

# COMPETITION LAW AND POLICY IN CANADA

## CANADA

*(from April 1, 2002 through March 31, 2003)*

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## Executive Summary

1. The Competition Bureau (the Bureau) was extremely pleased with the speedy passage of Bill C-23, which brought in changes to the *Competition Act* and the *Competition Tribunal Act*. This legislation strengthens Canada's competition law and gives the Bureau better tools to ensure individuals and organizations comply with the Act, to the benefit of both consumers and businesses.
2. On January 31, 2003, the Federal Court of Appeal dismissed the Bureau's challenge of the acquisition of ICG Propane Inc. by Superior Propane Inc. The Bureau had challenged this merger on a number of grounds, including that the efficiencies it generated did not justify creating a monopoly. The Bureau decided not to appeal the Court's decision but will support a legislative change to ensure that the Competition Tribunal only considers efficiencies created in an anti-competitive merger when they are beneficial to consumers.
3. Another key Bureau activity in 2002-2003 was its ongoing work to clarify the rules under which a dominant airline must operate. The Bureau is currently awaiting a decision from the Competition Tribunal on this issue.
4. Public documents, including more detailed descriptions or full texts of many of the matters referred to in this report are available in English at <http://www.cb-bc.gc.ca> and French on the Bureau's Web site at <http://www.bc-cb.gc.ca>.

## Introduction

5. This report describes recent competition law and policy developments in Canada and summarizes the enforcement activities of the Bureau for the fiscal year April 1, 2002, through March 31, 2003.

### I. Changes to competition laws and policies, proposed or adopted

#### A. Summary of new legal provisions of competition law and related legislation

6. On June 21, 2002, Bill C-23 (now c. 16, S.C. 2002) and its changes to the *Competition Act* and the *Competition Tribunal Act* came into force. This bill strengthens Canada's competition legislation in a number of important ways. Amendments include:
  - (i) prohibiting companies from sending out deceptive notices of winning a price;
  - (ii) providing a framework to allow for mutual legal assistance in non-criminal competition matters;
  - (iii) allowing the Competition Tribunal to issue interim orders in civil reviewable matters, except mergers, in cases where: injury to competition that cannot adequately be remedied by the Tribunal is likely to occur; a person is likely to be eliminated as a competitor; or a person is likely to suffer a significant loss of market share, a significant loss of revenue, or other harm that cannot be adequately remedied by the Tribunal;
  - (iv) giving the Competition Tribunal the authority to hear references, award costs and make summary dispositions;
  - (v) allowing private parties to apply directly to the Competition Tribunal to address matters regarding refusal to deal, tied selling, exclusive dealing and market restrictions (sections 75 and 77 of the *Competition Act*); and,
  - (vi) providing measures to protect competition in the Canadian airline industry.

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### ***B. Other relevant measures, including guidelines***

7. On December 2, 2002, the Bureau published its bulletin, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector*, to give the grocery industry a better understanding of how the Bureau applies the abuse of dominance provisions, and to help deter anti-competitive conduct in the grocery sector by encouraging compliance with the law.

8. On December 17, 2002, the Bureau published an information Bulletin on the Regulated Conduct Defence to foster compliance and ensure greater fairness, predictability and transparency. Broadly speaking, the regulated conduct defence is an interpretive tool the courts developed to resolve apparent conflicts between two laws. The defence is of particular relevance to the Bureau's enforcement of the Competition Act because it protects conduct that would otherwise be subject to the Act when that conduct is allowed under other provincial or federal legislation. The bulletin outlines and clarifies the Bureau's position on the defence, which is that it should only apply in limited circumstances.

9. The Bureau released a draft version of Enforcement Guidelines for Illegal Trade Practices: Unreasonably Low Pricing Policies for public comment on March 8, 2002. These draft guidelines, which are intended to promote the transparency of paragraphs 50(1)(b) and 50(1)(c) of the Competition Act, update the 1992 Predatory Pricing Enforcement Guidelines to reflect changes in economic thinking about low-pricing behaviour. The draft guidelines propose two key changes to how the Bureau enforces these parts of the Act. The Bureau will continue to include recoupment of losses as a factor in its considerations, but it will no longer use it as the sole screening criterion to determine whether an unreasonably low-pricing policy exists. When doing a cost-revenue analysis to determine below-cost selling, the Bureau will now apply the concept of "avoidable cost" rather than "average variable cost," as it had done previously.

10. A public consultation was held in 2001 to help prepare draft guidelines for online Internet representations. A revised document, based on responses received from the initial consultation as well as from legal and technical advisors, was circulated to the stakeholders in the fall of 2002 for additional feedback and input. The final Information Bulletin on the Application of the Competition Act to Representations on the Internet was approved by the Bureau management in January 2003 and publicly released in February 2003.

### ***C. Proposals to change competition laws, related legislation or policies***

11. A Private Member's Bill (Bill C-249) was considered by the House of Commons Standing Committee on Industry Science and Technology in the spring of 2003 and is now being considered by the Senate. The Bill seeks to amend the Competition Act in order to clarify the treatment of efficiencies in merger review. It makes efficiencies one of many factors the Tribunal may consider to assess a merger's overall impact on competition and it clarifies that efficiencies only matter to the extent that they bring benefits to consumers (for example, in the form of competitive prices and product choice).

### ***D. International Cooperation Developments***

12. The Bureau participates in international activities to promote the development of coordinated competition policy and to enhance enforcement through cooperation with competition agencies around the world. The Bureau cooperates with its foreign counterparts on a regular basis in, for example, international merger transactions, and shares our national perspectives and experiences through our active participation in international conferences and meetings.

13. The International Competition Network (ICN), a network of private and public sector competition practitioners from around the world, continued to gain momentum this year. Since its launch in October 2001, the network has grown significantly by promoting inclusiveness, informality and

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relevance to all competition players. Currently, it includes 77 member agencies from 67 jurisdictions. Canada is a founding member of the ICN and the Commissioner of Competition was the Chair of the Steering Group during the period covered by this annual report.

14. Representatives of the Bureau actively participate in work on competition at the Organisation for Economic Co-operation and Development (OECD) on competition. The Commissioner of Competition chaired the Competition Committee's Working Party 3 on International Cooperation during the period covered by this annual report. This group has been focussing on international cooperation in the fight against hard-core cartels, as well as examining merger control procedures in OECD member jurisdictions.

15. Canada has been active in providing technical assistance and cooperation to other Asia-Pacific Economic Cooperation (APEC) member economies. The Bureau participated in two seminars on regulation and competition organized by Mexico, in the electricity sector in May 2002 and in the transportation sector in September 2002. In February 2003, APEC members reviewed Canada's 2002 Individual Action Plan (IAP). The purpose of the review was to monitor progress towards the targets set in Indonesia in 1994 for freer and more open trade and investment in the APEC region.

16. The Bureau provides technical assistance to a number of countries in the process of drafting their own competition laws or in various stages of implementing them. Technical assistance may include providing information on Canadian policy, law and practices, welcoming visitors from foreign governments and competition authorities, helping develop or refine foreign competition laws, and providing advice on how to deal with specific investigations. This year, the Bureau welcomed visitors from the Congo, Vietnam, China and South Africa.

17. The Bureau undertake several initiatives with regard to deceptive telemarketing. Canadian and U.S. law enforcers announced on June 10, 2002, in Washington, D.C., increased efforts to cooperate in targeting cross-border deceptive telemarketing. The Bureau and the Federal Trade Commission formalized their sharing of complaint and investigation data to catch cross-border fraud operators faster and more efficiently. This protocol streamlines and enhances cooperation under agreements adopted in 1995 and 1996. The Bureau is also an active participant and contributor to the *International Consumer Protection and Enforcement Network*, which is focussed on finding ways for agencies to cooperate and deal more effectively with the growing problem of cross-border scams. During the course of the year, the Bureau collaborated with *Northwest Netforce*. This is an international initiative (Canada-U.S) targeting deceptive spam and Internet fraud.

18. In international cartel cases, the Bureau has cooperated with the United States, the United Kingdom, the European Union and Japan. Some noteworthy cases involved bulk vitamin and methylglucamine.

19. The Bureau announced on June 26, 2002, that negotiations were under way between Canada and Japan on a cooperation agreement regarding competition law. The proposed agreement is expected to provide a framework for coordination and cooperation to deal effectively with anti-competitive business activities affecting both countries. On April 11, 2003, the cooperation agreement with Mexico regarding competition law enforcement has come into force, following its approval by the Mexican Senate.

20. Canada is currently involved in free trade negotiations with the Central American Four (El Salvador, Guatemala, Honduras and Nicaragua), Singapore and the Americas (FTAA). Canada is seeking to include competition policy provisions in these agreements.

21. The World Trade Organization (WTO) is currently exploring the interaction between trade and competition policies. Discussions are currently in a clarification phase and are focussed on potential

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elements for a multilateral framework on competition, including such core principles as transparency, non-discrimination and procedural fairness, hard-core cartels as a serious breach of competition law, voluntary cooperation, and ideas for supporting competition institutions in developing countries. The WTO Ministerial Conference scheduled for September 2003 will consider whether to launch competition negotiations.

### **II. Enforcement of competition laws and policies**

22. Special constable status has now been granted to Bureau competition law officers in six provinces. Competition law officers in Nova Scotia, Prince Edward Island, Quebec, Ontario, Manitoba and British Columbia now hold this designation, which allows them to serve summonses and subpoenas as part of their duties under the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Precious Metals Marking Act* and the *Criminal Code*.

#### **A. Action against anticompetitive practices**

##### *(a) Abuse of Dominant Position*

###### Airline Industry

23. At the end of the fiscal year, three enforcement files in the airline sector remained open. Two of these involve allegations of predatory pricing. The third matter relates to an airline's practice of withholding part of its inventory from the computer reservation system and marketing discount fares directly from its own Internet site or an online travel agency. The Bureau is continuing to examine these matters.

24. In October 2001, the Bureau began an inquiry into allegations that Air Canada had launched its discount brand Tango to drive Canada 3000 from the market. Following an intensive examination and monitoring of Tango, the Bureau concluded that Tango did not constitute a "fighting brand" within the meaning of section 78 of the Act. There was also no evidence that Tango was in breach of the new airline regulations relating to the operation of a low-cost second brand carrier. Accordingly, this inquiry was discontinued in March 2003. In reporting the discontinuance, the Commissioner noted that the pending decision of the Competition Tribunal setting out the rules for the application of the avoidable cost test will have implications for Air Canada and all of its brands, including Tango.

25. In December 2002, the Bureau announced that it found no grounds to proceed with a complaint filed by Jetsgo regarding an agreement reached between Air Canada and the Government of Quebec. In return for Air Canada providing reduced fares for non-government users on 15 regional routes and continuing service on these routes, the Quebec government agreed to increase its volume of business with Air Canada. The Bureau concluded that this arrangement did not raise an issue under the Act, based on two main considerations. First, contrary to initial allegations, the agreement does not make Air Canada the exclusive provider of provincial government travel. Government employees remain free to choose the carrier best serving their needs in terms of price and schedule. Second, the agreement does not prevent other carriers from competing with Air Canada.

###### Other Industries

26. In October 2002, the Bureau filed an application with the Competition Tribunal for an order prohibiting Canada Pipe Company Ltd./Tuyauteries Canada Ltée ("Canada Pipe") from engaging in anti-competitive acts through its Bibby Ste-Croix ("Bibby") Division. The application followed an inquiry into complaints that Bibby, which was acquired by Canada Pipe in 1997, was abusing its dominant position in the supply of cast iron pipe, fittings and mechanical joint couplings for drain, waste and vent ("DWV")

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applications in markets across Canada by introducing a loyalty program which has the impact of locking in its customers and eliminating its competitors. Bibby requires that its clients purchase all their DWV products exclusively from it in order to obtain substantial rebates. The application asks the Tribunal to order Canada Pipe to cease the alleged conduct, to ensure that similar conduct will not continue in the future, to prohibit Canada Pipe from being part of any acquisitions of DWV cast iron businesses in Canada for the next three years and, to notify the Bureau of any such acquisitions for the three years following the initial three-year period.

27. In December 2002, a consent agreement between the Bureau and the Charter members of the Interac Association was filed with the Competition Tribunal, replacing the consent order issued in June 1996. The consent agreement expands the range of financial institutions eligible to issue cards that use the Interac network. The additional financial institutions include life insurance companies, securities dealers, money market mutual funds and foreign bank branches. Allowing these additional financial institutions to issue debit cards will promote increased competition in financial services. This change reflects expanded access to the Canadian Payments Association following pro-competitive changes to federal financial institutions legislation. The Bureau supported these changes in a previous submission to the Task Force on the Future of the Canadian Financial Services Sector.

28. In March 2003, the Bureau concluded its investigation of IKO Industries Ltd., Canada's largest manufacturer of asphalt roofing products. The Bureau had received complaints that IKO was abusing its dominant market position and impeding the entry and expansion of competitors through its policy of giving distributors loyalty rebates on sales of residential asphalt roofing shingles. The Bureau had outlined its concerns about the distributor loyalty program, observing that it likely prevented or substantially lessened competition in the supply of low-end asphalt roofing shingles in Canada. In response to the Bureau's concerns, IKO modified its rebate program by giving customers a choice between loyalty and volume-based rebates. In addition, the level of rebate varies in the modified loyalty program with the volume of percentage of shingles purchased from IKO. These modifications diminish the incentive to exclusivity inherent in loyalty rebates.

29. In March 2003, the Bureau announced it had found no evidence to proceed against GlaxoSmithKline for blocking Canadian-based Internet pharmacies from exporting its products to the United States. The Bureau was advised by the U.S. Food and Drug Administration that these cross-border sales violated U.S. law, supporting GlaxoSmithKline's position that it had a reasonable business justification for blocking exports while continuing to supply the Canadian market. The Bureau examined this matter with respect to both the criminal and civil provisions of the *Competition Act*, and found no evidence to suggest the Act had been violated.

### (b) *Conspiracy*

#### Domestic

30. In September 2001, the Bureau laid charges against Sherwood Co-operative Association Limited and Federated Co-operatives Limited following an investigation and hearings into allegations that the two companies through agreement, threat or promise attempted to maintain the price at which the Tempo gasoline retailer in Pilot Butte, Saskatchewan, sold its gasoline. In a preliminary hearing that took place in November 2002, the judge found that, while Sherwood Co-op and its principal had attempted to influence the price of gasoline sold at the station, this had not been done through agreement, threat or promise, as prohibited under section 61(1)(a) of the Competition Act. The charges were dismissed.

31. In October 2002, the Stroh Brewery Company (Quebec) Ltd. pleaded guilty to charges of price maintenance. The conviction followed a Bureau investigation revealing that Stroh prohibited convenience

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stores and other retail outlets in Quebec from discounting Stroh's bottled beer of various sizes by the case. The Federal Court of Canada imposed a \$250 000 fine, the largest fine to date in a price maintenance case.

### International

32. In October 2002, Degussa AG of Germany, Lonza AG of Switzerland, and Nepera Inc. and Reilly Industries Inc. of the U.S. pleaded guilty to participating in an international conspiracy to fix prices and allocate market shares of vitamin B3 sold in bulk in Canada between 1992 and 1998. Dr. Kumo Sommer, a Swiss national and former executive at Hoffmann-La Roche Ltd., a Swiss corporation, also pleaded guilty to participating in a number of conspiracies involving bulk vitamins between 1991 and 1997. The Federal Court of Canada imposed fines totalling CAN\$3.875 million on the companies and CAN\$150 000 on the former executive. Since September 1999, Canadian courts have imposed a total of approximately CAN\$95.5 million against companies and individuals involved in the bulk vitamin conspiracies.

33. In December 2002, Japan-based Nippon Gohsei Industries, Ltd. pleaded guilty to charges of price fixing and market sharing resulting from the Bureau's international investigation into the food preservatives industry. The investigation revealed that Nippon was involved in a conspiracy to fix prices for sorbic acid and potassium sorbate, otherwise known as sorbates. Sorbates are primarily used as mould inhibitors in foods such as dairy and bakery products, flavours and spices, syrups and other processed foods commonly sold in grocery stores. Nippon is the fifth international company to be convicted of such offences in Canada in the last three years. The company was sentenced to pay a \$100 000 fine for its part in the conspiracy.

34. In February 2003, Rhone-Poulenc Biochimie SA, a wholly owned subsidiary of Aventis SA, pleaded guilty in the Federal Court of Canada to a charge of price fixing under the Competition Act. The charges followed a Bureau investigation revealing that between 1990 and 1999 Rhone-Poulenc was involved in a price-fixing conspiracy involving methylglucamine, a specialized chemical ingredient primarily used to facilitate the recording of high contrast X-ray images. Under the conspiracy provisions of the Competition Act, it is a crime for competitors to agree on the prices they will charge customers when so doing unduly lessens competition or unreasonably raises prices. The court imposed a \$500 000 fine.

### Alternative dispute resolution

35. In February 2003, as a result of an agreement with the Competition Bureau and Re/Max Ontario-Atlantic Inc., Re/Max Western Canada (1998) and Re/Max International Inc., the Federal Court of Canada issued a prohibition order under subsection 34(2) of the Competition Act requiring the companies to change certain pricing and advertising policies to address concerns under the price maintenance provisions of the Act. The Re/Max companies involved are in the business of granting franchises for real estate brokerages under the Re/Max brand name. The prohibition order followed an inquiry by the Bureau into allegations that a policy directive issued by both Re/Max Ontario-Atlantic and Re/Max Western prohibited their franchises and sales associates from advertising commission rates. In a number of instances, noncompliant sales associates were fired. The settlement will enhance competition for the real estate brokerage industry by allowing Re/Max franchises, brokers and agents to advertise commission rates or fees to the public. The prohibition order also prevents the companies from doing the following: prohibiting their franchises or sales associates from setting independent commission rates or advertising such rates; attempting to influence commission rates upwards by any means; and, pressuring independent publishers to refuse advertising from any Re/Max franchise or sales associates because of the commission rates advertised. The prohibition order further requires the companies to pay the Crown's legal costs.

36. In March 2003, as a result of an agreement between the Competition Bureau and Toyota Canada Inc., the Federal Court of Canada issued a prohibition order under subsection 34(2) of the Competition Act requiring Toyota to amend certain aspects of its Access Toyota Program to address concerns under the price maintenance and misleading advertising provision of the Act. The Access Toyota Program started in 2000 in Manitoba and, at the time the prohibition order was issued, was in place in the four western provinces and parts of Quebec. The prohibition order followed an inquiry by the Bureau into allegations that Toyota was prohibiting dealers participating in the Access Toyota Program from selling vehicles below "Access/Drive-Away" prices. The inquiry also raised an issue under the misleading-representation provisions because the Access Toyota Web site indicated that Access Toyota dealers could sell vehicles for less than Access/Drive-Away prices without being penalized by Toyota. The settlement will enhance competition because Access Toyota dealers are now free to set their own prices, and consumers have the opportunity to negotiate the purchase of Toyota vehicles. The prohibition order also requires Toyota to amend its contractual relationships with Access Toyota dealers to ensure that dealers do not enter into agreements with each other on prices or discounts for Toyota vehicles, or make statements to the public that Toyota prohibits selling below Access/Drive Away prices. The prohibition order also requires Toyota advertising to include a disclaimer that Toyota dealers may sell vehicles for less than Access/Drive-Away prices and to pay the \$200 000 cost of the Bureau's investigation. As part of the settlement, Toyota also made voluntary donations totalling \$2.3 million to charitable organizations across Canada.

Discontinued case

37. In December 2001, the Bureau initiated an inquiry into the Quebec automobile repair industry after receiving a complaint under section 9 of the Competition Act. The complainants alleged that certain automobile insurance companies, body shops and suppliers of recycled parts were involved in activities contrary to sections 45 and 77 of the Act. The Bureau concluded that this was not the case and discontinued its inquiry on August 12, 2002.

(c) *Court proceedings*

38. In March 2001, the Commissioner filed an application against Air Canada with the Competition Tribunal. The application arose as the result of investigations into Air Canada's response to WestJet's expansion into eastern Canada and CanJet's entry into the market. The application alleged that Air Canada was engaged in anti-competitive practices, namely operating or adding capacity at fares that did not cover the avoidable cost of providing the service.

39. This is the first case under the new airline regulations specifying that avoidable costs are to be the standard for assessing predatory conduct by dominant airlines. In the first phase of the hearing, the Tribunal agreed to consider and rule on specific questions related to the application of this test. The hearing, which began in August 2001, and was twice adjourned— as a result of the events of September 11, 2001, and the illness of a Tribunal member — recommenced in November 2002. Following 40 days of hearings, including testimony from representatives of CanJet, WestJet and Air Canada, as well as economic, accounting and industry experts, the hearing concluded in early March 2003. At the end of the fiscal year, the Tribunal's decision was pending.

40. Air Canada had launched two legal challenges to the Bureau's authority under section 104.1 of the Competition Act to issue temporary orders to firms in the airline industry during the course of its investigations. In December 2002, the Supreme Court of Canada denied Air Canada's application for leave to appeal the Federal Court of Appeal's decision related to the CanJet complaint. This decision upheld the Competition Tribunal's decision to uphold the Commissioner's October 12, 2002, temporary order in this matter. As for the second challenge, on January 16, 2003, the Quebec Court of Appeal ruled section 104.1 of the Competition Act to be inoperative because it conflicts with rights to due process of law under the

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Canadian Bill of Rights. In March 2003, the federal government filed an application with the Supreme Court of Canada for leave to appeal this decision. At the end of the fiscal year, the matter was pending.

### **B. Mergers and Acquisitions**

#### *(a) Statistics on mergers notified and/or controlled under the Competition Act*

41. During the 2002-2003 fiscal year, the Bureau's Merger Branch concluded 267 merger examinations and there were 27 ongoing at year end. Six merger examinations were concluded with agreed remedies, three with consent agreements or consent orders. Some 257 examinations of which 163 resulted in the issuance of an Advance Ruling Certificate were concluded as posing no issue under the *Act*. At year end, one case was before the Competition Tribunal and the courts while four such cases were concluded or withdrawn during the year.

#### *(b) Summary of Significant Cases*

42. The following are summaries of some of the major cases the Bureau commenced or that were ongoing during 2002-2003.

43. In December 1998, the Bureau challenged Superior Propane's acquisition of ICG Propane Inc. In August 2000, the Competition Tribunal found that the merger would create a monopoly in many local markets, and would also have negative consequences for consumer choice, service and price throughout Canada. The Tribunal ultimately allowed the merger to proceed because a majority of Tribunal members found that the efficiencies generated by the merger would be greater than its anti-competitive effects. The Bureau subsequently appealed the Tribunal's decision, asking the Federal Court of Appeal to review the Tribunal's interpretation of the efficiencies defence. On April 4, 2001, the Federal Court of Appeal ruled that the Tribunal's interpretation of section 96 should have considered a wider range of effects and have considered the purposes of the *Competition Act* (set out in section 1.1 of the Act). The matter was remitted to the Tribunal for a redetermination hearing. On April 4, 2002, the Competition Tribunal dismissed the Commissioner's application. The Commissioner appealed this decision to the Federal Court of Appeal on the grounds that the Tribunal: erred by not including all the effects of lessening of competition, including the entire wealth transfer; refused to consider the effects from a qualitative perspective; adopted a restrictive view of the effect of the merger on small and medium-sized businesses; did not consider the creation of a monopoly *per se* as an anti-competitive effect in the subsection 96(1) analysis; did not respect the judgment of a higher court; and erred in its allocation of the onus of proof. On January 31, 2003, the Federal Court of Appeal dismissed the Commissioner's application and accepted the Tribunal's methodology. The dissenting opinion held that subsection 96(1) did not authorize the creation of monopolies. On March 31, 2003, the Bureau announced that it would not appeal the Federal Court's decision.

44. On December 21, 2001, the Bureau challenged Astral Media Inc.'s proposed acquisition of Telemedia Radio Inc.'s French-language radio stations and 50 percent interest in Radiomédia. In its application to the Competition Tribunal, the Bureau argued that this acquisition would substantially lessen competition in six radio advertising markets in the province of Quebec. The merging parties filed a motion with the Federal Court of Canada challenging the Bureau's jurisdiction over the proposed transaction. The Federal Court's Trial Division heard this matter in May 2002 in Montréal. However, a Consent Agreement filed on September 3, 2002, resolved the Commissioner's competition concerns with this merger.

45. In April 2000, the Bureau challenged Canadian Waste Services Inc.'s acquisition of a southern Ontario landfill on the grounds that it would likely result in higher prices for customers of waste disposal services in the Greater Toronto Area and Chatham-Kent. Following a contested hearing in November 2000,

the Competition Tribunal ruled in favour of the Bureau's position in March 2001. The Tribunal held a three-day hearing in June 2001 to determine the appropriate remedy and accepted the Bureau's proposal on October 11, 2001, ruling that Canadian Waste must divest itself of the landfill in question. In November 2001, Canadian Waste appealed both the March and June 2001 decisions, and the following month, the Tribunal's divestiture order was stayed pending the outcome of the appeals. Following a hearing in March 2003, the Federal Court of Appeal dismissed Canadian Waste's appeals, ruling that the Tribunal had specialized expertise in making its findings. On March 12, 2003, the Tribunal's divestiture order came into effect.

46. In July, 2001, two of the largest grain-handling companies in Western Canada, United Grain Growers Limited (UGG) and Agricore Cooperative Ltd. (Agricore) announced they would merge into Agricore United. The Bureau advised the parties that the proposed transaction would substantially lessen competition in grain-handling services at the Port of Vancouver and in certain grain-handling markets in Manitoba and Alberta. In response to the Bureau's concerns, Agricore United agreed to divest up to seven primary grain handling elevators in western Canada. On December 17, 2001 the Bureau filed an application with the Competition Tribunal for a consent order requesting the divestiture of primary grain elevator assets in the Dauphin, Manitoba, and Edmonton and Peace River, Alberta, areas. In February of 2002, the Tribunal issued a consent order, requiring the elevators to be divested, a process that has been substantially completed. The Bureau also challenged UGG's acquisition of Agricore's port terminal assets at the Port of Vancouver, requiring Agricore United to divest either the Pacific port terminal or the UGG port terminal. Agricore United took the position that a divestiture of only a part of the Pacific terminal was necessary. On January 15, 2002, the Tribunal issued an order requiring Agricore United to maintain the competitive viability of the grain-handling terminals at the Port of Vancouver pending the outcome of the contested portion of this transaction. After a hearing on September 12, 2002, the Tribunal found that the acquisition did substantially lessen competition. On October 17, 2002, the Bureau announced that it had reached an agreement with Agricore United to divest either the UGG or Pacific grain-handling terminal in the Port of Vancouver. A consent agreement reflecting the settlement was registered with the Tribunal thereby terminating the Tribunal remedy proceedings. The Vancouver grain terminal divestiture process is ongoing.

47. On July 19, 2002, the Competition Tribunal issued a consent order to remedy competition concerns raised by Bayer AG's acquisition of Aventis CropScience. It required Bayer AG to divest three key agricultural chemical products and to license a fourth in its crop protection division. The Tribunal had issued an interim consent order on June 6, 2002, to ensure that the designated assets were separated and managed independently from Bayer's other business operations. On January 21, 2003, the Bureau announced that Bayer AG had complied with the provisions of the consent order and the Bureau approved the following divestitures: Arvesta Corporation would acquire certain assets of the flucarbazone business (including Everest, a spring wheat herbicide); BASF AG would acquire certain assets of the triticonazole business (including Charter, a cereal seed treatment); and, Nippon Soda Co. Ltd. would acquire certain assets of the acetamiprid business, including a licence for Iprodione. In partnership with a Canadian licensee, Nippon would then be able to manufacture and develop Assail, a fruit and vegetable insecticide, and Assail ST, a canola seed treatment. Close coordination with the U.S. Federal Trade Commission and the Merger Task Force of the European Commission ensured appropriate and consistent remedies.

48. Abitibi-Consolidated's acquisition of Donohue Inc in 2000 raised Bureau concerns that this \$7.1-billion merger would substantially lessen competition in the supply of newsprint in eastern Canada. To address the Bureau's competition concerns, Abitibi agreed to divest its Port-Alfred newsprint mill in Quebec. Due to a depressed market for newsprint, Abitibi was unable to sell the mill and agreed to a consent order providing for an agent sale of the mill on February 21, 2002. The agent sale process was handled by Deloitte & Touche Corporate Finance Canada Inc, which was also unable to find a buyer for

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the mill before the conclusion of the sale period in September 2002. As a result the mill remained the property of Abitibi.

49. In the course of reviewing Onex Corporation's proposed restructuring of Loews Cineplex, the Bureau learned that Onex Corporation's Galaxy Entertainment Inc., with movie theatres in five provinces, had previously merged with Famous Players, Canada's largest exhibitor. Following discussions in April 2002 about the Bureau's concerns regarding the intercorporate links between Famous Players, Cineplex Odeon and Galaxy, Famous Players agreed to divest its interest in Galaxy, end its representation on Galaxy's board of directors and terminate all ancillary agreements.

50. On October 4, 2002, Diageo plc (Diageo) completed the sale of its Gibson's Finest brand of Canadian whisky and related assets to William Grant & Sons Limited (Grant). The divestiture was required as part of an agreement with the Bureau, announced in October 2001, to address competition concerns. Following a thorough review of the acquisition of Seagram's spirit and wine business by Diageo and Pernod Richard, the Bureau concluded that the Diageo purchase of Seagram's Canadian whisky brands, which included Crown Royal and Seagram's VO, would likely have substantially lessened competition in the supply of premium Canadian whisky products in several provinces. The purchase of Gibson's Finest brand by Grant, an international spirits company with no presence in the Canadian whisky market, should help to ensure that the market for premium Canadian whisky remains competitive.

51. On April 11, 2003, the Bureau registered a consent agreement with the Competition Tribunal to remedy the competition concerns arising from the acquisition of Pharmacia Canada Inc. and its foreign parent by Pfizer Inc. The Bureau concluded that the transaction would substantially prevent competition in the market for pharmaceutical products used in the treatment of human sexual dysfunction. To remedy these concerns, the parties agreed to: terminate a collaboration and licence agreement between Pharmacia and Natestch Pharmaceuticals Inc. involving a developmental intranasal apomorphine, and to divest another pipeline product to Neurocrine Biosciences Inc. These divestitures ensured the continued development of these products for eventual introduction into a Canadian market currently dominated by Pfizer's product, Viagra. The Bureau also determined that the transaction would substantially prevent competition in the market for pharmaceutical products that treat overactive bladder problems. To remedy these concerns, the parties agreed to divest Pfizer's developmental product, Darifenacin, to Novartis Pharma AG. The current market leader in Canada is Pharmacia with its products, Detrol and Unidet. During the review process, the Bureau communicated regularly with the U.S. Federal Trade Commission and the Merger Task Force of the European Commission to ensure consistent remedies.

52. Reitmans (Canada) Limited's acquisition of Shirmax Fashions Ltd., a competitor retailer in plus-size ladies apparel, raised concerns that access to retail space in shopping centres would be negatively affected. In response, Reitmans agreed not to enforce restrictive clauses in more than 100 leases, nor to enter into leases that would exclude competitors during the subsequent three years. With these undertakings, the Bureau concluded that competition would not be substantially lessened as a result of the proposed merger.

53. On October 18, 2002, Canadian National Railway (CN) announced that it had been selected by the Ontario government over three other candidates to acquire Ontario Northland Railway (ONR). Since then, the Ontario Northland Transportation Commission, owner of the ONR, and CN, have been negotiating the final terms and conditions associated with this proposed transaction. The ONR owns and provides freight and passenger transportation services over approximately 700 miles of rail track in northeastern Ontario. CN's rail network connects with the ONR regional network at Hearst and North Bay, Ontario, and Rouyn-Noranda, Quebec. At the end of 2002-2003 the Bureau was examining this proposed transaction.

54. In November 2002, the Bureau announced that it had come to an agreement with Cendant Corporation, the U.S. parent company of Aviscar Inc. (Avis) to resolve competition concerns arising from its acquisition of Budget Rent A Car of Canada Limited (Budget). This agreement included a restriction on the sharing of competitively sensitive information between Budget and Avis to preserve competition in Canada's car rental business and to maintain the independence of Budget's Canadian franchisees from Cendant's control.

**C. *Misleading Advertising and Deceptive Marketing Practices***

55. The Bureau resolved 67 matters through alternative case resolution under the misleading representations and deceptive marketing practices provisions of the *Competition Act*, and 104 matters under the three standards-based statutes.

*(a) Civil*

56. On May 10, 2002 a consent order was filed with the Competition Tribunal requiring Phone Directories Company Inc. to refrain from making false or misleading representations in connection with the sale of telephone directories. Under the terms of the Consent Order, the company has agreed not to make representations by any means, including via the Internet, which are false or misleading including those regarding: the number of telephone directories to be published for any given geographic area; the time period in which any given telephone directory will be published and distributed; the geographic area over which any given telephone directory will be distributed; and the density of the distribution of any given telephone directory. In addition, pursuant to the consent order the company paid a \$5,000 administrative penalty.

57. On May 31, 2002, the Competition Tribunal found that PVI International Inc. and the individuals behind the company contravened the *Competition Act* by making false and misleading representations to the public in promoting an alleged fuel saving/emission reducing device known as the Platinum Vapour Injector. The Tribunal also found that, contrary to the Act, PVI International Inc. and the individuals made certain performance claims that were not supported by adequate and proper tests. The Tribunal ordered the accused to cease making the representations with respect to the device for 10 years, the maximum available under the Act. The company was also ordered to pay an administrative penalty in the amount of \$75,000. The individuals behind the company were personally ordered to pay \$25,000 each for their role in the conduct.

58. On July 23, 2002, the Bureau served its first application under the new ordinary selling price provisions of the *Competition Act* on Sears Canada Inc. The application, filed with the Competition Tribunal, alleges that Sears deceived consumers about the real value of their savings by referring to inflated regular prices when advertising certain tires at sale prices during the year 1999. During that year, Canadian customers spent approximately \$1-billion on tires.

59. On December 13, 2002, the Bureau registered a Consent Agreement with the Competition Tribunal addressing false claims made by Thane Direct Canada Inc. ("Thane"). Thane sold two devices via television Infomercials and their web site for approximately \$120 each to hundreds of thousands of Canadians, giving the false impression that without performing any physical exercise, a person could lose weight, obtain an athletic physique with well-defined abdominal muscles, replace the workout benefits of a fully equipped gymnasium and increase their strength. According to this agreement, Thane has agreed to stop selling and marketing these devices. Furthermore, the company will not market any similar device that offers weight loss or muscle toning without exercise, unless the Bureau agrees that the claims are based on adequate and proper tests. The company has also agreed to pay a \$75,000 administrative penalty. Finally, anyone who bought these products and is not satisfied, can obtain a refund from Thane.

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### (b) *Criminal*

60. On May 28, 2002, Mr. Peter Kuryliw, the sole director of the 1473253 Ontario Incorporated, operating as Yellowbusiness.ca, pleaded guilty to targeting over 40,000 business and non-profit organizations with a deceptive mail-out for an Internet directory. The investigation into this case included the seizure by the Bureau and Canada Post of mail containing an estimated \$700,000 in payments for the fraudulently deceptive mail pieces. Mr. Kuryliw was fined \$30,000. He was given 90 days to pay the fine and to dissolve 1473253 Ontario Incorporated.

61. On June 4, 2002, Mr. Marvin Redler, pleaded guilty to nine misleading advertising and deceptive telemarketing charges under the *Competition Act*. Mr. Redler was a telemarketer with S.S. Viking Industries and C.S.R.H. Heritage Group Inc., which were charged with misleading advertising under the Act in December 1999 and May 2000, respectively. Both companies and their directors pleaded guilty and received sentences ranging from large fines to jail terms.

62. On July 3, 2002 the Bureau charged HMS Direct Limited and Hallstone Products Ltd. as well as their director and one employee, and 483775 B.C. Ltd. and Ravenshoe Services Limited, and their director, under the misleading representations and deceptive marketing practices provisions of the *Competition Act*. The charges relate to unsolicited allegedly deceptive mailings promoting participation in the purchase of lottery tickets that were sent to residents of the United States, United Kingdom, Australia and New Zealand. The mailings asked recipients to send a payment to participate in various international lotteries. The Bureau alleges that the mailings exaggerated the amount that consumers could win, as well as their chances of winning, that the mailings falsely represented an association with the governmental body issuing the lottery tickets and that consumers had already won substantial sums of money. On August 21, 2002, charges under the *Competition Act* and the *Criminal Code* were also laid against two individuals for their role in promoting alleged deceptive mailings encouraging participation in the purchase of lottery tickets. Further charges were also laid on March 12, 2003.

63. On March 8, 2002, a Bureau investigation into the practices of NSV Nutrinautes Inc., a multi-level marketing firm, led to eleven charges against the target company under the deceptive marketing practices provisions of the Act. On July 19, 2002, two directors, alleged to be the directing minds of the target company, were also charged under the Act's deceptive marketing provisions. The company operates a multi-level marketing plan known as Cocooning Club, which promotes and sells computer software on nutrition and other subjects. It has been alleged that the target company and its participants recruited new participants by exaggerating income expectations without disclosing the income of a typical participant, contrary to the *Competition Act*. Furthermore, the target company and the directors were charged with operating an illegal scheme of pyramid selling and making false or misleading representations on its web sites.

64. On August 29, 2002, the Bureau announced that eight charges were laid in Halifax, N.S., against All Communications Network of Canada Co./ACN, Réseau De Toutes Communications Du Canada C.R.I., under the *Competition Act's* deceptive marketing practices provisions. The company, who's registered corporate office is in Halifax operates a multi-level marketing plan which promotes and sells long-distance telecommunication services. The Bureau alleges that ACN Canada, as it is known, and its participants, through its web sites and at public meetings, recruited new participants by exaggerating income expectations without disclosing the income of a typical participant. ACN Canada was charged with operating an illegal scheme or pyramid selling by offering recruitment bonuses to participants who paid for the right to recruit other participants.

65. On October 22, 2002, the Bureau announced that criminal charges were laid following the largest criminal deceptive telemarketing operation investigated by the Bureau and the Toronto Strategic

Partnership. Operating in boiler-rooms in the Toronto area over several months, First Capital Consumers Group allegedly defrauded close to 100,000 American consumers with poor credit history, claiming they had been approved for a Master Card or Visa credit card. Receipt of one or both cards was conditional on a prior payment of a one-time processing fee. The victims never received a valid credit card. It is estimated that this deceptive telemarketing operation grossed approximately \$20 million (U.S.) in the last year. The charges stem from a Bureau investigation into cross-border deceptive telemarketing practices carried out by 1492828 Ontario Inc., operating as First Capital Consumers Group, U.S. Guardian United Consumers and Trans America United Benefits Group. Between October 2001 and July 2002, the Bureau received approximately 1,200 complaints from various sources, including the Phonebusters National Call Centre and Consumer Sentinel, a call centre maintained by the U.S. Federal Trade Commission.

66. On November 15, 2002, the Bureau announced that criminal charges were laid against seven companies and eight individuals engaged in telemarketing business directories, credit card supplies and office toner supplies. This telemarketing operation targeted consumers in Canada and the U.S., invoicing them for office supplies or business directories that they allege they have not ordered. The charges stem from a Bureau investigation into allegations of criminal deceptive telemarketing by a group of corporations and individuals operating as Hanson Publications, Copier Supply Centre and Associated Merchant Paper Supplies. The accused operated from boiler rooms in Toronto and Montreal, allegedly targeting businesses and not-for-profit organizations across Canada and the United States.

67. On November 19, 2002, criminal charges were laid against six companies and six people operating from Toronto, Montreal and St.John's for allegedly engaging in deceptive telemarketing which targeted businesses and not-for-profit organizations worldwide. The charges stem from a Bureau investigation into deceptive telemarketing by a group of corporations operating as Commercial Business Supplies (CBS), Merchant Transaction Supplies (MTS), Merchant Supply Services (MSS) and International Business Directories (IBD). These companies sold paper rolls and cleaning cartridges used in debit and credit card machines, as well as business directories and listings in those directories. Companies and non-profit organizations from Canada, the United States, France, the United Kingdom and Puerto Rico complained they were contacted by telemarketers who allegedly misrepresented themselves as their regular supplier of business directories or office supplies. This investigation was conducted with the assistance of Project Colt, a law enforcement partnership established in Montréal to combat deceptive telemarketing practices across North America. The Toronto Police, the Royal Newfoundland Constabulary, and la Police de la ville de Montréal also assisted the Bureau during their investigation.

68. On January 20, 2003, the Bureau reported that telemarketing company Farber Blake Corporation pleaded guilty to one criminal charge and has been fined \$300,000 for misleading consumers in Canada and New Zealand. Farber Blake victims were contacted by telemarketers and told that they had won prizes, such as cash, a boat or a cruise in the Bahamas. However, in order to claim their prize, they were informed that they had to buy one of the company's promotional items, such as coin sets or art work. The Bureau found that the company sold these promotional items at highly inflated prices and misrepresented the nature, value and quality of both the prizes and the promotional items sold.

69. On January 21, 2003, the Bureau reported that an investigation into the deceptive telemarketing activities of two Montreal-based companies resulted in guilty pleas from five people who were involved in a prize-pitch scam targeting consumers in Australia and New Zealand. The pleas follow a criminal investigation by the Bureau that primarily used wiretaps to gather information about the operation of 363615 Canada Inc., which conducted business in Montreal as Alexis Corporation, and 3587932 Canada Inc., its administrative affiliate. Between May 2000 and June 2001, the Bureau and Phonebusters received numerous complaints alleging that Alexis telemarketers were explicitly telling consumers they had won valuable prizes such as a Toyota Corolla or up to \$20,000 U.S., "his and her" diamond watches, a washer and dryer set or up to \$2,500 U.S., a tri-coloured gold genuine sapphire bracelet or a video camera or up

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top \$2,000 U.S. However, customers were required to make a purchase of a promotional item, such as a Columbus map, Sirius Flagship, or Napoleon Collectible, in order to receive these prizes.

70. In February of 2003, criminal charges were laid against seven individuals engaged in an Ontario-based telemarketing operation targeting U.S. residents, primarily seniors. The boiler-rooms located in the Toronto area had recently been shut down but had been operating for more than a year, conducting promotions under the names MedPlan, Global and STF Group. The telemarketers allegedly used high pressure sales techniques to induce potential clients, residents of the United States, to purchase a medical discount plan and to induce them through false or misleading representations to release bank account information. Funds were then withdrawn without authorization from the client. Promises of a free trial period and refund conditions were not respected. It is estimated that this telemarketing operation grossed approximately \$8 million (U.S.) in the last year.

### **III. The role of competition authorities in the formulation and implementation of other policies**

71. In 2002–2003, the Bureau made a number of interventions on issues ranging from rail, bus and marine transportation to telecommunications and broadcasting. The following pages summarize these interventions as well as their outcomes and potential benefits for Canadians.

#### **A. Transportation: Rail, Bus and Water**

##### *(a) Submission to the Canadian Transportation Agency*

72. In April 2002, the Bureau sent a letter of intervention to the Canadian Transportation Agency (CTA) saying that it supported in principle the application of Ferroequus Railway Company Limited for running rights over specified lines of the Canadian National Railway Company (CN) between Camrose, Alberta, and Prince Rupert, British Columbia; that captive shippers are major exporters of Canadian products and face strong international competition in their markets, so cost-effective transportation systems would be required to maintain current markets and expand into new ones; and that granting running rights would also be consistent with the recent recommendations of the Canada Transportation Act Review Panel.

##### *(b) Submission to the Senate Standing Committee on Transport and Communications*

73. On May 7, 2002, the Bureau made a submission on the intercity busing industry. The submission reviewed the Bureau's long-standing interest in and position on intercity busing. It indicated that the industry had not prospered under regulation, that the regulatory diversity among provinces had increased the administrative burden on all carriers, leading to excess capacity and higher costs, and that the rationale for regulation (i.e. natural monopoly) did not exist. It recommended that the Committee deregulate extraprovincial and international bus services (i.e. scheduled and charter passenger and express parcel service) by reintroducing amendments proposed in Bill C-77 related to economic deregulation.

##### *(c) Submission to the Canada Marine Act Review Panel*

74. In November 2002, the Bureau made a submission to the Canada Marine Act Review Panel addressing three areas: Canada Port Authorities (CPAs), Pilotage and Ferry Services and, Shipping in Domestic Waters.

75. The Bureau indicated that the existing not-for-profit and governance structure does not benefit the competitive position of Canadian ports compared to U.S. ports, since it does not encourage investment or offer CPAs the freedom to minimize costs. Therefore, the Bureau recommended adopting a for-profit objective for CPAs; selecting directors for CPA boards either competitively or according to the interests

they represent; removing regulatory constraints that reduce the freedom of CPAs to engage in non-port activities, restrict CPAs' ability to borrow money and prevent CPAs from merging (subject to the merger provisions of the Competition Act); limiting the Crown's financial liability to current levels; considering privatizing CPAs in the medium term to maximize profits; restraining the competitive advantages of CPA subsidiaries when competing for CPA business; and, legislating access to CPAs and ensuring that no exemptions from the Competition Act are introduced for CPAs and marine terminal operators.

76. The Bureau was concerned about the absence of competition, cross-subsidization and an adequate mechanism in the Pilotage Act to protect users of pilotage services. It recommended to following: abolishing the statutory monopoly of the Pilotage Authorities in providing pilotage services; creating an accreditation body for licensing pilots; considering competitive forces when determining tariffs; applying the current limited liability requirements to all accredited pilots; and, continuing the commercialization or privatization of ferries, and reducing subsidies.

77. To increase competition in this area the Bureau recommended the following: discussing with other countries the reciprocal removal of cabotage laws in domestic waters, where appropriate, so that U.S., Commonwealth and foreign ships would be allowed to trade in Canadian waters freely on a reciprocal basis.

**B. Telecommunications and Broadcasting**

*(a) Telecommunications*

78. In May 2002, the Bureau made a submission to the Canadian Radio-Television Commission (CRTC) in response to its request for public input on proposed changes to agreements between telephone companies and service providers that offer information and entertainment services through 900-service numbers (users are billed by the telephone company or the service provider). The Bureau commented on two issues: "scratch-and-win"scams and "modem hijacking" scams (switching customers' modem connection from their usual Internet service provider to a foreign and very expensive one).

79. The Bureau recommended that agreements about scratch and-win promotions should mention that these promotions fall under sections 52, 53 and 74.01 of the *Competition Act*. This would ensure that a single law enforcement agency would respond to these scams.

80. The Bureau supported the proposed changes in the area of modem hijacking to extend consumer safeguards to people using the Internet to access 900 services. It also recommended that the notice about the switch and rate change be a very short, accurate and clear message, displayed to viewers before the switch occurs. In addition, Internet service providers would allow ample opportunity for users to refuse the new connection. These recommendations will give more protection to consumers. Participants in scratch-and-win contests will have an independent method of verifying that the offers made in the representation are in fact being fulfilled.

81. In August, 2002, AT&T Canada submitted a petition to the Governor in Council to vary Telecom Decision CRTC 2002-34. This Decision provided for a second price cap period to protect the interests of consumers and competitors from potential anti-competitive behaviour by incumbent local telephone companies. The Bureau opposed the petition on the grounds that it would hinder the development of facilities-based competition, encourage uneconomic entry and negatively impair the development of efficient competitive wholesale and retail markets.

82. On January 17, 2003, Call-Net applied to the CRTC for an order directing Bell Canada, Telus and the other incumbent local telephone companies to provide high-speed Internet service to residential customers choosing a competitor's local service. At the time of this application, the policy of the

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incumbents was to require their high speed Internet customers to take their local service. Call-Net argued that this policy was a barrier to new entry into the local residential telephone market and denied consumers the benefit of competition. On February 26, 2003, the Bureau filed a submission with the CRTC supporting Call-Net's view that opening up local residential telephone markets to competition was an important priority for the Government. The Bureau argued that the incumbents had a virtual monopoly over local residential telephone service, and that their requirement for high-speed Internet customers to take their service raised barriers to entry into local competition. As of March 31, 2003, the CRTC's decision was pending.

83. On June 12 and 19, 2002, Call-Net asked the CRTC to clarify and make certain procedural changes in connection with Competitor Digital Network Access (DNA) Service. The CRTC had identified DNA Service as an essential service in its second price cap decision (Telecom Decision CRTC 2002-34). Call-Net's application included broadening the definition of DNA Service. New entrants in local telecommunications markets are required to offer services to customers located outside the downtown core of urban areas. In its application, Call-Net stated that the time frame set out in the Decision for the development and implementation of a Competitor DNA Service was likely to extend well into 2003. Call-Net proposed that the regulatory process be sped up to ensure competitors and consumers benefit as quickly as possible. On June 27, 2002, the Bureau made a submission to the CRTC supporting Call-Net's request, noting it would allow earlier entry into local telecommunication markets, thereby providing consumers with competitive prices, services and quality. On August 9, 2002, in Telecom Public Notice CRTC 2002-4, the CRTC ruled that Call-Net's application merited further review and initiated a new procedure to address the issues Call-Net had raised.

84. On April 27, 2001, the CRTC issued Telecom Public Notice CRTC 2001-47 and initiated a proceeding to establish a set of general principles and criteria for assessing applications for expanding local telephone calling areas (LCAs). On November 15, 2001, the Bureau submitted comments responding to the Public Notice. The Bureau identified a number of problems with expanding local calling areas through regulation, including the cost of ongoing regulation, the adverse impact on competition and the negative effect on consumers. In light of these concerns, the Bureau recommended the following: that local calling areas be determined by the interplay of competitive market forces; and that each service provider have the flexibility to offer a variety of price-geographic coverage plans to consumers, who would benefit from the freedom of choosing the most appropriate plan for themselves. The CRTC issued its decision on September 12, 2002. The Commission chose to adopt a regulatory framework for the expansion of local telephone calling areas rather than rely on market forces.

85. On February 24, 2003, the Commissioner of Competition appeared before the House of Commons Standing Committee on Industry Science and Technology on foreign investment restrictions applicable to telecommunications common carriers. The Commissioner reiterated and amplified the views presented to the House of Commons Heritage Committee. First, access to capital is essential for a dynamic and efficient industry and squeezing out foreign capital is inconsistent with an effective capital market. Second, foreign capital involves more than bringing cash, it involves bring financial ideas, influence, technology and managerial efficiency. Third, there is no distinction between carrying telephone signals vs. broadcasting signals and they should enjoy the same access to capital and be bound by the same ownership rules. Fourth, if a regulator's powers are insufficient, which is not the view of the Bureau, the *Telecommunications Act* should be amended. Fifth, with regard to broadcasting and related content issues, competition should not be ignored. Greater reliance on market forces, enhanced efficiency and competition should be reflected as part of Canada's broadcasting and regulatory policy.

(b) *Broadcasting*

86. On April 3, 2002, the Bureau made a submission to the Standing Committee on the Study of the State of the Canadian Broadcasting System. The Bureau made three recommendations: First, include as part of Canada's broadcasting and regulatory policy that: a) regulation, where required, be efficient, effective and directed solely to the realization of the Act's core cultural objectives; b) regulation include an objective of increased reliance on market forces; and c) regulation include an objective of enhanced efficiency and competitiveness of Canadian broadcasting services; second, clarify the mandate of the CRTC: a) to specify that the CRTC has a responsibility to preserve a diversity of voices within the broadcasting system; and b) to focus, at the same time, that the CRTC's review of broadcasting transactions be solely on the impact that the mergers would have on core cultural values and diversity of voices; and, finally, ensure that foreign investment levels for Broadcasting Distribution Undertakings parallel those for Telecommunications Carriers.

87. On December 12, 2002, the Commissioner of Competition appeared before the Standing Committee and presented his views on the future of broadcasting. First, with regard to cross-media ownership the Commissioner indicated that the Bureau has not set specific rules but would analyse each proposed transaction from the perspective of the impact on levels of competition in the affected markets. It is not part of the Bureau's mandate to take into account impacts on cultural objectives such as diversity of voices. Canadian content levels and other regulatory concerns can be dealt with under the existing or new rules administered by the CRTC. Second, with regard to foreign ownership issues, the Bureau considers access to capital as essential for a dynamic and efficient industry. Squeezing out foreign capital is not consistent with an effective capital market, and access to foreign capital can only ensure a stronger Canadian industry in the end. Finally, foreign capital is not just about bringing cash to Canada but involves bringing outside financial ideas, financial influence, sources of technology, and management efficiency. This would result in more competition and greater choice for consumers. The House of Commons Heritage Committee as of March 31, 2003, had not released its report.

C. *Energy*

88. The Ontario Energy Board invited the Bureau to participate in the hearing on whether Ontario Power Generation's lease with Bruce Power constituted a decontrol measure under the Market Power Mitigation Framework in Ontario Power Generation's transitional generation licence. In particular, the Board wanted the Bureau's opinion on certain competition law and policy issues, namely the following: the reasoning behind the granting of an advance ruling certificate for the Bruce transaction; the concept of interdependent behaviour under Canadian competition law and policy; and arrangements that might facilitate interdependent behaviour under the merger provisions, and others, of the Competition Act. The Bureau noted that a favourable advance ruling certificate should not be viewed as relevant to the matters before the Board. It outlined the factors it might consider when examining interdependence and coordination concerns that could raise an issue under the Competition Act. The Board's decision was pending as of March 31, 2003.

89. The Alberta Department of Energy initiated this review in 2001 to evaluate how to structure the functions carried out by institutions with a primary role in the operation of the electricity industry. In 2002–2003 the Bureau continued its involvement through comments on a discussion paper on the recommended structure of the Alberta electricity industry and discussions with provincial officials. On March 27, 2003, the Alberta legislature entrenched the Bureau's key recommendations into legislation.

90. In March 2002, the Bureau signed an agreement with the Ontario Energy Board and the Independent Electricity Market Operator to work together to ensure effective competition oversight in Ontario's electricity industry. The agreement outlined each agency's role and responsibilities in the new

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markets and provided a framework for cooperation and coordination when overlap exists. As noted in the agreement, the Bureau maintained regular contact with the Ontario Energy Board and the Independent Electricity Market Operator on competition related matters. This played an important role in coordinating the agencies' competition-related actions over the year, such as their respective reviews of the Bruce Power lease referred to above.

### **D. Trade**

91. On February 12, 2003, the Bureau filed a submission with the Canadian International Trade Tribunal (CITT) about its review of its April 1998 findings of dumping of non-organic jarred baby food originating in or exported from the United States. The CITT reviewed its findings to determine whether dumping was likely to continue and, if so, whether Heinz Canada would continue to suffer material injury. The review would help determine whether antidumping duties would be maintained for another five years or would expire in April 2003. The Bureau, the sole intervener in this proceeding, submitted that the evidence did not indicate a direct link between dumping and material injury. Rather, any economic harm to Heinz would result from the nature of competition in an increasingly segmented baby food market, self-imposed injury resulting from corporate agreements preventing Heinz Canada from competing in the U.S., and the lack of product innovation on Heinz's part. The Bureau also noted that Canadian regulations about jar sizes and food ingredients would prevent American firms from effectively competing in Canada for at least two years. Any injury that Heinz was likely to suffer would be due, for the most part, to the effect of the entry of renewed competition into the market, not to dumping. On April 28, 2003, the CITT immediately rescinded its April 1998 findings. On June 30, 2003 Heinz Canada appealed the CITT's decision to the Federal Court of Appeal Court decision is pending.

92. On March 25, 2002, the CITT launched a safeguard inquiry into certain imported steel goods. The purpose of the inquiry was to determine whether the increased imports of any of nine steel products since 1996 were the principal cause of serious injury, or a threat of serious injury, to Canadian steel producers. The CITT asked the Bureau to comment on the following: the likely effects of possible trade remedies on competition in the steel industry and downstream users of steel products in Canada; and, how different types of trade remedies might be applied to the steel industry to ensure domestic producers are not injured, while minimizing disruption to other sectors of the Canadian economy. The Bureau made representations in support of free trade in steel products, while noting that the proposed remedies were likely to be very costly to the Canadian economy, particularly the downstream purchasers of steel. The Bureau recommended that, when action was warranted, trade remedies provided for domestic producers be as limited as possible, while still meeting the objective of reducing the injury. On July 4, 2002, the CITT said that increased imports were a principal cause of serious injury to domestic producers of five of the nine subject goods. On August 19, 2002, the CITT recommended a tariff as well as a tariff rate quota for four of the nine subject goods.

### **E. Voluntary Codes**

93. On June 11, 2002, the Bureau endorsed the *Scanner Price Accuracy Voluntary Code*, which provides participating retailers of four major associations with a mechanism to provide redress to consumers when there is a scanner error. When the scanned price of an item without a price tag is higher than the shelf price, or any other displayed price, the customer is entitled to receive the item free when it is worth less than \$10, or receive a \$10 reduction for more expensive items. The Bureau regards scanner price accuracy as an important element of maintaining consumer confidence.

94. In 2002, as a result of the Bureau's information bulletin on the marketing of Canadian diamonds, an industry working group developed a voluntary code of conduct that sets a minimum standard for validating Canadian diamond claims, based on documentary evidence and a series of warranties. Prior to

endorsing the voluntary code, the Bureau sought feedback from the jewellery industry, provincial stakeholders and consumer groups. Results of the consultation revealed that 82 per cent of respondents from the industry indicated they would subscribe to the code. In light of this feedback, the Bureau and the Canadian Diamond Code Committee finalized the *Voluntary Code of Conduct for Authenticating Canadian Diamond Claims* and launched it on November 6, 2002.

#### **IV. Resources of competition authorities**

##### **A. Resources overall**

###### *(a) Annual budget*

95. In fiscal year 2002-2003, the Bureau received \$31.6M (\$20.5M US) in base budget plus \$11.7M (\$7.6M US) in temporary funding for a total of \$43.3M (\$27.9M US).

###### *(b) Number of employees (person-years):*

- economists: 14
- lawyers: 19 lawyers, 2 paralegals, 2 articling students paid by Department of Justice
- Other Professionals: 221 Competition Law Officers, 23 Executives
- Informatics, Administrative Services and Support Functions: 120
- Communications Professionals: 5
- Total Full Time Authorized Bureau Employees: 383

96. Almost half of the 221 Competition Law Officers employed by the Bureau have formal training or education in either economics or law.

##### **B. Application of Human Resources to Bureau Activities**

*(a) Enforcement against anticompetitive practices: 317*

*(b) Merger review and enforcement: 44*

*(c) Advocacy efforts: 22*

##### **C. Period covered by the above information**

97. April 1<sup>st</sup> 2002 - March 31<sup>st</sup> 2003.

#### **V. Summaries of or references to new reports and studies on competition policy issues**

Duhamel, Marc and Peter G. C. Townley, "An Effective and Enforceable Alternative to the Consumer Surplus Standard," *World Competition Law and Economics Review*, 26 (1), 2003, pp. 3–24.

Lafond, André, *The Complementary Role of Regulations and Competition Law in Deregulating Industries*, Competition Law Section, Canadian Bar Association, annual fall conference on competition law, October 3–4, 2002, Ottawa, Ontario.

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- Legault, Suzanne, *Legislative Process for Amending the Competition Act*, Competition Law Section, Canadian Bar Association, annual fall conference on competition law, October 3–4, 2002, Ottawa, Ontario.
- McCrone, Robert W., *Reform of Section 45 of the Competition Act: A Bureau Review*, Competition Law Section, Canadian Bar Association, annual fall conference on competition law, October 3–4, 2002, Ottawa, Ontario.
- Monteiro, Joseph and Benjamin Atkinson, “Rotary Wing Aviation in Canada,” *Canadian Transportation Research Forum: Proceedings of the 2002 Annual Conference*, St. John’s, Newfoundland and Labrador, May 11–15, 2002, pp. 353–370.
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