COUNTRY STUDIES

Canada - The Role of Competition Policy in Regulatory Reform

2002

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Canada. This report was principally prepared by Mr. Michael Wise for the OECD.

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LE ROLE DE LA POLITIQUE DE LA CONCURRENCE DANS LA RÉFORME DE LA RÉGLEMENTATION

FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Canada. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Canada* published in September 2002. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macroeconomic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Canada. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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Executive Summary

Competition policy has been integrated inconsistently into the general policy framework in Canada, but it is becoming an increasingly important subject in public debate over regulatory decisions. The economic policy means that Canada has used to maintain distinctions from the large economy next door have sometimes tolerated local market power, entry controls, industry co-operation, and protection of national firms at the expense of national consumers.

The uncertain status of competition policy as a principle in regulation is mirrored in the status of the institutions principally responsible for it, the Commissioner of Competition and the Competition Bureau in Industry Canada. There is a common perception that important decisions have been subjected to political pressures to protect "national champion" interests. The desire to retain Canadian control in some sectors limits what competition policy can do to remedy problems, which leads to tolerating monopolies subject to *ad hoc* measures to regulate them through order or special legislation. Controversies over merger decisions in airlines, banks, and bookstores have nonetheless had the salutary effect of stimulating public debate about the priority of competition policy. In each of these controversies, competition policy concerns expressed by the Commissioner were addressed to some extent. But to bring perceptions closer to reality, some way needs to be found to make the Commissioner's decision-making independence more visible and credible.

Enforcement of the competition law itself has been hampered by a paradoxical set of enforcement tools. The law appeared tough because it provided criminal penalties, but in fact it was ineffective because those penalties were rarely imposed. Extensive revisions in 1986 still left the law against collusion difficult to enforce. In the last few years, substantial fines have been collected from some cartels whose participants pleaded guilty; however, the Commissioner has had few successes in contested cases. Increasing co-operation with agencies in other countries has leveraged the Competition Bureau's enforcement resources. The Competition Bureau's unique "conformity continuum" program for applying the law is an intriguing implementation of a general reform principle, the importance of choosing appropriate instruments. But the lack of visible "victories" may tend to encourage the public perception that powerful interests can somehow avoid consequences.

A clearer rule against hard-core cartels, coupled with a civil alternative to the criminal sanction for less egregious cases, would make judicial application of the law more efficient. Procedures for dealing with mergers have drawn criticism for delay, cost, and uncertainty, much of that criticism being directed to the specialised Competition Tribunal. The Competition Tribunal process should be re-examined. The Tribunal either should do more, justifying the existence of an expert "court", or it should be replaced. First-instance decisions in civil matters might then be made by general jurisdiction courts or by the Commissioner (or a multi-member Commission). The Bureau needs more resources and a better mix of them to improve its success record in contested cases. More successes before independent, sceptical judges would help demonstrate the Commissioner's own decision-making independence.

Particularly in the 1980s, but continuing today, the Competition Bureau has put much of its energy into competition advocacy. Reform has succeeded in several sectors, such as telecoms and long-distance trucking. The Competition Bureau has contributed to the policy debate about airlines, banks, agricultural products, railways, liner shipping, broadcasting, and publishing. The extent of regulatory intervention, through ownership restraints, provincial licensing and other trade-regulating authorities, and special sectoral arrangements is substantial. It has never been surveyed comprehensively, and the total effect is hard to quantify, but it is likely to be impairing opportunities for smaller firms, entrenching the position of some dominant ones, and encouraging others to look outside of Canada for growth.

Box 1. **Competition policy's roles in regulatory reform**

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different outcomes.

- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

1. Competition policy foundations

Canada was first to adopt a national competition statute, but for most of the last century competition policy was subordinated to the pursuit of other values, notably respect for the autonomy of provincial governments and the protection of national identity and producer interests. The terms of debate may be shifting, though. Increasing attention is drawn to how restraints on competition affect the interests of Canadian consumers.

Distinguishing features of Canada's political economy explain the long gestation of its competition policy. Comparisons to the nearby experience of the US are inevitable and instructive. Canada's economy is smaller and more trade-dependent. Most manufacturing industries are relatively concentrated, considered within a Canadian "market", and policy-makers have been sympathetic to fears that a strong competition policy could undermine economies of scale. Dependence on trade, and much of that with one trading partner, the US, also provided an argument against strict domestic competition enforcement. Policy-makers and the public have supported the preservation of national identity, including national firms in major industries. National regulatory and economic policies have stressed nation-building projects and goals, which sometimes entailed protection of domestic interests (Doern, 1996). Competition policy in Canada has had an ambivalent relationship with that of the US. In sectoral reforms and in competition law, developments in Canada often accompanied—and sometimes led—those in the US. But Canada was slow to embrace the model of vigorous antitrust enforcement.

In 1889, the heyday of North American populism, Canada adopted *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*. The Combines Act responded to criticism of the concentration that had resulted from the government's 1879 National Policy to protect and encourage manufacturing. The language of the original Combines Act survives today: it is an offence to conspire, combine, agree, or arrange to prevent or lessen competition "unduly" or to "unreasonably" enhance prices. Three years later this rule was incorporated into the Criminal Code and the offence became indictable. The Combines Act was thought simply to declare existing common law (Competition Bureau, 2001)—and some thought it was a symbolic gesture that was not really intended to be applied. Whatever its intention, its practical impact proved to be insignificant.[1]

Efforts a generation later to make the Combines Act effective fell short, leaving Canada with an unworkable system. The 1910 Combines Investigation Act provided for investigating alleged combinations (Competition Bureau, 2001). In 1912, a ruling by the Supreme Court of Canada rescued Canada's competition law from impotence, by avoiding a common-law interpretation by the House of Lords that would have made most cartels legal. But in 1921, the House of Lords had the last word.[2] The Lords found that the subject of combinations and restraints of trade involved "property and civil rights", which is a responsibility of the provincial governments under Canada's Constitutional Act. The only power the national government could use here was its criminal jurisdiction. As it turned out, persuading judges to convict proved nearly impossible.[3]

Frustration with the criminal-law approach grew. Enforcers could not prevail in significant cases. Efforts to undo major national mergers in the early 1960s in breweries and sugar refining failed. In 1966, the Economic Council of Canada was asked to study the situation and make recommendations. Its *Interim Report on Competition Policy* in 1969 called for a new approach, retaining criminal penalties against some kinds of conduct but creating a civil review process for monopoly, mergers, and some other matters. The report urged that the objective of competition policy should be to promote consumer interests through an efficient economy. But it also repeated the historic concern that Canadian businesses be strong enough to compete in a continental market (Facey, 2000).

It took 17 years to implement those recommendations. The principal hurdle was the opposition of Canadian business interests, which had enjoyed a substantial degree of protection. When reform legislation was first debated in 1971, some legislators complained that the bill was "solely concerned with consumer benefits and not at all with the survival of domestic industry." It was feared that the law would centralise "decision-making power in the hands of a group of technocrats bound only by the vaguest of rules." One editorial thundered that the bill "could well spell the death knell of private enterprise as it is known in this country" (Competition Bureau, 2001). The 1971 proposal proved to be too ambitious. It was presented with little prior consultation, and the business community's initial reactions were hostile. The less controversial parts of it were enacted in 1975. These included a *per se* rule against bid-rigging definition of several "civil reviewable" practices, consumer protection measures, expanded jurisdiction over services, a narrow private right of action for damages, and clearer powers of intervention in regulatory proceedings and of remedy in civil matters. The more controversial parts about monopolies and mergers were deferred. A 1981 "framework discussion document" tried again, and this time the project succeeded, 5 years later, because some business groups began to see advantages from effective competition policy. Larger firms and those with foreign ownership lobbied for reforming the ineffective merger and monopoly provisions, in part to reduce the differences between Canadian law and the approaches taken by major trading partners. And smaller firms wanted stronger laws to protect them against big firms. The consultation process after the 1983 election was better structured, to bring in these new business viewpoints. But the consumer lobby was a marginal participant in the process (Doern, 1996, pp. 81-84, 87).

Canada's Competition Act in essentially its present form was adopted in 1986. It retains many elements of the original laws, notably the definition of the criminal offences. But it made serious enforcement possible by providing a more flexible process through a special civil court, the Competition Tribunal. Before the 1986 changes, years of frustration in its enforcement mission had taken a toll on the Competition Bureau. Despite some success against misleading advertising and resale price maintenance, and some productive regulatory interventions, basic antitrust enforcement lay dormant. The new Act promised a fresh start. To ratify the fundamental change, the courts freed the law from its trap in criminal jurisprudence. Canada's Supreme Court revisited the constitutional issue in 1989 (long after the House of Lords had stopped being Canada's highest court) and decided that the national parliament could enact civil competition laws under its constitutional power to regulate trade and commerce.[4]

The 1986 Act contains a comprehensive statement of purpose whose many facets reflect the years of debate (Sec. 1.1). The overall aim of the Act is to maintain and encourage competition, a term that is not formally defined. Rather, the remainder of the statutory purpose section describes several benefits that would flow from encouraging competition. "Efficiency" leads the list, in phrasing that is general enough to include both allocative and productive conceptions of efficiency. The benefit of "adaptability" recognises the importance of dynamic efficiency. Another benefit, expanded opportunities for Canadian business in world markets, is linked to efficiency and adaptability. The statement of purpose also recognises the role of foreign competition in Canada, perhaps to balance the implied export-promotion goal that precedes it. The combination of the two carries an implication of reciprocity and retaliation, though. The law shows concern about small businesses, assuring them that they will have an "equitable opportunity to participate". Listed last are the benefits to customers of competitive prices and product choices. These explicitly stated purposes appeal directly to the different groups that were affected by the legislation, particularly the business interests (Doern, 1996).

Although consumer issues come at the end of the statute's list, history shows that consumer interests were considered important from the outset. The Labour Minister who was responsible for the Combines Investigation Act of 1910 said that the "main purpose of this measure is the protection of the consumer" (Gorecki, 1984, p. 34; quoted in Fisher, 2000). A merger case now working through the courts presents serious questions about the priority of consumer interests in Canadian competition policy. The most recent decision implies that consumer interests are becoming a more important element in the policy mix.

The issue is the balance between the consumers' interest in lower prices and the producers' interest in greater efficiency. This case was the first time the Competition Tribunal had directly considered the efficiency defence. The Tribunal compared the increase in productive efficiency to the reduction in output due to market power. The Tribunal deliberately left out of the balance the effect of market power in transferring wealth, reasoning that this loss to consumers could equally be considered as a gain to producers. But the Federal Court of Appeal rejected the Tribunal's approach.[5] Instead, the court looked to the Act's general purpose clause and its promotion in parliament as a consumer protection measure, and instructed the Tribunal to consider a wider range of effects, including effects on consumers who must pay higher prices to firms with monopoly power. On remand, the Tribunal reiterated its first decision, and that decision has again been appealed.

2. Substantive issues: content of the competition law

The constitutional bases for Canada's competition law now include the federal trade and commerce power as well as the criminal law power. Much of it retains the criminal-law character of the original Combines Act, along with the difficulties of applying it. The need to prove a criminal case has inhibited using the law to reform industry self-regulation. The process of dealing with the "civil reviewable" matters has encountered some problems, too, notably in processing mergers.

Box 2. **The competition policy toolkit**

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

2.1. Horizontal agreements

Agreements that prevent or lessen competition unduly, or that enhance prices unreasonably, are crimes (Sec. 45). The statute does not distinguish between horizontal and vertical agreements, but in practice it has been applied principally to horizontal price-fixing and market division. Bid-rigging is a separately-defined offence (Sec. 47). Another part of the statute that outlaws price "enhancement" or price "maintenance" may also be applied to conduct between horizontal competitors (Sec. 61). Penalties for violating the conspiracy provisions may be stiff: a fine up to C 10 million or imprisonment up to 5 years. In addition, the court may enter a prohibition order to control future conduct for up to 10 years or to prevent a threatened violation (Sec. 34).

The statute's qualifying terms, "unduly" and "unreasonably," make proof complex. Both behaviour and structure are relevant. In determining whether enhancement of price is "unreasonable," what matters is the manner of enhancement, not the magnitude. In determining whether lessening of competition is "undue", the courts look to market power. The most authoritative explanation of the principles is a 1992 decision by the Supreme Court of Canada[6] responding to a claim that the statute's vagueness violated the Charter of Rights and Freedoms. The Court found that the combination of market power and conduct likely to impair competition qualifies as "undue". The agreement must give the parties enough market power to make a difference to the price level or at least to insulate them from market discipline. Market power could be shown, or refuted, by the usual array of economic factors, such as concentration, market shares, entry barriers, geographic distribution of buyers and sellers, differences in degree of integration, product differentiation, countervailing power, and demand elasticity. Making market power an element of the violation implies there could be a market share test for liability, but there is no clear threshold. The parties' agreement must impose "improper, inordinate, excessive or oppressive" restrictions on competition. But the parties need not have formed the subjective intention to achieve an anti-competitive result. The *mens rea* requirement is satisfied by proof that they intended to agree, and that a reasonable business person would have known, in the circumstances, that the agreement would be likely to lessen or prevent competition (Competition Bureau, 2001). A dual sliding scale applies, so the more egregious the behaviour, the less market power need be shown (Chandler, 2000).

Proving the competition violation is not complicated further by consideration of other policies, though. Countervailing benefits or harms other than to competition are irrelevant, and the courts have said that "efficiencies" are no defence. This simplification may come at a cost, though, as some businesses have expressed concern that the law inhibits "strategic alliances". Proof is simplified even further for bid-rigging, which is defined as a *per se* offence. There is no need to prove harm, but the bid-rigging agreement must be proved beyond a reasonable doubt, and agreements to submit a joint bid are permitted if the parties tell the tendering authority that is what they are doing (Competition Bureau, 2001). The provisions about price "enhancement" or "maintenance" also have a *per se* character, because they do not include the element of "undueness" (Goldman, 2000). They do require showing that there is a threat or promise to influence a competitor's prices, and thus the section could apply where conspirators tried to discipline or persuade defectors (Chandler, 2000).

Special rules target particular kinds of horizontal agreements. One is designed to catch international cartel agreements reached outside of Canada. It is an offence to give effect to such an agreement that would have violated Sec. 45 if entered within Canada (Sec. 46). It is unnecessary to show that the parties acting in Canada were aware of the international conspiracy, if they were implementing corporate directives from elsewhere that were aimed at giving effect to the agreement (Competition Bureau, 2001). There have been no contested cases under this section, but there have been several guilty pleas (Chandler, 2000). Agreements among federal financial institutions about interest rates, charges, or services are illegal *per se* (Sec. 49).[7] Several exceptions ensure that the ban does not impair legitimate financial operations. Originally applicable to banks, the rule was extended to federally incorporated trust, loan, and insurance companies in 1991 (Competition Bureau, 2001). There have been no referrals or prosecutions (Chandler, 2000). And in professional sports, it is an offence to conspire to limit unreasonably players' opportunities to participate or negotiate with other teams (Sec. 48). There have been no referrals or prosecutions (Competition Bureau, 2001).

Nearly all convictions have been through guilty pleas, many of them in international cartel cases. In the sorbates cartel, two firms paid C 3.28 million; in the lysine and citric acid case, one firm paid C 16 million, a record under the Competition Act (Competition Bureau, 2001). Fines against international cartels in 1999 totalled about C 100 million (Goldman, 2000). From January 1980 to May 2000, there were 32 cases under Sec. 45 and its predecessor that resulted in convictions, virtually all through plea agreements, producing total fines of 158 million. In addition, fines against foreign-directed agreements totalled 14 million, and against bid rigging, 8.8 million (Chandler, 2000). In negotiating pleas, the Bureau uses a formula and the courts use generally applicable sentencing principles (Goldman, 2000). Multiple-count indictments can multiply the C 10 million statutory fine (Rowley, 1999).

Although prosecutions have targeted hard-core conduct, since 1980only 3 contested cases (out of 20) have resulted in convictions. In about half of those unsuccessful cases, the prosecution has failed to show that the restraint was "undue" (Chandler, 2000). Proving the *per se* violations is obviously easier. The success rate against bid-rigging is much higher. About half of the 10 contested bid-rigging cases have resulted in convictions (Chandler, 2000). The first jail sentence for a price-related crime under the Competition Act was imposed in 1996, for violating several aspects of the law, including harassing competitors to raise prices (Collins, 1997). Language in recent court decisions suggests that a conviction could be based on modest amounts of market power, but that has not yet been borne out in a verdict.[8] The courts' acceptance of high fines through guilty pleas also suggests that the courts might be willing to impose them in an appropriate contested case, for the courts have the discretion to reject a plea agreement.

The range of the courts' discretion frustrates enforcement. An example is the fate of the Bureau's effort to prosecute a market division agreement among rail freight forwarders.[9] The court found an explicit agreement, which endured for 11 years, not to undercut each others' prices for "pool car" forwarding. This service became important after deregulation permitted greater rate flexibility and pooled cargoes could be shipped under standard, blanket rates. The judge found that the market included long-haul truckers and inter-modal rail service, so the effect of the conspiracy was not "undue." The judge did not quantify the shares or rely on any objective measure in defining the market (and the prosecution offered no evidence about the shares of the market the judge found). Instead, the "overall sense of the evidence" led the judge to believe that customers would have been willing to switch given the right price incentive. The judge faulted the prosecution for failing to show that the conspiracy had elevated its price above the competitive level, to the elastic point that made alternatives attractive. That is, the court in effect required the prosecution to prove a complex economic monopolisation case in order to obtain a conviction against a price-fixing conspiracy.

The law about horizontal agreements is unsatisfactory, despite the occasional success. The law of conspiracy is both over-broad yet under-inclusive (Ross, 1997). The term "unduly" has been interpreted to outlaw wide range of restraints, not always truly anti-competitive ones, if the parties control a market. The threat of criminal sanctions may thus over-deter potentially efficient collaborations. On the other hand, obviously anti-competitive agreements have survived where the market is arguably wider than the conspiracy. A recent consultation considered proposals to reform the law. One suggestion was to create a presumption of harm, subject to an exemption for ancillary restraints. Another was to provide a safe harbour or *de minimis* exemption, at the relatively high threshold of a 25% market share. Alternatives to criminal prosecution could be a provision for civil liability, to be decided by the Competition Tribunal rather than general-jurisdiction courts, and a process of application to the Commissioner for clearance and thus immunity from suit. The consultation disclosed support for creating a dual-track system, but also for harmonising more closely with the approaches of the EU and US, in eliminating the "effects" test for true hard-core cartels. More consultations are planned, as the participants also feared that even after such changes the law could still deter potentially efficient strategic alliances (Competition Bureau, 2001).

2.2. Vertical agreements

Non-price vertical restraints are usually treated as "civil reviewable" matters. Specific provisions govern several common distribution issues, such as refusal to deal (Sec. 75), consignment sales (Sec. 76), and exclusive dealing, territorial or customer restrictions, and tying (Sec. 77). Several of the statute's provisions about abuse of dominance address conduct that could also be considered vertical restraints.

The section about refusal to deal sets several conditions that, in effect, filter out purely commercial disputes. The section about exclusive dealing, market restrictions, and tying includes a "competitive effects" requirement, focusing the law on restraints that are imposed by a major supplier or that are in widespread use, and that are likely to lessen competition substantially by impeding entry or otherwise.

The general criminal conspiracy section (Sec. 45) could in theory be applied to vertical agreements, but that rarely happens. One vertical restraint, resale price maintenance, is covered by the criminal law and indeed is treated as virtually *per se* illegal. Under the provision about "price maintenance", it is an offence to attempt, by threat, promise, or agreement, to influence prices to rise (or discourage them from falling), or to refuse to deal with or discriminate against another firm because of the latter's low prices (Sec. 61). This rule, which dates from 1951, was aimed originally against threats or coercion between dealers and resellers. It was extended to cover horizontal-level attempts and boycotts in 1975 (Competition Bureau, 2001).

2.3. Abuse of dominance

The term "abuse of dominance" is not actually used in the text of the statute, although it does appear in an outline-subheading. The section that authorises the Tribunal to prohibit "abuse" has three defining subsections, about market power, conduct, and effects (Sec. 79). First, there must be substantial or complete "control" over a class of business, in the whole country or a part of it. The Tribunal has decided that "control" means "market power". This control may be exerted by a single firm or by several. Second, there must be "a practice of anti-competitive acts." Third, the practice must prevent or lessen competition "substantially" (or be likely to do so). In the Bureau's analysis, "dominance" or market power is the ability to profitably maintain prices above competitive levels (or similarly restrict non-price dimensions of competition) for a significant period of time. That period is normally taken to be 1 year (Competition Bureau, 2001*a*, p. 10) (Competition Bureau, 2001). No market share test is prescribed, but in practical fact a firm with a market share below 35% and a group with a collective market share below 60% are unlikely to be considered dominant (Competition Bureau, 2001). Findings of dominance in contested cases have all involved monopoly-level shares, the lowest being 87%.

Some of the kinds of acts deemed to be anti-competitive are spelled out: vertical squeezing of non-integrated customers' margins, acquisition of a customer or supplier's potential alternative source or outlet, freight equalisation on a competitor's plant, "fighting brands," pre-emption of scarce facilities, buying up output to sustain prices, setting incompatible product specifications, exclusive dealing, and sales below cost. The list is not exhaustive, so other kinds of conduct might be considered abuse (Competition Bureau, 2001). The list includes acts that are predatory or exclusionary, but it does not include simply exercising market power by charging a high price or by withholding supply from the market. Canadian jurisprudence does not consider it to be an abuse to take advantage of market power in this way. Rather, "abuse" is conduct that tends to enhance or entrench market power, or facilitate its exercise, by excluding, threatening, or disciplining competitors.

A vertical "squeeze" of competing non-integrated retailers' margins is specifically identified as an abuse. But like the other types of "abusive" conduct, it is only illegal if done "for the purpose of impeding or preventing the customer's entry into, or expansion in, a market." This provision of the 1986 Act does not go far enough to satisfy the interests of non-integrated gas stations, who have lobbied for a rule requiring integrated firms to hold a profit umbrella over these competing operations. The Bureau has opposed this proposal on the grounds that it is fundamentally inconsistent with the Act's purpose (Competition Bureau, 2001).

The Tribunal has issued 6 decisions finding abuse of dominance, 4 of them contested, in 15 years. Final enforcement guidelines were issued in mid-2001, collecting and explaining the principles that emerge from these cases and from some earlier ones (Competition Bureau, 2001*a*). These guidelines set out the economics-based analysis that the Bureau applies. They include some principles that have not yet been tested by the courts. For example, in identifying predatory pricing, the Bureau inquires whether prices are below avoidable cost, and whether barriers to entry exist that will permit the predator to exercise market power if it succeeds. These principles in the general enforcement guidelines also appeared in the draft guidelines about the treatment of predation in the airline industry, a matter of some priority due to the pending litigation against allegedly predatory conduct by the dominant national scheduled airline.

The Bureau believes that the Competition Act is not well suited to overseeing industries undergoing the transition from regulated monopoly to competition. Because it does not prohibit the possession or enjoyment of market power, it could not be used to regulate prices or service levels. And although pre-emption of a scarce facility or resource to prevent entry would be treated as abuse of dominance, the Bureau believes that identifying a denial of access to an essential facility is best done through sector-specific rules and oversight, because it often involves technical issues that are unique to the industry. Moreover, that task is often closely connected with pricing, and the Competition Act process tries to avoid price regulation (Competition Bureau, 2001).

2.3. Mergers

Mergers that are likely to prevent or lessen competition substantially may be prohibited. The statute's test is not based on dominance. The Bureau interprets the "substantial lessening of competition" test both in terms of single-firm market power and of co-ordinated action. The Bureau will be concerned if the merger would permit the merged entity to increase price above competitive levels for a sustained period, typically considered to be two years. This test for the anti-competitive effect of a merger is more stringent than the one-year market power test for dominance.

Market share presumptions guide analysis and offer safe harbours. Generally, a merger will not be challenged if the merged firms' share will be under 35%. If the concern is the risk of co-ordinated action, the merger will not be challenged if 4-firm concentration will be under 65% and the merged firms' share will be under 10%. Markets are defined by an economic analysis of demand and supply substitution. The usual rule is to include in the market those products or sources that would be alternatives within a year if prices increased by 5%. In addition to market share, other factors are considered: barriers to entry, effectiveness of remaining competitors (or the risk of eliminating a particularly effective one), and innovation. It might be analytically simpler to incorporate some of the items on the list of "other factors", such as foreign competition, constraints on international or inter-provincial trade, and substitution of other products, into the process of defining markets. The Bureau will examine any other factors that could affect the ability to co-ordinate or exercise market power. A "failing firm" test may be applied, to permit an acquisition of an insolvent firm that is in the process of exiting the market, as long as there is no better buyer in sight and acquisition would be a better competitive outcome than restructuring or liquidation (Competition Bureau, 2001).

Box 3. **Efficiencies: a hot issue**

Treatment of efficiencies in the merger context, and by extension in competition policy generally, has been a subject of great attention. Canada's 1986 merger law dates from the high water mark of "Chicago" economics, and thus it takes a strong position about efficiencies. A merger that reduces competition may proceed if that loss is offset by gains in efficiency. The Bureau's 1991 merger guidelines followed the Chicago tradition and interpreted this balancing in terms of the lenient "total surplus" standard. If the gains in productive efficiency, making resources available for other purposes, exceed the "deadweight loss" from the reduction in output due to market power, then the merger would be permitted.

The facts of the 1998 *Superior Propane* transaction challenged that position starkly. The merger, to near-monopoly, would produce dead-weight loss and other inefficiencies totalling about C 6 million, but it would save the combined firms about C 30 million. And the market power would lead to an increase in consumer prices for bottled petroleum gas, which is sold mostly to lower-income rural users and small businesses, of about C 40 million, or nearly 10%. The Bureau challenged the merger and in doing so did not follow its own guidelines.

The Tribunal looked only at the dead-weight losses and held that the acquisition should proceed because they were outweighed by the cost savings. The Federal Court of Appeal disagreed, finding that the Tribunal had improperly limited the balancing of effects and efficiencies. The court instructed the Tribunal to consider whether other anti-competitive effects, such as wealth transfers from consumers to producers or impacts on smaller businesses, should be compared to the claimed efficiency benefits. Noting that the original competition law had been justified as a measure to protect consumers, the judges were not convinced that it should permit a transaction that significantly increased consumer prices. They were dubious about the "consumer protection" credentials of a decision rule that would find it good to increase prices most to those consumers who were least able to avoid the increase by switching to other products.

The Tribunal reopened the matter, after the merging parties' application to appeal to the Supreme Court was rejected, and in early 2002 issued another decision, reaching essentially the same conclusion as it had the first time. Another appeal appears likely. The general principle has changed prospectively, in any event. The Commissioner announced in May 2001 that his approach to the statutory balance of efficiencies would consider factors other than the net of losses in total surplus and gains in productive efficiency.

Merging parties must notify the Bureau in advance if size-based thresholds are met. There are two notification thresholds. First is the combined size of the parties: their total combined Canadian assets (or sales in, from, or to Canada) must be over C 400 million. Second is the size of the acquired entity: its assets or annual sales in or from Canada must be over C 35 million (C 70 million for an amalgamation). All kinds of combination or acquisition are covered.[10] There are two ways to notify. Under the "short form" method, the parties must wait 14 days between filing and closing. The Commissioner may require them to submit the long form. Under the "long form" method, the waiting period is 42 days.[11] The Bureau has an internal service standard period within which the Commissioner undertakes to decide whether to challenge a merger. The period varies according to the transaction's complexity and the extent of likely competition concerns in the industry: non-complex, 14 days; complex, 70 days (10 weeks); and very complex, 5 months. For complex and very complex cases, the Bureau must persuade the parties to voluntarily refrain from closing or seek interim relief from the Tribunal (Sec. 100(1)), or else rely on post-transaction remedies. The Commissioner has power under Sec. 100 to issue a temporary order staying the transaction, but only for 30 days; the Commissioner can apply to the court for one 30 day extension. Failure to notify when required, or closing a transaction before the deadline, is an offence, punishable by summary prosecution or, on indictment, by a fine of up to CAD 50 000. Parties may obtain some certainty and avoid the notification process by applying to the Commissioner for an Advance Ruling Certificate (Sec. 102) (Competition Bureau, 2001). Few mergers raise issues calling for investigation or intervention. Over the period 1995-2000, there was some remedy or enforcement action in only 28 merger matters, or about 1.7% of the 1 685 transactions reviewed (Competition Bureau, 2001). The Bureau reviews about 25-30% of all publicly reported mergers.[12]

Other bodies also review mergers in some industries or circumstances, applying different policy standards. In transport, telecoms, and broadcasting, the Canada Radio-Television and Telecommunications Commission (CRTC) and the Canada Transportation Agency administer statutes that require Canadian control. The Minister of Finance has the power to approve or disapprove mergers involving federally regulated financial institutions, and the Minister of Transport has similar power to approve or disapprove mergers involving airlines. These two regimes, which co-exist with the Competition Act's jurisdiction, are discussed further below (Competition Bureau, 2001). Investment Canada, the successor to the Foreign Investment Review Agency of the 1970s, has two roles, to promote foreign investment in Canada and also to screen and approve foreign acquisitions to determine whether they are of net benefit to Canada. The review thresholds and standards for that process do not match those applied to mergers generally. But there is much less intervention now than 20 years ago. Investment Canada has not rejected an investment since it was created in the 1980s. Instead, it has tried to negotiate commitments from the parties. Canadian Heritage also has a role in reviewing investments and mergers in industries that are deemed cultural. It too tries to negotiate undertakings from the parties where it has a concern. There is no formal process of inter-departmental consultation about merger matters, but departments may express their interests or concerns through ministerial channels if not directly to the Bureau.

The Commissioner may initiate full litigated proceedings at the Tribunal or submit a consent order for review and approval (Sec. 105). Most problematic merger matters are resolved by negotiated settlements, which may involve consent orders. These may include behavioural requirements as well as structural divestitures. In some prominent cases, reliance on a purely structural approach was impracticable because laws that required Canadian control also eliminated most realistic alternative purchasers. For example, the Bureau and the Tribunal approved the combination of the only two national book-selling chains in the country, subject to a consent order. The acquired firm, which was in financial trouble, was the object of a hostile takeover offer by the other major chain but the ban on foreign ownership of bookstores prevented a deal with a US or European acquisition partner. The behavioural remedies include a self-enforcing "code of conduct" governing the merged firms' relationships with publishers. The order also required the merging parties to offer to sell a package of retail locations and other assets, and, to facilitate entry and expansion, it restricts the growth of the merged parties. A behavioural rule was also used to encourage competition among airline computer reservation systems, after Air Canada and Canadian Airlines combined.

The consent order process at the Tribunal has been problematic. All orders, including those resulting from negotiated settlements, must be issued by the Tribunal, which is the first-instance decision-maker. The process of reviewing a proposed consent order takes at least 60 days, for publishing notice and providing an opportunity for intervention and so on. It can stretch out to 6 months, though. Moreover, the Tribunal has sometimes demanded changes to the deal that the Bureau and the parties have reached. The risk of uncertainty and delay has reportedly encouraged firms to seek more informal resolutions rather than negotiating consent orders. The Commissioner would retain some power to enforce an informal commitment during the 3 year period after a merger before the statute of limitations prevents challenging it. Binding arbitration might also be a means of enforcing these informal commitments, but the Commissioner's legal authority to enter agreements providing for binding arbitration is not yet tested in court. Changes to the law are under consideration to permit a consent order to become effective and enforceable upon filing.

2.4. *Unfair competition*

Parts of the Competition Act are meant to protect small businesses in their relationships with large suppliers and customers by outlawing several forms of discrimination. Discrimination between customers in price or other terms, for goods of like quality and quantity, is prohibited generally (Sec. 50(1(a)). This prohibition does not depend upon showing that the discrimination had any anti-competitive effect, and it is no defence that the difference in price was justified by a difference in costs. But volume discounts are permitted, even if they could not be cost-justified. Granting advertising or marketing allowances on non-proportional terms is prohibited, again without regard to whether there is any anti-competitive effect (Sec. 51). Geographic price discrimination and selling at “unreasonably low” prices are prohibited, if the effect, tendency, or intent is to substantially lessen competition or eliminate a competitor (Sec. 50(1(b) and (c)). Violations of all these provisions are indictable offences, punishable by imprisonment up to 2 years. These prohibitions were adopted in 1935 following a report of the Royal Commission on Price Spreads, which raised concerns that large buyers could extract unfairly large discounts from suppliers, particularly in the grocery industry. The purpose was obviously to protect small business from chain stores.[13]

Through guidelines, the Bureau has tried to limit the risk that these rules could be used to prevent competition unnecessarily. Liability depends on a there being a “practice” or a “policy” of discrimination or unreasonably low pricing. The Bureau has interpreted this in a way that permits businesses to meet a rival’s lower price, to win a new account, enter a new market, or participate in a special retail event (Ross, 1997). There have been efforts to repeal the provisions, but these efforts have been unsuccessful, as small businesses believe they offer some protection. Indeed, some small business interests want more. Typically, independent gas stations and grocery stores complain that the laws do not protect them adequately, and they press for protection under the Act’s abuse of dominance provisions against alleged “margin-squeezing” by vertically integrated firms, and against exclusionary slotting allowances in grocery retailing. The Bureau maintains some enforcement of these prohibitions. There have been 3 prosecutions concluded since 1984, all resulting in convictions (including one jury conviction and several guilty pleas) (VanDuzer, 1999).

2.5. *Consumer protection*

The Bureau also enforces laws against marketing practices that harm consumers. This function occupies about half of its enforcement staff. The Bureau is not a general consumer protection agency, though. Provincial governments have a major role in consumer protection, with responsibility over unfair business practices and contract terms, warranties, conditions of sale, guarantees, and business licensing (Competition Bureau, 2001).

The Competition Act prohibits misleading advertising (Sec. 52; Sec. 74), sales above advertised prices (Sec. 74.05), pyramid schemes (Sec. 55.1), certain promotional contests (Sec. 74.06), and bait and switch advertising (Sec. 74.04). Representations are prohibited if they are false or misleading in a material respect, that is, if they could influence a consumer to buy. General impressions, as well as literal meaning, are assessed to determine whether a representation is misleading (Competition Bureau, 2001). The Commissioner is also responsible for enforcing several statutes that require accurate (and in some cases, mandatory) labelling: the Consumer Packaging and Labelling Act, the Textile Labelling Act, and the Precious Metals Marking Act. All of these are potentially subject to criminal law enforcement. Amendments in 1999 provided for civil processes to stop misleading advertising, sales above advertised price, promotional contests and bait-and-switch tactics. The (criminal) penalties for knowing or reckless misrepresentation were also increased. But the use of civil process is expected to achieve results more quickly (Competition Bureau, 2001).

The 1999 amendments include detailed rules about telemarketing, an area where deception and outright fraud have been serious problems. Deceptive telemarketing is now a crime, and the Bureau has stronger investigative powers to deal with it (Competition Bureau, 2001). The law provides for defining acceptable telemarketing behaviour, so legitimate telemarketing firms have clear guidance and the Bureau can prosecute conduct that falls outside. Dealing with telemarketing fraud has been a major Bureau priority and an occasion for enforcement co-ordination and co-operation. In 1997, a Bureau effort in co-operation with the Ontario Provincial Police and the Montreal Urban Community Police Force resulted in charges against 17 companies and 18 individuals. Another co-operative initiative is Canshare, a national consumer complaints intranet-based system which is intended to integrate complaint information from federal and provincial and territorial law enforcement agencies (including the Bureau's Fair Business Practices Branch) across Canada. There is a Joint Canada-US Task Force on Deceptive Marketing Practices, set up under an agreement between the national governments, as well as a joint venture with the US FTC and Postal Inspection Service, Toronto Police Service, and Ontario Ministry of Consumer and Commercial Relations (Competition Bureau, 2001).

Legal protections of consumer interests in the market are strong, but the consumers' voice in policy debate about market competition is weak. National consumer organisations are spread thin, although some provincial associations are active. Some public financial support is available, from the Office of Consumer Affairs of Industry Canada and from intervenor funding by regulatory bodies. It is not lack of funding that has muted the consumer voice, though, but uncertainty about the message. On the one hand, consumer organisation representatives recognise that creating a national monopoly in a major service such as air transport will increase prices and degrade services. On the other hand, they also have been heard to muse that these clear losses may be offset by the psychological satisfaction of seeing the national "brand" on a firm in the industry.

3. Institutional issues: enforcement structures and practices

In concept, Canada has a "bifurcated" system of applying competition law. The Competition Bureau, formally located within the Department of Industry, investigates, and the Commissioner recommends action (which is taken by an independent prosecutor in criminal cases), and independent courts and a Competition Tribunal make the decisions. In practice, the system is moving toward a unitary system in which the Commissioner has the primary role. Clarifying the relationship between the Commissioner and Industry Canada is an increasingly important concern, because the appearance that decisions depend on political calculation and direction undermines the Commissioner's credibility.

3.1. Competition policy institutions

The principal official responsible for competition policy is the Commissioner of Competition. The Commissioner is an "independent statutory person," appointed by the Governor in Council. As a practical matter this means appointment by the Prime Minister, based on the recommendation of the Minister of Industry. The Commissioner is not a final decision-maker, though. In criminal matters, the Commissioner may refer evidence to the Attorney General for whatever action the Attorney General deems appropriate; in a civil or merger matter, the Commissioner may ask the Competition Tribunal to issue an order. The Competition Bureau acts like a secretariat for the Commissioner. The Bureau is part of Industry Canada and subject to the department's oversight and policies about personnel and budget.

The Minister of Industry is responsible for policy and legislation, which are developed by the Bureau. The Department of Industry is also responsible for some 60 other statutes, many of them with direct or indirect effects on competition such as the laws about bankruptcy and intellectual property.

Industry Canada has generally supported policies of developing competition and international competitiveness, but specific programs, mandates, and sometimes political considerations can lead to differences with the Commissioner (Doern, 1996).

Provisions to ensure decision-making independence leave the Commissioner's position unclear. The Commissioner is appointed by the Governor in Council to carry out the administration of the Act (Competition Bureau, 2001). A reorganisation in 1993 integrated the Bureau into Industry Canada.[14] The Commissioner has the rank of an Assistant Deputy Minister. On administrative matters, the Commissioner reports through the Deputy Minister of Industry Canada; on substantive matters, the Commissioner issues an Annual Report to the Minister of Industry, who tables it before Parliament (Competition Bureau, 2001). In that position, the Commissioner appears less independent than enforcement bodies in many other OECD member countries. The Minister has the power to instruct the Commissioner to open a formal inquiry or to revisit a decision to discontinue an inquiry, but that power has rarely been used. The Minister has no power to close a case or direct a particular outcome. Relations between the Commissioner and the Minister are formal and infrequent, typically to prepare the Minister to respond in Parliament to questions about Bureau actions, or to consult about legislative amendments. Independence of ultimate decisions is promoted by the requirement that all matters, civil and criminal, be decided by a court or the Tribunal in the first instance. But the position of the Bureau within the department fuels media perceptions that political connections affect the disposition of controversial cases.

The Bureau is the initiator of policy proposals and legislation specifically addressing competition issues. In general, for this function (and for dealing with other legislation that may affect competition), the Bureau operates within the Department's legislative review process. Others in the Department may offer views on competition legislation. Those views often deal with the sectoral problems that are the other divisions' responsibilities. Bureau representatives may provide input and advice to other departments, and Bureau representatives frequently appear before Parliamentary committees commenting on relevant issues. The Commissioner may appear or intervene as of right in proceedings before other federal agencies. For cases or mergers at the Bureau, there is no formal process of inter-departmental consultation, but departments find ways to make their views known.

Criminal cases are prosecuted by the Attorney General. The lawyers who handle civil cases before the Tribunal are employees of the (federal) Department of Justice. Thus, Industry Canada and the Bureau are the lawyers' clients, not their bosses. This assignment of responsibility provides useful perspective. Although the media regularly accuse Industry Canada of giving instructions to the Bureau in civil cases, they have not made similar accusations about political motivation of the Attorney General in criminal cases.

The Commissioner has announced 5 principles of regulatory quality to guide the application of competition policy: transparency, fairness, timeliness, predictability, and confidentiality. Transparency informs stakeholders and the public. Fairness in the balance between compliance and enforcement implies a general norm of least-intrusive application. Timeliness means completing decisions as soon as possible. Predictability includes publishing background information and guidance to encourage compliance. Confidentiality is protected to the greatest extent possible, to encourage co-operation (Competition Bureau, 2001). These principles are not merely formalities; by all accounts, the Bureau tries to follow this guidance in practice, generally meeting its "service standard" deadlines for timeliness and protecting confidentiality zealously. The Commissioner's position about treatment of efficiencies under the Bureau's merger guidelines led to some criticism about unpredictability, though.

The Bureau has issued legally non-binding guidelines about enforcement policies through a process of public consultation on draft proposals. Some are tailored for particular industries. A general guideline about abuse of dominance was issued in final form in August 2001. A proposed guideline for applying the principles to the airline industry had been published, too. There is a general merger enforcement guideline and one for mergers in the banking industry. The special guidelines for airlines and banking were issued in connection with important, difficult cases in those sectors. Other general guidelines deal with intellectual property, predatory pricing, price discrimination, and misleading advertising. Explanatory guidelines are useful and even necessary, but they are not without possible problems. In the *Superior Propane* case, the Commissioner took a position different from the 1991 merger guidelines. The Court of Appeal agreed with the position, in principle, but observed that the inconsistency "may do little to inspire public confidence" in the administration of the Act. But a guideline dealing with a particular sector could run a constitutional risk if were considered binding, by undermining the position that competition law is a framework law of general application. In any event, the Commissioner's guidelines could only bind the Commissioner, who is not the actual decision-maker in the Canadian system.

The Competition Tribunal is the first-instance decision-maker for civil reviewable matters, including mergers and abuse of dominance. There are up to 4 judicial members, who are sitting judges with other judicial duties, and 8 lay members. Members are appointed by the Governor in Council on recommendation of the Minister of Justice. They serve 7 year renewable terms. For advice about the appointment of the lay members, the Minister may appoint an advisory council from the business and legal communities, consumer groups, and labour; however, this advisory committee was dropped about 8 years ago, for budgetary reasons. One of the judicial members is designated as the Chairman by the Governor in Council.

The Tribunal was intended to be a specialised "court", with judicial members for procedural fairness and lay members for economic and business expertise. It was created by the 1986 Act to replace the Restrictive Trade Practices Commission, which had had more limited powers. The Tribunal sits in panels of from 3 to 5 members, which must include at least one judicial and one lay member. A judicial member chairs each panel. The Tribunal includes one permanent full-time economist. Questions of law are determined only by the judicial members. The Tribunal's decisions and proceedings are published and available on its web-site.[15]

3.2. Competition law enforcement

Applying competition policy has relied on a variety of "compliance" activities more than on conventional enforcement. Before 1986, this may have been inevitable, as the only enforcement tool, criminal prosecution, was not credible. Even since then, though, there have been relatively few formal cases or even consent orders. Instead, matters are wound up through office visits and what amount to assurances of voluntary compliance (Goldman, 2000). The compliance strategy may be effective, or at least inevitable, because of the Canadians' perceived cultural aversion to confrontation.

The motivating philosophy behind the enforcement approach is a belief that businesses subject to the law want to comply, in part to avoid the costs and complications of formal processes. Thus, the Bureau's "conformity continuum" includes education and stresses advice, voluntary compliance, and consent procedures (Competition Bureau, 2001). When the Bureau encounters "non-conformity," the appropriate instrument is chosen from a range of possible responses, from persuasion, to negotiating a consent resolution, to "adversarial instruments." The Bureau entertains applications for advisory opinions and rulings and has adopted deadline standards for responding: for marketing practices, 8 days (or 30 days for complex matters), and for competition issues, 4 weeks (8 weeks for complex matters) (Competition Bureau, 2001). The Bureau charges a fee for those advisory opinions (up to CAD 4 000), though. Advice about mergers is subject to another set of timetables and fees.[16]

Box 4. **The conformity continuum**

The integrated, balanced approach to achieving behaviour that conforms to the law includes education, compliance, and enforcement instruments. Increased emphasis on education and voluntary compliance limits the need for contested proceedings.

General application instruments

These are aimed at the public and the market in general to encourage conformity. They include:

Education:

- Publications (information bulletins, enforcement guidelines, Annual Reports, news releases, discussion papers, reports, pamphlets)
- Communications (speeches, seminars, trade shows, website, media contacts, videos)
- Advocacy (interventions, representations, policy development, liaison, partnerships, research)

Facilitation:

- Monitoring (Information Centre, pre-notification, targeted inspections, marketplace contacts, practitioner contacts, consultations).

Specific application instruments

These respond to individual initiatives or to specific non-conformities. They include:

Facilitation:

- Voluntary compliance (advisory opinions, pre-market assessment, advance ruling certificates, corporate compliance programs, voluntary codes)

Responses to non-conformity:

- Suasion (information contacts, information letters, warning letters, compliance meetings)
- Consent (negotiated settlements, consent orders, consent prohibition orders, undertakings, corrective notices, voluntary product recalls)
- Adversarial (prosecutions, Tribunal applications, product seizures, contested prohibition orders, injunctions).

Although increased emphasis is placed on providing the business community with the knowledge and the tools to comply, the Bureau does not consider enforcement instruments to be a last resort. Where appropriate, the Bureau may use immediate enforcement action without first exhausting other possibilities. The objective is to select the most effective and efficient instrument to address the specific situation and achieve lasting conformity. Factors considered include economic impact, the extent of the practice, the market power of the entities involved, and their prior conduct. Adversarial instruments may be appropriate for repeat offenders or order violators, for example. The choice of instrument will be determined in part by whether it will achieve the requisite level of general and specific deterrence.

Source: Competition Bureau, Conformity Continuum Information Bulletin (*Bulletin d'information sur le continuum d'observation de la loi*).

Investigations may be initiated in three ways. The most common is the Commissioner's finding of "reason to believe" that there are grounds for civil or criminal action. The rarest method is instruction from the minister. And the Commissioner may also undertake an inquiry upon the application of 6 Canadian residents complaining about a violation (Competition Bureau, 2001) (Sec. 9, 10). The Commissioner can discontinue an inquiry at any time, but must explain that action to the Minister, and, where applicable, to the 6 citizens whose complaint sparked the inquiry. The Minister has the power to instruct the Commissioner to undertake further inquiry (Sec. 22), but of course the Commissioner can come back with the same response. To obtain information in support of the Bureau's inquiries, the Commissioner may apply to a court for an order requiring testimony under oath, production of documents, or responses to interrogatories (Sec. 11(1)). A party's opportunity to challenge such an order on the grounds of relevance or scope is narrow and untested.

In civil reviewable matters, the only sanctions available are orders (except that administrative fines may also be imposed against deceptive practices). Pursuant to recent amendments, courts may issue mandatory as well as prohibitory orders (Competition Bureau, 2001). The Commissioner now has the power in airline matters to order preliminary relief pending the final decision, a power that was used in the recent *Canjet* case.[17]. Use of intellectual property to monopolise a broader market may be subject to an order regulating licences or mandating licensing (Sec. 32). This section, which dates from the 1930s, has never actually been used. In its Intellectual Property Enforcement Guidelines, the Bureau observes that these remedies might be applied in "network industry" situations.

Civil matters are brought to the Competition Tribunal for adjudication and resolution. Contested proceedings are often costly and drawn-out. One famous example, the *Southam* case, concerned a transaction that closed in 1990; after hearing 46 witnesses and receiving 520 documents in evidence, the Tribunal's final divestiture decision came 22 months later, and the appeals did not end until 1997. In the more recent *Superior Propane* case, the Commissioner called 72 lay witnesses and submitted 9 expert affidavits (Wetston, 2001, p. 25, 27). Practitioners contend that a contested matter typically costs about CAD 1 million. The substantive issues in these cases are admittedly complex, but a reason cases are "overtried" may be that the Bureau and Tribunal are both unfamiliar with the process and are therefore cautious. Over its 15 years, the Tribunal has only decided about a dozen contested cases. Hearings may be delayed because members, especially the judges, have difficulty accommodating other commitments. The Tribunal has proposed new rules[18] to make its process more efficient mostly by cutting down on pre-trial discovery.

To avoid cost, delay, and uncertainty, parties might negotiate settlements. But even the consent process risks delay and uncertainty, because most negotiated consent orders (except those involving deceptive marketing practices) must be taken to the Tribunal for review and promulgation as court orders. The Commissioner does not have the power to accept binding commitments to settle a controversy, and the Tribunal believes that its responsibility for the public interest requires it to examine the terms of settlements. The Tribunal's standard for acceptance is whether the order addresses the substantial lessening of competition, not whether the order is the best way to do so. But the Tribunal has on occasion rejected or modified negotiated orders.

Observers in Canada, including some members of the Tribunal, believe that these difficulties have made the Tribunal a secondary factor. Nearly everyone is dissatisfied with the Tribunal's processes, finding them too costly and cumbersome, unfocused and drawn-out. Amendments are before Parliament to deal with these problems (Competition Bureau, 2001). These would streamline the process by permitting the Tribunal to award costs to deter frivolous or dilatory litigants, make summary dispositions, hear references at an early stage, and issue interim orders (before the Bureau has completed its investigation) to prevent irreversible damage to competition, elimination of a competitor, or significant loss that cannot otherwise be remedied (Competition Bureau, 2001). Proposed legislation would also streamline the consent order process,[19] by providing that a negotiated agreement "may be filed with the court for immediate registration" and at that point has the same force and effect as a court order. This would extend to terms that a court might not have had the power to impose. It is unclear whether failure to comply with such terms would be remediable as breaches of the Tribunal's order or as breaches of the Commissioner's agreement with the respondent.

In cartel and other criminal cases, the principal investigative tool is the search warrant, typically executed without notice by Bureau officers (sometimes helped by the police) (Goldman, 2000). Courts may issue search warrants when there are reasonable grounds to believe that an offence has been or is about to be committed (Sec. 15). The Bureau may now apply to a court for wiretapping authority when investigating price fixing, market sharing, bid-rigging, or deceptive telemarketing (Competition Bureau, 2001). Criminal matters are referred to the Attorney General of Canada with a recommendation for action. The decision to prosecute (and any negotiation of a consent resolution in a criminal case) is up to the Attorney General. Criminal penalties for conspiracy can be imprisonment up to 5 years or a fine up to CAD 10 million.

Appeals from the Tribunal go to the Federal Court of Appeal, on the same basis as judgements of trial-level federal courts (Competition Tribunal Act). Appeal is of right for matters of law and "mixed" matters of law and fact, but on matters solely of fact, leave to appeal must be requested and obtained (Competition Tribunal Act, Sec. 13). Matters of law are reviewed under a "correctness" standard, and other matters, under a less exacting, more deferential "reasonableness" standard.

3.3. Other enforcement methods

The processes under the control of the Commissioner can be supplemented by private party initiatives. Private parties can sue to recover damages caused by conduct that would violate the Competition Act's criminal provisions or by failure to comply with an order of the Tribunal or another court (Sec. 36). The private suit would not depend on there actually being a prior conviction (Collins, 1997) (Goldman, 2000). Private suit may be feasible even concerning conduct that the Bureau would probably not treat as a criminal violation. A recent Ontario Court of Appeal decision permitted a suit against an arrangement that was principally vertical, with alleged horizontal effects. The plaintiff may also recover some of the costs of suit. Recovery in a damages case can include costs and legal fees. If there is a prior criminal conviction or civil order, the record in the prior proceeding may be admitted as *prima facie* evidence of the breach and the effect. Plaintiffs might also get useful information and admissions from the statement of facts that accompanies a prohibition order entered under Sec. 34 (Goldman, 2000). Only a few private suits cases have been brought under Sec. 36.

Expanding the scope of private suits is under consideration. Now, a plaintiff can only sue concerning conduct that would at least arguably violate the criminal prohibitions, or after the Commissioner has already obtained a court order about civil reviewable conduct, and the parties then violate that order. Permitting civil suits about the other civil reviewable matters without the need for a prior order in an action by the Commissioner—not to mention a violation of that order—would expand the range of tools for remedying refusals to deal, exclusive dealing, market restrictions, and tying. On the other hand, it could also risk encouraging unnecessary or abusive litigation. One proposal in a package of amendments now under review in the Parliament is to permit private parties to bring these complaints to the Tribunal, to take advantage of its presumed experience and expertise in distinguishing serious problems from others. The Tribunal would have the power to reject the complaint or to award costs or other sanctions to discourage frivolous or strategic litigation (Competition Bureau, 2001). This process could provide an outlet if the Bureau rejects a complaint. The options now available to a disappointed complainant are limited. The Bureau explains its actions, including its decisions not to pursue an investigation or inquiry stage. A disappointed complainant might "appeal" to the Minister (Competition Bureau, 2001), but the Minister could only ask the Bureau to look at the matter again.

Class actions are possible under provincial laws. The scope of these actions is not limited by Sec 36, which provides a civil remedy that complements, but does not replace, other civil rights of action. At least 10 class actions have been filed in the wake of the international vitamin conspiracies, and others have followed the guilty pleas in lysine and graphite electrodes. One defendant in the electrodes case reportedly settled for CAD 19 million (in addition to the CAD 11 million criminal fine) (Goldman, 2000). An Ontario court certified a broad consumer class action about price-fixing for a pigment used in building materials, claiming total damages of CAD 150 million (Rowley, 1999).

A rarely used alternative means of public enforcement is the provincial attorneys general. In principle, these officials can apply the Competition Act's criminal provisions, because the provincial attorneys general can prosecute federal crimes if the federal attorney general has not done so. Provincial attorneys general have been active in criminal cases about deceptive advertising and marketing, but not in antitrust prosecutions (Goldman, 2000). Another procedure is the private criminal complaint. There has been at least one privately-prosecuted criminal competition matter.

3.4. International trade issues in competition policy and enforcement

Canada asserts extraterritorial jurisdiction over conduct outside Canada, in particular anti-competitive agreements and coercion to boycott, if that conduct has a real and substantial connection to competition in Canada (that is, that would have violated the basic anti-cartel rule if the parties had reached their agreement in Canada). This common law principle of jurisdiction has not been applied in contested cases, but it has contributed to several guilty pleas. Canada objects to the assertion of extraterritorial jurisdiction by other countries where it conflicts with Canadian law or policy. In the past, this principle was invoked to resist US antitrust proceedings, both private and public. Ontario and Quebec adopted legislation 50 years ago to prevent investigation into Canada by the US Department of Justice. Federal regulations in 1976 prevented compliance with discovery in the US uranium cartel litigation. The blocking provision that was formerly part of the Combines Investigation Act is now in the Competition Act (Secs. 82, 83). Compliance with a foreign order, decree, or judgement may be blocked by order of the Tribunal, if compliance would affect Canadian competition, efficiency, or foreign trade. The asserted purpose of this provision is to ensure that Canadian subsidiaries of multinational firms would be responsive to Canadian laws and policies (Competition Bureau, 2001). General federal legislation, the Foreign Extraterritorial Measures Act, was adopted in 1985, empowering the Attorney General to issue blocking orders where a foreign tribunal is seeing to exercise jurisdiction or power in a way that is likely to adversely affect significant Canadian interests in international trade or commerce or that is likely to infringe Canadian sovereignty. These orders can block compliance with discovery in foreign proceedings. In addition, the law provides for complete "clawback" of any damage award elsewhere (Waller, 1997, §§4.17-18). Most of these defensive measures appear to have been intended to shield Canadian firms from US treble damage litigation, and they have not been invoked since the uranium cases

In the last 10 years, increasing co-operation with other public enforcers has displaced this history of defensiveness about foreign private litigants. The Bureau has leveraged its resources by offering and obtaining assistance from law enforcement agencies, in the US and the EU especially. Co-operation has been most extensive in prosecuting deceptive marketing practices. In those cases, the Bureau and Canadian investigators work with police and postal inspectors and other law enforcement agencies. There have been several prominent examples of international co-operation in competition enforcement, too, such as the use of mutual legal assistance treaties in cartel investigations of thermal fax paper, plastic dinnerware, sulphuric acid, and ductile iron pipe. The first three were requests from the US, and the fourth was a request from Canada. Bureau representatives have attended EU hearings and examined documents with EU and US enforcers in several major merger investigations, such as Dow-Union Carbide, Guinness-Grand Metropolitan, and Alcoa-Reynolds (Competition Bureau, 2001).

Canada has entered several competition enforcement co-operation agreements. A formal state-to-state agreement with the US from 1995 covers competition and deceptive marketing. Canada entered a similar agreement about competition matters with the EC in 1999. In 2001 the Bureau entered a trilateral agency-to-agency agreement with the competition agencies in Australia and New Zealand. The recent free trade agreement with Costa Rica includes a competition chapter setting out a framework for policy and enforcement co-operation. A "positive comity" agreement with the US and a co-operation agreement with Mexico should be in place during 2002. Canada has entered bilateral mutual assistance treaties for criminal matters (under the enabling legislation, the Mutual Legal Assistance in Criminal Matters Act). In 2001, legislation was introduced to enable similar treaties for mutual legal assistance in civil matters. The principal concern is assuring protection of confidentiality of information shared with foreign enforcers (Competition Bureau, 2001). The proposed legislation will provide for co-operation among enforcement bodies, while providing for opposition to applications from third parties, such as in aid of private litigation. Progress on similar legislation was slowed some by a Canadian judicial decision implying that judicial intervention and authorisation based on some standard of reasonableness would be required. The law's confidentiality protections (Sec. 29) may inhibit information exchange. Interpretation of this provision has focused on the strength of the constraints, but the Bureau is now trying to make more use of the proviso that permits sharing among enforcers. Canada has been the beneficiary of sharing with other jurisdictions and thus finds it has an interest in promoting co-operation in both directions. The Bureau has taken a lead in negotiating the competition provisions of trade agreements, and it was the Canadian negotiators who suggested including a chapter on competition in the North American Free Trade Agreement.

Box 5. **International co-operation**

Over the last 10 years, the number of matters at the Bureau with an international dimension has grown significantly. International co-operation can be critical to effective and efficient enforcement. The Bureau benefits from communication and co-operation with foreign agencies, particularly in the US and the EU, on almost a daily basis. These exchanges are both formal and informal, cover consumer as well as competition matters, and involve particular cases and general problems. International co-operation is particularly important for reviewing mergers and for investigating conspiracy and deceptive telemarketing.

A well-known example of co-operation in a conspiracy matter involved an agreement among companies based in Canada, the US, and Japan to raise the price of thermal fax paper in North America. The conspiracy was originally uncovered by the Bureau. It affected both the Canadian and the US markets, and most of the evidence was in the US. Following the provisions of the 1995 Co-operation Agreement and its predecessor, the 1984 Memorandum of Understanding, the Bureau notified the US Department of Justice of the conspiracy and used the Mutual Legal Assistance Treaty and enabling legislation to request DOJ's assistance in gathering evidence in the US. During 1996 and 1997, the two enforcement agencies co-ordinated planning and strategy about searches and witness interviews. The Japanese and US companies pleaded guilty under Sec. 45 of the Competition Act and the Japanese company's Canadian subsidiary also pleaded guilty under Sec. 46 for having implemented a foreign-directed conspiracy. Total fines in Canada amounted to CAD 3.45 million.

Co-operation in merger review is illustrated by the Lafarge-Blue Circle acquisition in 2000-2001. The Bureau shared views with the US Federal Trade Commission on substantive matters such as market definition and entry conditions. Co-operation was particularly effective at the remedy stage. The Bureau and the FTC worked out divestiture and consent orders to provide effective relief on both sides of the border. The Bureau announced on 11 April 2001 that it would not challenge the proposed acquisition after Lafarge agreed to sell the majority of Blue Circle assets and businesses in Canada as well as related cement distribution assets in the U.S.

Co-operation against deceptive marketing often involves different officials. In 2000, the Bureau investigated a company that was promising consumers in Canada and the US valuable awards or "premiums" for buying promotional products at inflated prices. The Bureau obtained assistance from US correctional services under the Mutual Legal Assistance Treaty to gather evidence located in the US. That evidence prompted the Montreal-based company and its manager to plead guilty to deceptive telemarketing and direct mail practices.

International trade agreements have provided foreign firms with an additional outlet for complaints. This is illustrated by a pending matter involving small parcel delivery. The Bureau concluded in 1998 that there was no evidence of cross subsidisation between Canada Post's monopoly operations and its courier services, Priority Post and Purolator. But UPS is pursuing a claim under Ch. 11 of NAFTA, alleging, among other things, that Canada has breached its obligation under Ch. 15 of NAFTA by failing to control and supervise Canada Post.[20]

The Bureau has supported pro-competitive interpretations of laws about international trade and investment. Investment Canada, which promotes foreign investment, also screens and approves foreign acquisitions to determine whether they are of net benefit to the country. The review thresholds and standards for that process do not match those applied to mergers generally. Investment Canada has not generally prevented investment, but has sometimes negotiated conditions. Foreign investment is limited or controlled in several fields, notably airlines, telecoms, and media, ostensibly to achieve affordable universal service and promote Canadian content and culture. The Bureau believes these restrictions are barriers to competition and has advocated turning to less restrictive measures to achieve these objectives (Competition Bureau, 2001). Competitive effects of the dumping and subsidies laws, which are applied by the Canadian International Trade Tribunal (CITT), have been a concern. A Bureau representative argued before a parliamentary sub-committee, with some success, that the Special Import Measures Act should be revised so that the "public interest" test would explicitly include consideration of the impact of dumping duties on domestic competition (Competition Bureau, 2001).

3.5. Agency resources, actions, and implied priorities

Staff and budget levels have remained stable for several years. These are determined by Industry Canada. Fees, for merger notifications, advance ruling certificates, advisory opinions, and copies, generate some income, of which the Bureau can retain up to CAD 7.5 million. The total collected in the most recent year was about CAD 8.5 million. The Bureau has had to ask the Department and the Treasury Board for additional funding to support extraordinary operating initiatives, including major merger investigations. Those amounts account for the higher expenditures from 1998-2001 (Competition Bureau, 2001).

The Bureau is organised by function, rather than by industry (as it was until 1990). The divisions that apply the competition laws include the Mergers Branch, the Civil Matters Branch (which also handles interventions before regulatory agencies), the Fair Business Practices Branch, and the Criminal Branch. The Criminal Branch, responsible for cartel, price "maintenance" and bid rigging cases, has a total staff of 38. In addition, the Fair Business Practices Branch, with about half of the Bureau's total enforcement staff, is responsible for cases of deception and misrepresentation, both civil and criminal, and for several special statutes about product labelling. The branches that handle criminal matters often exchange staff and expertise, taking advantage of the similarity of the relevant professional skills. These divisions make the most use of the Bureau's formal rotation policy and periodic "draft" to encourage exchange. Other branches provide administrative, legal, and policy support (Competition Bureau, 2001). The permanent staff is supplemented by the extensive use of outside lawyers, who are appointed as agents of the attorney general. The Bureau pays about CAD 700 000 to CAD 1 million per year for this legal help.

Table 1. **Trends in competition policy resources**

	Personnel (FTE)	Expenditures (C MM)
2000-01	383	36.9
1999-2000	382	36.1
1998-99	382	36.2
1997-98	382	30.1
1996-97	368	28.4

Source: Competition Bureau, 2001

Table 2. **Trends in competition policy actions**

	Criminal Branch	Civil Branch	Mergers Branch	Fair Practices Branch
2000-01: matters opened[1]	60	46	373	329
possible violations found[2]	6			8
relief imposed[3]	13	4	3	129
total sanctions imposed C MM	17,6			0,8
1999-2000: matters opened[1]	41	48	361	140
possible violations found [2]	9			13
relief imposed [3]	21	5	10	3
total sanctions imposed C MM	102,8			1,2
1998-99: matters opened[1]	56	33	309	163
possible violations found t[2]	7			4
relief imposed [3]	16	3	8	5
total sanctions imposed C MM	40,6			1,4
1997-98: matters opened[1]	43	44	320	397
possible violations found [2]	3			7
relief imposed[3]	48	8	6	7
total sanctions imposed C MM	2,7			0,6
1996-97: matters opened[1]	54	33	262	383
possible violations found [2]	0			7
relief imposed [3]	22	4	3	8
total sanctions imposed C MM	9,9			0,2

	Criminal Branch	Civil Branch	Mergers Branch	Fair Practices Branch
1995-96: matters opened[1]			n/a	
possible violations found				
relief imposed [3]			5	
total sanctions imposed C MM				

1. Includes examinations involving 2 or more days of review and applications for inquiry under Sec. 9 (annual average, 5 for criminal, 3 for civil); for Criminal and Civil Branch, does not include advisory opinions; for the Fair Practices Branch, completed examinations.
2. For criminal matters, referrals to the Attorney General (for 2 matters, 1 in 1997-98, 1 in 1999-2000, the Attorney General declined to proceed or withdrew the charges; for civil matters and mergers, proceedings initiated at the Tribunal; for Fair Business Practices Branch, referrals to the Attorney General or consent orders filed with Competition Tribunal.
3. For criminal matters, includes all dispositions, including acquittals as well as convictions and guilty pleas; several dispositions may be possible, for different defendants, in the same matter. For civil matters, includes alternative case resolution and consent order restructuring, and for mergers, also includes transactions abandoned after the Commissioner's objection. For Fair Business Practices Branch, includes undertakings, convictions, and consent orders.
Source: Competition Bureau, 2001

4. Limits of competition policy: exemptions and special regulatory regimes

A history of concern to support national-scale firms and a strong federal structure explain the long list of special regimes and exemptions. Recent controversies that highlighted the anti-competitive results of those traditions are raising the public's awareness of competition policy. One of those controversies has put the Bureau into the inappropriate position of trying to regulate a monopolist's prices and services through litigation, applying special rules under the general competition law.

4.1. Economy-wide exemptions or special treatments

State-owned corporations are subject to the Competition Act to the extent they are engaged in commercial operations (Sec. 2.1). The 1986 amendments ensured that the law would apply to Crown corporations that compete (or could compete) with private firms (Anderson, 1998). An early case, in 1987, found a state-owned airline guilty of deceptive, bait-and-switch marketing, and fined it C 15 000 (Competition Bureau, 2001). More recent instances include the Bureau's review, and approval, of the acquisitions by publicly-owned Canada Post Corporation of interests in Purolator Courier, and the investigation of claims that participants in the Alberta power pool, among them the government-owned British Columbia Power Exchange Corporation (Powerex), were manipulating bids.

The "regulated conduct doctrine" shields conduct from antitrust consequences where it is required by a national or provincial regulatory program, so that obeying the rules of that program would require a violation of the Competition Act. A common factual setting is provincial marketing boards and price-setting commissions. The 1960 case that clearly announced the doctrine condoned a series of acquisitions of local brewers that had given the defendant a national market share over 60 percent. The court linked the effects of that concentration to the provinces' control over the price of beer. The court said in effect that a merger among brewers could be prevented only if the combination would hinder the provincial bodies from performing that anti-competitive function (Competition Bureau, 2001).

The courts have not reduced the general regulated-conduct doctrine into specific rules, but some principles emerge from the Bureau's enforcement policies. A party will not be charged with competition law liability if a provincial legislature has conferred on a regulator the power to order action contrary to the competition law, the regulator has exercised that power, and the party has not frustrated the exercise of that power (Competition Bureau, 2001).[21] The regulation at issue must be within the lawmaker's authority. The conduct must be specifically authorised by the regulation, and not simply within its subject matter. The regulator must exercise some active authority about it, beyond passive acquiescence or tacit approval. And the conduct must be consistent with the regulatory purpose. It would compound the problem if conduct that frustrated the regulation was also exempted from the Competition Act.

The regulated conduct doctrine has been applied in a civil case although it was originally conceived as a defence in criminal cases. The Bureau has claimed that it should be limited to criminal matters and that otherwise regulation and the competition law should apply concurrently (Anderson, 1998). The Bureau also takes the position that an economic regulator's decision to forbear from regulation, because a market has become competitive, necessarily makes the regulated conduct defence unavailable; the issue has not been decided (Anderson, 1998). The doctrine has been invoked in about 5 cases in the last 20 years, most of them involving lawyers or other services. Although the number of decisions invoking the doctrine is low, many complaints have not been pursued at all because regulations clearly protected the anti-competitive conduct.

The division of powers between federal and provincial institutions in Canada's constitution in effect authorises provinces to adopt laws that impair competition in local markets and that inhibit inter-provincial trade and competition. The national Parliament is empowered, exclusively, to legislate concerning "the regulation of trade and commerce" (Constitution Act, 1867, Sec. 91(2)). But the provincial legislatures are empowered, also exclusively, to legislate concerning business licensing and "property and civil rights" within the province (Constitution Act, 1867, Secs. 92(9), 92(13)). Provincial governments also have exclusive legislative authority concerning non-renewable resources, forestry, and electric power generation (subject to a requirement, enforceable by national legislation, of non-discrimination in trade with other provinces) (Constitution Act, 1867, Sec. 92A). National and provincial legislatures have concurrent powers over agriculture (and immigration) (Constitution Act, 1867, Sec. 95). Interpretations and applications of these terms have given provincial governments substantial power over business regulation and trade.

Distribution of responsibilities can lead to regulatory competition. In securities, the national government has tried without success to establish a national regulator. The *de facto* national regulatory body is thus the Ontario Securities Commission.[22] Jurisdictional competition can drive reform. In the 1980s, Quebec revised its financial regulations in a way that threatened to attract the industry into Quebec unless the federal government and Ontario also made similar changes. On the other hand, disparate regulations about pharmaceuticals, reflecting the different interests of generic and brand name producers in different provinces, led to problems that have gone to the WTO for adjudication.

Protecting provincial discretion has impaired competition within Canada. In 1995, the provinces and the national government entered an extensive, wide-ranging agreement intended to promote an open, efficient, and stable domestic market and to reduce and eliminate barriers to trade and investment to the extent possible (Agreement on Internal Trade, 1995, Art. 100; Preamble). It is a negotiated agreement, though, not a set of enforceable commitments. The agreement contains rules about government procurement and bidding, investment, labour mobility, consumer measures and standards, agriculture and food products, alcoholic beverages, natural resources, communications, transportation, and environmental protection. A promised section on energy remains to be negotiated. This breadth suggests the extent to which constraints on inter-provincial trade could present problems, as well as the issues at stake in dealing with them. Business groups complain that barriers and costs of internal trade are hindering growth, as small firms cannot expand within the Canadian market, while larger firms prefer to expand to markets outside it. Interprovincial trade is increasing, but international trade is increasing faster.

The Agreement on Internal Trade, whose purposes include removing barriers that prevent competition, lacks an effective or efficient means of implementation. Its dispute-resolution process depends heavily on negotiation, proceeding from consultation through consideration by a high-level committee government representatives to appointment of a panel. It contemplates that disputes will generally be resolved between governments. Private entities have some rights to complain, but they are secondary. The principal sanction for failure to comply appears to be adverse publicity. The Agreement permits the complaining government to impose retaliatory constraints against a government that does not remove a barrier at the end of the process. But even if that were a credible threat, it could be a long time coming. The schedule and deadlines in the Agreement mean that the time from complaint to action could be 2 years or more. The elaborate consultation procedures do not apply to procurement and bid protests. Perhaps unsurprisingly, most formal complaints have arisen under those sections, for which the process is much more efficient. Progress has also been reported about labour mobility. Most self-regulating professions (42 out of 51) were reported to be in substantial compliance with the Agreement's obligations by the 1 July 2001 deadline that had been set for working out mutual recognition agreements or similar protocols.

There is no complete catalogue of the provincial and federal regulations that displace the Competition Act. They range from marketing boards setting commodity prices to controls over price and entry into professions and services. Generalisation is difficult because policy directions are inconsistent, not only between provinces but sometimes within the same province. Quebec sets minimum prices for gasoline, but has dropped its controls over professional fees.

Box 6. **Reform in a federal jurisdiction: the Australian example**

In federal countries, the constitutional reach and potential overlap of federal and state or provincial authorities add a dimension of complexity, a risk of conflict, and an opportunity for innovation, to wide range of regulations and policies, including those affecting competition. In Australia, the National Competition Policy Reform of the mid-1990s addressed several of these "federalism" issues directly.

Before, the federal competition legislation (the Trade Practices Act) had applied only within the defined limits of federal constitutional power. The corporate sector, interstate trade, and federal government business entities were subject to the law, but the unincorporated sector and state government business entities were not. The professions and significant parts of the infrastructure network industries, which were run by the states (such as the electricity sector), were not covered. Moreover, the complete extent of regulatory exclusions from the competition law, either at the state or federal level, was unknown.

To address these problems (and some others), in 1995 the nine competent federal, state and territorial governments agreed to a set of significant reforms:

- The states and territories passed "application legislation", which applied the federal rules about competitive conduct and mergers to the subjects of state and territory constitutional power. These laws referred enforcement back to a new single "national" competition authority, the Australian Competition and Consumer Commission. This combination ensured seamless application and enforcement of common competition rules to all economic activity (after a transition period).

- The federal law was amended to remove the right of the competent federal minister to formally intervene in the enforcement of federal laws, and consequently the state and territory laws too.

- The mechanism to provide exemptions from the competition law was significantly tightened. Instead of being shielded by a general doctrine of "state action", exemptions would have to be explicit. A law could not operate to exempt conduct or mergers from the federal, state, or territory competition law unless the exempting law specifically stated that the conduct was exempted. The federal government retained a right to veto state or territory exemptions from the federal, state, or territory competition law.

In addition to the reforms of the competition law, all 9 governments agreed to undertake a systematic review of legislation that had anti-competitive effects, even if it was not directly inconsistent with the competition law. This included laws that set up entry barriers, such as licensing regimes, or that controlled conduct by setting or controlling qualifications, opening hours, prices, technical specifications, and marketing arrangement. Some 1700 separate enactments, mostly at the state level, were identified as requiring a review. It was envisaged that this task would take five years to complete, but in fact it has taken somewhat longer. The standard of review was that the restriction on competition should be necessary to achieve the objectives of the regulation, and the benefits of the restriction should outweigh the costs. New legislation requires a regulation impact analysis that incorporates the same standard.

In addition, a statutory infrastructure access regime was created, linked to a range of reforms in the energy and transport sectors. These were designed to better integrate markets that had previously had a state-based focus.

The federal government agreed that it would make a series of "competition payments" to the states and territories, to distribute the benefits of the reforms. In the absence of the competition payments, the benefits to governments from the reforms would have flowed disproportionately to the federal government in the form of increased income tax payments. The competition payments were made contingent on the actual performance of the reforms by the states and territories. Some payments have been withheld pending improved performance.

4.2. Sector-specific exclusions, rules and exemptions

Several major sectors are subject to special regulatory oversight. The Bureau has promoted sound general principles about the relationship between competition policy and the reform of sectoral regulation (Competition Bureau, 2001):

- Put a competitive market structure in place, as soon as possible;
- Make the regulator explicitly responsible for promoting competition;
- Control incumbent market power by regulatory control over prices;
- Assure access to essential facilities through regulatory intervention;
- Control other anti-competitive practices with competition law, unless regulation is demonstrably better;
- Create a mechanism for removing regulation as its costs exceed its benefits; and
- Co-ordinate to minimise overlap and duplication.

One avenue for applying general competition principles under a sectoral regime is “forbearance,” that is, a decision by the regulator that competition in the sector is strong enough to permit the regulator to decline to apply its powers to a problem (Competition Bureau, 2001). Provisions that anticipate forbearance are included in some national and provincial regulatory schemes. In general, though the Bureau’s principles are not consistently borne out in practice. Several minor, technical exemptions appear to be protection against the theoretical risk of criminal penalties. And a few sectoral rules respond to, or undo, particular enforcement decisions.

Financial services

The treatment of major bank mergers has marked a coming-of-age for Canada's merger policy. A merger of financial institutions may be exempted from Competition Act notification and oversight if the Minister of Finance certifies to the Commissioner that the proposed merger is in the best interests of the financial system in Canada (Competition Bureau, 2001). The Minister of Finance has announced a policy of incorporating the Bureau's competition concerns and the prudential objectives established by the industry regulator into the public policy concerns in considering future merger proposals (Competition Bureau, 2001).

Two cases from 1998 illustrate the interaction of the Bureau with the Department and the increasing importance of competition issues. Two very large bank mergers were announced (between the first and third largest banks, and between the second and fourth), shortly after the Bureau had published draft Guidelines illustrating how merger analysis would apply in the banking sector. The banking legislation required that mergers be approved by the Minister of Finance. The Minister decided to apply a broad "public interest" test, of which one "critical" element would be the Bureau's assessment of the implications for competition. The Bureau undertook the largest merger investigation it had ever done, taking 10 months, and ultimately decided that the transactions threatened to lessen competition in branch banking, credit cards, and securities. The Bureau's concerns were communicated both to the Department and to the merging parties, without detailing specific remedies. The parties abandoned their plans when the Minister announced his objections, based on the prudential risks of permitting such large amalgamations, as well as the threats to competition and the concentration of decision-making power over allocating credit in the Canadian economy (Competition Bureau, 2001).

Legislation passed in June 2001 substantially changes the system of bank regulation. New guidelines set out the review process for mergers of large banks (over C 5 billion). Reviewing a bank merger now involves 5 parties—the Bureau, the banking regulator, two committees of Parliament, and the Minister—and takes 3 steps—a competition analysis, a prudential review, and a public interest evaluation.[23] The ultimate decision is still up to the Minister. The guidelines indicate that, subject to the prerogatives of Parliament, the government will seek to complete the decision stage of the process within 5 months of receiving a completed application. The decision stage is followed by the remedies stage, which follows the Minister's decision. Once the Minister decides the public interest balance, the regulators and the Minister of Finance work together to co-ordinate a set of remedies that meets the identified requirements. Remedies in bank merger cases may have been constrained by a statutory cap (10%) on the share of a bank's equity that can be held by a single shareholder. This has had the effect of discouraging foreign banks from investing in Canadian banks. The new legislation eases this constraint somewhat by raising the cap to 20%. But the provisions regulating foreign bank ownership and branching still run to 50 pages.

A limited exemption applies to the formation and operation of underwriting groups. Agreements or arrangements among securities dealers and issuers or vendors about underwriting a specific security are exempted from the competition act's prohibitions of restrictive agreements and of efforts to influence price (Sec. 5(1), Sec. 45, Sec. 61). Although the price-related actions within an underwriting group would probably be considered "reasonable" under Sec. 45 (and the exemption is conditioned on a "reasonable" relationship to underwriting a particular security (Sec. 5(1)), there might be some risk under the parts of the Act that do not include the qualification.

Airlines

In airline services, a sector that has also been marked by recent controversy about competition, the balance between regulation and competition is not yet working out so well. In 1984 Canada relaxed entry controls, ended licence restrictions on flight frequency and aircraft type, and permitted discounting. The regulator, the Minister of Transport, followed this with a period of "administrative deregulation" through increasingly liberal interpretations of existing restrictions. The National Transportation Act 1987 cemented the changes. In the higher-volume markets in southern Canada, the old, restrictive licensing standard of "public convenience and necessity" was replaced by the more permissive requirement of being "fit, willing, and able." Even for service in the north, the burden was placed on objectors to new service instead of on applicants; eventually, in 1996, the distinctive standard for licences in the north was removed. The 1987 law also relaxed tariff filing and permitted confidential contracts (Anderson, 1998).

But ten years of competition took a toll on one of the country's two major scheduled airlines, Canadian Airlines. Rather than permit the weaker firm to join with a US airline (which would have required relaxing constraints on cabotage or foreign ownership), in 1999 the government decided to permit the other carrier, Air Canada, to acquire it. To reach this result, the government suspended the Competition Act so the two could negotiate. The Canada Transportation Act provides for suspension of the Competition Act for a period of 90 days, in favour of action by the Governor in Council that is considered "essential to stabilise the national transportation system" (Sec. 47)—notwithstanding the statement in the same Act that nothing done under the Transportation Act affects the application of the Competition Act (Sec. 4(2)).[24] The order was never made public, and it expired before the parties could work out the deal. The eventual merger was reviewed and approved, subject to conditions, because the Bureau found that Canadian Airlines was failing. The statutory restriction on foreign ownership severely limited the otherwise available remedies. The result is now a near-monopoly. The Air Canada-Canadian Airlines combination carries more than 80% of domestic passengers and earns nearly 90% of domestic passenger revenues (Competition Bureau, 2001).

The controversy led to sector-specific rules to deal with the resulting market power. The Minister of Transport asked the Bureau for its views about what should be done. One part of the Bureau's response described the kinds of conditions that should be placed on a dominant carrier's conduct in order to encourage new entry. The conduct that might need to be controlled or ordered could include access to slots and gate facilities at airports, access to the incumbent's loyalty program for new entrants and smaller carriers, travel agent commission overrides, access to surplus aircraft, interlining and code sharing, and divestiture of regional carriers. In addition, the Bureau pointed out changes in policy that should be considered to deal with the new structure, concerning airport access, slot usage, international charters, and computer reservation systems. Changes about international services could include permitting US carriers to market travel between Canadian points via the US, and franchise arrangements that would permit a Canadian carrier to use an established foreign brand identification. Permitting a higher share of foreign capital (49% instead of 25%), or permitting foreign firms to establish Canada-only subsidiaries, could increase the pool of competitors. But the Minister's request specifically ruled out the simplest and most obvious steps that would quickly produce competitive entry, namely permitting foreign ownership of airlines serving intra-Canada routes and permitting cabotage. The Bureau noted in its response that the two items it was not asked to study or comment on represented the most substantial regulatory barriers to competitive entry. The Commissioner has recommended in other forums that these policies be changed. Recently, the *Canada Transportation Act* Review Panel has also recommended that the government enter into negotiations to create a North American Common Aviation Area.

The legislation that resulted added sector-specific rules to the Competition Act. Most important are a definition of airline-specific "anti-competitive acts" of abuse of dominance and a new cease and desist power (Competition Bureau, 2001). The amendments authorise development of airline-specific rules

(Sec. 78(1)(j)), and specify one particular “anti-competitive” act explicitly: denial, by a domestic airline, of access on reasonable commercial terms to essential facilities or services, or refusal to supply them (Sec. 78(1)(k)). Those “essential” facilities or services are described further in regulations, to include operating slots, interline arrangements, airport gates and related facilities, maintenance services, and baggage handling. The regulations also describe conduct that would be considered predatory or exclusionary. The concept underlying the rules is “avoidable cost”. It will be considered anti-competitive for a dominant airline to operate or expand capacity on a route at fares that do not cover the avoidable cost of the service (or to use an affiliated carrier to accomplish the same result). Other kinds of anti-competitive conduct described in the regulations are pre-empting slots or facilities to withhold them from the market, and using commissions, incentives, loyalty programs, or scheduling or infrastructure changes to discipline or eliminate a competitor or to prevent entry. The amendments make the Commissioner, not the Minister of Transport, responsible for enforcing these sectoral rules; moreover, they give the Commissioner an extraordinary power to issue interim orders to preserve competition before a matter is brought to the Competition Tribunal. A parliamentary committee recently added to these amendments to permit the Tribunal to impose an administrative monetary penalty up to 15 million against an airline for proven abuse of its dominant position. The later amendments are still undergoing parliamentary review.

The new rules and the guidelines describing what costs the Bureau thinks are avoidable are now being tested before the Tribunal, in a challenge to how Air Canada responded to new entry serving the maritime provinces. The Bureau is trying to show that Air Canada met the new entrants with fares that were below the relevant measure of cost, and not just that it was willing to forgo profits. Matters in dispute include setting the period of time over which the fixed costs of operating a service should be treated as avoidable. The Tribunal is scheduled to hear this matter in late 2002. This litigation will be a valuable opportunity to develop a principle of more general application concerning what kind of strategic behaviour will be considered exclusionary. The concept of “avoidable cost” as the relevant measure is used now in the Bureau’s general guidelines about abuse of dominance, as well as in the special guidelines for the airline industry.

A special merger review regime was adopted after the Air Canada-Canadian Airlines combination and applied retroactively to make the terms of that deal legally enforceable. A dual track is used for notifiable transactions. The Minister of Transport may seek input about the competitive impact of a merger from the Competition Bureau and the Canada Transportation Agency, if a notifiable merger raises public interest concerns about national transportation policy. The Minister would then make a recommendation to the Governor in Council about whether to permit the merger (Competition Bureau, 2001). Only the Bureau has jurisdiction over transactions that are too small-scale to be notifiable.

Other transport sectors

The CTA (Canada Transportation Agency) once had a wider merger review responsibility, concurrent with the Bureau’s Competition Act review, to determine if mergers in transport sectors were in the public interest. Except for the special regime for airlines, these provisions were dropped in 1996. On one occasion, involving marine transport, the two agencies did not agree, and the merger was taken up by the Tribunal.

Liner conference agreements in ocean shipping are exempted by the Shipping Conferences Exemption Act. This dates from the mid-1960s. At that time, the Restrictive Trade Practices Commission found that conference agreements fixing rates and discriminating against non-members, which would clearly have violated the competition act even before its 1986 revisions, were necessary for handling exports and imports efficiently.

Surface transport modes have been liberalised, particularly national-scale trucking. The Motor Vehicle Transport Act 1987 ended rate controls and made entry easier by setting a uniform national standard, administrated by provinces under delegated authority. As of 1993, "fitness" is the only standard for licensing, and limits on routes and commodities were eliminated from existing licences (Anderson, 1998). But constraints may remain at the intra-provincial level, although all provinces undertook at least some deregulation—except for Alberta, which did not need to because it had never imposed economic regulation (Anderson, 1998).

In rail service too, the National Transportation Act 1987 moved toward liberalisation and competition. It permitted confidential contracts with shippers, abolished collective rate making, provided for competitive access, streamlined the process for abandoning rail lines, and provided for dispute resolution. But the process of disposing of surplus lines to new operators was not put onto a more commercially realistic basis until 1996 (Anderson, 1998). These developments parallel those in the US over the same period. And again paralleling US concern about rail mergers, there is a call now for a special merger rule for Canadian railroads, which the Bureau opposes in principle.

Agricultural products

The Farm Products Agencies Act[25] authorises an apparently very broad exemption. The Competition Act does not apply to a contract or arrangement among parties that are subject to the authority of a regulatory agency under this Act or other legislation (Competition Bureau, 2001). Provincial legislation authorises collective price setting among a wide variety of agricultural producers.

A principal example of a collective selling agency so important that it is governed by its own special legislation, is the Canadian Wheat Board. It enjoys a legal monopoly on export and domestic sale of wheat and barley produced in Western Canada,[26] under the Canadian Wheat Board Act. This shared-governance corporation took its present form in 1935; bodies with similar powers date from 1917. Its rules have been compulsory since 1943. It is one of Canada's largest exporters and one of the world's largest marketers of wheat and barley. One-third of its directors are appointed by the government and two-thirds are elected by producers. It negotiates prices with buyers on the world market, and it pays farmers prices averaged over a crop year. In the export market, Canadian products compete with those of other major producers such as the US, Australia, Argentina, and the EU, and in the Canadian market, US suppliers have had unlimited duty-free access since 1998. To the extent the Wheat Board's activities impair competition, they are shielded from liability by the regulated conduct doctrine.

The Canadian Wheat Board also has the power to influence the transport of the western-province grain products to the ports. Those powers have not often been exercised, though. The legislation governing transport of western grain was recently amended. A revenue limit reduced railway revenues on regulated grain movements by 18%and the time period for acquiring branch lines was extended. Tendering for logistical services was to be phased in at some ports, through an agreement between the government and the Canadian Wheat Board. The Bureau has recommended a more market-driven, competitive transport system (Competition Bureau, 2001). The government deferred consideration of competitive rail access until the completion of a general review of the Transportation Act. The review, completed in June 2001, was released to the public in July 2001, and its recommendations are now under consideration.

Fisheries

Contracts or arrangements among fishermen and buyers or processors about prices or terms are exempted from the Competition Act (Sec. 4(1)(b)). This exemption dates from an investigation in the late 1950s and a finding by the Restrictive Trade Practices Commission against a combination of fishermen in British Columbia. The fish packing firms then refused to negotiate prices with the fishermen's organisations. To break the commercial impasse, special legislation exempted these agreements in British Columbia for a year. The special legislation was renewed annually and then made permanent, and general, in 1976.

Professional services

Licensing, and hence controlling entry into professional and other services, is a provincial responsibility. Under the Agreement on Internal Trade, mutual recognition agreements or similar protocols were to be negotiated to permit greater mobility between provinces, encouraging competition in local markets. The target date for completion was 1 July 2001 (OECD, 2000, p. 92). As of that deadline, 42 of the 51 regulated professions on a national level had reached agreement on conditions that would facilitate mobility. In some cases, the parties had reached substantial, but not final, agreement, and most but not all were documented in mutual recognition agreements. The remaining 9 professions were still working to resolve outstanding issues.

Some provinces authorise collective price setting among professionals. Litigation to promote reform has run into the regulated conduct doctrine. Courts appear sensitive to the balance of interests, but the direction of their rulings seems to depend on the identity of the parties. A decision by the Supreme Court of British Columbia is sceptical about private self-regulation, even while finding that the Competition Act itself could not overcome it. In considering the victim's objection to a "conviction" for violating the minimum rate rule of the provincial association of surveyors, the court sustained the provincial law that authorised collective action, but then read that law narrowly to avoid the anti-competitive result. The statute was less explicit than some laws about other professions, and the court seized on that ambiguity, combined with the general policy of the Competition Act and a general common law suspicion of monopoly, to infer that the provincial legislature must have intended to authorise only an agreement on suggested fees. On that interpretation, the court threw out the "conviction".[27] By contrast, the courts have been jealous in protecting the legal profession from the Competition Act. For example, the Ontario law authorising the body regulating the legal profession to set up a liability insurance scheme and set rules for members' contributions was interpreted to authorise a bar-managed monopoly.[28] Such decisions imply that the regulated conduct doctrine can immunise conduct that is not demanded, but merely authorised, by other legislation, even in circumstances where complying with both laws raises no necessary conflict.

Natural gas

The wholesale gas market was opened fully to competition in 1986. The Bureau intervened several times, at the National Energy Board and in provincial regulatory hearings, concerning wholesale liberalisation and pipeline access. The Bureau has also become involved lately in advising about the retail gas market, which is a provincial responsibility. The National Energy Board and provincial regulators are generally supporting the development of the market. In Alberta for example, shippers were allowed to build a pipeline to bypass the monopoly and permitted exports of ethane-rich gas.

Electric power

Under the Constitution Act, 1867, electric power generation is a provincial responsibility. Regulation, and reform, are thus matters for the provincial governments. Interprovincial trade is limited. There are more transmission ties between the provinces and the US market than there are among the provinces in Canada. One driver of reform is meeting the open-access standards for selling into the US market. The National Energy Board engaged in a review of inter-utility trading in electric power, to which the Bureau contributed, in 1993 (Competition Bureau, 2001). The Bureau has intervened in restructuring reviews and hearings in several provinces—Ontario, Alberta, British Columbia, and Nova Scotia.

Ontario has the largest electric power market in Canada, and its reform plans are the most ambitious. Ontario is corporatising and encouraging private generation, aiming at deconcentrating generation to a level that parallels the merger guidelines standards. It is scheduled to open to full wholesale and retail competition in the spring of 2002. The reform design includes creating an independent market operator, structural separation of generation from transmission and distribution, regulation and codes of conduct to curb cross-subsidisation of unregulated utility affiliates, an independent regulator of prices and grid access, generation market restructuring, a "forbearance" provision requiring the regulator to refrain from regulation if competition is strong enough to protect the public interest, market-based prices for customers staying with the traditional supplier, spot market and bilateral trading, and transmission lines connecting Ontario to neighbouring systems (Competition Bureau, 2001). The Bureau has participated in the process that developed this program, and it is now working with the provincial regulator on an "interface" document to detail their respective responsibilities.

In Alberta, most of the electric power industry had not been publicly owned. Alberta had the first spot market in electric power in North America, in 1996, but did not open fully to wholesale competition until 2001. Alberta is reviewing its status and program (Competition Bureau, 2001). Some competition enforcement issues have already arisen in the new market setting. There has been inquiry about bid rigging and a Bureau review of an asset acquisition involving 2 utilities.

Telecommunications

Reform has proceeded most smoothly in the telecoms sector. The process was simplified by a 1989 Canadian Supreme Court decision, which made it clear that the subject is a federal issue, reducing the number of entities that have to be consulted. The Bureau and the sectoral regulator, CRTC (Canadian Radio-television and Telecommunications Commission) entered an "Interface Agreement" in 1999 setting out their understanding of the two agencies' related jurisdictions, specifying those areas where one body or the other has jurisdiction and those where jurisdiction is shared (Competition Bureau, 2001). The Telecommunications Act provides for forbearance from regulation, and thus full application of the competition law, where the regulator finds that competition is strong enough to obviate the need for special controls over a formerly dominant firm (Competition Bureau, 2001). The Bureau could play a greater role in the transition of the telecoms sector towards competition, if the CRTC made greater use of unconditional forbearance. CRTC retains responsibility for technical issues about interconnection and network access, and for social policy goals such as affordability and broadcasting.

Both agencies deal with mergers. The Bureau applies the Competition Act. The CRTC applies a Canadian-control mandate. Foreign ownership cannot exceed one-third of the voting shares of a telecoms or broadcast distribution firm. The Bureau has recommended easing this limit, at least for infrastructure, to make entry easier (Competition Bureau, 2001).

Broadcast

The CRTC also regulates broadcasting. Its responsibilities include licensing radio and television programming and broadcast distribution. There is no provision for forbearance under the Broadcasting Act, so the application of the Competition Act may depend more on the particular activity at issue. The CRTC's primary goals are promoting Canadian content and culture and programming diversity. Broadcast program distribution was opened to competition in 1997, so cable firms face competition now from direct-broadcast satellites and multi-point systems. In 1999, policies were revised to encourage greater diversity and consumer choice. And in December 2000, the CRTC awarded nearly 300 licenses for specialty, pay-per-view, and video-on-demand services. These licences were not issued in competition with existing services, though (Competition Bureau, 2001). Regulation of all kinds of broadcasting—television, cable, satellite direct broadcast, and wireless cable—has been subject to Canadian-content requirements, principally to resist the influence of US media firms and to support a distinct cultural identity. The effect is also to reduce broadcaster revenues and increase their costs, and to subsidise, indirectly, Canadian providers of content (Anderson, 1998).

Mergers in broadcasting are subject to special concentration and ownership rules, which CRTC applies, as well as to the merger oversight of the Competition Act. In radio, a single owner can have up to 4 stations in a market (2 AM, 2 FM). In TV, owning more than one station is permitted in a few markets, such as Vancouver-Victoria. As of June 2001, cable TV firms can own an unlimited number of analog cable program sources, but limits remain on owning digital cable specialty channels. CRTC is engaged in a consultation process now about rules for control of digital TV. Foreign ownership in broadcast distribution firms cannot exceed 1/3 of voting shares (Competition Bureau, 2001). The special ownership rules are motivated by concerns about competition as well as about viewpoint diversity and promoting Canadian culture. In 1999, the Bureau argued to the CRTC that the regulator's policy about radio station management contracts should be based only on non-competition matters, and the Competition Act should address effects on local advertising markets. But CRTC rejected that advice, determining to apply the same limits to management agreements as it does to station ownership (Competition Bureau, 2000).

Publishing

Concerns about preserving Canadian cultural sources constrain competition in print media. In addition to paying subsidies to Canadian publishers, the government limits the extent of foreign ownership of booksellers and newspapers. Foreign ownership of a bookstore requires the approval of Heritage Canada). And foreign ownership of newspapers is limited to non-controlling shares. Regulations under the Copyright Act prevent booksellers from ordering a book except from its authorised distributor in Canada. That regulation has a perverse effect, by encouraging consumers to resort to direct purchases via the internet. The effects of ownership limits on competition policy is illustrated by the recent bookstore merger decision. Foreign-based bookstore chains could not bid against the hostile takeover offer, and the result was a near-monopoly as no other Canadian firms were able or willing to meet the offer for the target chain.

Sports

Agreements among teams, clubs, and leagues in amateur sports are exempted from the Competition Act (Sec. 6(1)). This protection for the organisers of sports in which participants receive no remuneration dates from the 1970s amendments. It is not clear whether the exemption applies only to agreements about the terms of competition within or between leagues, or whether it could also extend to agreements with commercial implications, such as agreements that affected the value of broadcast rights.

Presumably other parties to such agreements (for example, promoters or media firms) would not enjoy any exemption if there were an anti-competitive impact, even if the teams, clubs, and leagues themselves could not be found liable.

Performing arts

The general exemption for collective bargaining agreements (Sec. 4(1)) is reinforced by another explicit exemption in the Status of the Artist Act covering certain associations of performers (Competition Bureau, 2001).

Export trade

Agreements about export trade are exempt from the conspiracy prohibition of the Competition Act (Sec. 45(5)). The effect of such an agreement on competition outside Canada is not considered. The exemption is lost if the agreement affects competition in Canada by reducing the real value of exports, restricting entry into the exporting business, or impairing competition in services facilitating exports (Sec. 45(6).

5. Competition advocacy for regulatory reform

The Bureau has devoted considerable attention to the challenge of restructuring traditionally regulated monopolies and to other regulatory constraints on competition. The Bureau distinguishes "interventions," that is, on-the-record appearances before other agencies and bodies, from "advocacy," that is, policy analysis and advice to other agencies and departments in the process of developing rules and decisions (Competition Bureau, 2001).

Intervention and advocacy were a high priority in the early 1980s, in part as an outlet for the frustration of trying to enforce the pre-1986 competition law (Doern, 1996, p. 87). From 1975 to 1996, the Competition Bureau and its predecessor submitted 208 interventions in regulatory proceedings, two-thirds of them in telecoms and transport (Anderson, 1998). The Bureau has made an average of 13 interventions and representations per year for the last several years (a total of 40 in the three years 1997-2000). Principal topics remain communications (16) and transport (7), and now energy (10) (Competition Bureau, 2001).

Until 1976, there was no statutory basis for the competition agency to participate in the deliberations of other agencies. The 1969 *Interim Report on Competition Policy* from the Economic Council of Canada, which foreshadowed the reforms of the next 2 decades, had pointed out how regulatory structures inhibited competition. The 1976 amendments authorised the Commissioner to appear as a party, making arguments and calling evidence, in the proceedings of other federal regulatory boards or tribunals. The Commissioner may appear on invitation, on his own initiative, or at the direction of the Minister of Industry. This power was limited by its terms to federal-level agencies. After a Bureau effort to appear at the provincial level was rebuffed in 1981, the 1986 law added section 126, which now makes it clear that the Commissioner could appear in a similar manner before provincial bodies as well, although only at their request or with their consent.

Some subjects have proven difficult to influence through advocacy. The monopoly position of the Canadian Wheat Board is unchanged. In rail transport, the Bureau's views were heeded only in part. In airlines, the Department of Transport accepted many of the Bureau's recommendations to mitigate the market power of the near-monopoly it created, but refused to consider the most fundamental reform, to lower barriers to the entry of foreign firms.

In international trade, competition policy has scored some modest successes. Bureau efforts to prevent the use of the Special Import Measures Act to establish or protect domestic monopolies have generally failed, as the Canadian International Trade Tribunal (CITT) has usually held that its goal is the protection of a domestic industry from unfairly traded imports and thus did not adopt a more consumer-oriented understanding of the statute's "public interest" test (Competition Bureau, 2001). To open the proceeding to consider other issues required a showing of "compelling and special circumstances". In 1999, a compelling set of facts demonstrated the harm that the rigid interpretation could do. A duty had been placed on imported baby food, at a level so high—C .30 per jar—that it forced the (US) imports out of the market, leaving Canada with a monopoly supplier. The Bureau and others, including the importer, obtained a public interest inquiry at CITT and argued that the duty should be set no higher than the level of injury that was found to the Canadian producer (C .04 per jar). The CITT met the objectors most of the way and recommended that the duty be reduced by 2/3, that is, to C .10, in recognition of the interests of consumers and care-givers (Competition Bureau, 2000).

Building on the momentum of this example, the import legislation was amended, effective in April 2000, to make it easier to raise other concerns in CITT proceedings. Initiating a "public interest" inquiry at the CITT, which might lead to reducing or eliminating duties otherwise ordered, now requires showing only "reasonable grounds". The factors to be considered in that inquiry include whether there are competitive goods available from other exporters to which the duty does not apply, and more generally, whether imposing the full anti-dumping or countervailing duty is likely to eliminate or substantially lessen competition in the Canadian domestic market. Bureau representatives will have greater access to confidential information when intervening in CITT cases, so they can make more effective presentations (Competition Bureau, 2001).

The numerous interventions in telecoms appear to have been the most successful. The Civil Matters Branch of the Bureau took the lead in telecoms interventions because of the expectation that it would move into an enforcement role as competition developed in the sector. In broadcasting, the Bureau participated in proceedings about such subjects as whether to regulate the internet and "new media," permitting competition in broadcast distribution, policies about commercial radio stations, direct-broadcast satellite program distribution, competition and culture, and the licensing framework for pay and specialty television.

Transport has been an important field for intervention, but the record is uneven. The Bureau has made 61 interventions and submissions about air, road, rail, and water transport over the years. Most economic regulations of price and entry in these modes had been removed by the late 1980s. Effort now is devoted to correcting unintended consequences of previous reforms. In 1999, the Bureau had to deal with the imminent re-monopolisation of the liberalised airline market. In November 2000, the Bureau argued, so far without success, that the exemption for ocean shipping conferences should be repealed (Competition Bureau, 2001).

A record of effective intervention in natural gas laid a foundation for the current program of working with provincial regulators about electric power. The wholesale natural gas market was opened fully to competition in 1986. The Bureau intervened several times, at the National Energy Board and in provincial regulatory hearings, concerning wholesale liberalisation and pipeline access. More recently, the focus has shifted to retail competition, and the Bureau has continued to present the case at the provincial level. Conditions vary among the provinces. In provinces that have had gas supplies for a long time, such as Manitoba and Ontario, the issues are separating regulated distributors from unregulated affiliates, effecting the transition to competition, and co-ordinating with consumer protection concerns. In other provinces that are just now getting gas supplies from offshore development, the issues are creating conditions for competitive supply, as well as consumer protection, notably promotional allowances offered to encourage fuel switching and cross-subsidisation between gas and appliance sales businesses (Competition Bureau, 2001).

Observers in Canada, especially consumer groups, have found the Bureau's participation in regulatory processes to be very useful, providing a credible voice backed with resources that public-interest groups do not have. Advocacy and intervention, often occasioned by inability to enforce competition policy because of government intervention to protect monopoly, have called attention to the most serious competition problems facing the country.

6. Conclusions and policy options

Canadian competition policy revived in the 1970s after nearly a century in hibernation. In some sectors, pro-competitive reforms have achieved solid results, overcoming a tradition of ambivalence and even indifference to competition policy. As of the early 1970s, about 29% of the Canadian economy was subject to direct economic regulation of price or output (or both). Substantial deregulation and reform in transport, energy, telecoms, and financial services have reduced that share significantly (Anderson, 1998).

High-profile cases have stimulated a new debate about the priority of competition policy. The outcomes of these cases were mixed. Creating a near-monopoly airline was a clear step backward, while holding back consolidation of the banking industry until the regulatory structure could be adapted better was sound. The government's suspension of the Competition Act to permit the airlines to negotiate indicated that the law was taken seriously, at least. When the merger was ultimately permitted, the Bureau was centrally involved. Partly as a result of these major cases, competition issues are now getting much more attention. The recent effort to design a system for addressing multiple policy issues for the financial sector shows sensitivity to competition issues, although it establishes a complex process in which they could be side-tracked.

Positions in the debate about competition policy are shifting. Despite greater integration of North American markets, Canadian standards of living are not keeping up. Some businesses have contended that one reason is a regulatory approach that does not sufficiently promote domestic competition. Representatives of consumer groups point to the problems of inadequate competition in monopolised sectors, yet they also emphasise that competition policy should recognise links to other social goals—including pride in maintaining national champions in key industries.

The competition policy impact of reform is diluted by the long-standing habit of solicitude for national champions, ostensibly to offset or resist the influence of the large economy next door. This solicitude often takes the form of rules requiring Canadian ownership or control of firms in a sector. These rules can hamstring competition policy. In two sectors, airline service and book retailing, Canada now tolerates a near-monopolist because no suitable Canadian investor stepped forward. In each case, policy-makers had to resort to a second-best *ad hoc* fix to try to protect the public from the monopoly.

The reasons for this protection deserve careful examination. What is the benefit and what is the cost of special ownership rules and other advantages? More pointedly, who bears the costs and who enjoys the benefits of protected market power in Canada? The issue is raised in the *Superior Propane* merger (although that case did not involve a regulation that prevented entry). The Tribunal and the courts were asked to find that the interests of the shareholders of the merging firms should count more than the interests of the consumers of the product they were selling. The court has sent the matter back with the instruction that the consumers' interest should be taken seriously in the analysis. That lesson should also be applied to entry-barring regulations. One argument raised in the merger case was that the choice might depend on the identity of the shareholders and the consumers. Whether or not making that inquiry would be useful in an enforcement context, identifying the stakeholder interests clearly is certainly relevant in the policy context. Canadian consumers and business bear the costs of dealing with monopolies. Are the principal beneficiaries Canadian pension funds? Canadian workers? Canadian investors? Or others?[29]

Enforcement of competition law has become stronger since the 1986 amendments, but the "success rate" is still disappointing. The Bureau's systematic "conformity continuum" approach to applying competition law is a distinctive contribution. It describes and makes a formal commitment to the full range and sequence of tactics that many enforcers employ without being so explicit about it. It reflects the realities of the Bureau's powers and Canada's business and administrative culture. One reason a "compliance" strategy is promising in Canada is a perceived cultural aversion to confrontation and litigation. The approach assures a sceptical business community that the Bureau is willing to be reasonable. But another reason may be that the capacity for complex, resource-intensive litigation is limited. The specialised bar is still relatively small. Neither the Bureau nor the private bar could credibly threaten to maintain more than one substantial litigated case at a time, especially because the Bureau has also relied on the private bar to represent it in complex matters. With increasing exposure and more cases, those conditions may change. Non-co-operative tactics may already be undermining the consensual tradition, as parties to merger investigations sometimes submit information that is less than candid or complete. To counter that, the Bureau is considering moving to a practice of routinely using formal investigative tools in mergers that are designated "very complex".

Some of the problems in enforcement—notably the record of losses in contested conspiracy cases—are explained by inexperience, both of the Bureau's litigators and of the courts. Courts that decide few cases do not become familiar with the issues and rules. Even the specialist adjudicator, the Competition Tribunal, has only issued about one decision a year. The Bureau staff too reportedly has "overtried" cases, failing to focus the analysis and delaying the process. By contrast, merger reviews are reportedly handled better, although major, complex cases stretch the system's capacities. Major cases require extraordinary funding requests to pay outside lawyers. The Commissioner's cases have reportedly gone better when handled by outside counsel.

Another explanation for the spotty enforcement record is the complexity of the Competition Act. Strong enforcement against cartels is hampered by the "effects" test that is embedded in the jurisprudence about the statute's qualifying terms, "unduly" and "unreasonable". The Bureau must consider the expense of preparing an elaborate market power proof in every conspiracy case in order to show that the restraint is "undue," a hurdle that discourages enforcement. The likely result is that the law under-deters cartel behaviour. On the other hand, the courts' formalistic interpretations may discourage businesses from engaging in co-operation that should not be considered anti-competitive. The Competition Tribunal is again dealing with another uncertainty, about the extent of the efficiencies that can be weighed against the anti-competitive effect of mergers. The Tribunal's first decision was closer to the historic Canadian approach to competition policy, of favouring producer interests. Acceptance by the Federal Court of Appeal of the Commissioner's views marks an important shift that could affect competition policy more broadly. The analytic complexities about effects and efficiencies might make the application of the law more economically coherent, but that coherence may not be realised when decisions are made by non-expert judges.

5.1. Policy options for consideration

- ***Use direct measures, rather than controls on competitive entry, to protect distinctive interests.***

Laws and rules that require local ownership and control in several sectors have prevented competition policy from dealing well with market power and monopoly. The Bureau has already called attention to this effect, especially in airlines. Similar constraints also prevented a straightforward, more pro-competitive resolution of the recent bookstore acquisition. Rules should target achieving the identified policy goal, and do so by means such as service standards that do not encourage or protect domestic monopolies.

- ***Review the scope of provincial-government restraints on competitive markets.***

The impact of anti-competitive provincial legislation is a matter of concern. Provincial governments, just like the national government, may choose to protect their producers rather than their consumers. Examples are intra-provincial trucking regulation in some provinces, rules that prevent competition by professionals, and restraints on trade and services among provinces. A comprehensive study should be undertaken to assess the competitive effects of provincial laws and regulations and to identify sectors where reform is most needed. A model for such a study in a federal context is the review of state-level constraints on competition undertaken in Australia. Prime targets for action would be provincial laws and decisions that constrain trade among the provinces, that permit business and professional associations to restrict price and other forms of competition among their members, and that protect providers and dealers against new competition or prohibit aggressive pricing and other marketing methods. The outcome would be material for advocacy, more than for direct action. Respect for the prerogatives of provincial governments is embedded in Canada's constitutional framework.

- ***Clarify the scope of the Commissioner's decision-making independence.***

The uncertain status of competition in Canada's economic policy is mirrored in the status of its competition policy institutions. The Commissioner is formally independent in decision-making under the Competition Act, but the office appears to be bureaucratically subordinate to a Deputy Minister. Perceptions of the Commissioner's independence changed after the Bureau shifted to Industry Canada from the now-defunct Department of Consumer and Corporate Affairs. One reason may have been doubt about combining under one head the two roles of promoting industry and of policing it. The need for an independent official is reduced, perhaps, by the law's reliance on independent bodies as first-instance decision-makers. But the Tribunal and the courts have been under-used and inconsistent. Public perceptions about the Commissioner's independence, or lack of it, may be an instance of a more widespread public impression that government decisions depend on political influence as much as on policy merits. Strengthening the Commissioner's independence would help show that competition policy, at least, does not follow that pattern. A small move in that direction would be to elevate the Commissioner's status by making the Bureau a stand-alone agency, reporting to Parliament through the Minister of Industry but responsible for its own finances and personnel. Now, it is a section of the Department, reporting to the Deputy Minister for resources and administration (Goldman, 2001)). A more radical step would be to find another location for the Commissioner and the Bureau within the government structure, one that was not so closely identified with producer interests. Suggestions to create a multi-member decision-making body within the enforcer look less promising, though. At least, whether to create a "board" at the Bureau should depend on what, if anything, is done to improve the process at the Competition Tribunal.

- ***Improve the Bureau's resources.***

The Bureau needs more resources, or perhaps better resources, so that it can bring better cases and more successful ones. More successes in contested cases before the courts would enhance public faith in the independence of the Commissioner and the Bureau. The Bureau now must turn to the private bar for help, at a considerable financial cost. The private bar has supported a substantial increase in Bureau resources, perhaps out of self-interest. Dependence on the private bar could undermine public confidence in the law enforcement function, though, if it appears that the same interests are both prosecuting and defending. The Bureau's operational costing study identifies a need for a third merger section, 30% more people in the Civil Matters Branch, and another dozen in the Fair Business Practices Branch. It also calls for more staff in the Criminal Branch, both to handle cartel matters and to resume enforcement of the discriminatory pricing laws after a 10 year lapse. The bottom line is a request for an additional C 15 million, a 50% budget increase.

- ***Providing a wider right of private action could use institutions more efficiently.***

Private actions now depend on a prior order in a case initiated by the Commissioner, except for suits about conduct that might be considered criminal violations. Providing private parties with a means of access to the Tribunal about civil reviewable matters would deflect concerns about the independence of the Commissioner. A complainant who is frustrated at the Bureau could present its case to the neutral decision-maker. It is unclear whether there is a large unmet demand for this avenue of relief, but no harm would be done by providing for the possibility, subject, of course, to measures to discourage frivolous or strategic litigation. Moreover, such actions would give the now-underemployed Tribunal a larger role in developing policy.

- ***Improve the consent-order process.***

Perhaps because it is not very busy deciding contested cases, the Tribunal has taken an active interest in examining and revising the terms of consent orders that are presented to it. Parties to those orders have expressed frustration about the Tribunal's intervention. On the one hand, the Tribunal feels that this examination is required in the public interest. On the other hand, parties reach settlements in order to truncate proceedings, save costs, and achieve certainty. These goals are defeated if the Tribunal reopens and re-examines the settlement terms. To avoid delay and uncertainty at the Tribunal, parties to mergers have improvised other means of settlement that are not entirely satisfactory. Informal agreements with the Commissioner might be enforced by the threat of bringing suit during the 3-year statute of limitations period. But that threat may not be credible. It would depend on convincing the Tribunal about the merits of a matter that the Commissioner chose not to bring to the Tribunal's attention at the time. Amendments now under Parliamentary review propose that consent agreements between the Commissioner and parties, like consent agreements between parties to a private action, can be registered without review by the Tribunal. Another approach might be an agreement for binding arbitration, but the Commissioner's legal authority to enter such an agreement has not been tested in court. One way to balance the concerns would be a more formal process for considering consent order applications, one that set clear deadlines on the Tribunal and provided clear limits on its discretion to second-guess the Commissioner's judgement.

- ***Improve the decision process, by strengthening the Tribunal or by shifting to a "unitary" structure.***

The Competition Tribunal has not worked out as originally envisioned. Conceived as a expert body, it has appeared to be more like an ordinary court, and its processes have suffered from delay, cost, and uncertainty. It is becoming a secondary player compared to the Commissioner and the Bureau. Unless the Tribunal is reconstituted and reconceived, Canada is going to have an integrated, not bifurcated, model of application of competition policy. Some observers contend that despite its weaknesses, the Tribunal's existence gives the Commissioner leverage. But that leverage results from parties' fear of delay and unpredictability. That fear would arise equally from the prospect of resorting to the ordinary non-expert courts.

One option could be to abandon the notion that competition cases are so special that they demand specialists to decide them. Assigning decision-making responsibility to general jurisdiction courts can support a broad and general conception of competition policy, and it can ensure that developments in competition policy are in step with other policies. But if judges rarely confront an antitrust issue, then reliance on courts for the first-instance decision will founder on judicial inexperience and idiosyncracy. Reliance on general courts might also compound, rather than correct, the Bureau's tendency to over-try cases out of an abundance of caution. The Bureau's problems proving criminal cases, which are much like complex civil cases because of the "undueness" requirement, demonstrates that risk. If the Tribunal is discarded, then it would be appropriate to consider re-constituting the Commissioner's office. Uncertainty about the Tribunal process is already driving parties to reach accommodations, so that the Commissioner's decision is in effect final. Uncertainty about the outcome in court will only be greater, making the Commissioner's decision even more likely to be dispositive. Thus, providing for a collegial decision-maker could be important, to reduce variance in outcomes.

The other option is to make the Tribunal work better. If it did, and if more issues were taken to the Tribunal for resolution, perhaps lawmakers would be less tempted to try to solve competition problems through *ad hoc* legislation. The Tribunal has proposed some amendments to its rules to make its process more efficient. They would eliminate document discovery in non-merger matters and permit more efficient use of evidence developed during the Bureau's investigations. Other suggestions for improvement include lengthening the terms of the non-judicial members, to increase their independence, and adding more judges, to avoid scheduling problems. Obviously, the Tribunal needs to adopt and observe timelines for its hearings and decisions. The package of amendments being considered in parliament would give the Tribunal the power to award costs. This change is widely supported, but the reasons for it are not entirely clear, unless the principal application would be to discipline parties for excessive or oppressive discovery demands.

- ***Clarify the anti-cartel principle in the substantive law.***

The present statutory rule against cartels is inefficient, as long as decisions applying it are made by general-jurisdiction criminal courts. The rule against hard-core horizontal cartels should not depend so much on fine distinctions in the economic analysis of particular markets. A less stringent, civil alternative enforcement route should be provided for ambiguous conduct that courts are reluctant to condemn as criminal.

- ***Provide stronger civil sanctions against abuse of dominance.***

The only remedies that may be applied now in civil reviewable competition matters are orders which would control behaviour in the future and, in abuse of dominance cases, structural orders such as divestiture. Administrative fines may be imposed, by a court order, against deceptive practices. To strengthen the deterrent effect of the prohibition against abusive practices by dominant firms that prevent competition, consideration should be given to providing for such administrative fines in that setting as well.

Box 7. **Reforms in parliament**

The Canadian Parliament has been considering legislation, Bill C-23, that would implement some of the options proposed here, and others. As passed by the House of Commons, the bill now under consideration by the Senate deals with the following subjects:

- Private actions: private individuals will have the right to seek relief directly from the Competition Tribunal, a power that was previously only available to the Commissioner. These actions would be limited to claims about exclusive dealing, tied selling, market restrictions, and refusals to deal. The Tribunal would have powers to weed out meritless or strategic claims.

- Tribunal processes and powers: (cost awards, summary dispositions, references): The Tribunal would gain the power to award costs, applying the rules about costs of Canada's Federal Court Rules. The Tribunal would have the power to dismiss matters on a summary basis, on finding there was no genuine basis for the application to it. And parties, including the Commissioner and private litigants, would have the power to refer issues of law or jurisdiction to the Tribunal for decision, whether or not there has been a formal application for Tribunal action.

- Interim relief: The Commissioner will be able to ask the Tribunal to issue an interim order while it is investigating a complaint in a wider range of cases; now, that power is limited to merger cases.

- Sanctions for abuse of dominance—in the airline industry: The Tribunal would have the power to impose administrative penalties up to C 15 million against a domestic air carrier that has abused its dominant position, by such actions as using "fighting brands" or predatory pricing.

- Mutual legal assistance with foreign states: A long, technical section makes several provisions for implementing agreements for co-operation in developing evidence in civil enforcement matters.

- Deceptive prize notices: a newly defined criminal violation would be added to the existing rules about deceptive telemarketing.

NOTES

1. The year after Canada's Combines Act, the US also adopted a federal statute that some thought accomplished a similar purpose, to put common law restraint of trade doctrines into a federal forum: that was the Sherman Act. And some observers in the US thought it was also merely a symbolic gesture in response to outcry over high protective tariffs.

2. Weidmann v. Shragge, [1912] 2 D.L.R. 734, 46 S.C.R. 1.

3. The parallel to US experience is again instructive. During this same era of "progressivism," provisions for enforcing US law were also strengthened, by the Clayton and Federal Trade Commission Acts of 1914. The courts seemed to back off from strong enforcement in the 1920s, too. But the creation of viable non-criminal methods sustained a program of enforcement despite judicial scepticism.

4. General Motors of Canada v. City Natl'l Leasing, [1989] 58 D.L.R. 4th 255; Ross, 1997.

5. Commissioner of Competition v. Superior Propane Inc., Fed. Ct. App., No. A-533-00, April 4, 2001, 80 ATRR 340; 69 USLW 1639 (April 24, 2001).

6. R. v. Nova Scotia Pharmaceutical Society (1992), S.C.R. 606.

7. This section moved into the Competition Act from the Bank Act in 1986.

8. *See*, *e.g.* R. v. Clarke Transport Canada Inc., [1995] 64 C.P.R. 3d 289, 320; R. v. Nova Scotia Pharmaceutical Society (1992), 49 C.P.R.(3d) 289, 319-21, 326.

9. R. v. Clarke Transport Canada Inc., [1995] 64 C.P.R. 3d 289.

10. For partial acquisitions, notification is required for share acquisitions over 20% (35% for a closely held firm), or acquisitions of control over 50%.

11. Targets of an unsolicited offer must also file the short form within 10 days (or the long form within 20 days), but the deadlines run from the acquiring firm's filing.

12. In 2000, 24% of all publicly reported mergers were formally notified (316 out of 1 297). The Bureau examined 366 mergers that year, or 28% of the total, including 50 that were not subject to notification. Of these, 63 were considered "complex" or "very complex".

13. Canada was again the pioneer. Just as the Combines Act predated the US Sherman Act by a year, these rules to protect small businesses predated the very similar terms of the US Robinson-Patman Act, also by a year.

14. The Commissioner was formerly styled the "Director of Investigation and Research," reporting to the Minister of Consumer and Corporate Affairs (CCA), a department that was abolished.

15. www.ct-tc.gc.ca.

16. There are also fees for merger filings (C 25,000) and applications for Advance Ruling Certificates (CAD 25 000).

17. The action was appealed on constitutional grounds and reviewed at the Tribunal, but the order was not stayed pending the appeals

18. *Canada Gazette*, 17 March 2001.

19. Bill C-23, sec. 11, revising Sec. 74.12 of the law, and Sec. 14, revising Sec. 105.

20. Art. 1501 of HAFTA calls for the adherents "to adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action" with respect to it.

21. The first two elements are similar to the principal elements of the "state action" doctrine in the US: clear articulation of the policy to displace competition, and active supervision of its implementation.

22. There is also some provincial specialisation at the business level, such as the arrangement between the Quebec stock exchange and NASDAQ

23. As part of the public interest evaluation, the parties must prepare a Public Interest Impact Assessment, which will be reviewed by the House of Commons Finance Committee and the Senate Banking, Trade and Commerce Committee. The process also will make available to these Committees the Commissioner's final letter on the competitive impact of the transaction for their review.

24. Invoking the suspension requires joint findings by the Minister of Transport and the Minister of Industry that an extraordinary disruption to effective operation of the national transportation system exists or is imminent, that failure to act would be contrary to the interest of users and operators, and that no other remedy would suffice.

25. Sec. 32.

26. The monopoly is only over grain for human consumption, but not over animal feed, and it does not control imports.

27. Mortimer v. British Columbia Land Surveyors (March 29, 1989).

28. Law Soc. Of Upper Canada v. Canada (Attorney General), 28 O.R. (3d) (1996).

29. In reaffirming its original findings, the Tribunal addressed many of these issues. But in following the direction of the Federal Court of Appeals to take these effects into account, the Tribunal did so only to the extent that they had an adverse impact on allocative efficiency in the Canadian economy. The reaffirmation is under appeal.

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