving new matters forward. While I am optimistic that these amendments can provide the Bureau with the opportunity to fundamentally shift the way in which our criminal programme is run - to my mind, an imperative for the Bureau's long term credibility - there are at least two significant challenges that, as a practical matter, offer resistance.

First, the Bureau has no authority or power to prosecute. With the able assistance of Public Prosecution Service of Canada (the "PPSC") counsel, the Bureau conducts its criminal investigations; however, once charges are referred to the PPSC, the Bureau cedes all authority to the PPSC, over the pace, direction and

ultimate resolution of the matter. While the PPSC is supportive of the Bureau's agenda to re-order the manner in which criminal matters are investigated and prosecuted, the PPSC has both other priorities and public interest considerations to take into account, and limited resource considerations. With that dynamic, effecting change is complicated and, necessarily, less within the Bureau's control; however, I remain hopeful that, with the PPSC's support, we will seize upon the enormous potential of these new criminal powers and promote a steady shift to more active, predictable and suitably aggressive enforcement. This will be to the great benefit of Canadian businesses and consumers who depend on us for the dogged and effective pursuit of offenders engaged in unambiguously harmful price-fixing and other criminal cartel conduct.

Second, and this is more a recognition of our historical reality than an operational impediment, while I am heartened to see Parliament's determination to codify very significant potential penalties for criminal conspiracies under the Act, the court and prosecutorial tradition in Canada with regards to condemning white collar offences has been weak. We are by no means alone in this; indeed, some of our commonwealth sister jurisdictions have only very recently even criminalized this conduct on the books. However, the fact remains that, to truly deter conspiratorial conduct in Canada, and to be taken seriously by would-be commercial criminals around the world as a jurisdiction that will mete out meaningful punishments, we will have to see an increase in the determination of prosecutors and courts to insist upon serious consequences for this very seriously harmful conduct.

Perhaps I am an optimist, but I do see signs of change in the attitudes of courts to more readily appreciate the real harms caused by cartelists, and the corresponding importance of appropriate censure for such conduct, that while economic, is no less criminal. I am also a pragmatist – this shift will take time. What we at the Bureau must do is play our part; namely, use the newly invigorated criminal provisions as our foundation to agitate for appropriate recognition of these criminal offences and their very real harm, emphasizing the enormous value to principled, consistent and appropriately aggressive prosecutions. At the practical level, it will take time for the appropriate cases to arise to explore and test the efficacy and scope of the Act's amendments. My hope is that the pressure will not let up, but rather intensify against those who chose to exploit Canadians by their criminal conduct.

Looking ahead, we must consider exploring additional initiatives that could be taken to complement and further enhance the enforcement value of the Act. It is also important that we do more to facilitate enforcement through enhanced transparency and predictability, including through existing means

such as increasingly practical enforcement guidelines. Finally, since effective enforcement depends upon the Bureau having a supportive organizational structure and workable internal processes, the Bureau must continuously align and focus its capacities, priorities and resources.

CONCLUSION

Competition laws play an important role in fostering an efficient, productive and innovative economy. To do so effectively, the law must strike an appropriate balance between providing the tools to investigate, remedy and deter anti-competitive conduct, and creating the conditions in which efficiency-enhancing, innovative conduct can flourish. The Bureau's experience with implementing and enforcing the 2009 amendments suggests that, overall, this balance has been achieved, or at least set well into motion, by the statutory changes and the Bureau's enforcement approach. Nevertheless, the marketplace is constantly evolving, and so the exercise of ensuring that the Act is up-to-date and sufficiently flexible to address present and future circumstances must necessarily be an ongoing one.

ENDNOTES

[1] This paper benefited from the helpful contributions of Kevin Rushton and Patricia Dechman.

[2] Competition Policy Review Panel, *Compete to Win*, Final Report, June 2008, p. 54 [Compete to Win].

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

[4] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 45.

[5] The 2009 amendments also increased the maximum fines and terms of imprisonment that courts may impose under the Act for non-compliance with prohibition orders (s. 34(6)), obstruction (s. 64(2)), destruction or alteration of records (s. 65(3)), and non-compliance with an order under Part II of the Act (s. 65(1)).

[6] In addition to these changes to the merger review process, the 2009 amendments created a new injunctive relief and AMPs remedy in s. 123.1 of the Act.

[7] Compete to Win, p. 55.

[8] *Ibid*, p. 56.

[9] *Ibid.*

[10] Competition Bureau, *Merger Review Process Guidelines* (11 January 2012).

[11] Compete to Win, p.57.

[12] In 1899, the predecessor to s. 45 was amended to repeal the word "unduly"; however, this amendment was reversed one year later and the "unduly" requirement was restored; S.C. 1899, c. 46, s. 1 and S.C. 1900, c. 46, s. 3.

[13] *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606.

[14] INDU Report, p. 57 and 60.

[15] *Ibid*, p. 57.

[16] Given that conspiracies by their nature are covert and reporting statistics turn

on a variety of factors, no conclusions should be drawn from complaint volumes about the level of hard-core cartel activities in the marketplace, or the impact of the efficiency-enhancing practices at the Bureau.

[17] The Organisation for Economic Cooperation and Development (the "OECD") Competition Committee and the International Competition Network have both initiated projects to develop recommendations to address common barriers to effective cooperation between jurisdictions.

[18] *Commissioner of Competition* v. *Air Canada, United Continental Holdings Inc., et al.*, CT-2011-004, Notice of Application (27 June 2011).

[19] *Commissioner of Competition* v. *Visa Canada Corporation and MasterCard International Incorporated et al.*, CT-2010-010, Notice of Application (15 December 2010).

[20] Competition Bureau, News Release, "Competition Bureau Sends Signal to Price-Fixers with $12.5 million Fine," (6 January 2012).

[21] OECD Directorate for Financial and Enterprise Affairs, Competition Committee, "Canada – Updated Report on Competition Law and Institutions (2004)" (18 January 2005) p. 6.

[22] *Commissioner of Competition* v. *Waste Services (CA) Inc. et al.*, CT-2009-003, Consent Agreement (16 June 2009).

[23] *Commissioner of Competition* v. *The Canadian Real Estate Association*, CT-2010-002, Consent Agreement (25 October 2010).

[24] *Commissioner of Competition* v. *The Toronto Real Estate Board*, CT-2011-003, Notice of Application (27 May 2011).

[25] *The Commissioner of Competition and Chatr Wireless Inc. and Rogers Communications Inc., Ontario Superior Court of Justice (Commercial List) Court File No. CV-10-8993-00CL.*

[26] Competition Bureau, News Release, "Competition Bureau Takes Action Against Rogers Over Misleading Advertising," (19 November 2010).

[27] *Commissioner of Competition* v. *Bell Canada et al.*, CT-2011-005, Consent Agreement (28 June 2011).

[28] Competition Bureau, News Release, "Competition Bureau Sues to Shut Down Business Directory Scam," (28 July 2011).

[29] Competition Bureau, News Release, "Competition Bureau Secures Over $9 Million and Money Back to Victims for Business Scam," (2 March 2012).

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