CT-2025-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

IN THE MATTER OF an application by Alexander Martin for an order pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34, as amended, for leave to make an application under sections 79 and 90.1 of the *Competition Act*.

B E T W E E N:

ALEXANDER MARTIN

Applicant

– and –

ALPHABET INC., GOOGLE LLC, GOOGLE CANADA CORPORATION APPLE INC. and APPLE CANADA INC.

Respondent

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Discussion Paper

Competition Act Amendments

June 1995

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COMPETITION ACT AMENDMENTS

DISCUSSION PAPER

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PREFACE

At the request of the Minister of Industry, the Honourable John Manley, I am undertaking a consultation process to obtain the views of stakeholders on a package of amendments to the *Competition Act*.

It is my view that, for the most part, the *Act* is working well and the approach it represents is fundamentally sound. However, after nearly a decade of experience in applying the *Act* in its current form, there are some areas where improvements may be warranted to address recent developments in the marketplace.

This amendments initiative has been prompted by a number of factors. The globalization of markets has heightened the need for international cooperation among investigative agencies in order to deal better with anti-competitive and deceptive practices that originate outside the country. The need for such cooperation has also heightened concerns within the business community about how confidential business information will be shared.

In addition, the recent proliferation of deceptive telemarketing practices has highlighted difficulties in addressing such matters under the current law.

Finally, a number of areas have been identified where amendments could provide for quicker and more effective resolution of competition issues, reduce the regulatory burden for business and, overall, fine-tune competition law administration in ways that would be beneficial for businesses and consumers.

In order to address these issues, I am seeking your views on amendments in the following areas:

- notifiable merger transactions;
- the protection of confidential information and mutual assistance with foreign competition law agencies;
- misleading advertising and deceptive marketing practices;
- "regular price" claims and s. 52(1)(*d*);
- price discrimination and promotional allowances;
- access to the Competition Tribunal;
- prohibition orders; and
- deceptive telemarketing solicitations.

This discussion paper is intended to stimulate comments on the approach that should be taken and to provide an opportunity for alternative suggestions to be brought forward. You are welcome to comment on any or all issues of interest to you.

You will find further details on the consultation process on page 4 of the paper. The deadline for submissions is September 15, 1995.

An effective competition law is necessary to ensure a healthy marketplace. I encourage you to join me in this effort to amend the *Act* for the benefit of all Canadians.

George N. Addy
Director of Investigation and Research
Competition Act

INTRODUCTION

This discussion paper is being distributed as part of a broad public consultation initiative relating to a proposed package of amendments to the *Competition Act.*

The proposed amendments carry forward the government's commitment towards ensuring a healthier marketplace, one of the key components of the strategy to foster job creation and economic growth. These amendments will update the *Act* to better address recent changes in the global marketplace and ensure more effective competition law enforcement.

While the proposed changes are not insignificant, the majority of the *Act* -- including major provisions relating to mergers, abuse of dominance, and conspiracies in restraint of trade, to name just a few -- will remain unchanged. The fundamental philosophy of the *Act* remains constant.

This discussion paper provides additional detail on specific sections of the *Act* where changes are suggested. It reviews the nature of the problems that have been identified and poses questions that will help to determine how the *Act* should be amended to address these problems. Comments from the public are being sought to help identify appropriate solutions.

The *Competition Act* is a key component of the marketplace framework that governs business activities in Canada. Competition stimulates greater efficiency, productivity and innovation, all of which contribute to increased economic growth.

THE NEED FOR AMENDMENTS

The *Act* was last amended in 1986, when a substantial overhaul was completed after many years of research and extensive public debate. That process provided Canada with a strong and effective law that has served Canadians' interests well.

However, the business and enforcement environment has changed since then. The marketplace of the 1990's is rapidly evolving. Developments such as the burgeoning growth of technology and the liberalization of the global trading environment have an impact on competition law enforcement. The legislation requires fine-tuning to keep pace with emerging business trends.

For example, the globalization of business generally and the "freer" trade environment in North America have increased the frequency with which competition law offences, and investigations, cross national boundaries. This has heightened the need for cooperation and information-sharing among investigative agencies. Greater cooperation, in turn, raises concerns for the business community about how confidential business information will be shared with law enforcement agencies. Concerns in this area call for legislative clarification of how confidential information will be treated and the authority of the Director to engage in international enforcement cooperation.

Another new development that has surfaced as a competition law issue is the growth of deceptive telemarketing practices. While recognized as a legitimate and valuable marketing tool, the use of telemarketing as an instrument for deceptive purposes has also highlighted difficulties in pursuing and addressing such matters under the current law. We need to identify measures to deal effectively with such practices.

In addition, there is a growing sense that the job of competition law enforcement could simply be done better if more flexible enforcement approaches could be employed. At the same time, there is growing recognition of the need for government to reduce, where feasible, the regulatory burden on business and to remove restrictions that prevent the private sector from taking action to challenge anti-competitive practices.

There are several amendments that could further these objectives:

- improving the notification process applicable to large merger transactions;
- providing a non-criminal adjudicative alternative for misleading advertising and an array of potential remedies;
- reviewing the concept of "ordinary selling price" under the misleading advertising provisions;
- shifting the treatment of price discrimination and promotional allowances from a criminal prohibition to civil review before the Tribunal;
- allowing private parties to file applications before the Tribunal in respect of some civil reviewable matters; and
- expanding the scope of prohibition orders to allow them to include terms that are prescriptive in nature.

In addition to these specific matters, the amendments initiative may provide an opportunity to correct certain technical errors in the *Act* that have been identified since 1986.

Some administrative matters will also be addressed that stem from the recent assumption by the Director of Investigation of Research of additional responsibilities under federal packaging and labelling statutes -- the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*. This area will be the subject of future consultations.

THE CONSULTATION PROCESS

The discussion paper is the first step in the consultation process. The objective of this process is to identify a manageable amendments package that focuses on addressing specific problems.

The paper presents eight different areas where changes in the law appear to be desirable. Readers are invited to comment on any or all of the areas of interest to them. A series of questions have been posed to help focus debate on the possible solutions. However, stakeholders may have other solutions to suggest or other areas to bring forward where they believe amendments would be beneficial. At the end of the consultation process, the government will be in a position to select those matters with which to proceed and those that would benefit from further study and debate. **The deadline for submissions on this paper is September 15, 1995.**

Further consultation meetings or discussions may be organized in the coming months to discuss specific topics in greater depth or to explore issues raised in written submissions with smaller groups of stakeholders. The complete consultation process is to be concluded by the end of November, 1995.

The discussion paper is being circulated to associations, businesses, and members of the legal, law enforcement and academic communities. Recipients are encouraged to circulate it to others for whom it may be of interest. Additional copies may be obtained by contacting the Resource Centre of the Bureau at the address noted below. The paper is also available on the Internet at:

world-wide-web: http://info.ic.gc.ca/ic-data

PLEASE FORWARD YOUR COMMENTS ON THE DISCUSSION PAPER BY SEPTEMBER 15, 1995 TO:

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THE APPLICATION OF THE *COMPETITION ACT*

The *Competition Act* is a law of general application that, with few exceptions, applies to all industries and levels of trade. The law establishes basic principles for the conduct of business that are designed to promote competition and efficiency in the Canadian economy. A competitive marketplace is in everyone's benefit -- consumers and business alike. The application of competition law helps lead to lower costs and prices, greater incentives for product innovation and development and better quality goods and services for Canadian purchasers.

The *Act* is administered and enforced by the Director of Investigation and Research and his staff at the Bureau of Competition Policy which is part of Industry Canada. Although the Director is an independent statutory official, the *Act* provides limited powers of oversight to the Minister of Industry in relation to the administration of the legislation. The Director's statutory responsibilities are largely investigative in nature. However, in addition to his authority to conduct inquiries into possible transgressions of the *Act*, the legislation also authorizes the Director to appear before federal and provincial regulatory bodies to make representations in respect of competition.

The *Act* contains both criminal offences and non-criminal provisions referred to as "reviewable matters".

The criminal offences include conspiracy, bid-rigging, discriminatory and predatory pricing, price maintenance, misleading advertising and deceptive marketing practices. These offences are prosecuted before the courts by the Attorney General of Canada. Those convicted of an offence may be sentenced to a fine or a term of imprisonment. Prohibition orders and interim orders may also be obtained from the courts upon application by the Attorney General.

Reviewable matters include mergers, abuse of dominant position, refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction and delivered pricing. In the case of large merger transactions, the *Act* imposes an obligation upon merging parties to provide advance notification of a transaction ("prenotification") and to wait a prescribed period of time, prior to completing the transaction. Following an inquiry into any of the reviewable matters, the Director may file an application before the Competition Tribunal if grounds exist to obtain a remedial order. The Tribunal is a specialized administrative tribunal composed of judges from the Federal Court of Canada and lay persons appointed to bring a business and economic perspective to the proceedings.

The investigative process under the *Act* provides that an inquiry shall be commenced whenever the Director believes on reasonable grounds that an offence under the *Act* has been or is about to be committed, or that grounds exist for the Tribunal to issue an order in respect of a reviewable matter. The Director is also obliged to commence an inquiry when the Minister so directs, or when six Canadian residents make an application for an inquiry. Once an inquiry has begun, the Director can seek to use formal investigative tools to gather information -- search and seizure of records, and court orders requiring the production of records or the provision of information or oral testimony under oath.

All inquiries under the *Act* are conducted in private. In addition, the *Act* prohibits the communication of information that parties are required to supply to the Director either through compulsory process, pursuant to the merger prenotification provisions, or in support of an application for an Advance Ruling Certificate. However, such information may be communicated to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the *Act*.

A limited right of private action is provided under the *Act*. Anyone who has suffered losses or damages arising from a criminal offence or the failure to comply with an order of the Tribunal may sue for recovery in the courts.

NOTIFIABLE TRANSACTIONS

The notifiable transactions provisions of the *Act* require that parties proposing certain specified transactions which exceed prescribed thresholds notify the Director prior to their completion and provide specified information. Notifications are intended to alert the Director to such transactions and provide the opportunity to assess the competitive impact prior to their completion.

Since their implementation in 1987, experience with these provisions has identified a number of issues. The most significant concern relates to the information required to be filed. Parties subject to prenotification have the option to file a short form or a long form. While the information required under both forms is fairly detailed and time-consuming to assemble, with either form, information *essential* to assessing the likely impact of the transaction is not required. Such information must be obtained either voluntarily from the parties or, increasingly, through the use of formal powers. The prescribed waiting period may expire without the information needed for the competitive assessment being available to the Director. Delays in the completion of transactions are often the result.

Amendments to these provisions have a two-fold focus. They would reduce the paper and regulatory burden for transactions that raise no competition issues. They would also improve the relevance of the information provided, thereby allowing a timely and predictable review process for transactions that do raise competition issues. Additionally, these amendments should reduce the need to rely on formal powers to obtain relevant information from the parties to a proposed merger. To accomplish these objectives a two-stage pre-merger notification process would be retained.

The initial filing could be amended to preserve its effectiveness in allowing speedy examination of non-contentious transactions while reducing the paper burden. In addition, amendments could be introduced to eliminate the obligation to prenotify for certain classes of transactions having no competitive effect, such as asset securitizations, that trigger the threshold for the acquisition of assets but involve no change of control or are not an acquisition of significant interests in the target firm. The Director could also be authorized to waive the obligation to prenotify in circumstances where it is considered unnecessary.

Revisions to the information requirements to ensure the provision of more relevant information would result in notifications more specifically targeted towards the elements of substantive merger law. A second filing could be required by the Director where the initial examination discloses potential competition issues. The types of information to be included in such filing would be specified in the law so that parties would be aware of what may be required by the Director.

While better tailored information requirements would improve the Director's ability to render a decision regarding a proposed transaction within the waiting period and reduce the need to resort to formal powers to obtain information, with regard to the waiting periods before a transaction may close, the existing timeframes have proven to be unrealistic, particularly in an era of resource constraints. Some adjustments are required to address this issue.

Further issues could be pursued in the area of prenotification. For example, the thresholds for a transaction requiring prenotification are defined in terms of

acquisition of shares or assets. However, the application of the prenotification provisions to acquisitions of interests in partnerships and other types of entities is not clear. Changes could be made to the *Act* to deal more clearly with this type of acquisition and to clarify the definition of control for partnerships or similar entities.

Finally, most stakeholders will be aware, as a result of past consultation, that it is the Director's intention to introduce cost recovery for merger notifications and advance ruling certificates, among other matters. The *Department of Industry Act*, which was recently passed by Parliament, contains the legislative authority to implement fees on a cost recovery basis. That legislation also requires consultations prior to the establishment of any such fees. No amendments to the *Competition Act* are required for these purposes. Accordingly, further consultations on a cost recovery proposal will take place in a separate process later this year.

QUESTIONS

1. Information to be Filed

Unless an ARC has been obtained from the Director, parties subject to prenotification would file information under an initial form similar to the current short form. Some modifications could be made to include the basic information necessary to do at least an initial assessment of the notifiable transaction. This revised initial filing would be sufficient for the majority of the transactions. For transactions requiring more in-depth analysis, a second filing, containing more relevant and detailed information, could be required by the Director. The Director would have the flexibility to tailor this request to only that information still required to complete his examination.

1.1 What are your views with respect to this proposed approach? Please explain your position.

The initial filing could include the following types of information[1]:

a) names and addresses of the parties involved;

b) a description of the proposed transaction, reasons for the transaction, scheduled closing date;

c) a list of affiliates;

d) a description of the businesses of the parties and their affiliates, products supplied, principal suppliers and customers and areas of competitive overlap between the merging parties;

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[1] As a result, the following elements would no longer be required in the initial filing: copies of legal documents to implement the proposed transaction; jurisdiction of incorporation; organizational charts; volume of purchases from, and sales to, suppliers and customers; and information filed with a securities commission or stock exchange. The following elements are new: annual reports; competitive overlaps; and the list of competitors.

e) a list of the foreign competition authorities that must be notified of the proposed transaction;

f) most recent annual reports and financial statements; and

g) a list of competitors (actual and potential).

1.2 What type of information would you add to or remove from the list and why?

The second filing, if requested, could include the following types of information:

a) organizational chart of the companies or divisions involved;

b) a list of the main officers of the companies, their position and telephone number;

c) copies of legal documents to implement the transaction;

d) a description of the industry (trends, structure, entry conditions);

e) geographic areas of operation;

f) volume and sales revenue by product by geographic area;

g) volume and total value of product purchased by supplier;

h) description of pricing policy, documents relating to strategic plans, promotional activities and sales projections;

i) location and size of production facilities and distribution centres;

j) maximum potential and actual production capacity of these facilities;

k) description of agreements with competitors with respect to products;

l) current state of the market and estimated market shares;

m) documents prepared by corporate officers for the purposes of discussing or analyzing the proposed transaction; and

n) efficiencies expected from the proposed transaction.

1.3 What information would you add to, or remove from, the list and why?

1.4 Should information required pursuant to prenotifications be set out in regulations instead of in the *Act* itself? Why or why not?

1.5 Should the use of standard forms be made compulsory? Why or why not?

2. Waiting Periods

2.1 Waiting periods would be thirty (30) days for an initial filing and twenty further days (20) for a second filing. Do you consider these waiting periods appropriate? Why or why not?

3. Exemption from Notification

3.1 Asset securitization transactions could be exempted from the prenotification requirement by prescribing such matters pursuant to subs. 113(*d*). Would this be an appropriate way to ensure that these transactions are not subject to prenotification? Why or why not?

3.2 Would a definition along the lines of "an acquisition of assets for the purpose of financing where there is no change of control or acquisition of significant interest" be appropriate? (Does it capture only those transactions that are intended to be exempt, as outlined above?) If you disagree with the proposed definition, please explain why and how you would modify it.

3.3 Are there other classes of transactions that should be exempt from the prenotification obligation because they raise no competition issues? If yes, please describe them and explain why they should be exempted.

3.4 Should the Director have discretion to waive the notification requirements on a case-by-case basis if he considers it appropriate? If not, why not?

4. Application to Acquisition of Partnership and Joint Venture Interests

4.1 Should the same type of limits apply to acquisition of interests in partnership and joint ventures as those applicable for the acquisition of shares? If not, why not? What alternative approach could be used?

4.2 Would a definition of control for partnerships along the lines of "a voting interest in a partnership or joint venture greater than 50%" be clear enough to make a determination of whether a partnership is an affiliate of another entity? If not, why not? Can you suggest an alternate definition?

CONFIDENTIALITY AND MUTUAL ASSISTANCE IN ENFORCING COMPETITION LAWS

Last year, the Director issued a draft bulletin entitled "Confidentiality of Information under the *Competition Act*" and invited comments on the document. Comments received reflected a broad range of legal interpretations on current statutory confidentiality limits on the communication of information. Subsequently, on May 8, 1995, the Director distributed a statement entitled "Communication of Confidential Information under the *Competition Act*" and indicated that he intended to recommend to the Minister that there be legislative amendments to articulate his statutory authority clearly in this area.

The Director remains convinced of the need to communicate confidential information selectively, both domestically and to foreign competition law agencies, in order to administer and enforce the *Act* effectively. At the same time, it is recognized that this needs to be done in the context of a well-established framework for the treatment of confidential information and with adequate safeguards for the protection of those whose interests are affected. Accordingly, amendments are proposed to expand statutory protection and to make explicit the extent of the Director's authority to communicate confidential information in his possession, with appropriate safeguards.

To orient comments, the sections that follow outline a proposed new regime for the treatment of information, including a brief rationale for the positions advanced. The new regime for the treatment of information would start from the premise that all information received by the Director is confidential (Section 1). The communication of confidential information would be prohibited unless one of a number of specified exceptions are met. These suggested exceptions are detailed in Sections 2, 3 and 4 below.

QUESTIONS

1. General Protection

It is the Director's current practice to treat information not protected under the *Act* as if it were covered by s. 29 because of the generally sensitive nature of information coming into his possession. A new confidentiality regime could extend statutory coverage to all information.

1.1 Should all information in the Director's possession, including that voluntarily provided, be subject to the same general level of statutory protection? Why or why not?

2. General Authority to Communicate Information under the *Act*

From time to time, the Director may wish to communicate confidential information in order to advance an investigation or assist in the administration of the *Act*. For example, in negotiating an alternative case resolution with a party under investigation, Bureau staff may wish to communicate some of the available evidence to that party. Another example would be communicating information to an industry participant to assess its value and credibility. A further example could arise in the context of the Director's responsibilities under ss. 125 or 126 of the

Act to make representations to, and call evidence before, boards, commissions or other tribunals in respect of competition whenever this is relevant to matters they are hearing. Were the Director to be aware that a party to such proceedings was misleading the tribunal, confidential information in his possession could be communicated during such proceedings to correct the record.

2.1 Recognizing the importance of communicating information in the Director's possession for the effective administration and enforcement of the *Act*, how should the *Act* be amended in this regard?

3. Communications to other Canadian Law Enforcement Agencies

The Bureau receives complaints involving matters which fall within other government agencies' jurisdictions and do not raise issues under the *Act*. Complaints are also received where there is concurrent jurisdiction but the issues raised would be better or more efficiently handled by another government agency. For example, the Marketing Practices Branch frequently redirects some of the complaints it receives about unfair business practices to provincial agencies that are equipped to mediate disputes between consumers and suppliers. Where those agencies are operating under a federal or provincial statutory framework which lacks penal sanctions, the current "Canadian law enforcement agency" exception in s. 29 may not be broad enough to encompass them.

3.1 How should the *Act* be amended in relation to the Director's authority in these circumstances?

Another exception under the new regime would relate to communications to Canadian law enforcement agencies. Many would argue from a public policy standpoint that communicating information in the Director's possession to assist Canadian law enforcement agencies in carrying out *their* duties is in the public interest.

3.2 How should the *Act* be amended in relation to the Director's authority in these circumstances?

4. Mutual Assistance in Enforcing Competition Laws

4.1 Introduction

As business activity globalizes, the Canadian economy becomes increasingly susceptible to anticompetitive practices occurring outside Canada's borders. This has heightened the need for cooperation with foreign competition law authorities in order for the Director to administer and enforce the *Act* effectively. Mechanisms to facilitate cooperation with foreign competition authorities in the detection, investigation and prosecution of violations are necessary to address anticompetitive practices that transcend borders and harm Canadian consumers and businesses.

The new regime would permit the communication of confidential information pursuant to mutual assistance agreements negotiated with foreign governments willing to reciprocate. It would also address information providers' concerns about the extent to which commercially sensitive information may be communicated to foreign authorities by including appropriate safeguards.

The new regime would explicitly authorize assistance between the Bureau and a foreign competition law authority regarding:

- a Bureau investigation;
- joint investigations, where both countries' laws are implicated; and
- a foreign competition law authority's investigation (where Canada's competition laws are not necessarily implicated).

In the first scenario, the communication of confidential information would advance a Bureau investigation where it allowed a foreign competition law authority to provide to the Bureau additional information not available in Canada. In the second category, it would permit the pooling of information to advance both the Canadian and foreign investigations. In the final category, Canada's interests would be served insofar as comparable assistance would be provided by foreign competition law authorities in the enforcement of Canada's competition laws.

Under this regime, mutual assistance could include the following:

- authorizing the Director to use the compulsory powers available under the *Act* to obtain information for the enforcement of another country's competition laws; and
- authorizing the Director to provide a foreign authority, upon request or at his own initiative, with information in his possession that may be relevant to the enforcement of the *Competition Act* or foreign competition law.

4.1.1 Do you agree that such mutual assistance is generally in the public interest?

4.1.2 What safeguards would be appropriate to ensure that assistance would not occur in specific cases where it would be contrary to the public interest?

4.2 Compulsory Powers

Although compulsory investigative powers are available to assist foreign authorities in the enforcement of criminal competition law matters pursuant to treaties negotiated under the *Mutual Legal Assistance in Criminal Matters Act*, there is currently no mechanism to allow for reciprocal assistance in non-criminal competition matters. The proposed regime would provide the Director with parallel authority to use compulsory powers with prior judicial authorization to assist foreign authorities in all competition matters, whether criminal or non-criminal in nature.

4.2.1 Should the full range of compulsory powers available under the *Act* be available to assist foreign authorities?

4.3 Safeguards Against the Communication of Information

Competition authorities in Canada and abroad obtain extensive information in the course of the administration and enforcement of their respective laws. Such information may, on occasion, be relevant to the enforcement of another country's competition law. An effective cooperation regime would authorize the communication of certain information between competition authorities in appropriate cases.

There may, however, be certain kinds of information that ought to be exempted from communication. Businesses have significant concerns about the potential for commercially sensitive information to be communicated. Accordingly, any information provided to a foreign authority should be subject to adequate safeguards with respect to its use and communication by the foreign authority.

4.3.1 Should certain categories of information be exempted from communication under a mutual assistance regime? Please explain why those categories you have identified warrant special treatment.

4.3.2 How would exempt information be defined without unduly hindering effective cooperation?

4.3.3 What safeguards would be appropriate to ensure that information communicated to a foreign authority is not used, or communicated to third parties, for purposes unrelated to the enforcement of the foreign competition law?

4.4 Mutual Assistance Agreements -- General Considerations

In deciding whether to enter into a particular mutual assistance agreement under the proposed regime, the following factors would be considered:

- the degree of similarity between Canada's and the foreign country's competition laws;
- the ability of the receiving agency to provide reciprocal assistance; and
- whether the receiving authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of the information that is received under such a regime.

4.4.1 What, if any, additional factors would you include and why?

MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES

Misleading advertising and deceptive marketing practices are criminal offences. Criminal prosecution, as the sole legal instrument of government enforcement, has a number of shortcomings -- a lack of speedy decision-making, specialization and consistency in decisions. Criminal sanctions can be too severe a response for some instances of unintentional misleading advertising, even when the advertiser has failed to meet the due diligence standard. Invoking the criminal process can be unjustifiably expensive, time and resource intensive for both the businesses involved and the Bureau.

There are also cases where due diligence has been exercised but misleading advertising has occurred with adverse consequences for consumers or competitors for which no remedy is currently available. Since criminal sanctions are directed at specific and general deterrence, rather than correcting the impugned practices, the current tools are not always effective in stopping misleading advertising as quickly as possible.

There have been continuing calls for reform since the 1970s. Studies have concluded that criminal sanctions are an incomplete response to misleading advertising (although essential to retain to ensure adequate deterrence in the most egregious cases). However, perceived constitutional limitations on the federal government, and other legislative priorities, inhibited serious consideration of non-criminal alternatives.

In June 1988, the Parliamentary Standing Committee on Consumer and Corporate Affairs issued a unanimous report on misleading advertising (the "Collins Report"), recommending administrative remedies, remedial orders, assurances of voluntary compliance, rule-making powers and increased educational efforts. Extensive consultations by the Bureau, prompted by the Collins recommendations, culminated in 1990 with the formation of a working group to develop reform proposals. On January 31, 1991, the working group submitted a unanimous report to the Director, recommending a non-criminal adjudication alternative before the Tribunal with a number of remedies -- cease and desist orders, restitution orders, orders directing payments towards consumer education and the publication of information notices.

Non-criminal adjudication of misleading advertising cases would alleviate some of the shortcomings of the criminal process identified above, thereby enhancing certainty for businesses, advertisers, consumers and enforcement authorities. Uncertainty can inhibit businesses from engaging in conduct that might be legal and advantageous from a business standpoint and beneficial to a competitive marketplace. The availability of a non-criminal alternative would also provide more flexible remedies, while criminal prohibitions would remain in place to deal with more egregious transgressions.

QUESTIONS

1. General

Misleading advertising and deceptive marketing practices could be made reviewable by a single judicial member of the Tribunal. While s. 55.1 -- the pyramid sales provision -- would remain solely criminal, the remaining

misleading advertising offences would be replaced by analogous reviewable practices provisions. A general criminal prohibition, akin to the current s. 52(1)(*a*), would continue to be available in appropriate instances. The choice of one adjudication route would foreclose the other.

1.1 Is it desirable to establish such a regime? Why or why not? If not, please set out what you consider would be a reasonable alternative.

2. Cease and Desist Orders -- General Standard of Responsibility

The Tribunal would be empowered to order advertisers engaging in misleading or deceptive practices to "cease and desist" doing so. Whether or not due diligence was exercised by advertisers to avoid misleading would not be considered by the Tribunal -- simply whether advertising which has occurred, and may still be occurring, is misleading or deceptive. (The due diligence defence would continue to be available under the criminal regime.)

2.1 Do you agree with the standard of responsibility for cease and desist orders? Why or why not? If not, what alternative would you suggest?

3. Interim Cease and Desist Orders

The Tribunal could be empowered to issue interim cease and desist orders. Akin to interim injunctions, such orders could be obtained in urgent situations involving substantial harm to the marketplace.

3.1 Should the Tribunal be empowered to make interim cease and desist orders? Why or why not? If not, what alternative , if any, would you suggest?

3.2 In the event interim orders are made available, what, if any, thresholds should apply and why? Please elaborate.

4. Remedial Orders

4.1 Restitution Orders

The Tribunal could be authorized to issue restitution orders. However, before such orders would be available, the Director would be required to meet a specified threshold. The Director would be required to establish that a clearly identifiable individual or group had suffered a readily determinable financial loss caused by the misleading advertising in question and that losses were significant on an individual basis.

4.1.1 Should the Tribunal be empowered to make such orders? Why or why not? If not, what alternative, if any, would you suggest?

4.1.2 Is the above-noted threshold appropriate? Why or why not? If not, what alternative would you suggest?

4.2 Orders Respecting Marketplace Information

In lieu of restitution, the Tribunal could be empowered to order payments or actions directed toward improving the quality of marketplace information. This could involve education for consumers and/or businesses about the law's requirements.

4.2.1 Should the Tribunal be empowered to make such orders? Why or why not? If not, what alternative, if any, would you suggest?

4.2.2 What, if any, thresholds should apply and why? Please elaborate.

4.3 Orders Requiring the Publication of Information Notices

The Tribunal could be empowered to order notices be published informing the public in the relevant market of the misleading nature of earlier advertisements.

4.3.1 Should the Tribunal be empowered to make such orders? Why or why not? If not, what alternative, if any, would you suggest?

4.3.2 What, if any, thresholds should apply and why? Please elaborate.

4.4 Other Orders

4.4.1 Are there other orders which the Tribunal should be able to make in misleading advertising cases? Please elaborate on the types of orders and appropriate thresholds, if any.

5. Interventions

The *Competition Tribunal Act* currently sets out the scope for intervenor participation in proceedings before the Tribunal.

5.1 Should the general regime apply in misleading advertising cases? Why or why not? If not, what alternative would you suggest?

REGULAR PRICE CLAIMS AND SECTION 52(1)(*d*)

Regular price claims are common in the marketplace. Because they are such a powerful marketing tool, some retailers may be tempted to obtain an unfair advantage over their competitors by misrepresenting ordinary selling prices in advertising and promotional material.

Section 52(1)(*d*) prohibits materially misleading representations to the public concerning the price at which a product or like products have been, are or will be *ordinarily* sold. Members of the retail industry as well as some consumer interests have expressed concern that s. 52(1)(*d*) lacks sufficient clarity to determine under what circumstances ordinary price claims may be made.

Although the provision does not explicitly mention sales volume as the relevant criterion, the courts have interpreted the ordinary selling price of a product to mean that a substantial volume of sales of the product must have occurred at the represented price during the relevant time period. This has also been the Director's long-standing position.

QUESTIONS

1.1 Does the definition of ordinary selling price adequately reflect marketplace reality? Why or why not? If not, what factors should be considered in establishing ordinary selling prices?

1.2 The current provision provides for an exception to the deeming provision with respect to representations as to sellers' own ordinary selling prices. Should other exceptions be established? If so, please explain your rationale.

PRICE DISCRIMINATION AND PROMOTIONAL ALLOWANCES

The *Act* contains a criminal prohibition against price discrimination that applies when a supplier grants price concessions to one purchaser which are not available to competing purchasers in respect of a sale of articles of like quality and quantity. Another provision prohibits the granting of allowances for advertising or display purposes that are not offered on proportionate terms to competing purchasers.

The price discrimination provision was added to Canada's competition law in 1935 to protect small, independent retailers from unfair discrimination flowing from the exertion of buying power of large buyers. The promotional allowances provision was added to the law in 1960 to address the perceived unfair advantage available to large buyers arising from the allocation of such allowances. It was believed that this practice was not adequately captured by the price discrimination provision, even though allowances were offered on a discriminatory basis, because they were not provided as a price concession.

The wording of the price discrimination and promotional allowances provisions is out of step with current economic thinking and the approach reflected in other provisions of the *Act*. These provisions currently focus on the impact on individual competitors, rather than the overall level of competition in the market concerned. They deny businesses greater pricing flexibility while creating a resource burden for government associated with administering criminal prohibitions in respect of business practices that rarely warrant prosecution. Despite the issuance of detailed price discrimination enforcement guidelines in 1992, the threat of private action may still chill price behaviour that would be benign or even pro competitive.

The price discrimination and promotional allowances provisions are concerned with forms of conduct that should not be addressed with criminal penalties. The reviewable matters provisions, which have been added to the *Act* since 1976, provide a more appropriate means of addressing anti-competitive behaviour by suppliers in situations where the Tribunal finds such behaviour has resulted in a substantial lessening of competition. Remedial orders flowing from a rule of reason analysis would be more appropriate for these kinds of borderline behaviour that, in many instances, are pro competitive. Accordingly, these criminal prohibitions could be repealed and such practices addressed under the existing reviewable matters provisions.

QUESTIONS

1. Price Discrimination

1.1 Do you agree that the price discrimination provision should be repealed? If not, why not?

1.2 Would the existing reviewable matters provisions be sufficient to address situations where price discrimination results in a substantial lessening of competition? If not, why not? If possible, describe those situations raising competition concerns which could not be addressed by these provisions.

2. Promotional Allowances

2.1 Do you agree that the provision for promotional allowances should be repealed? If not, why not?

2.2 Do you agree that the existing reviewable matters provisions would be sufficient to address situations where the use of promotional allowances result in a substantial lessening of competition? If not, why not? If possible, describe those situations raising competition concerns which could not be addressed by these provisions.

ACCESS TO THE COMPETITION TRIBUNAL

The *Act* contains a group of provisions referred to as "reviewable matters". These matters include mergers, abuse of a dominant position, tied selling, exclusive dealing, delivered pricing, and refusal to deal. These matters are not criminal offences, but may be reviewed by the Tribunal when the criteria outlined in the *Act* are met. The Tribunal is a quasi-judicial body empowered to issue orders designed to remedy the effects of the conduct in question. The Tribunal may also issue interim orders and orders containing terms that have been arrived at by consent of the parties. It does not award damages or costs.

Currently, only the Director may launch proceedings before the Tribunal in respect of all matters except specialization agreements. Private parties cannot initiate proceedings to obtain a remedy before the Tribunal in those cases where the Director does not act. However, any affected person may apply for leave to intervene before the Tribunal to make representations relevant to those proceedings.

Given the large volume of business activity that is subject to the *Act*, it is difficult for the Director to investigate and pursue all seemingly meritorious complaints that are brought forward. In determining resource allocation for investigations, greater emphasis is placed on cases that are perceived to have a greater economic impact. However, there are some matters that do not harm a broad class of consumers, but take the form of violations of contractual agreements between commercial interests. These types of violations of the *Act* may still be judged important by private parties.

Amendments to the *Act* could allow parties aggrieved by alleged violations of the reviewable matters provisions to commence proceedings on their own initiative, seeking the remedial orders that are currently provided under the *Act*. As a result, the limited resources available to the Director to enforce the law with respect to reviewable matters would be supplemented, and jurisprudence would develop more quickly. However, in designing a process to allow private parties access to the Tribunal, there is a need to strike a balance between facilitating the pursuit of private remedies and safeguarding against the use of litigation as an instrument of strategic behaviour, or as a means of pursuing objectives inconsistent with the promotion or maintenance of competition. While this is an issue in respect of all of the reviewable matters provisions, it is a particular concern in respect of mergers.

The vast majority of mergers occurring in Canada raise no competition concerns under the *Act*. It is important that pro competitive corporate restructuring not be impeded by the threat of private litigation. In addition, merger review is one area where public resources are particularly focused, due to the broader economic effects arising from merger transactions and the variety and complexity of factors that must be considered in determining their impact. As a result, the need for private remedies in relation to mergers is much lower than in respect of other provisions of the *Act*.

QUESTIONS

1. Scope of Application

If private parties are allowed to initiate proceedings before the Tribunal, this right could be extended to all of the reviewable matters provisions or only some of them. It may be desirable to exclude mergers for the reasons articulated above. In addition, if civil misleading advertising provisions are created, there is a need to consider whether private parties should be able to launch proceedings in respect of these matters.

1.1 Should private parties be able to initiate proceedings before the Tribunal in respect of all of the existing reviewable matters except mergers? If not, why not?

1.2 If not, in respect of which reviewable matters would private access to the Tribunal be appropriate and why?

1.3 Should private parties be able to initiate proceedings in respect of the misleading advertising provisions if the Tribunal is given jurisdiction to determine such matters? If not, why not?

2. Remedial Orders

The reviewable matters provisions generally require the party that is the subject of the application to cease from engaging in conduct, or to take a particular action, such as accepting a person as a customer on usual trade terms in the case of refusal to deal. Interim orders (akin to an interim injunctions) may also be obtained. In the case of misleading advertising, a variety of additional remedies are proposed above.

2.1 If private litigants were able to obtain the interim and remedial orders now provided under the current reviewable matters provisions, would this provide sufficient relief?

2.2 If interim orders were available to private litigants, what criteria should apply in determining whether such orders should be granted? Please elaborate.

2.3 Should all of the remedies proposed in relation to reviewable misleading advertising matters be available to private litigants or only some of them? If certain of the remedies would not be appropriate for private litigants, please identify which ones and explain why.

3. Standing

If private parties have the right to institute proceedings before the Tribunal, an appropriate threshold for standing must be established. This threshold will affect both the level of litigation and the potential for actions that are frivolous or unrelated to the goals of competition law enforcement.

3.1 Should standing be accorded to those who have been "directly affected in their business or property" or, alternatively, those "materially affected in their business or property"?

3.2 If neither of the above options are appropriate, what definition would you suggest and why?

4. Costs

Currently, costs are not awarded in proceedings before the Tribunal. Each party bears its own costs of litigation, regardless of the outcome.

4.1 Would the institution of costs rules applicable only in proceedings commenced by private litigants provide a useful means of checking vexatious or frivolous litigation? Please explain why or why not.

4.2 If yes, what rules should apply?

4.3 Aside from costs, are there other means you can suggest to prevent litigation that may be vexatious or unrelated to the goals of competition law?

5. Role of the Director

5.1 Should the Director have any special role or rights in relation to private actions? For example, should he be entitled to notice of the filing of applications to the Tribunal by private parties?

5.2 Should the Director be entitled to intervene, as of right, in private proceedings? Why or why not?

5.3 Should the Director be entitled to take over carriage of proceedings from applicants in some circumstances? Under what circumstances, if any, might this be appropriate?

PROHIBITION ORDERS

Section 34 establishes authority for the courts to issue prohibition orders. Specifically, s. 34(1) provides that, in addition to any other penalty imposed on a person convicted of any offence under the *Act*, a court may issue an order prohibiting that person from continuing or repeating the offence, or from doing any act or thing directed toward the continuation or repetition of the offence. This section was originally enacted in 1927 to address situations where criminal prosecutions were ineffective or unsuitable and to introduce a useful element of flexibility into the administration of the *Act*. Under s. 34(2), prohibition orders are also available without securing a conviction, either on consent, or on a contested basis.

While prohibition orders can be very useful in prohibiting certain conduct, it is also desirable in some instances to require an accused to *engage* in certain conduct. Some prohibition orders in the past have contained prescriptive terms. However, such instances have been exceptional and no longer reflect current policy in light of uncertain enforceability.

The Director has implemented an "alternative case resolution" program, in which one possible resolution mechanism is to provide him with an undertaking. Undertakings received frequently include prescriptive terms. Parties may undertake to:

- establish an education or compliance program for its employees;
- establish internal policies and procedures to encourage whistle blowing by employees in appropriate cases;
- publish the facts in respect of the anti-competitive activities giving rise to the resolution;
- make restitution for actual losses or damages sustained by persons as a result of the commission of the anti-competitive acts;
- establish and implement a program of executive review and approval of advertising materials in advance of their publication; and/or
- include in their contracts with retailers a clause stating that it is illegal for the supplier to attempt to influence upward, or discourage the reduction of, the retailers' prices and that it is illegal for the supplier to refuse to continue to supply the retailers because of the retailers' low pricing policies.

However, apart from general prosecutorial discretion, there is no clear authority in law to compel such activities. Nor is there a decision-making mechanism available which can operate where the "negotiation" process has not been successful and prescriptive terms are desirable. Finally, there is no enforcement mechanism for the failure to comply with an undertaking reached through the alternative case resolution process.

In addition, the effectiveness of prohibition orders as mechanisms for appropriately resolving inquiries under the *Act*, without the need for prosecution, would be considerably enhanced if the courts were able to issue prescriptive orders

directed towards reducing the impact of anti-competitive practices or restoring the marketplace to the competitive position it would have been in but for the existence of the anti-competitive practices in question. Costly prosecutions would be avoided in favour of direct corrective action by way of enforceable orders containing both prohibitive and prescriptive terms. Overall, the availability of such orders would establish a more effective, enforceable instrument for alternative case resolutions in those matters where there is no need for criminal penalties. What terms are appropriate in respect of any particular order would be assessed in light of the facts and circumstances surrounding each case, but could include terms such as those listed above in respect of undertakings.

QUESTIONS

1. General

The *Act* could authorize the courts to issue orders which include prescriptive terms intended to prevent the continuation or repetition of offences or to overcome the effects of the anti-competitive practice.

1.1 Should the courts be authorized to issue orders including both prescriptive and prohibitive terms? Why or why not?

2. Scope of Prescriptive Terms

To ensure that an order which includes prescriptive terms can provide the best resolution given the facts of a particular case, there is a need to balance the requirement for flexibility against potential concerns that possible terms could pose an unreasonable burden or hardship. Such a balance could be achieved in one of several ways. A general provision could give the court the discretion to include any prescriptive term which meets certain defined criteria. Alternatively, the *Act* could provide the court with an exhaustive list of prescriptive terms.

2.1 How should the court's authority to fashion prescriptive terms be defined? Please provide appropriate explanation.

3. Availability

Prescriptive terms could be available in all cases where the court deems it appropriate. Alternatively, they could be available on a more limited basis, after certain stated thresholds or statutorily specified criteria are met.

3.1 Which alternative do you prefer and why?

One possible threshold could be "where the court is satisfied that the order would be *reasonable and necessary* to overcome the effects of the anti-competitive practice, or in order to *prevent* future contraventions of the *Act*".

3.2 Is this threshold appropriate? Why or why not? If not, please set out a reasonable alternative with appropriate elaboration.

DECEPTIVE TELEMARKETING SOLICITATIONS

Deceptive telemarketing practices involve representations made by telephone to promote the sale of products or services that either do not exist or are claimed to have grossly exaggerated values. Both consumers and businesses fall victim to such schemes. Victims are not just the gullible or less "consumer conscious" members of Canadian society, as one might assume, but also include persons from all walks of life and all levels of sophistication. Deceptive telemarketers gain access to Canadians' homes through the telephone and use its anonymity to persuade victims to place their trust in what they believe are reputable businesses. They exploit that trust, often using abusive, high pressure sales tactics to obtain from victims as much money as possible, using whatever misrepresentations are necessary.

Illicit telemarketing can also take the form of charitable solicitation calls made by some businesses specializing in "telefunding", in which misleading claims are often made to induce people to give money. While a minimal percentage of donated money may actually be remitted to true charities, most of the donations make up the deceptive telefunder's profits.

Consumers need to be vigilant against offers that seem "too good to be true". However, self-education and self-protection are not enough to counter the sophisticated methods used by deceptive telemarketers. In the United States, annual losses from deceptive telemarketing are estimated at up to $40 billion. Although no specific estimate is available for Canada, virtually all the practices affecting the U.S. also occur in Canada.

The practices of illicit telemarketers have had an adverse impact on Canadians' perception of the legitimacy of telephone solicitations as an acceptable and appropriate marketing method. Because the actions of deceptive telemarketers reflect badly on lawful operations, it is in the interests of legitimate telemarketers to address the problem.

The cross-jurisdictional nature of deceptive telemarketing emphasizes the need for a strong involvement of the federal government to protect the marketplace. In 1992, the Federal-Provincial Territorial Working Group on Telemarketing issued a report recommending among other things that the misleading advertising provisions of the *Act* be strengthened to address deceptive telemarketing more effectively. Although s. 52(1)(*a*) creates a criminal offence of making a materially misleading representation to the public to promote the supply or use of a product or service or any business interest, this provision is too general and is lacking specific attributes that would help to address deceptive telemarketing. With diminishing resources available to law enforcement agencies to combat deceptive telemarketing, the statutory tools to deal with these practices could be improved to facilitate enforcement as well as to ensure a high level of deterrence.

The U.S. Federal Trade Commission recently distributed a proposed *Telemarketing Sales Rule* and invited public comment. The comments received indicated there was significant concern about the impact on legitimate telemarketers of efforts to address deceptive telemarketing practices by a comprehensive regulatory-type response. The Director is sensitive to these concerns and wishes to ensure that, whatever solutions are proposed, they will not unduly hinder the operations of legitimate enterprises.

What follows is a discussion of a number of distinct issues that could be addressed through new deceptive telemarketing provisions.

General Scope and Application

New provisions dealing with deceptive telemarketing solicitations could apply to telemarketers who seek to cause money to be paid for products by using the telephone, or by using the telephone in conjunction with mail solicitations. Fundraising businesses that use telemarketing to solicit donations on behalf of charitable causes could also be included. Expanded responsibility to ensure compliance could involve those persons operationally responsible for communications with customers; individual plan operators -- the directing minds of telemarketing plans -- who often shield themselves from potential liability for the representations made by their employees; and sellers who promote their products through telemarketing.

Affirmative Disclosure

Deceptive telemarketers often deny victims basic information about the requirements of promotions or sales. Thus, victims end up paying without clearly understanding the obligations or conditions that will be imposed upon them. New provisions could require certain information (such as the caller's identity, purpose of the call, total cost and other material conditions) to be disclosed in a timely fashion.

Unauthorized Payments

Deceptive telemarketers employ a variety of means to obtain substantial amounts of money from their victims, including unauthorized credit card debits, bank drafts and cheques. Amendments could address this problem by requiring express or written authorization to be given by consumers before any such payment is obtained.

Prize Promotions and Premium Offers[1]

Deceptive telemarketing solicitations often involve prize or premium promotion schemes in which consumers are requested to send substantial amounts of money up front to receive an allegedly valuable prize. Victims send in their money but no prize is ultimately delivered by the telemarketer. Provisions could specifically deal with certain aspects of prize promotions and premium offers used in conjunction with telemarketing plans. In such situations, the telemarketer or seller could be prohibited from requesting or receiving payment for a prize or premium before delivering it to the recipient.

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[1] In this context, a prize promotion is a scheme conducted for the disposal of any product or benefit by way of chance and/or skill -- such promotions are often used as incentives to sell products. A premium is a product offered or given to a person as an incentive to purchase products, regardless of any selection based on chance and/or skill.

Record Keeping

Because they are essentially oral in nature, it can be extremely difficult to establish to the satisfaction of a criminal court the specific representations that have been made by deceptive telemarketers. Gathering material evidence against illicit telemarketers is difficult since many operators avoid keeping the kind of records of operations and transactions kept by legitimate businesses. Record-keeping could be addressed in amendments.

QUESTION

1.1 Considering the significance of the problem of deceptive telemarketing practices and the inadequacy of current statutory mechanisms, what solutions do you favour and how would you ensure that these would not unduly burden legitimate businesses? You are encouraged to discuss the options outlined above but feel free to suggest and discuss other possible responses.

TAB 2

Constitutional Law of Canada, 5th Ed. § 59:5

Constitutional Law of Canada, 5th Edition
Peter W. Hogg, Wade Wright

Part IV. Practice

Chapter 59. Procedure

II. Standing

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§ 59:5. Discretionary public interest standing

The exceptional prejudice rule, which was established in 1924,[1] is still the law of Canada in that only exceptional prejudice *entitles* a plaintiff to the standing needed to bring a declaratory action to challenge the validity of a statute. But in a series of cases the Supreme Court of Canada has held that there is a discretion to grant standing to a private plaintiff who seeks to vindicate a public interest and who is not exceptionally prejudiced.

The first case is *Thorson v. Attorney General of Canada* (1974).[2] In that case, the plaintiff sued for a declaration that the federal Official Languages Act was invalid. The plaintiff was not exceptionally prejudiced by the Act, which applied to him no differently than to other Canadians. Nonetheless, the Supreme Court of Canada by a majority granted standing to the plaintiff. The Court held that it had a discretion to grant standing to a plaintiff who was not exceptionally prejudiced, and that the discretion should be exercised in this plaintiff's favour. Laskin J., writing for the majority of the Court, pointed out that, because the Official Languages Act was declaratory and directory, not even imposing penalties for its breach, no-one would be able to establish exceptional prejudice. Moreover, it was not realistic to suppose that the federal Attorney General would exercise his undoubted right to bring proceedings, since he was a member of the government that had secured the passage of the Act, and indeed he was the minister responsible for its implementation. Therefore, the effect of the traditional standing rules would be to immunize the Act from constitutional challenge. Laskin J. asserted[3] that it would be a cause for alarm if the legal system provided no route by which a question concerning the constitutionality of a statute could be determined by the courts.[4]

The second case in the series of public interest standing cases is *Nova Scotia Board of Censors v. McNeil* (1975),[5] in which the plaintiff brought an action for a declaration that Nova Scotia's film censorship statute was invalid. This statute differed from the Official Languages Act in that the censorship statute was not merely declaratory. The statute was regulatory, and film exhibitors were subject to the regulatory regime and liable to penalties for non-compliance. An exhibitor would be entitled to standing under the exceptional prejudice rule. The plaintiff, however, was not an exhibitor; he was a member of the public who objected to the banning in Nova Scotia of the movie “Last Tango in Paris”. Did the new discretion to grant standing extend to a plaintiff who had not suffered exceptional prejudice, when the object of the challenge was a regulatory statute and those regulated by the statute had chosen not to sue? The Supreme Court of Canada, now speaking unanimously through Laskin C.J., answered yes. The Court took the view that the plaintiff was asserting an interest different from that of the exhibitors, in that the statute controlled what the public could see at the movies. Since the statute had not been challenged by the exhibitors (or by the Attorney General), there was no practical way in which the public's interest in what it could see at the movies could be translated into a constitutional challenge. Therefore, the Court held, it should exercise its discretion in favour of granting standing to the plaintiff.[6]

The third case in the series of public interest standing cases is *Minister of Justice of Canada v. Borowski* (1981),[7] in which the plaintiff sued for a declaration that the therapeutic abortion provisions of the Criminal Code were inoperative through conflict with the Canadian Bill of Rights (the Charter of Rights not being in the Constitution at this time). This case differed from

the previous two cases in that the impugned legislation was neither declaratory (as in *Thorson)* nor regulatory (as in *McNeil)*, but rather exculpatory: abortion was a criminal offence, but the constitutional challenge was brought against provisions that exempted therapeutic abortions from the offence. The other new element of the case was that the impugned provisions could have no direct impact on the plaintiff, [8] because he was male, and was not a doctor. Nevertheless, the Supreme Court of Canada, by a seven to two majority, exercised its discretion to grant standing to the plaintiff. Martland J., who wrote for the majority of the Court, pointed out that neither doctors performing abortions nor women seeking abortions would want to challenge provisions that were exculpatory. He summarized *Thorson* and *McNeil* in these terms: [9]

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Laskin C.J., who had written the judgments in *Thorson* and *McNeil*, now dissented, holding [10] that the plaintiff had no "judicially cognizable interest in the matter he raises". [11]

The fourth case in the series of public interest standing cases is *Finlay v. Minister of Finance of Canada* (1986). [12] In that case, the plaintiff sought a declaration that payments by the federal government to the province of Manitoba were illegal, on the ground that Manitoba was not fulfilling the conditions of the cost-sharing agreement between the two governments under which the payments were made. The plaintiff was a recipient of income support under provincial legislation that he contended did not fulfil the agreed-upon conditions. However, success in his action would have no direct effect on his own (or anyone else's) entitlement to support, because that entitlement arose under the provincial legislation, and the validity of the provincial legislation would not be affected by the illegality of the federal funding. (The plaintiff's hope, of course, was that success in the action would persuade the province to amend the provincial legislation.)

Finlay raised the question whether the public interest standing discretion could be extended to a non-constitutional challenge to the legality of a federal public expenditure. The Supreme Court of Canada, in a unanimous judgment written by Le Dain J., answered yes. Although the plaintiff's claim raised no constitutional issue, it did raise a question of law that was justiciable. Then, taking Martland J.'s summary of the cases in *Borowski* [13] as his text, Le Dain J. held [14] that the plaintiff was "a person with a genuine interest in these issues and not a mere busybody"; and there was "no other reasonable and effective manner in which the issue may be brought before a court". [15]

The result of these four cases was to establish a very liberal rule for public interest standing. While it is still the case that a private plaintiff has no right to bring a declaratory action when the plaintiff has no special personal interest in an issue of constitutional or public law, these four cases established that the courts could grant standing as a matter of discretion to the plaintiff who established (1) that the action raises a serious legal question, (2) that the plaintiff has a genuine interest in the resolution of the question, and (3) that there is no other reasonable and effective manner in which the question may be brought to court. [16]

The third requirement of public interest standing from *Thorson, McNeil, Borowski* and *Finlay*—that there is no other reasonable and effective manner in which the question may be brought to court—is a corollary of the purpose of granting public interest standing, which is to make sure that governments and legislative bodies adhere to the Constitution and other applicable laws. If there is no obstacle to judicial review at the suit of someone who is directly affected by a particular government measure, then it is not a wise use of scarce judicial resources to permit proceedings by persons or bodies that have no special interest in the measure. In *Canadian Council of Churches v. Canada* (1992), [17] the Canadian Council of Churches brought an action for a declaration of invalidity in respect of newly-enacted provisions of the Immigration Act that stipulated the procedure for determining claims by immigrants of refugee status. The Supreme Court of Canada struck out the statement of claim on the ground that the Council lacked standing to pursue it. The first two requirements for public interest standing were satisfied, because (1) the action raised a serious issue as to the validity of the new refugee determination procedures, and (2) the Council had a genuine interest in the

issue, because it provided services to refugees and other recent immigrants. But the third requirement was not satisfied, because individual refugee claimants, who had been arriving at the rate of about 3,000 per month, each had standing to challenge the legislation, and some of them had in fact done so. It was clear therefore that persons with a direct interest in the issue could bring it to court, and there was no possibility that the legislation would be immunized from judicial review by a denial of standing to the Canadian Council of Churches. The Council was therefore denied standing. [18]

In *Vriend v. Alberta* (1998), [19] the plaintiff, who alleged that he had been dismissed from his job because of his sexual orientation as a gay man, brought proceedings to challenge Alberta's human rights statute under s. 15 of the Charter of Rights. The statute prohibited discrimination in employment on a range of grounds, but did not include sexual orientation among the prohibited grounds. It was clear that the plaintiff had standing to challenge the provision prohibiting discrimination in employment, since the plaintiff was directly affected by its failure to include sexual orientation. However, the plaintiff also wanted to challenge other provisions of the statute dealing with discrimination in housing, retail goods and services, public facilities, trade union membership, signs and advertising. These all suffered from the same constitutional infirmity as the provision dealing with employment, he argued, and it was desirable to deal with all of them at the same time. With respect to these non-employment provisions, the plaintiff's standing had to be based on discretionary public interest standing. The Supreme Court of Canada held that the plaintiff should be granted the standing that he sought. There was a serious legal question as to the validity of the provisions, the plaintiff as a gay man had a genuine interest in the resolution of the question, and it would be wasteful, delaying and unfair to wait for other acts of discrimination and require a separate challenge to each of the provisions. On the merits, the plaintiff succeeded, and the Court added (“read in”) the ground of sexual orientation to all of the challenged provisions.

The Supreme Court of Canada restated the test for public interest standing in *Canada v. Downtown Eastside Sex Workers United Against Violence Society* (2012). [20] That case was an action, brought in British Columbia, for a declaration of invalidity of the prostitution provisions of the Criminal Code (keeping a bawdy house, living off the avails of prostitution, and soliciting in a public place). The plaintiff in the action [21] was a registered British Columbia society, whose members were women who were current or former sex workers, and whose object was to improve working conditions for female sex workers in the Downtown Eastside of Vancouver. The standing of the Society to bring the action was challenged. It was the third requirement of the test for public interest standing that was difficult. Could it be said that there was no other reasonable and effective manner to bring the issue to court? On this point, the case was very like *Canadian Council of Churches* in that there were hundreds of prosecutions under the impugned provisions every year in British Columbia. Any of these accused persons were free to bring constitutional challenges to the provisions under which they were charged, and in many cases constitutional challenges had in fact been brought. As well, in Ontario, an action for a declaration of invalidity of the prostitution provisions was being vigorously and effectively pursued and had reached the Court of Appeal, where it had been mainly successful. [22] Despite these various ways in which the constitutional issue could (and had) come before a court, the Supreme Court of Canada granted public interest standing to the Society in the British Columbia case.

Cromwell J., who wrote the opinion of the Court, first made a crucial modification to the third requirement. It was no longer necessary to show that there was “no other” reasonable and effective manner to bring the issue to court; it was sufficient, he held, to find that “the proposed suit is, in all the circumstances, a reasonable and effective means of bringing the matter before the court”. [23] As for the prosecutions of individual sex workers, a multitude of similar challenges to particular prostitution offences was not a wise use of judicial resources, and a summary conviction proceeding was not the most appropriate setting for a complex constitutional challenge; the Society's “comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised”. [24] As for the Ontario case, its existence did not “weigh very heavily” in the discretionary balance: it was taking place in a different province, there were some differences in the way the claim was framed, and the claimants were not primarily involved in street-level sex work, whereas in the British Columbia case the main focus was on street-level sex work. [25] The Society's proposed proceedings were comprehensive, were supported by a strong factual record (including expert reports and 90 affidavits by Downtown Eastside sex workers), and were conducted by experienced human rights lawyers. The Supreme Court concluded that the (reformulated) third requirement for public interest standing was met: the Society's British Columbia action was a reasonable and effective manner to bring the issue to court. [26] Since the first and

second requirements—(1) serious issue to be tried and (2) genuine interest on the part of the plaintiff—were also met, public interest standing was granted to the Society.

Following the *Downton Eastside* case, the test for public interest standing is: (1) whether the plaintiff raises a serious legal ("justiciable") issue; (2) whether the plaintiff has a genuine interest in the resolution of the issue; and (3) whether the case is, in all the circumstances, a reasonable and effective means to bring the issue to court. [27] All three of these factors are to be applied flexibly, and no factor is necessarily to be given more weight in the analysis. [28] The key difference between this test and the test outlined earlier in this section is the third factor; that factor, as noted, no longer requires there to be *no other*, but rather that the case be *a* reasonable and effective, means to bring the issue to court. Under the third factor, the courts should consider: (1) the plaintiff's capacity to bring the case forward; (2) whether the case is of broader public interest; (3) whether there are other realistic, more efficient and effective means to bring the case to court; and (4) the potential impact of the case on others who might be equally or more affected by it. [29]

As noted in the previous paragraph, one of the factors the courts should consider in determining whether a case is a reasonable and effective means to bring an issue to court is the capacity of the plaintiff to bring the case forward. This capacity factor requires a determination of, among other things, "whether the issue will be presented in a sufficiently concrete and well-developed factual setting". [30] How can a plaintiff that is not directly affected by the issue demonstrate that the issue will be presented in such a factual setting in the absence of a co-plaintiff that is directly affected by the issue? The answer to this question is particularly salient for those organizations that pursue public interest litigation on behalf of their members and stakeholders.

The Supreme Court of Canada addressed this question in *British Columbia v. Council of Canadians with Disabilities* (2022). [31] In that case, the Council of Canadians with Disabilities ("CCD"), a disability-rights advocacy organization, and two individual co-plaintiffs challenged provisions in several British Columbia statutes that permitted the involuntary administration of psychiatric treatment to patients with mental disabilities under ss. 7 and 15 of the Charter. The two individual co-plaintiffs were directly affected by the issue raised in the challenge. After the two individual co-plaintiffs discontinued their claims, British Columbia filed to have the challenge dismissed on the basis that CCD should be denied public interest standing because it did not and could not present a sufficiently concrete and well-developed factual setting without directly affected co-plaintiffs. An appeal of this application to dismiss ended up in the Court.

Wagner C.J., who wrote the opinion of the Court, rejected British Columbia's argument. A non-directly affected plaintiff like CCD did not need a directly affected co-plaintiff to demonstrate that an issue will be presented in a sufficiently concrete and well-developed factual setting. What will demonstrate such a factual setting will necessarily vary with the context, and will depend on, among other things, (1) "the stage of litigation at which standing is challenged"; and (2) "the nature of the case and the issues before the court". [32] The first factor is relevant because "what may … satisfy the court at an early stage may not suffice at a later stage", and the second factor is relevant because "the significance of a lack of evidence will vary with the nature of the claim and the pleadings". [33] In addition, a grant of public interest standing can be revisited, if a material change occurs that casts doubt on whether a sufficiently concrete and well-developed factual setting will in fact be put forward when the matter is considered on the merits. [34] Applying these principles, Wagner C.J. was satisfied that CCD would present its Charter challenge in a sufficiently concrete and well-developed factual setting, and – more broadly – that CCD's challenge was a reasonable and effective means to bring the issue to court. He was also satisfied that CCD's challenge raised a serious justiciable issue about the Charter rights of people with mental disabilities, and that, as a disability-rights advocacy organization, CCD had a genuine interest in this issue. CCD was therefore granted public interest standing. However, Wagner C.J. noted that, if a sufficiently concrete and well-developed factual setting failed to materialize at discovery, British Columbia could apply to have CCD's public interest standing reconsidered.

Footnotes

1 Smith v. A.G. Ont., [1924] S.C.R. 331.

2 Thorson v. A.-G. Can., [1975] 1 S.C.R. 138. The Court divided six to three, with Laskin J. writing for the majority, and Judson J. writing for the minority.

3 Thorson v. A.-G. Can., [1975] 1 S.C.R. 138, 145.

4 The issue reached the Supreme Court of Canada on the merits in a reference in which Mr. Thorson appeared as counsel for one of the interveners: Jones v. A.-G. N.B., [1975] 2 S.C.R. 182, where the legislation was upheld.

5 N.S. Bd. of Censors v. McNeil, [1976] 2 S.C.R. 265.

6 The action reached the Supreme Court of Canada on the merits in N.S. Bd. of Censors v. McNeil, [1978] 2 S.C.R. 662, where the legislation was upheld.

7 Minister of Justice (Can.) v. Borowski, [1981] 2 S.C.R. 575. The Court divided seven to two, with Martland J. writing for the majority, and Laskin C.J. writing for the minority.

8 Public interest standing was granted to a corporation in Energy Probe v. Can. (1989), 68 O.R. (2d) 449 (C.A.) and Canadian Council of Churches v. Can., [1990] 2 F.C. 534 (C.A.); reversed on other grounds [1992] 1 S.C.R. 236; although the challenged legislation could not in either case affect the corporation. These cases establish that the public interest plaintiff may sue through a corporate vehicle.

9 Minister of Justice (Can.) v. Borowski, [1981] 2 S.C.R. 575, 598.

10 Minister of Justice (Can.) v. Borowski, [1981] 2 S.C.R. 575, 587.

11 The plaintiff's case was never decided by the Supreme Court of Canada on the merits. It did reach the Court, but by that time the entire Criminal Code section respecting abortion — not only the offence part (which Borowski wanted to preserve) but also the exculpatory part (which Borowski attacked) — had been struck down in R. v. Morgentaler (No. 2), [1988] 1 S.C.R. 30 (a criminal prosecution of doctors for performing abortions without complying with the exculpatory provisions). The Court dismissed Borowski's appeal on the grounds that (1) the issue he raised was moot, and (2) he had lost standing. On the latter ground, the Court held that the standing cases *(Thorson, McNeil, Borowski)* required an individual to challenge a specific law or a specific government act, which Borowski could no longer do: Borowski v. A.-G. Can., [1989] 1 S.C.R. 342.

12 Finlay v. Can., [1986] 2 S.C.R. 607.

13 Minister of Justice (Can.) v. Borowski, [1981] 2 S.C.R. 575, 598.

14 Finlay v. Can., [1986] 2 S.C.R. 607, 633.

15 The issue reached the Supreme Court of Canada on the merits in Finlay v. Can., [1993] 1 S.C.R. 1080, where a majority held that Manitoba was not in breach of the federal conditions; the declaration was therefore denied.

16 E.g., Chaoulli v. Que., [2005] 1 S.C.R. 791, paras. 35, 188 (physician and patient granted standing to challenge Quebec's prohibition on private health insurance).

17 Canadian Council of Churches v. Can., [1992] 1 S.C.R. 236. Cory J. wrote the opinion for the unanimous Court.

18 See also CARAL v. N.S. (1990), 69 D.L.R. (4th) 241 (N.S.A.D.) (public interest standing to challenge abortion law denied, because criminal charge under law had been laid against doctor who was also challenging law); Hy and Zel's v. Ont., [1993] 3 S.C.R. 675 (public interest standing to challenge Sunday-closing law denied, because of other (unspecified) ways of bringing the issue to court); Canadian Civil Liberties Assn. v. Can. (1998), 161 D.L.R. (4th) 225 (Ont. C.A.) (public interest standing to challenge powers of Canadian Security Intelligence Service denied, because private litigant had already brought a similar case).

19 Vriend v. Alta., [1998] 1 S.C.R. 493.

20 Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524. Cromwell J. wrote the opinion of the Court.

21 There was also an individual plaintiff, who was a former sex worker and now a community worker, but the Court chose to decide the case on the public interest standing of the Society; the individual plaintiff was also granted standing on the same public interest basis without deciding whether she also qualified for private interest standing: Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, para. 77.

22 This was Can. v. Bedford (2012), 109 O.R. (3d) 1 (C.A.).

23 Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, para. 52.

24 Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, para. 70.

25 Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, para. 65.

26 Folld., Manitoba Métis Federation v. Can., [2013] 1 S.C.R. 623, 2013 SCC 14, paras. 43-44, 160 (public interest standing granted to Manitoba Métis Federation, although there were individual plaintiffs, whose standing was not challenged, in the same action).

27 Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, paras. 2, 37.

28 B.C. v. Council of Canadians with Disabilities, 2022 SCC 27, paras. 56-59.

29 Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, para. 51.

30 Can. v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524, para. 51. The factor also requires an assessment of the plaintiff's resources and expertise to bring the case forward.

31 B.C. v. Council of Canadians with Disabilities, 2022 SCC 27. Wagner C.J. wrote the opinion of the Court.

32 B.C. v. Council of Canadians with Disabilities, 2022 SCC 27, para. 71. The Court listed (at para. 72) several factors that "may be helpful" at a *preliminary* stage of the proceedings: (1) the stage of the proceedings at which standing is challenged; (2) the nature of the pleadings and what material facts are pled; (3) the nature of the public interest plaintiff; (4) whether an undertaking has been provided to provide evidence; and (5) whether actual evidence has been provided.

33 B.C. v. Council of Canadians with Disabilities, 2022 SCC 27, para. 71.

34 The Court emphasized that such a material change would typically occur during the pleadings and discovery stages: B.C. v. Council of Canadians with Disabilities, 2022 SCC 27, para. 77.

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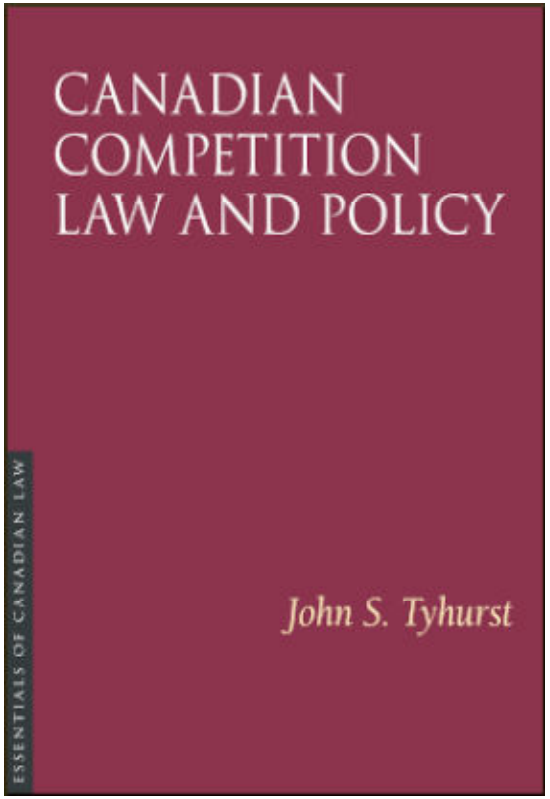
TAB 3


CANADIAN
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LAW AND POLICY
John S. Tyhurst
ESSENTIALS OF CANADIAN LAW

CHAPTER 2

ENFORCEMENT AND ADJUDICATION: HISTORICAL EVOLUTION AND CURRENT STRUCTURE

A. INTRODUCTION

Canada has had competition law since 1889, a year before the first antitrust legislation was passed in the United States. However, there was soon a marked divergence between America's forceful embrace of antitrust and Canada's rather anaemic scheme. The reasons for this included Canada's weak initial legislation, Canada's smaller and trade-dependent economy, a differing business and economic culture, and the constitutional structure of the two countries. By the 1960s, it was clear that Canada's "combines" regime was badly broken, largely ineffective, and in need of overhaul. Constitutional limitations had frustrated efforts to move away from the ineffective criminal law enforcement that lay at the centre of the problems facing the Canadian law. Reform was, however, a slow and incremental process. Major rounds of amendments took place in 1976, 1986, and 2009. With those changes, Canada's legislative scheme moved to the forefront of competition law regimes in the world, armed with the enforcement tools, adjudicative structure, and substantive tests which make it possible to promote strong and dynamic competition in the economy. For example, Canada was described in one journal article as "the leading jurisdiction" in dealing with efficiencies in merger assessment.[1]

1 Roger Ware & Ralph A Winter, "Merger Efficiencies in Canada: Lessons for the Integration of Economics into Antitrust Law" (2016) 61:3 *Antitrust Bulletin* 365 at 366.

This chapter examines the historical evolution of enforcement and adjudication of Canadian competition law, and describes the current structure. The emphasis will be on the institutions governing investigation and adjudication, and the reasons for their evolution over time. The major changes to the substantive law will be touched upon, but discussed in greater detail in later chapters. Table 2.1 below provides a chronological overview.

Table 2.1. Enforcement and Adjudication of Competition Law: 1889–Present

Period	Provisions	Investigation	Adjudication
1889–1910	**Criminal:** • conspiracy	AG of Province (crown prosecutor)	Courts
1910–1919	**Criminal:** • conspiracy • combines breaching a Board order	AG of Province (crown prosecutor)	Courts
	Civil: • combines: inquiry and report only	Ad Hoc Board	
1919–1923	**Civil:** • combines: inquiry, remedial orders	Board of Commerce	Board of Commerce
1923–1935	**Criminal:** • combines (merger, monopoly, etc.), conspiracy	Registrar or Ad Hoc Commissioners	Courts
1935–1937	**Criminal:** • conspiracy , price discrimination, predation	AG of Province (crown prosecutor)	Courts
	Civil: • exemption of agreements	Dominion Trade and Industry Commission	Dominion Trade and Industry Commission
1937–1952	**Criminal:** • conspiracy, combines, price discrimination, predation	Commissioner or Ad Hoc Commissioners	Courts
1952–1976	**Criminal:** • combines (until 1960) • merger/monopoly (from 1960) • conspiracy, price discrimination/predation, resale price maintenance, trade practices	Director of Investigation and Research	Courts
Regimes declared unconstitutional on division of powers grounds			

Period	Provisions	Investigation	Adjudication
1976–1986	**Criminal:** • conspiracy, price discrimination/predation, price maintenance, trade practices, merger/monopoly	Director of Investigation and Research	Courts
	Civil: • refusal to supply, consignment selling, exclusive dealing, tied selling, etc.	Director of Investigation and Research	Restrictive Trade Practices Commission
	Civil (private actions): actions for damages	Plaintiff	Courts
1986–present	**Criminal:** • conspiracy, trade practices • price discrimination/predation (until 2009) • price maintenance (until 2009)	• Director of Investigation and Research (until 1999) • Commissioner of Competition (from 1999)	Courts
	Civil: • merger, abuse of dominance • refusal to supply, exclusive dealing, tied selling, trade practices, etc. • consignment selling (until 2009) • resale price maintenance (from 2009)	• Director of Investigation and Research (until 1999) • Commissioner of Competition (from 1999)	Competition Tribunal
	Civil (private actions/applications): • actions for damages • leave applications to the Tribunal (from 2002)	Plaintiff/Applicant	Courts , Competition Tribunal

Three main themes will be explored in this chapter:

1) During the first half-century of competition law in Canada, there was an evolution of enforcement toward a specialized agency with increasing resources, powers, and expertise.
2) Since the 1970s, there has been a gradual movement away from the criminal courts and criminal offences and toward a specialized civil tribunal to adjudicate a growing number of civilly reviewable practices.

3) Private enforcement avenues have become increasingly available through a statutory cause of action for damages (for breach of the criminal prohibitions) and private access to the Competition Tribunal (to obtain remedies for certain civilly reviewable practices). Since the advent of class actions reform, and recent Supreme Court jurisprudence, the civil damages action has shown the promise of becoming a more important companion to public enforcement.

B. HISTORY OF ENFORCEMENT AND ADJUDICATION

1) The First Legislation, 1889: A Paper Tiger

Canada's first competition legislation had its roots in events which occurred in the first decades after Confederation.[2] During this period, the Canadian economy experienced several ups and downs in the business cycle between growth and recession. Years of growth in heavy industry, transportation, and other sectors of the North American economy were matched by recessions in the 1870s and then 1880s. Some businesses reacted to market downturns with price cutting, then to the drop in prices with consolidation and restrictive agreements.[3] In the United States, great fortunes were gathered by the "trusts" in railways, oil, whiskey, meat, nails, lead, copper, steel rail, iron nuts and washers, barbed fence wire, slate-pencils, nickel, zinc, jute bags, castor oil, linseed oil, cottonseed oil, and other products.[4]

In Canada, the effect of similar combines and restrictive arrangements was magnified by the National Policy, the economic policy of Prime Minister Sir John A Macdonald which centred on the erection of high tariffs to help develop manufacturing industry in central Canada. Under the Policy, for example, duties on textiles and footwear were raised to approximately 30 percent and 25 percent, respectively. Such

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2 Described in generous terms by one commentator as "the world's first modern competition statute": Charles Paul Hoffman, "A Reappraisal of the Canadian Anti-Combines Act of 1889" (2013) 39 *Queen's Law Journal* 127 at 128 [Hoffman].

3 William T Easterbrook & Hugh Aitken, *Canadian Economic History* (Toronto: MacMillan, 1975) at 387–400.

4 Robin Carey, "The Sherman Act: What Did Congress Intend?" (1989) 34:2 *Antitrust Bulletin* 337 and 338–41; Carman D Baggaley, "Tariffs, Combines and Politics: The Beginning of Canadian Competition Policy, 1888-1900" [Baggaley] in RS Khemani & William T Stanbury, eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: IRPP, 1991) at 9 [Khemani & Stanbury, *Historical Perspectives*].

tariffs promoted domestic industry and provided funds to finance projects such as the transcontinental railway, but they also insulated Canadian business from foreign competition. (See Figure 2.1.)

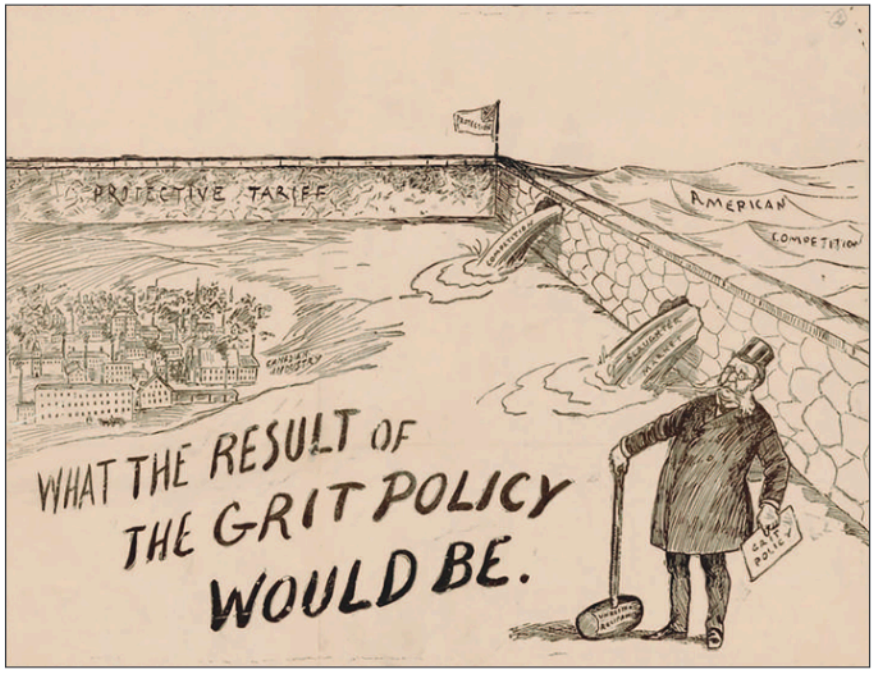

FIGURE 2.2. A cartoon supporting the National Policy depicts the benefit of the tariff as a dam holding back "American competition" (National Archives, LAC item 2989918)

In 1888, increased visibility in the press and in political debate concerning private combines which controlled supply or fixed prices of sugar, coal, and other products led to a "Select Committee on Combinations" being appointed by Parliament to examine the nature, extent, and effect of business combinations in Canada. The Committee's Report concluded that the "injurious tendencies" of such combinations of competing sellers in industries such as sugar and stoves, groceries, coal, coffins, biscuits, barbed wire, and binder twine "justify legislative action arising from these and similar combinations and monopolies."[5] One combine of Ottawa coal suppliers, for example, channelled the product

5 Canada, *Report of the Select Committee appointed 29th February, 1888, to Investigate and Report upon alleged combinations in Manufacturing, Trade and Insurance in Canada* by NC Wallace in 51-52 Vict, Sessional Papers, 6th Parl, 2d Sess (16 May 1888) at 10; see also John M Magwood, *Competition Law of Canada* (Toronto: Carswell, 1981) at 42.

FIGURE 2.3.
N Clarke Wallace, MP

through a single jointly-controlled company, which carried out delivery to customers at a common price and distributed substantial profits back to the "competitors."

N Clarke Wallace, a back-bench Member of Parliament and small businessman from the Toronto area, chaired the Select Committee. Shortly after the release of the Committee's report, he tabled a private member's bill, proposing to create an offence of combining, agreeing, or arranging to prevent or restrict competition in various ways.[6] While public statements by Wallace described the bill as providing "prompt and decisive action" to the evil of combines,[7] there are differing views on what motivations were at play. Some commentators have viewed the bill as "part of a calculated Conservative manoeuvre to deflect criticism from the combines-creating effects of the protective tariff";[8] others as "a genuine attempt to resolve the combines problem in its incipiency."[9]

Wallace's Conservative government colleagues did not wholeheartedly embrace his proposal: "the lukewarm, almost disinterested, attitude of the government afforded little aid to the measure's parliamentary progress."[10] When reviewed by a Parliamentary Committee the following year, the statutory language was watered down by requiring that the conduct in question be carried out "unlawfully," "unreasonably," or "unduly." These words found their way into the final legislation, *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*.[11] The *Act* created a misdemeanour with a maximum penalty of $4,000 or two years' imprisonment for "[e]very person who conspires, combines, agrees or arranges with any other person ... *unlawfully* ... [t]o *unduly* prevent or lessen competition" or "to *unreasonably* enhance"

6 Richard Gosse, *The Law on Competition in Canada* (Toronto: Carswell, 1962) at 70.
7 Baggaley, above note 4 at 22.
8 Michael Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889–1910" (1973) 47 *Business History Review* 177 at 180. See also Lloyd G Reynolds, *The Control of Competition in Canada* (Cambridge, MA: Harvard University Press, 1940) at 134.
9 Hoffman, above note 2 at 173.
10 Maxwell Cohen, "The Canadian Anti-Trust Laws—Doctrinal and Legislative Beginnings" (1938) 16:6 *Canadian Bar Review* 439 at 455 [Cohen].
11 (1889) 52 Vict, c 41 [*Canada Anti-Combines Act* 1889]; Cohen, above note 10 at 455–58; Baggaley, above note 4 at 24–25.

prices.[12] The offence was incorporated into the *Criminal Code* in 1892.[13]

The word "unlawfully" incorporated the existing common law jurisprudence, leaving the law effectively unchanged.[14] This reflected the view of the then Minister of Justice, who said in the House that "the Bill ... will not create any new offence."[15] The common law at the time provided only a weak foundation to attack restrictions on competition, as the relevant test was oriented toward protecting the fairness of the bargain between the parties, not the anti-competitive effects of restrictive agreements on the general public.[16] Justice Osler of the Ontario Court of Appeal summed the situation up well when he held that this convoluted language "made the section unintelligible and innocuous by attaching a penalty only to a conspiracy to do an unlawful act unduly."[17] A prominent Canadian business historian aptly described the 1889 Act as "utterly useless."[18] After a series of attempts, Parliament finally removed the word "unlawfully" in 1900.[19] However, the words "unduly" and "unreasonably" remained, reducing the effectiveness of the prohibition.

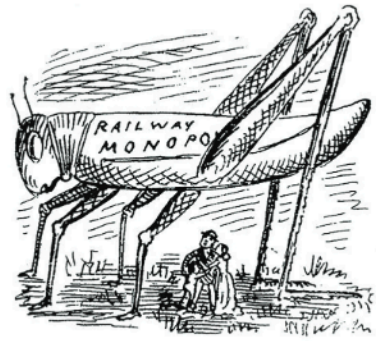

FIGURE 2.4. *Grip* magazine, Toronto, 1880

The unwillingness of Canadian legislators to embrace forceful competition law and enforcement is a theme repeated throughout subsequent decades, including after the Economic Council of Canada had recommended wholesale reform in 1969.[20] Thus, while Canada's

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12 *Canada Anti-Combines Act* 1889, s 1. In 1892, the section was placed in the *Criminal Code*, SC 1892, c 29 as s 520 [*Criminal Code* 1892]; in 1900, as s 498 of the *Criminal Code*, RSC 1927, c 36.

13 *Criminal Code* 1892, above note 12, s 520.

14 Cohen, above note 10 at 461–63, citing *R v American Tobacco Company of Canada* (1897) 3 *Rev de Jur* 453, the first reported prosecution under the legislation.

15 *House of Commons Debates*, 6th Parl, 3d Sess (8 April 1889) at 1438 (Sir John Thompson).

16 Cohen, above note 10 at 440–53.

17 *R v Elliott*, [1905] OJ No 162 (CA) at para 55.

18 Michael Bliss, *A Living Profit* (Toronto: McClelland & Stewart, 1974) at 39.

19 Baggaley, above note 4 at 41; *An Act to further amend the Criminal Code*, SC 1900, c 46, s 3. In fact, "unduly" and "unreasonably" were briefly removed (and then re-inserted) before "unlawfully" was removed: *ibid*, s 1.

20 Canada, Bureau of Competition Policy, *Competition Policy in Canada: The First Hundred Years* (Ottawa: Consumer and Corporate Affairs Canada, 1989) at 19–20 [*Competition Policy in Canada*].

competition legislation shares historical roots, at least in terms of its initial timing, with its American counterparts (the first US antitrust legislation being passed in 1890[21]), these roots were not, for a significant period, nurtured in Canada.

Over most of its early history, Canada's combines policy and enforcement reflected an historic British tendency to tolerate the possession of economic power.[22] For almost a century in Canada after the passage of the first legislation in 1889, a combination of historical circumstances, political culture and economic conditions led to a weak response to anti-competitive practices, merger, and monopoly. This flowed from both the lack of effective legislation and its weak enforcement. British influences and institutions, starting with the monopoly granted to the Hudson's Bay Company in 1670, have shaped Canadian economic development. The relatively small size of the Canadian economy and the periodic need for nation-building projects led to reliance on economic power in the form of Crown or other monopolies in sectors such as transcontinental railway, energy, or broadcasting. Lacking a revolutionary history or civil war, and with a different frontier tradition, Canadians demonstrated a greater degree of deference to sources of authority of various kinds, whether king, country, or company.[23] Author Peter C Newman has described an "early attitude of obedience and fear of distant authority" in Canada, which was quite different from that prevailing south of the border:

> [The] tendency to defer to corporate authority . . . was one of the most significant differences between the Canadian and American frontiers. Lacking any corporate infrastructure, the American Wild West developed in exactly the opposite direction. There, rugged individualism became the way of life, enforced with the fabled six-shooter. Every man and woman was on his or her own, challenging or escaping authority, never catering to it.[24]

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21 *Sherman Act*, 26 US Stat 209 (1890).

22 Frederic M Scherer, *Industrial Market Structure and Economic Performance* (Boston: Houghton-Mifflin, 1980) at 512, citing AD Neale, *Antitrust Laws and the United States* (London: Cambridge University Press, 1967) at 475–76, who wrote: "In general, the possession of power by established authorities arouses a much lesser degree of anxiety or resentment in Britain, where emphasis is much more on the use of power."

23 Bruce Dunlop, Michael J Trebilcock & David McQueen, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 20–22 [Dunlop, Trebilcock & McQueen].

24 Peter C Newman, *The Canadian Revolution 1985-1995: From Deference to Defiance* (Toronto: Viking, 1997) at 8.

Canada's constitutional structure also significantly affected the development of competition law. Substantial economic powers were granted to the provinces in the *British North America Act, 1867*.[25] Early constitutional jurisprudence narrowly interpreted the scope of federal legislative authority over trade and commerce.[26] As a result, competition laws remained shackled to the criminal law as an enforcement vehicle, with constitutional uncertainty leading to hesitation to adopt another approach for more than half a century, from the 1930s through to the 1980s.[27]

For these reasons, Canadian competition law and enforcement had weak beginnings and a slow development. The differences between the competition law regimes in the United States and Canada, however, have narrowed with the growing integration of the North American economy, a change in direction of Canadian constitutional jurisprudence, and several rounds of amendments to the Canadian legislation, which began in the mid-1970s.

Looking back on the origins of the Canadian law, it is evident that the first legislation cannot be characterized as a part of some unified or carefully planned framework of economic policies. Rather, its development was reactive rather than proactive. Limited and ineffective legislation was passed in response to public, and political, concern over the "combines problem" and the unintended side-effects of a high tariffs policy. This reactive character continued until more recent decades, when circumstances and growing economic learning helped competition policy take a more central place among other economic and regulatory policies.

2) Evolution of the Enforcement Role

Over the decades, competition legislation has gone through a series of changes which created the bureaucratic and legal infrastructure for investigation, collection of evidence and statistics, searching premises, and compelling oral evidence, and bringing matters to adjudication. The present legislation contains few remnants of the enforcement machinery put in place in the early 1900s. An example is the ability of

25 Now *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

26 See, e.g., *Canada (Attorney General) v Alberta (Attorney General)* (1921), 60 DLR 513 (UKPC) [*Reference re Board of Commerce Act, 1919*].

27 Canada, Committee to Study Combines Legislation, *Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance* (Ottawa: Queen's Printer, 1952) at 7: "There has been a widely held view that the jurisdiction of the Federal Government did not extend beyond the criminal field. This partly explains why other types of action, which have been adopted in other countries, have not been used in Canada."

six citizens to initiate an inquiry, found in section 9 of today's *Competition Act*, which dates from the 1910 *Combines Investigation Act*.[28] In general terms, there has been a slow and steady evolution toward a more independent, sophisticated, and better-resourced enforcement authority for competition law in Canada.

In addition to weaknesses in the substantive law, the first legislation contained no formal investigative processes or permanent enforcement agency. The enforcement function was left to the provincial Attorneys General, reacting to public complaints; a mechanism described in an early text as "lethargic."[29] Only ten prosecutions were brought in the period 1889–1910 (nine after the word "unlawfully" was removed in 1900), and seven convictions were obtained.[30]

Complaints by individuals, who generally lack the information, knowledge, or incentive to bring forward cases, are an ineffective avenue for initiating investigations and prosecutions of matters such as price fixing. In spite of the severe harm that may be caused to the economy at large, the effects of such conduct are often broadly spread across a market, and an individual consumer is unlikely to experience sufficient economic loss or outrage to believe that it justifies the time and personal exposure to file and to pursue a complaint. Furthermore, the disclosure, investigation, and proof of such practices often requires the marshalling of data and economic evidence which requires specialized knowledge, and "falls more in the realm of the economist than the police detective."[31] Conspiratorial behaviour is also usually clandestine, and uncovering evidence often requires special powers for the search, seizure, or compulsion of the production of business and financial records. The possession of such powers is insufficient unless their holder also possesses the knowledge of where to look, and what to look for.

Over the period 1889–1952, there were four identifiable periods in the evolution of the enforcement function governing competition law in Canada (the following omits the regimes found unconstitutional in 1921 and 1937[32]):

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28 *Competition Act*, RSC 1985, c C-34 [*Competition Act*]; *Combines Investigation Act*, SC 1910, c 9, s 5 [*Combines Investigation Act* 1910].

29 John A Ball, *Canadian Anti-Trust Legislation* (Baltimore: William & Wilkins, 1934) at 23; see also Paul K Gorecki & William T Stanbury, "The Administration and Enforcement of Competition Policy in Canada, 1889 to 1952," ch 2 of Khemani & Stanbury, *Historical Perspectives*, above note 4 at 61 [Gorecki & Stanbury, "The Administration and Enforcement of Competition Policy in Canada"].

30 *Competition Policy in Canada*, above note 20 at 7, Table 4.

31 Dunlop, Trebilcock & McQueen, above note 23 at 45.

32 *Ibid* at 46–48. See also Table 2.1 above.

Table 2.2. Evolution of the Enforcement Function 1889–1952

1. **1889–1910**[33] In this period, there was no formal enforcement agency. The prosecution of cases was left to complaints by the public to prosecutors. Competition law offences were treated as any other criminal prohibition. Few cases were brought forward.
2. **1910–1923**[34] A process for the referral of complaints from six citizens to an *ad hoc* Board for the preparation of a report[35] was put in place. Formal powers of inquiry to assist the production of evidence were made available. Only one case was brought using this structure.[36]
3. **1923–1952**[37] A permanent enforcement official, the "Registrar" (renamed the "Commissioner" in 1937) was given the task of carrying out investigations and making reports, along with investigative powers.[38] The Registrar could initiate investigations, or rely upon six citizens or the Minister. Enforcement activities increased.
4. **1952 onward**[39] The permanent enforcement official was renamed the "Director of Investigation and Research" in 1952 and the preparation of reports was assigned to the Restrictive Trade Practices Commission. The Director's enforcement role was limited to carrying out investigations as opposed to preparing reports assessing conduct.

While there was only one investigation from 1910 to 1919,[40] and no prosecutions during that period,[41] from 1923 to 1952 there were forty-one reports prepared from investigations carried out under the legislation; all but thirteen were made public. The vast majority of the reports

33 *Proprietary Articles Trade Association v Canada (Attorney General)*, [1931] 2 DLR 1 (UKPC) at paras 9–10 [*Proprietary Articles Trade Associa*tion] sets out the history of this enforcement regime.

34 *Combines Investigation Act* 1910, above note 28.

35 *Competition Policy in Canada*, above note 20 at 7–8. "Reports" were summaries of the anti-competitive behaviour which were to be made public on the belief that "publicity is more effective than penalty": William Lyon Mackenzie King, then Minister of Labour, 1912; *ibid* at 8.

36 The case involved the United Shoe Machinery Company. See Ball, above note 29, ch 5, "Combines Investigation Act of 1910."

37 *Combines Investigation Act*, SC 1923, c 9.

38 *Ibid*; in particular, see the new investigative powers in ss 8–18.

39 *Combines Investigation Act*, RSC 1952, c 314.

40 Until the advent of the Board of Commerce, which was found unconstitutional in 1923.

41 Gorecki & Stanbury, "The Administration and Enforcement of Competition Policy in Canada," above note 29 at 69–70.

related to price fixing; a handful to merger, monopoly, and other practices.[42] Eighteen prosecutions were brought, with fourteen convictions, all for price fixing.[43]

From 1952 until the mid-1970s, the Restrictive Trade Practices Commission (RTPC) was referred numerous matters for the purposes of conducting an inquiry. In this period, it prepared seventy-seven reports from its inquiries, all of which were public.[44] The inquiry reports related to alleged anti-competitive conduct and created a rich legacy of information about industry structure and practices.[45] The reports provide some of the only "jurisprudence" in the areas of merger and monopoly in that time period. Some matters were referred to the Commission as so-called research inquiries, leading to recommendations to reform or to amend the legislation. An example was the Commission's 1962 report from an inquiry into petroleum industry distribution practices.[46] The report from that inquiry recommended the adoption of provisions relating to exclusive dealing and tied selling, which were added to the legislation in 1976.[47]

By the late 1970s, however, the RTPC was no longer being referred case-specific investigations for inquiry and report,[48] and in 1986 these functions were eliminated, the Commission was disbanded, and the Competition Tribunal was created (see below). The investigation function was thereafter solely the responsibility of the Director of Investigation and Research and the public report function ceased to exist.

The level of enforcement activity is a reflection, to a degree, of the budget of competition law enforcement officials. That budget also demonstrates the resources Parliament had been willing to devote to this task. The average yearly expenditures did not exceed $100,000 (in current dollars) until the period 1946–1950. From 1966 to 1970, they exceeded $1 million; during 1986 to 1988 this had grown to more than

42 *Ibid*, Table 5 at 135.

43 *Ibid*, Table 11 at 142–43.

44 JJ Quinlan, "The Restrictive Trade Practices Commission: Its Functions and Duties" (1975) 44 *Antitrust Law Journal* 492 at 502.

45 See, e.g., the cases reviewed in G Rosenbluth, "Monopoly and Monopolization," ch 13 of Robert S Pritchard, William T Stanbury & Thomas Wilson, eds, *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths, 1979) at 331–35 [Pritchard, Stanbury & Wilson].

46 Canada, Restrictive Trade Practices Commission, *Report on the Distribution and Sale of Automotive Oils, Greases, Anti-Freeze, Additives, Tires, Batteries and Accessories and Related Products* (Ottawa: Queen's Printer, 1962).

47 See Chapter 9.

48 Paul K Gorecki & William T Stanbury, "Canada's *Combines Investigation Act*, The Record of Public Law Enforcement, 1889-1976," in ch 13 of Pritchard, Stanbury & Wilson, above note 45 at 153.

$15 million.[49] The Director of Investigation and Research was renamed the Commissioner of Competition in 1999.[50] As noted in Chapter 1, the Commissioner heads the Competition Bureau, which had more than 350 employees and a budget of $52.5 million in 2018–19.[51]

The rationale for special investigatory powers in the enforcement of competition legislation was well summarized in the *Guide* which accompanied the 1986 amendments:

> In addition to the difficulties of detection, competition matters are characterized by unique enforcement problems. Because inquiries under the Act often involve assessing a firm's behaviour against the probable economic effects of the conduct, the analysis is unusually complex and often prospective. Sufficient information, including documentary information, must be available for the enforcement agency to make informed decisions. . . . [E]nforcement of legislation involving these critical factors requires effective investigatory powers. These include the powers to search premises and seize documents, require written return of information and affidavit evidence and subpoena witnesses to give oral testimony or produce documents.[52]

The 1986 amendments included changes to ensure compliance with the *Charter of Rights and Freedoms*[53] in respect of the search and seizure powers in the legislation. The Supreme Court had held in *Hunter v Southam Inc* that the RTPC, given its investigative role, could not act judicially to provide prior authorization of search warrants.[54] In 1990, in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, the Supreme Court upheld the amended procedures for compelling evidence and documents in the legislative scheme. Justice La Forest explained the need for special powers possessed by competition authorities to compel oral and documentary evidence:

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49 *Competition Policy in Canada*, above note 20, Table 1 at 58.

50 *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, SC 1999, c 2, s 4 [*An Act to amend the Competition Act* 1999].

51 Canada, Competition Bureau, *2018-19 Annual Plan: Building Trust to Advance Competition in the Marketplace* (3 May 2018), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04356.html.

52 Canada, Department of Consumer and Corporate Affairs, *Competition Law Amendments, A Guide* (Ottawa: Minister of Supply and Services, 1985) at 13.

53 The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

54 *Hunter v Southam Inc*, [1984] 2 SCR 145 [*Hunter v Southam*].

> [B]ecause of the nature of the conduct regulated by the *Act*, there will in many cases be no way of determining whether proscribed conduct has been engaged in, short of studying the process by which a suspected corporation or business has made and implemented its decisions. . . . Investigatory mechanisms which force corporations and other businesses to divulge what they and only they can know about their internal affairs are part of the state's interest in the enforcement of combines legislation. The power to subpoena books, records and documents is obviously one such investigatory mechanism.[55]

In addition to *Charter* compliance, investigative powers and programs have had to adapt to changing times and conditions, for example:

- In 1999, wiretapping was permitted for investigations into the conspiracy, bid-rigging, and deceptive telemarketing offences.[56]
- Provisions to protect whistleblowers (any person who has reasonable grounds to believe that another person has committed or intends to commit an offence) were also added in 1999.[57]
- In 2002, amendments were made to facilitate cooperation with foreign competition authorities for the enforcement of competition and fair trade practices laws.[58]
- In 2009, in merger cases, the Commissioner was given the power to make supplementary requests for information. Such requests automatically delay the closing of a transaction until thirty days after receipt by the Commissioner of the information requested, facilitating the completion of the Commissioner's investigation.[59]

From the foregoing, we see that Canadian competition law enforcement has evolved over the decades since 1889 toward a permanent enforcement agency, with specialized powers and increasing resources to analyze and to marshal the evidence produced. The early years demonstrated that this area of the law requires the expertise of a full-time enforcement agency which has specialized investigative knowledge and the authority to compel production of evidence. An increasing enforcement sophistication has occurred over time. The Commissioner now possesses powers to compel the production, interception, and seizure

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55 *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at para 153.

56 *An Act to amend the Competition Act* 1999, above note 50, s 47.

57 *Ibid*, s 19.

58 *An Act to amend the Competition Act and the Competition Tribunal Act*, SC 2002, c 16, s 3 [*An Act to amend the Competition Act* 2002].

59 *Budget Implementation Act, 2009*, SC 2009, c 2, s 439 [*Budget Implementation Act, 2009*].

of evidence and other investigative tools. Specialized powers have been developed to cope with the unique problems posed by economic evidence, transnational anti-competitive behaviour, clandestine conspiratorial conduct, and electronic business records.

3) Moving from Criminal Toward Civil Law Adjudication

a) The Constitutional Division of Powers: Reliance on the Criminal Law Power

As noted earlier, during the first century of Canadian combines laws, attempts to move beyond the criminal law for enforcement were limited by constitutional uncertainty. Legislation giving a civil tribunal the authority to make final orders was struck down by the Judicial Committee of the Privy Council in the *Board of Commerce* case in 1921[60] and by the Supreme Court in the *Reference re Dominion Trade and Industry Commission* in 1936.[61] The Privy Council in the *Board of Commerce* case took a narrow view of federal trade and commerce authority, holding that the power to regulate "trade and commerce [does] not, by itself, enable interference with particular trades."[62] This contrasted with the situation in the United States, where the interstate commerce jurisdiction had long been recognized as a foundation for federal antitrust law.[63]

On the other hand, the Canadian courts consistently confirmed the constitutionality of Parliament's criminal law authority as a basis for competition law. The criminal enforcement regime put in place under the *Combines Investigation Act* of 1923 was confirmed in *Proprietary Articles Trade Association v Canada (Attorney General)*.[64] The Privy Council had no difficulty with the proposition that commercial activities found by Parliament to be against the public interest could be made crimes. In the *Dominion Trade and Industry* decision, the Supreme Court and Privy Council upheld the investigative powers given the Commission as within the federal criminal law power.[65] The price discrimination and predatory pricing provisions added in 1935 were sustained under the criminal law power in *British Columbia (Attorney General) v Canada*

60 *Reference re Board of Commerce Act, 1919*, above note 26.

61 *Reference re legislative jurisdiction of Parliament of Canada to enact the Dominion Trade and Industry Commission Act, 1935*, [1936] SCR 379 [*Dominion Trade and Industry Commission* SCC], aff'd [1937] AC 405 (UKPC) [*Dominion Trade and Industry Commission* UKPC].

62 *Reference re Board of Commerce Act*, above note 26 at 517.

63 US Constitution, art I, § 8, cl 3.

64 *Proprietary Articles Trade Association*, above note 33.

65 *Dominion Trade and Industry Commission* SCC, above note 61, aff'd *Dominion Trade and Industry Commission* UKPC, above note 61.

(Attorney General).[66] In 1956, the Supreme Court (which had by then become Canada's highest appellate court) similarly sustained a section in the *Combines Investigation Act* providing for the making of prohibition orders as criminal law.[67] Prohibitions of resale price maintenance,[68] conspiracy,[69] and pyramid selling[70] were also held to be within federal competence based on the criminal law power.

b) Enforcement Problems in the Criminal Courts

In 1957, the Supreme Court of Canada heard an appeal in *R v Howard Smith Paper Mills*, a prosecution for price fixing in the production and distribution of fine papers, which raised the question of when a conspiracy to fix prices would be considered "undue" under the criminal conspiracy prohibition. Justice Cartwright, concurring, held:

> [A]n agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on these activities *virtually unaffected by the influence of competition* . . . that is, it is the arrogation to the members of the combination of the power to carry on their activities *without competition* which is rendered unlawful.[71]

The italicized text implied that a virtual monopoly among the conspirators was required before the agreement would violate the Act. This was a much higher standard than had previously been applied. While Cartwright J did not speak for a majority of the Court, his judgment created confusion,[72] and a troubling trend in the law.

Other setbacks came in two criminal prosecutions of mergers decided in 1960, *R v Canadian Breweries Ltd*[73] and *R v British Columbia Sugar Refining Co*.[74] (These cases are discussed in more detail in Chapter 5.) At that time, under the *Combines Investigation Act*, mergers fell within the criminal prohibition of "the formation or operation of

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66 *British Columbia (Attorney General) v Canada (Attorney General)*, [1937] 1 DLR 688 (UKPC).

67 *Goodyear Tire & Rubber Co v R* (1956), 2 DLR (2d) 11 (SCC).

68 *R v Campbell* (1966), 58 DLR (2d) 673n (SCC), aff'g (1964), 46 DLR (2d) 83 (Ont CA).

69 *Canada (Attorney General) v CN Transportation Ltd*, [1983] 2 SCR 206 [*CN Transportation*].

70 *Canada v Shaklee Canada Inc*, [1985] 1 FC 593 (CA).

71 *R v Howard Smith Paper Mills*, [1957] SCR 403 at 426 [emphasis added].

72 Dunlop, Trebilcock & McQueen, above note 23 at 125. See, e.g., *R v Aetna Insurance Co*, [1978] 1 SCR 731 at 740–41.

73 *R v Canadian Breweries Ltd*, [1960] OR 601 (HCJ) [*Canadian Breweries*].

74 *R v British Columbia Sugar Refining Co* (1960), 129 CCC 7 (Man QB) [*BC Sugar*].

a combine"[75] where the merger "operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others."[76] In both cases, the mergers had resulted in substantial control of the markets in question, but the trial courts were not satisfied that the necessary "detriment to the public" had been shown beyond a reasonable doubt. These cases suggested that the criminal law was ill-adapted to sanctioning certain types of anti-competitive conduct. Several reasons can be identified:

- The courts were reluctant to brand as criminal business conduct, such as mergers and acquisitions, subject to a case-by-case assessment based upon a "detriment to the public" standard. Given the need to balance myriad economic considerations under this standard—a "polycentric" inquiry—such conduct often lacks the character to justify the moral condemnation and the proof to result in a criminal conviction.[77] The criminal law *mens rea* requirement shifts the inquiry toward moral blameworthiness, rather than an assessment of whether the public interest has been prejudiced by the *effects* of the conduct, which is the principal concern of competition law.
- The criminal law presents a number of procedural difficulties for the presentation of economic evidence and concepts. Strict rules of evidence make the tendering of a wide range of data more difficult. The "beyond a reasonable doubt" burden of proof is difficult to meet where the assessment of such matters as the *likely* future impact of a practice on markets and competition is at issue.[78] Criminal remedies are also usually directed toward punishment rather than market restructuring and remedial action.
- Economic expertise is uncommon on the bench, particularly for courts hearing criminal matters. Economic evidence and assessment is unfamiliar territory for many judges.[79] In *R v McGavin Bakeries,* for example, a price fixing prosecution, the trial judge, cited *R v Container Materials* as follows:

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75 *Combines Investigation Act*, RSC 1952, c 314, s 32.

76 *Ibid*, s 2(a)(vi).

77 Michael J Trebilcock, "The Supreme Court and Strengthening the Conditions for Effective Competition in the Canadian Economy" (2001) 80 *Canadian Bar Review* 542 at 588; Bruce C McDonald, "Criminality and the Canadian Anti-combines Laws" (1965) 4 *Alberta Law Review* 67 at 74–75 [McDonald].

78 McDonald, *ibid* at 87.

79 Irving Brecher, *Canada's Competition Policy Revisited: Some New Thoughts on an Old Story* (Montreal: IRPP, 1982) at 13 [Brecher], commenting on the merger decisions: "an unsophisticated judiciary, overwhelmed by strict criminal law tests, had come very close to rendering the merger offence meaningless."

> Hope J. at p. 296 points out that: "Our lady of the common law is not a professed economist," and in my opinion the same is true of our statute law . . . in the apt language of Hope J. . . . of which I approve and with respect adopt, in view of the fact that economics are not by any means an exact science I do not feel I am justified in the circumstances of this case in developing any new jurisprudence based on alleged new or fashionable economic theories.[80]

Reviewing the combines decisions in 1965, a leading member of the bar questioned the institutional competence of the criminal courts to decide competition cases:

> The demands of 1889 are not the demands of the 1960's, and the combines cases illustrate contortions through which the courts have been going in their attempts to accommodate the change absent any fundamental overhaul of the statute. The object of the statute has changed, and increasingly the control of combines is recognized as a sophisticated problem requiring analysis of economic data. The Canadian courts, aware of their deficiencies in the training need for such evaluations, resist as much as possible any debate over or inquiry into economic data or theory.[81]

The criminal monopoly provision was also subject to the same requirement of operating "to the detriment or against the interests of the public" and therefore to the high thresholds applied by the courts in *Canadian Breweries* and *BC Sugar*. There was only one conviction for the offence of monopoly throughout the criminal law's lifespan[82] and as a result of the test applied by the courts, it "was widely perceived as ineffective in dealing with anti-competitive conduct by dominant firms."[83]

By the 1960s, Canadian combines law was an awkward jumble of sometimes conflicting prohibitions, all uneasily enforced under the banner of the criminal law. For example, even though the Supreme Court, in reference to the legislation's central conspiracy prohibition, had held that "[t]he enactment before us . . . was passed for the protection of the specific public interest in free competition,"[84] provisions such as predatory pricing and price discrimination (enacted in 1935) were directed

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80 *R v McGavin Bakeries Limited*, [1952] 13 CR 63 (Alta QB) at para 50, citing *R v Container Materials*, [1940] 4 DLR 293 at 296 (Ont SCJ).

81 McDonald, above note 77 at 92.

82 *R v Eddy Match Company Limited* (1953), 109 CCC 1 (Que CA).

83 D Jeffrey Brown, ed, *Competition Act and Commentary* (Markham: LexisNexis, 2016) at 123 [Brown, ed].

84 *R v Container Materials*, [1942] SCR 147 at 152.

as much at protecting competitors as promoting competition.[85] The tide was turning however; competition policy was finally being viewed as having a central place among other economic and regulatory policies.

In 1966, the Liberal government decided to refer "the whole question of combines, mergers, monopolies and restraint to trade" to the Economic Council of Canada along with other issues such as intellectual property. It stated that it did not want to make "piecemeal" changes to the *Combines Investigation Act*. Changes would only be undertaken "in the context of the whole review and any revisions that may take place in light of the findings of the Economic Council."[86] The government thus saw competition policy as an element of broader economic policy. This, itself, represented a more modern view, and an evolution of thinking in comparison to the reactive nature of the early law.

c) The *Interim Report on Competition Policy*

The *Interim Report on Competition Policy* of the Economic Council of Canada was released in July 1969 (Figure 2.5).[87] (In spite of its title, there was no further, or *final*, report.[88]) The Chairman of the Council described the *Report* as "a consensus among twenty-eight people reflecting a very broad cross-section of views and interests in different parts of the country and different sectors of the economy."[89]

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85 Lawrence A Skeoch & Bruce C McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa, Consumer and Corporate Affairs, 1976) at 223 [*Skeoch-McDonald Report*], observing that predatory pricing "can be construed as protecting competitors, regardless of the overall effect on competition or efficiency. To this extent, the provision is in conflict with the economic analysis of predation." See also Chapter 9.

86 Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 200 [*Interim Report* 1969].

87 For further background, see John S Tyhurst, "50 Years On: The Influence of the Economic Council of Canada's Interim Report on Competition Policy" (2019) 32 *Canadian Competition Law Review* 122.

88 The Council released two other "interim" reports (also final); its first, released in 1967, resulted in legislation to create the Department of Consumer and Corporate Affairs, transferring supervision of the Director of Investigation and Research, the predecessor to the Commissioner of Competition, to that Department from the Registrar General. See William T Stanbury, *Business Interests and Reform of Canadian Competition Policy, 1971-1975* (Toronto: Carswell/Methuen, 1977) at 61 [Stanbury].

89 *Ibid* at 63. Under its 1963 enabling legislation, *An Act to establish the Economic Council of Canada Act*, 12 Eliz II, c 11, s 3, as repealed 1993, c 1, s 23, the Council was composed of "a chairman, two directors and not more than twenty-five other members, to be appointed by the Governor in Council": The members were drawn from a broad cross-section of society—from business and agriculture to

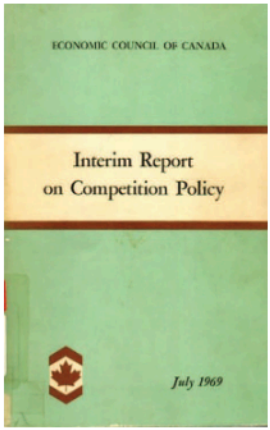

FIGURE 2.5. The *Interim Report on Competition Policy*

The *Report* began by noting how much the country had changed, in terms of industrialization and urbanization, in the preceding years. It noted that the government had requested a fundamental re-examination of the role of competition policy in the economy in light of these changes.[90] The Council's assessment was that competition legislation had historically had little more than a "modest" or "uneven" impact on the economy. In the area of corporate mergers, for example, the Report concluded bluntly that "the Act has been all but inoperative."[91] It stated that "it has proved impossible, within the confines of the criminal court procedure, to provide the sort of examination of complex economic phenomena that would adequately satisfy the protection of the public interest."[92]

The *Report* contained two powerful, and as it turned out, persuasive, ideas.

First, the *Report*'s second chapter, "Philosophy and Problems" proposed that "the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy."[93] The Report explained that historically, "popular thinking about competition policy" had emphasized the "income distribution" objective—the transfer of income which occurs, for example, when a monopoly seller raises prices to the consumer.[94] It explained, however, that other policies, such as taxation and direct subsidies would be more effective in achieving distributive goals; that elevating efficiency as the main objective was likely to lead to a more consistent application of competition policy.[95] The Report's emphasis was on pursuing "the most efficient performance from the economy" in terms of optimal resource use (i.e., allocative efficiency)[96] as well as "the recognition of the importance of research, invention and innovation" (i.e., dynamic efficiency).[97]

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academe. See D McQueen, "Revising Competition Law: Overview by a Participant," ch 1 in Prichard, Stanbury & Wilson, above note 45 at 6.

90 *Interim Report* 1969, above note 86 at 1–4.

91 *Ibid* at 64.

92 *Ibid* at 70.

93 *Ibid* at 19.

94 *Ibid* at 6–7.

95 *Ibid* at 20.

96 *Ibid* at 19.

97 *Ibid* at 19 and 12–15.

Second, the Council recommended moving away from criminal law enforcement of competition law. The Council argued that conduct which could be prohibited outright, such as bid rigging, price fixing, market allocation, resale price maintenance, and misleading advertising, should continue to be dealt with under the criminal law.[98] However, other practices, such as mergers and monopoly, require an assessment of their economic effects based on the facts of a particular case, and should be adjudicated by a new, independent, expert, "Competitive Practices Tribunal."[99] The rationale was explained as follows:

> The basic reason for seeking to place some of the federal government's competition policy on a civil law basis would be to improve its relevance to economic goals, its effectiveness, and its acceptability to the general public. The greater flexibility afforded by the civil law is especially to be desired in those areas of the policy that do not lend themselves to relatively unqualified prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices.[100]

An expert civil tribunal, the Council believed, would be able to distil the complex data and other evidence required to assess competition law issues, while retaining "some of the characteristics of a court," such as affording the parties before it the right to be heard and other aspects of procedural fairness.[101] It would also provide a range of remedies suited to practices such as mergers.[102] At the same time, the tribunal would have flexible procedures and expertise, permitting it to analyze and to decide technical economic questions: "[t]he prevailing atmosphere would ideally be one of a collective search for understanding of business practice and its economic effects."[103]

The *Report* noted that reliance on civil law remedies and adjudication for federal competition law required their constitutionality on division of powers grounds, although it accepted that there was "no certainty" in this respect until the issue was pronounced upon by the courts.[104] The *Report* did provide factual support for federal authority, however, in Appendix IV, entitled "The Interdependency of the Canadian Economy," which concluded that "an effective competition policy

98 *Ibid* at 101–2.
99 *Ibid* at 188, referring to the "crucial requirement of independence."
100 *Ibid* at 109.
101 *Ibid* at 110.
102 *Ibid* at 114–15.
103 *Ibid* at 110.
104 *Ibid* at 107.

in Canada must be organized, at least in part, on a national basis."[105] One commentator noted several "firsts" found in the Council's *Report*:

> [T]he earliest displacement of the term "anti-combines policy" by a positive-sounding "competition policy"; the first government attempt at in-depth analysis of its economic roots; the first real effort to explore the implications of competition policy for efficiency in government regulation and ownership.[106]

d) The Process of Reform: Taking up the Council's Mantle

Over a period of almost two decades after the Economic Council's *Report*, there were numerous initiatives to amend the law. Success was finally achieved in two main stages, in 1976 and 1986. These amendments shifted Canadian competition law toward a more consistent focus on the economic and efficiency-related effects of anti-competitive practices, and toward the use of civil remedies adjudicated before an expert tribunal, as the Council had recommended. More recently, amendments in 2002 adding a requirement for an "adverse effect on competition" to the refusal to supply provision and a right of private access to the Tribunal for certain provisions, and those of 2009, addressing conspiracy and other anti-competitive agreements and pricing practices, carried on the process of decriminalization and increased the consistency of the economic focus for the law.

The initial effort to achieve reform in one package was Bill C-256, tabled in June 1971. It was described by one commentator as "the most significant pro-competition, pro-consumer legislation in Canadian history."[107] The Council's Chairman noted that the proposals followed "closely the Economic Council's general approach."[108] Indeed, the responsible Minister had instructed officials that he wanted the draft legislation to reflect the Council's recommendations.[109] The proposed Competitive Practices Tribunal contained in the bill would have had an inquisitorial role and broad powers to restructure Canadian industry.

The bill encountered a strong adverse reaction from the business community:[110] "[i]n the eyes of some, the proposals . . . went far beyond the Council's recommendations in the extent of its advocacy for

105 *Ibid* at 232.
106 Brecher, above note 79 at 13.
107 Stanbury, above note 88 at 95.
108 *Ibid* at 98.
109 *Ibid* at 70.
110 For a detailed discussion, see Stanbury, above note 88, ch 8.

consumer interests."[111] To move matters forward, the reform proposals were split into Stage I and Stage II, with the more controversial matters, such as merger and monopoly law reform, and the recommended new tribunal, deferred to Stage II.[112]

i) 1976 Amendments: Civil Reviewable Practices and the RTPC

The Stage I proposals were first introduced in November 1973. They were finally passed into law in late 1975 and came into effect in January 1976.[113] One significant amendment was giving the existing Restrictive Trade Practices Commission (RTPC) the authority to make final decisions, and issue binding orders, in respect of a number of new "civilly reviewable matters." These were mainly "vertical" practices (i.e., seller to buyer, as opposed to "horizontal," competitor to competitor, conduct), such as refusal to supply and exclusive dealing. The RTPC had hitherto been tasked with investigations and "research inquiries," rather than conducting trial-like proceedings. Its expanded mandate implemented the Council's recommendation that a specialized tribunal be used for cases which involved a case-by-case assessment of economic effects.

Another important innovation in the 1976 amendments was the addition of a civil right of action for violations of the criminal provisions of the Act, and breaches of orders of the RTPC. This provision will be discussed in detail below.

It can be seen from the foregoing that Parliament took a partial step in 1976 toward moving the law away from its previously exclusive criminal law foundation, as the Economic Council had recommended. This step was taken in spite of the uncertain constitutional basis for such action in the jurisprudence as it then stood.

ii) 1976–86: Continued Resistance to Change

In 1976, the government commissioned and received a report from an advisory committee led by Dr Lawrence Skeoch (an economist) and Bruce McDonald (a lawyer).[114] The *Skeoch-McDonald Report* (*Dynamic Change and Accountability in a Canadian Market Economy*, Figure 2.6) continued to recommend the creation of a new expert civil tribunal and a shift away from criminal law for merger and monopoly review, as

111 I Clark, "Legislative Reform and the Policy Process: The Case of the Competition Act," ch 6 [Clark] in Khemani & Stanbury, *Historical Perspectives*, above note 4 at 228.

112 Stanbury, above 88 at 133.

113 *An Act to amend the Combines Investigation Act and the Bank Act*, SC 1974-75-76, c 76.

114 *Skeoch-McDonald Report*, above note 85.

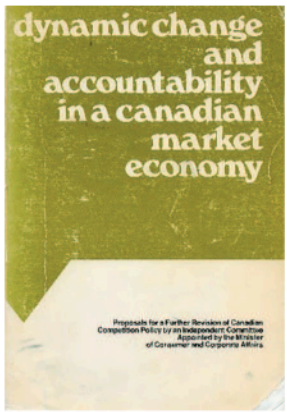

FIGURE 2.6.
The *Skeoch-McDonald Report*

the Economic Council had done. There was also a subtle shift in the approach. It placed an emphasis on ensuring that too-vigorous enforcement using structural tests would not stymie critical dynamic forces, such as innovation. The authors viewed such forces as a key driver of competitive markets. On adjudicative matters, it recommended that the new tribunal be subject to the "supervisory jurisdiction of the Federal Court of Canada"[115] and that Cabinet should have the ability to rescind or vary any order of the new civil tribunal because "[t]he Canadian economy is not as uniformly vigorous as some other economies and there is a greater need at times to compromise between public policy objectives."[116] The suggested need to reign in the authority of the proposed tribunal on substance and procedure gave ammunition to critics of subsequent proposals for a civil tribunal.[117] Thus, the Report had a mixed effect in terms of advancing the urgently needed legislative changes.

Bill C-42, introduced in March 1977, represented a blend of the recommendations of the Economic Council's *Report*, the *Skeoch-MacDonald Report*, and other proposals. It continued to propose that merger and monopoly law be shifted to a new civil tribunal. It also introduced controversial proposals for class actions to recover damages from anti-competitive practices.[118] Witnesses before the House of Commons Committee were generally critical.[119] The bill died after second reading. Its successor, Bill C-13, was introduced in November 1977. It contained substantial revisions to the language and tests in the earlier bill. Completely new was a Cabinet power to override decisions of a new civil tribunal on merger, monopoly, and other matters (as recommended in the *Skeoch-MacDonald Report*). In spite of such changes designed to deal with many of the criticisms that had emerged, Bill C-13 was never given second reading or referred to Committee.

In May 1981, the government released a discussion paper proposing, yet again, new civil-law based provisions dealing with merger and

115 *Ibid* at 309.
116 *Ibid* at 314–15.
117 Brecher, above note 79 at 31.
118 *Ibid* at 31–36.
119 *Ibid* at 34–36: "[T]he islands of support were barely visible in an ocean of demands for exemption, deletion and 'clarification.'"

monopoly, but this time to be adjudicated by the civil courts. No draft legislation flowed from these proposals, but they initiated a slow process of further consultation between government officials and interested groups.[120] Eventually this led to Bill C-29, introduced in 1984. However, the bill was not enacted before the general election in the fall of that year.

iii) The 1986 Competition Act

The new (Conservative) government took up the legislative torch where the previous (Liberal) government had left off. Proposals for reform of competition law were introduced as Bill C-91 in December 1985. The bill was passed into law as the *Competition Act* in June 1986.[121]

Table 2.3 summarizes the principal changes in the existing structure of enforcement and adjudication made in the 1986 amendments.

Table 2.3. Major Legislative Changes in the 1986 Amendments

1. **Creation of the Competition Tribunal** The Restrictive Trade Practices Commission (RTPC) was abolished and the Competition Tribunal, composed of judges from the Federal Court of Canada and lay members, was created. (More will be said about the structure of the Tribunal below.)
2. **Civil Merger and Monopoly Laws** The criminal merger and monopoly prohibition was abolished and new civil law provisions were enacted, reviewable by the Competition Tribunal. As with the civilly reviewable practices enacted in 1976, applications to the Tribunal based upon these provisions had to be brought by the Director of Investigation and Research.
3. **Changes to Inquiry/Report and Search Authorization Functions** Changes were needed to accommodate the findings in *Hunter v Southam*.[122] The RTPC was abolished and applications for the exercise of search and seizure powers transferred to the regular courts in the new Act. Investigative inquiries leading to a public report and research inquiry function were also abolished.[123]

120 Consultations focused on what became known as the "Gang of Three" — The Canadian Manufacturer's Association, Canadian Chamber of Commerce, and Business Council on National Issues. They were later broadened to include the Grocery Products Manufacturers of Canada, the Canadian Bar Association, the Consumers' Association of Canada, and the academic community. See Clark, above note 111 at 232.

121 *Competition Tribunal Act*, RSC 1985, c 19 (2d Supp); enacted by *An Act to establish the Competition Tribunal*, SC 1986, c 26, assented to 17 June 1986 [*Competition Tribunal Act*].

122 *Hunter v Southam*, above note 54.

123 These amendments caused little practical change, as the Director had already virtually ceased to bring such inquiries forward in any case.

e) Confirmation of a Non-criminal Constitutional Foundation for Competition Law

The 1986 *Competition Act* put into effect one of the principal recommendations for reform dating back to the Economic Council's 1969 *Interim Report,* with the creation of the civil-law Competition Tribunal to adjudicate such matters as mergers, abuse of dominance, and other restrictive practices. The first reliance on a civil tribunal dated to the 1976 Stage I amendments, which had given the RTPC jurisdiction over civilly reviewable practices.

In 1986, however, the Supreme Court had still not spoken definitively on the ability of Parliament to legislate to create competition laws not founded on a criminal law basis. The governing jurisprudence continued to be the *Board of Commerce* and *Re Dominion Trade and Industry Commission* decisions which, as seen above, had struck down two federal attempts to create civil law tribunals adjudicating competition law-related standards. The uncertain legal foundation of the federal jurisdiction over competition law led the 1985 *MacDonald Royal Commission* to state:

> Effective competition policy is essential to developing the full benefits that can occur from an economic union. Canada has not been very aggressive in encouraging competition, and one reason for this may be our constitutional structure.[124]

Authority for a constitutional structure more favourable to national competition law was potentially present in section 91(2) of the *Constitution Act, 1867*, the federal trade and commerce power. That source did not show promise until Privy Council appeals were abolished in 1949 and the Supreme Court of Canada became the final authority on Canada's division of powers. First the "international and interprovincial" branch of the trade and commerce power,[125] and then the "general" branch, were given content by the Supreme Court.[126] Justice Dickson (as he then was) picked up this line of authority in a concurring judgment in *Canada (Attorney General) v CN Transportation*,[127] in which he held that competition law could be supported on the basis of the federal trade and commerce power.

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124 *Royal Commission on the Economic Union and Development Prospects for Canada* (Ottawa: Minister of Supply and Services Canada, 1985), vol III at 168.

125 *Re The Farm Products Marketing Act*, [1957] SCR 198 at 265; *R v Klassen* (1959), 20 DLR (2d) 406 (Man CA), leave to appeal to SCC refused [1959] SCR ix.

126 *Re Anti-Inflation Act*, [1976] 2 SCR 373; *MacDonald v Vapour Canada* (1977), 66 DLR (3d) 1 (SCC).

127 *CN Transportation*, above note 69.

Chief Justice Dickson then authored the 1989 decision in *General Motors of Canada Ltd v City National Leasing*,[128] in which a unanimous court confirmed that competition law could be supported under the general branch of the trade and commerce power, sustaining the civil damages action in the *Combines Investigation Act* on that basis. Although the decision addressed the civil damages action and not the substantive civil provisions or the Competition Tribunal, it provided support for the constitutionality of the latter provisions, which have been upheld in challenges to date before the Tribunal and lower courts.[129] The Supreme Court's more recent decision upholding a federal scheme of securities regulation provides additional support, comparing the constitutional competence of federal securities and competition regulation as follows:

> [B]oth are aimed at stamping out risks and practices that are unhealthy to the Canadian economy. That Parliament's trade and commerce power is exercised in a way that affects particular industries is not inherently objectionable, so long as the focus of that exercise is on matters that affect trade as a whole.[130]

C. THE CURRENT ENFORCEMENT AND ADJUDICATIVE STRUCTURE

1) Public Enforcement

The following describes the roles and authorities of those involved in the public investigation, enforcement, prosecution, and adjudication of competition law matters.

a) The Commissioner of Competition

The Commissioner of Competition is appointed by the Governor in Council as the public official responsible for the administration and enforcement of the *Competition Act*.[131] The current Commissioner was

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128 *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 [*General Motors*].

129 See *Alex Couture Inc v Canada (Procureur général)* (1990), 41 QAC 1, leave to appeal to SCC ref'd, [1992] 2 SCR v; *Canada (Director of Investigation and Research, Competition Act) v Xerox Canada Inc* (1990), 33 CPR (3d) 83 (CCT); see also *Canada (Director of Investigation and Research, Competition Act) v NutraSweet Co* (1990), 32 CPR (3d) 1 (CCT).

130 *Reference re Pan-Canadian Securities Regulation*, [2018] 3 SCR 189 at para 111.

131 *Competition Act*, above note 28, s 7(1). The Commissioner is also responsible for the administration and enforcement of the *Consumer Packaging and Labelling*

appointed in 2019 to serve "during pleasure for a term of five years."[132] The *Competition Act* specifies the various enforcement powers and responsibilities of the Commissioner, such as the ability to apply to the courts to compel the production of records and oral evidence as part of the investigative process,[133] to seek remedial orders against mergers, abuse of dominance or other civilly reviewable practices from the Competition Tribunal,[134] and to refer criminal matters for prosecution to the Attorney General of Canada.[135] The Commissioner produces an annual report which describes enforcement and other activities in the past year, which the Minister tables in Parliament.[136]

b) The Competition Bureau

The Commissioner is the head of the Competition Bureau, made up of several hundred personnel trained in business, economics, and law who enforce the *Competition Act* and carry out other competition policy-related functions. The Bureau is self-described as "an independent law enforcement agency, [which] ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace."[137] The Bureau's budget in 2017–18 was $49.6 million and it had a staff of 361.[138] It is divided into Branches dealing with Mergers and Monopolistic Practices, Cartel and Deceptive Marketing Practices, Competition Promotion and Corporate Services. These branches are headed by Senior Deputy and Deputy Commissioners.

The Branches are divided into directorates. See Figure 2.7 below:[139]

Act, RSC 1985, c C-38, the *Precious Metals Marking Act*, RSC 1985, c P-19, and the *Textile Labelling Act*, RSC 1985, c T-10.

132 Order in Council PC 2019-0107, 27 February 2019.

133 *Competition Act*, above note 28, ss 11–20.

134 *Ibid*, pt VIII, ss 75–92.

135 *Ibid*, s 23(1).

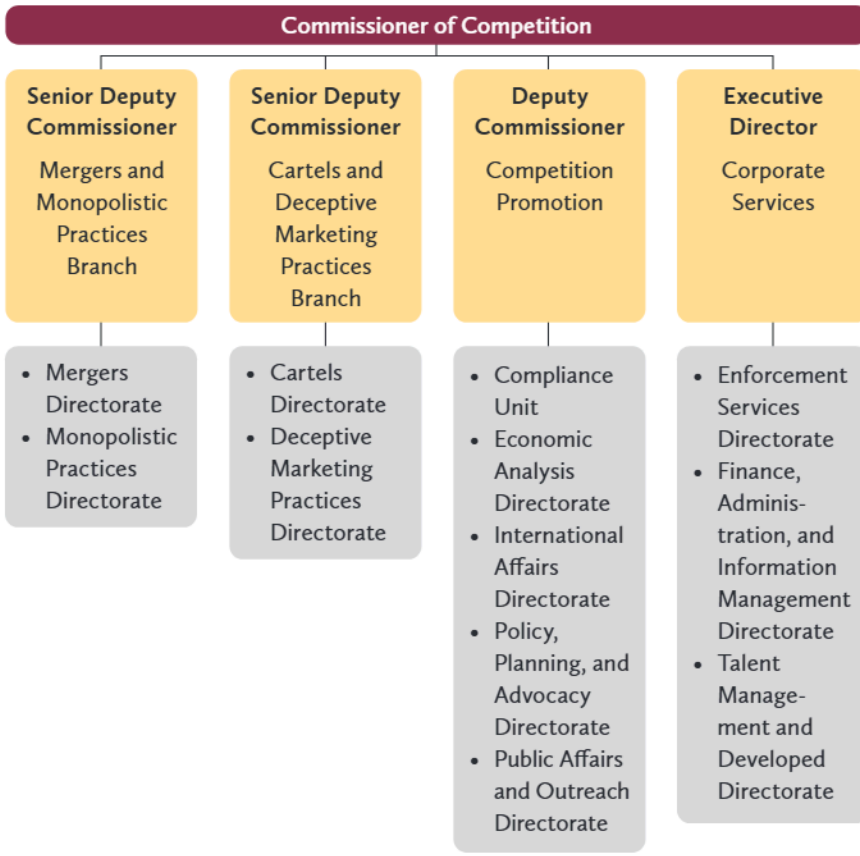
136 *Ibid*, s 127. See Canada, Competition Bureau, *Annual Report of the Commissioner of Competition for the Year Ended March 31, 2018* (26 February 2020), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04380.html [*Annual Report 2018*].

137 Canada, Competition Bureau, *Competition Bureau Canada*, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home.

138 *Annual Report 2018*, above note 136 at 2. The 361 are FTEs or "full time equivalent" positions.

139 Canada, Competition Bureau, *Annual Plan 2019-20* (25 July 2019), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04480.html.

FIGURE 2.7.



c) The Minister of Industry

The Minister of Industry is responsible in Parliament for the *Competition Act* and has certain discrete powers under it. The Minister can direct the Commissioner to carry out an inquiry into potential violations of the Act;[140] receives a report from the Commissioner on the reasons for discontinuing an inquiry;[141] may "require the Commissioner to submit an interim report with respect to any inquiry;"[142] and may "review any decision of the Commissioner to discontinue an inquiry . . . and may, if in the Minister's opinion the circumstances warrant, instruct the Commissioner to make further inquiry."[143] These powers have seldom been used. If the Minister directs an inquiry to occur, the Commissioner still

140 *Competition Act*, above note 28, s 10(1)(c).
141 *Ibid*, s 22(2).
142 *Ibid*, s 28.
143 *Ibid*, s 22(4).

has the discretion to take, or not to take, the steps that he or she sees fit in view of the circumstances.[144]

d) The Minister of Justice and Attorney General of Canada

These two roles, which in Canada are held by the same member of Cabinet, are assigned discrete responsibilities in the Act. The statute provides that the Attorney General of Canada may appoint and instruct counsel when requested by the Commissioner to assist in an inquiry.[145] Counsel from the Department of Justice are assigned to a Legal Services Unit which provides ongoing advice and other legal support to the Competition Bureau during all stages of the investigative process, including acting as civil litigation counsel. Private sector agents may also be retained by the Attorney General to act on behalf of the Commissioner.

The Attorney General also has carriage of matters referred by the Commissioner for possible criminal prosecution.[146] Under the *Director of Public Prosecutions Act*, the Director of Public Prosecutions (DPP) has the authority to initiate and conduct criminal prosecutions on behalf of the Crown that are under the jurisdiction of the Attorney General of Canada.[147] The Attorney General also has authority to apply to the courts for remedies for the misuse of intellectual property rights,[148] injunctive relief,[149] and prohibition orders in criminal matters.[150]

The Minister of Justice has certain specific responsibilities in respect of mutual legal assistance agreements and requests for mutual legal assistance from foreign states.[151]

2) Private Enforcement

There are three potential avenues for private parties to play a role in the enforcement of the Act: complaints to the Competition Bureau, private damage applications, and applications to the Competition Tribunal. All of these offer the potential to complement the enforcement efforts of the Bureau and promote greater deterrence and compliance with the legislation. Private actions also offer an avenue for injured parties to obtain compensation and damages.

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144 *Ibid*, s 10(1).
145 *Ibid*, s 21.
146 *Ibid*, ss 23, 73.
147 SC 2006, c 9, pt 3.
148 *Competition Act*, above note 28, s 32.
149 *Ibid*, s 33.
150 *Ibid*, s 34; the latter two powers also possessed by provincial Attorneys General.
151 *Ibid*, pt III.

a) Complaints to the Bureau and Formal Inquiries

The Competition Bureau receives thousands of complaints annually.[152] The Bureau must sift through them to identify those which raise serious issues under the Act and justify a further investigation or a formal inquiry. A formal inquiry under section 10 of the Act can be commenced if the Commissioner has reason to believe that there is the basis to obtain a civil remedy, or that there has been a breach of the criminal provision of the Act or of an order of the courts or Tribunal.[153] Commencing a formal inquiry opens the way for the Commissioner to apply to a judge for an order permitting the use of formal powers under the Act to compel the production of records, to obtain a search warrant, or to conduct oral examination of witnesses.[154] Evidence may also be collected without the use of these formal powers.

As noted above, the Act retains, in section 9, an avenue first added in 1910 permitting six residents of Canada over 18 years of age to compel the initiation of a formal inquiry into alleged breaches of the criminal and civil provisions of the Act.[155] The six residents must comply with certain formalities in the required supporting material, which include "a statement in the form of a solemn or statutory declaration" setting out the basis for their complaint, including "a concise statement of the evidence" in support.[156] If these formalities are met, the statute specifies that the Commissioner "shall . . . cause an inquiry to be made."[157]

Despite this mandatory language, the Federal Court of Appeal held that "the Commissioner is not required to initiate a formal inquiry under paragraph 10(1)(a) into complaints which he has already thoroughly investigated and found not to warrant a formal inquiry." In that case, the matter had already been investigated and the complaint provided no new information. The Court held that nothing would be accomplished by ordering that an inquiry occur.[158]

Once a formal inquiry is started, the Commissioner has discretion to determine what steps to take. The Commissioner need only examine "such matters as . . . necessary to inquire into with the view of

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152 See, e.g. 10,589 complaints and information requests in the fiscal year 2016–17: Canada, Competition Bureau, *Annual Report of the Commissioner of Competition for the Year Ended March 31, 2017* (2 March 2018), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04328.html.

153 *Competition Act*, above note 28, s 10(1)(b); also on a six residents' complaint (s 10(1)(a)) and where directed by the Minister (s 10(1)(c)).

154 *Ibid*, ss 11–20.

155 *Ibid*, s 9(1).

156 *Ibid*, s 9(2).

157 *Ibid*, s 10.

158 *Charette v Canada (Commissioner of Competition)*, 2003 FCA 426 at para 50.

determining the facts."[159] The Act contains nothing "that clearly requires the Commissioner to complete any inquiry [based on the request of six residents]. On the contrary, [it] recognizes the Commissioner's discretion to not continue an inquiry."[160] It has been held that this creates little scope for judicial review because the Commissioner "in conducting [an] inquiry is performing a purely administrative function" and such a function cannot be made subject to a mandatory order of the court.[161]

The initiation of a formal "inquiry" under section 10 thus may change little in terms of the position of a six residents' complaint versus an "informal" complaint to the Bureau.[162] A six residents' complaint does oblige the Commissioner to inform the party under inquiry and the six residents of progress, if they so request.[163] On discontinuance of the inquiry, the Commissioner is required to "make a report in writing to the Minister showing the information obtained and the reason for discontinuing the inquiry."[164] Both steps provide some accountability. However, if the Commissioner has examined the facts and decided the matter has no merit, there is little latitude for further recourse.

As noted above, the Minister has certain limited powers in respect of inquiries. In addition to initiating an inquiry and receiving a report on discontinuance, "[t]he Minister may, on the written request of applicants under section 9 or on the Minister's own motion, review any decision of the Commissioner to discontinue an inquiry under section 10, and may, if in the Minister's opinion the circumstances warrant, instruct the Commissioner to make further inquiry."[165] However, the Minister cannot initiate, or direct the initiation of, enforcement action. The limited scope for Ministerial direction at the enforcement level highlights the status of the Commissioner as an independent law enforcement official in this respect.

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159 *Ibid.*

160 *Ashley v Canada (Commissioner of Competition)*, 2006 FC 459 (TD) at para 45. See the power to discontinue in s 22(1): "At any stage of an inquiry under section 10, if the Commissioner is of the opinion that the matter being inquired into does not justify further inquiry."

161 *Ibid* at paras 27 and 48–49, citing *Gauthier v Canada (Director of Investigation and Research)*, [1991] FCJ 1002 (CA). See also *Cinémas Guzzo Inc v Canada (Attorney General)*, 2005 FC 691 (TD), aff'd 2006 FCA 160.

162 The process for filing a complaint is described at Canada, Competition Bureau, *Filing a Complaint* (5 November 2015), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02930.html.

163 *Competition Act*, above note 28, s 10(2).

164 *Ibid*, s 20(2).

165 *Ibid*, s 22(4).

b) Section 36—Statutory Cause of Action for Damages

i) History

A civil damages action has been a long-standing feature of the American law, as a complement to public enforcement.[166] In fact, given the incentive created by the ability to recover treble damages for any loss proven under the applicable statutory cause of action in the United States, the American private plaintiff has been described as "the primary enforcer of antitrust laws,"[167] and the private action there "the strongest pillar of antitrust."[168]

In Canada, there was no such statutory action passed as a companion to the initial law. In fact, the courts rejected attempts to use criminal competition law provisions as a foundation for a civil cause of action. In *Transport Oil,* the Ontario Court of Appeal said in 1935, "it is plain that the Parliament of Canada in passing this Act intended it to be an exercise by it of the power to legislate with respect to crime and criminal law, and that it did not intend to interfere with the Provincial jurisdiction over property and civil rights."[169] In *Direct Lumber,* the Supreme Court held in respect of the *Criminal Code* price discrimination prohibition, "this legislation creating a new crime was enacted solely for the protection of the public interest and . . . does not create a civil cause of action."[170]

In the reports and materials leading to the development of the 1976 amendments, a civil action was seen as substantially furthering certain policy objectives, such as compensation and deterrence. The Department of Consumer and Corporate Affairs cited compensation as a central rationale for the original proposals in 1973. The Department stated, "although [the civil damages action] is expected to be of particular value to small businessmen who have been hurt by conduct contrary to the Act, [it] will be equally available to consumers and to any other members of the public who have been so damaged."[171] Furthering deterrence was also identified as an objective. The Competition Bureau's *Background Papers* to the 1976 amendments stated, "we are hopeful that

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166 *Clayton Act*, 15 USC §§ 12–27, 29 USC §§ 52–53.

167 Note, "The Antitrust Treble Damages Remedy" (1983) 9 *William Mitchell Law Review* 435 at 436.

168 Lee Loevinger, "Private Action—The Strongest Pillar of Antitrust" 3 *Antitrust Bulletin* 167 (1958).

169 *Transport Oil Ltd v Imperial Oil Ltd*, [1935] 2 DLR 500 (Ont CA) at 501.

170 *Direct Lumber Co v Western Plywood Co*, [1962] SCR 646 at 648.

171 *Proposals for a New Competition Policy for Canada* (Ottawa: Consumer and Corp Affairs Canada, 1973) at 48–49; cited in *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 68 [*Pioneer*].

the inclusion of a private damage action will be a significant deterrent to violations of the *Act* and also prevent unjust enrichment."[172]

In 1989, in sustaining the constitutionality of the civil damages action in section 36 as within federal authority, the Supreme Court of Canada held that it "is clearly as much a part of the legislative scheme regulating competition throughout Canada as is the criminal action for fines and imprisonment or the administrative action involving an inquiry or the reduction of customs duties."[173] The Court noted that the damages remedy in the United States had proven to be "an ever-present threat to deter anyone contemplating business behaviour in violation of the antitrust laws."[174]

ii) Section 36: Statutory Language

Subsection 36(1) creates a statutory cause of action for breaches of the criminal prohibitions in Part VI of the Act or of an order of the Tribunal or other court under the Act. It states:

> 36 (1) Any person who has suffered loss or damage as a result of
> (a) conduct that is contrary to any provision of Part VI, or
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

a. "Loss or Damage" Needed for the Cause of Action

Under the subsection, the plaintiff may recover "an amount equal to the loss or damage proved to have been suffered by him." The Supreme Court has given a plain reading to the "loss or damage" requirement. In a trilogy of decisions in 2013, it permitted class actions by indirect purchasers affected by an alleged price fixing overcharge.[175] "Indirect"

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172 Canada, Bureau of Competition Policy, *Stage I Competition Policy, Background Papers* (Ottawa, Consumer and Corporate Affairs, 1976) at 32 [*Stage I Competition Policy*].

173 *General Motors*, above note 128 at para 70.

174 *Ibid* at para 74. See also M Trebilcock & M Sanderson, "Competition Class Actions: An Evaluation of Deterrence and Corrective Justice Rationales" and E Iacobucci, "Imperfect Information and Conspiracy Class Actions" in S Pitel, *Litigating Conspiracy: An Analysis of Competition Class Actions* (Toronto: Irwin Law, 2006) [*Litigating Conspiracy*].

175 *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [*Microsoft*]; *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58; and *Infineon*

purchasers are "consumers who have not purchased a product directly from the alleged overcharger, but who have purchased it either from one of the overcharger's direct purchasers, or from some other intermediary in the chain of distribution."[176] This includes situations where the product (such as a computer chip) is only a component of a manufactured product. In spite of the potential remoteness of this interest, and the spectre of double recovery, the Court accepted that any proven loss or damage may fall within the section:

> Practically, the risk of duplicate or multiple recoveries can be managed by the courts.
>
> Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However . . . these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case.[177]

The Court saw such actions as serving the compensation objective, "because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge."[178] It also viewed permitting the action to proceed as furthering deterrence, noting that "the Competition Bureau in this case has said that it will not be pursuing any action against Microsoft. Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives."[179]

The Court has more recently permitted actions by another remote class of plaintiff, so-called umbrella purchasers. These are purchasers who have allegedly suffered damage based on the theory that "the defendants' anti-competitive cartel activity creates an 'umbrella' of supra-competitive prices, causing non-cartel manufacturers to raise their prices."[180] The Court again cited the plain words of section 36 in finding that the provision does not exclude such plaintiffs:

Technologies v Option Consommateurs, 2013 SCC 59. For background, see JJ Camp, "A Historical Perspective of a Made-in-Canada Remedy for Anticompetitive Behaviour" (2018) 31:1 *Canadian Competition Law Review* 85.

176 *Microsoft*, above note 175 at para 16.

177 *Ibid* at paras 37 and 44.

178 *Ibid* at para 50.

179 *Ibid* at para 141.

180 *Pioneer*, above note 171 at para 58.

> Section 36(1)(a) provides a cause of action to *any person* who has *suffered loss or damage* as a result of conduct contrary to s. 45. Significantly, Parliament's use of "any person" does not narrow the realm of possible claimants. Rather, it empowers *any* claimant who can demonstrate that loss or damage was incurred as a result of the defendant's conduct to bring a claim. On this point, the following paragraph from the Court of Appeal for Ontario's decision in *Shah (ONCA)* (at para. 34) is apposite, and I adopt it as mine:
>
> > . . . the umbrella purchasers' right of recovery is limited only by their ability to demonstrate two things: (1) that the respondents conspired within the meaning of s. 45; and (2) that the losses or damages suffered by the appellants resulted from that conspiracy.[181]

The Court held, referring to the objectives of the legislation:

> [T]he purpose of the *Competition Act* is to "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices" (s. 1.1). A conspiracy to price-fix is the "very antithesis of the *Competition Act*'s objective." . . . Monetary sanctions for such anti-competitive conduct therefore further the *Competition Act*'s purpose. This Court has also recognized two other objectives of the *Competition Act* of particular relevance here, being deterrence of anti-competitive behaviour, and compensation for the victims of such behaviour. . . . Interpreting s. 36(1)(a) so as to permit umbrella purchaser actions furthers both of these objectives.[182]

The Court explained that this result "furthers deterrence because it increases the potential liability falling upon those who engage in anti-competitive behaviour."[183]

While indirect and umbrella purchasers may assert claims, they still must prove they have incurred "loss or damage." This can pose challenges. In a price fixing case, for example, it will be necessary to connect a price increase or "overcharge" flowing from the conspiracy to harm to the plaintiff. It must be shown that the overcharge was paid, in whole or part, by the plaintiff. This is an area that is yet to be subject to extensive contested litigation, with most of the jurisprudence arising in the context of consent settlements.[184]

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181 *Ibid* at para 64 [emphasis in original].

182 *Ibid* at para 65 [citations omitted].

183 *Ibid* at para 66.

184 Eliot Kolers & Danielle Royal, "Canada," ch 7 in Ilene K Gotts, ed, *The Private Competition Enforcement Review*, 7th ed (London: Law Business Research, 2014) at 94.

b. Other Relief

A section 36 plaintiff may also recover "any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section." This amounts to a bolstered costs authority given that it expressly refers to "the full cost . . . of any investigation," an amount that would not flow simply from a right to recover litigation costs.

Section 36 does not provide for punitive damages. Such damages may be the subject, however, of concurrent tort claims, such as for intentional interference with economic relations or conspiracy to carry out an unlawful act. The Supreme Court has held that section 36 does not preclude a tort claim which relies upon the breach of the Act as the "unlawful act," which is a required element in tort. The Court reasoned:

> [Section] 62 of the *Competition Act* . . . contemplates the subsistence of common law and equitable rights of action by providing that "nothing in this Part [which includes s. 45(1), in respect of which s. 36(1) creates a statutory right of action] shall be construed as depriving any person of any civil right of action."[185]

c. Conduct Contrary to the Criminal Prohibitions; Onus

Subparagraph 36(1)(a) provides for an action in respect of "conduct that is contrary to" the criminal prohibitions the Act. The bulk of the actions brought under the section have been alleged breaches of three prohibitions, of conspiracy (section 45), of bid-rigging (section 47), and of knowingly false or misleading representations (section 52).

It is noteworthy that while the legislation creates a private cause of action for breach of *criminal* prohibitions, no cause of action for damages is available for breach of the *civil* prohibitions which are subject to review by the Competition Tribunal, except for breaches of civil orders made by the Tribunal.[186] As we will see below, a limited right to challenge certain practices is made available before the Tribunal, but damages are not an available remedy.

The reference to "conduct contrary to" the criminal prohibitions in section 36(1)(a) requires the plaintiff to prove that the defendant carried out the elements of the underlying offence. For example, for price fixing, the plaintiff must prove both the *actus reus* of agreement to fix prices and the necessary *mens rea* to carry out the agreement.[187] The Supreme Court has made it clear that in a civil action, each of these requisite

185 *Pioneer*, above note 171 at para 88.
186 *Competition Act*, above note 28, s 36(1)(b).
187 *Watson v Bank of America Corp*, 2015 BCCA 362 at para 72.

elements need only be proven on a balance of probabilities, not beyond a reasonable doubt. In *FH v McDougall*, the Court held:

> I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.[188]

Subsection 36(2) assists a plaintiff with the burden of proof where there has been a prior criminal conviction. It supplies *prima facie* proof in the damages action that an offence was committed:

> [T]he record of proceedings in any court in which that person was convicted of an offence under Part VI . . . is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI . . . and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in an action.

Reflecting the value of this provision, a substantial portion of the actions commenced under section 36 have been brought after criminal proceedings were filed, and in many cases after guilty pleas were obtained. Difficulties are raised for plaintiffs when there is settlement of criminal proceedings prior to prosecution but no public record of the resolution, because "even where there is evidence of criminal activity, the Commissioner will not necessarily refer the matter for prosecution but may settle it through negotiation. The terms of such settlement are kept confidential and no consent order is usually sought from the court."[189]

Even where the matter is contested and proceeds to trial, a plaintiff cannot necessarily expect the enforcement authorities to provide them free and open access to the investigative file. The Bureau's position is that it "will not voluntarily provide information to persons

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188 *FH v McDougall*, 2008 SCC 53 at para 40. A standard of "high preponderance of possibilities" was applied in *Distrimedic Inc v Dispill Inc*, 2013 FC 1043 (TD) at para 270, citing *Janelle Pharmacy Ltd v Blue Cross of Atlantic Canada*, 2003 NSSC 179; *Pentagon Investments Ltd v Canadian Surety Co*, [1992] NSJ No 402 (CA).

189 House of Commons, Standing Committee on Industry, *Interim Report on the Competition Act* (June 2000) (Chair: Susan Whelan), online: www.ourcommons.ca/DocumentViewer/en/36-2/INDU/report-7/page-78 [Standing Committee *Interim Report*].

contemplating or initiating a private action under section 36 of the Act" and will "oppose subpoenas for production of information if compliance with them would potentially interfere with an ongoing examination or inquiry." If opposition is unsuccessful, the Bureau will seek protective orders to maintain the confidentiality of the information in question.[190]

The Bureau has successfully resisted attempts to compel production of investigative evidence.[191] Furthermore, third party discovery is not available from the Competition Bureau under the provisions of the *Crown Liability and Proceedings Act*.[192]

d. Class Actions

As the recent jurisprudence from the Supreme Court indicates, class actions have become a leading vehicle for the pursuit of section 36 damages claims. Their potential importance in furthering the effectiveness of civil damages actions was recognized at the time of the 1976 amendments, but the issue was deferred for further study.[193] A 1977 report recommended that further amendments "provide for class and substitute actions and the procedure in relation to them."[194] Citing the recently added civil damages action, it noted that "only in situations involving large sums of money would suits normally be brought . . . . Those whose damages are small would not individually bring suit because their individual recoveries would be small and they would be bound to incur legal fees and costs of a prohibitive size if they were to lose."[195] The report referred to a study by an Osgoode Hall Law School law professor, which concluded that class actions were particularly effective means by which "the economically disadvantaged, consumers, tenants, small businessmen and others, can secure collective redress in the courts for injury, actual or threatened, inflicted by government or industry."[196]

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190 Canada, Competition Bureau, "Submission to the OECD Competition Committee Roundtable on the Relationship between Public and Private Antitrust Enforcement," (10 June 2015), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03926.html.

191 *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2016 BCSC 97; however, a class privilege was not recognized in *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24; see also Mohsen Seddigh, "Section 36 Requests for Access to Information and the Competition Bureau: Hast Thou Forsaken Me?" (2018) 31 *Canadian Competition Law Review* 233.

192 RSC 1985, c C-50, as am; *Canada (Attorney General) v Thouin*, [2017] 2 SCR 184.

193 *Stage I Competition Policy*, above note 172 at 33.

194 Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada Second Stage* (Ottawa: Consumer and Corporate Affairs Canada, 1977) at 73.

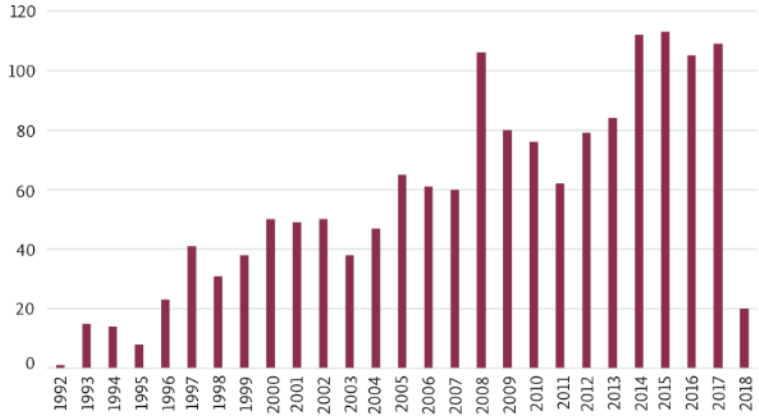
195 *Ibid*.

196 *Ibid* at 72.

A class actions regime was proposed in two bills tabled in 1977.[197] The initiative proved controversial[198] and the amendments were shelved. When the Stage II amendments finally went ahead a decade later, class actions provisions were not part of the amendments.[199]

With the institution of class actions regimes under provincial legislation in all provinces but PEI (beginning with Quebec in 1978),[200] the recognition of a common law foundation for class proceedings by the Supreme Court in 2001,[201] and the adoption of class actions rules in the Federal Court,[202] there has been a steady escalation of recourse to this procedure in Canada.[203] The overall number of class actions in Ontario was recently profiled by the Law Commission of Ontario (see Figure 2.8):[204]

FIGURE 2.8. Estimated number of class action matters filed in Ontario annually, 1993–February 2018



197 Bill C-42, *Proposed Stage II Amendments to Canadian Combines Legislation*, introduced in March 1977 and Bill C-13, Second Version of *Proposed Stage II Amendments to Canadian Combines Legislation* in November 1977.

198 Particularly in respect of "substitute actions," which would permit the Competition Policy Advocate to bring an action when certification was denied. See William T Stanbury, "The Stage II Amendments: An Overview," ch 3 in Prichard, Stanbury & Wilson, above note 45 at 68–70.

199 *Competition Tribunal Act*, above note 121.

200 *Code of Civil Procedure*, CQLR c C-25.01.

201 *Western Canadian Shopping Centres v Dutton*, [2001] 2 SCR 534.

202 *Federal Courts Rules*, SOR/98-106, pt 5.1.

203 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: Law Commission of Ontario, 2019), online: www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf at 5: "The number of class action matters filed in recent years has clearly increased, averaging more than 100 class actions per year for the last several years."

204 *Ibid* at 14.

Class actions provide a vehicle well-suited for claims such as price fixing, which often feature broadly spread impacts on a large number of parties. An Ontario court observed the following in this respect:

> Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade.
>
> If each class member in the subject class actions proceeded individually against the Defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis.
>
> A class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issues and because it will advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all.[205]

One of the challenges posed in *Competition Act*-based class actions relating to such matters as price fixing is the need for the plaintiff to show that some loss can be proven on a class-wide basis, rather than the need for numerous individual damage assessments. This issue is heightened where indirect purchasers are the claimants. For certification, the Supreme Court held in *Microsoft* that the plaintiff must at least lay the foundation to prove class-wide loss:

> It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.[206]

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205 *Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd* (2005), 74 OR (2d) 758 (SC) at paras 34 and 36. See however *Shah v LG Chem Ltd*, 2015 ONSC 6148 at paras 132–37, rev'd 2018 ONCA 819 to the effect that this statement should not be taken as determinative as to the requirements for certification based on common issues.

206 *Microsoft*, above note 175 at para 115. See also the assessment of damages methodology by Perell J and certification of class claims made against certain banks for conspiracy to fix or unreasonably enhance the prices of currency purchased in the foreign exchange foreign currency market in *Mancinelli v Royal Bank of Canada et al*, 2020 ONSC 1646.

The Court explained the nature of the evidence required in *Pioneer*:

> [F]or a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers—that is, claimants at the "purchaser *level*." For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge.[207]

In terms of the strength of the evidence required, the Court held that the methodology must demonstrate only "a realistic prospect of establishing loss on a class-wide basis."[208]

The recent jurisprudence from the Supreme Court provides helpful guidance for the certification of competition law class proceedings. While methodology for proof of loss has not been tested extensively in the courts to date, and other challenges, such as access to evidence, may face plaintiffs, the recent decisions may bolster further actions under section 36.

e. Limitation Period

Subsection 36(4) provides a two-year limitation period for private damages actions in respect of breaches of the criminal provisions:

> (4) No action may be brought under subsection (1),
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
> (i) a day on which the conduct was engaged in, or
> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
> whichever is the later.

The Supreme Court in *Pioneer* held the subparagraph (i) limitation period above is subject to the "discoverability" principle—meaning that it does not begin to run until "the material facts on which [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence."[209] The majority noted that anti-competitive agreements "are invariably conducted through secrecy and deception . . . meaning that they are, by their very nature, *unknown* to s. 36(1)(a) claimants."[210] They concluded:

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207 *Pioneer*, above note 171 at para 107 [emphasis in original].

208 *Ibid* at para 118. Re proof of damage methodology, see also James A Brander & Thomas W Ross, "Estimating Damages from Price-Fixing," in *Litigating Conspiracy*, above note 174.

209 *Pioneer*, above note 171 at para 31, citing *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at 224.

210 *Pioneer*, above note 171 at para 46 [emphasis in original].

> It would therefore be absurd, and would render the cause of action granted by s. 36(1)(a) almost meaningless, to state that Parliament did not intend for discoverability to apply, such that the plaintiff's right of action would expire prior to his or her acquiring knowledge of the anti-competitive behaviour. I agree with the Court of Appeal that "it cannot be said that Parliament intended to accord such little weight to the interests of injured plaintiffs in the context of alleged conspiracies so as to exclude the availability of the discoverability rule in s. 36(4)."[211]

In terms of what may constitute discoverability, publicity and general public notoriety of conspiratorial conduct has been found to be sufficient to satisfy this requirement, given the interest of businesspeople in being informed of matters within their commercial interest. In upholding discoverability, the BC Court of Appeal held "[i]t strains credulity to find that those purchasing several hundreds of thousands of dollars' worth of a product annually would not make it their business to know all of the sources of supply and how the prices were determined."[212]

The limitation period is also delayed under the statute until the conclusion of any criminal prosecution relating to the conduct. This may extend the limitation period significantly, given that it may take several years for charges to be laid, and the matter brought to trial. In the case of the lysine conspiracy in the United States, for example, class proceedings were still being dealt with at the certification stage in Canada almost two decades after the period of the conspiracy in question.[213]

c) Section 103.1 Applications to the Competition Tribunal

i) History

Only the Commissioner (or the predecessor, Director of Investigation and Research) was permitted to seek a remedy under the original civil practices provisions added to the legislation in 1976. Private access to civil adjudication had, however, been recommended by the Economic Council's 1969 *Interim Report on Competition Policy*. The Council proposed that applications before a new civil tribunal could be initiated both by a Crown official (the "Director of Legal Proceedings") and by "private parties deeming themselves affected by the practice." Applications by the latter would have been subject to a screening process before

211 *Ibid.*
212 *Sun-Rype Products Ltd v Archer Daniels Midland Co*, 2008 BCCA 278 at para 129.
213 See, e.g., *Mura v Archer Daniels Midland Co*, 2003 BCSC 727.

the tribunal to determine whether "there appeared to be public interest grounds for subjecting the practice to a full hearing."[214]

In 1995, a consultation paper was issued by the Competition Bureau proposing a private right of action to supplement the Bureau's limited resources in bringing vertical restraints (refusals to deal, market restriction, exclusive dealing, tied selling) matters.[215] A 1996 Consultative Panel report was divided over this proposal.[216] The Bureau then funded further studies, two of which supported this change,[217] but no amendments were brought forward at that time.

A further consultation process on the proposal of expanded private access was initiated in 2000.[218] Concerns in respect of the potential tactical use of applications to the Tribunal by competitors were raised before the House of Commons Committee studying the proposal. However, the Committee concluded that the cost and time required to bring such applications would mitigate such concerns, stating: "[t]he mere cost of bringing a case to the Tribunal [provides] a disincentive to spurious litigation."[219] Noting that there had been few applications to the Tribunal by the Commissioner in the first decade after the *Competition Act* was enacted,[220] the House Committee concluded in its *Interim Report*: "the Act is currently under-enforced by the Commissioner of Competition and . . . the Canadian competitive environment would benefit from having more cases brought to the Competition Tribunal."[221] The Committee put forward the following rationales for extending private access to the Tribunal:[222]

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214 *Interim Report* 1969, above note 86 at 121.

215 Canada, Bureau of Competition Policy, *Competition Act Amendments* (Ottawa: Industry Canada, 1995) at 21–23.

216 Canada, *Report of the Consultative Panel on Amendments to the Competition Act* (Ottawa: Industry Canada, 1996). See also A Neil Campbell, "Distribution Freedom: The Evolution of Vertical Distribution Practices under the Competition Act" (2012) 25:2 *Canadian Competition Law Review* 377.

217 Kent Roach & Michael Trebilcock, *Private Party Access to the Competition Tribunal* (Ottawa: Competition Bureau, 1996); Kent Roach & Michael Trebilcock, "Private Enforcement of Competition Laws" (1997) 34:3 *Osgoode Hall Law Journal* 461.

218 Canada, Competition Bureau, *Amending the Competition Act: Discussion Paper on Meeting the Challenges of the Global Economy* (Ottawa: Industry Canada, 2000).

219 Standing Committee *Interim Report*, above note 189.

220 *Ibid*.

221 *Ibid*.

222 *Ibid*, Exhibit 6.1.

Reasons for a Right of Private Access to the Competition Tribunal

Studies suggest that the private sector is more able than the government in detecting anticompetitive conduct that has an immediate impact on participants in a specific market.

Private actions would free up Bureau resources, and allow it to focus upon higher-level anticompetitive conduct that is not readily detectable, owing to its covert nature.

The Competition Tribunal is currently underutilized.

The possibility of private action might deter firms from undertaking anticompetitive activity.

The private sector could be an effective partner in achieving compliance with competition law if interim injunctive relief or cease and desist orders were made available to it on a relatively inexpensive, expedited basis.

Private actions would result in judicial decisions providing guidance to the business community on its responsibilities under competition law.

An increase in cases would provide new opportunities for more lawyers to specialize in competition law practice, contributing to the development of a more diverse bar reflecting broader socio-economic interests.

Similarly, increased opportunities for economists and other experts to provide evidence in proceedings would promote the development of theoretical constructs unique to the Canadian experience, and reduce the degree of reliance on the experience of foreign jurisdictions.

In the Committee's final report in 2002, which followed additional consultations, it noted that there was "broad agreement on the principle of granting private access to the Tribunal" among interested parties.[223] It recommended permitting the Tribunal to: (1) impose administrative monetary penalties in cases involving refusal to deal, consignment selling, tied selling, market restriction, exclusive dealing, abuse of dominant position, and delivered pricing; and (2) entertain private proceedings involving the bulk of the foregoing provisions, including abuse of dominance, as well as expanding the Tribunal's authority to award damages

223 House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime* (April 2002) (Chair: Walt Lastewka) at 33, online: www.ourcommons.ca/Content/Committee/371/INST/Reports/RP1032077/indurp08/indurp08-e.pdf [*A Plan to Modernize Canada's Competition Regime*].

in such applications.[224] The Committee considered that damages would provide greater deterrence of anti-competitive behaviour.[225]

In the amendments that followed the Report, only the private applications in respect of vertical restraints were added.[226] The Commissioner thus remained the gatekeeper to the Tribunal for applications in respect of mergers and abuse of dominance, and no damages were made available. The government left the door open to broadening access, stating in its response to the House Committee Report, "[a] review of the amendments relating to private access . . . will take place two years after it comes into force. At that time, the Government will be in a better position to assess whether rights of private access should be extended to" abuse of dominance.[227] However, no such changes were made at that time.

The 2008 *Compete to Win* panel recommended against extension of private access to the Tribunal for the abuse of dominance and merger provisions.[228] A modest expansion in private access occurred in 2009, when resale price maintenance was decriminalized, and private applications were permitted to enforce that provision.[229]

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224 *Ibid* at 50, Recommendation 8: "That the Government of Canada amend the *Competition Act* and the *Competition Tribunal Act* to extend the private right of action in the case of abuse of dominant position (section 79) and to permit the Competition Tribunal to award damages in private action proceedings (sections 75, 77 and 79)."

225 *Ibid* at 48.

226 *An Act to amend the Competition Act* 2002, above note 58.

227 Canada, Competition Bureau, "Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology *'A Plan to Modernize Canada's Competition Regime'*" (1 October 2002) at 9, online: www.competitionbureau.gc.ca/eic/site/iccat.nsf/eng/03282.html.

228 Canada, Competition Policy Review Panel, *Compete to Win, Final Report* (Public Works and Government Services Canada: Ottawa, 2008) at 59. The Panel's Report stated:

> [T]here is a concern that extending private access to the abuse of dominance or merger provisions would serve to promote unmeritorious litigation between competitors that would not enhance the competitiveness of Canadian industry or markets. The Panel is of the view that empowering the Competition Tribunal to award damages should not be pursued for similar reasons.

On the issue of expanding such remedies, see Paul Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment" (2009) 18:1 *Dalhousie Journal of Legal Studies* 1; Calvin S Goldman & Navin Joneja, "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner" (2010) 41:3 *Loyola University Chicago Law Journal* 535.

229 *Budget Implementation Act, 2009*, above note 59, ss 426 and 431.

ii) Screens for Bringing Private Applications

The Tribunal may screen and refuse a private party's leave application if

- the matter is already the subject of an inquiry being carried out by the Commissioner;
- the Commissioner has reached a settlement with the person against whom an order is sought and discontinued a related inquiry as a result; or
- the matter was already the subject of an application by the Commissioner.[230]

iii) The Test for Leave

Subsection 103.1(7) provides that leave may be granted to a private party to bring an application

- under section 75 (refusal to supply) or section 77 (exclusive dealing, market restriction, tied selling) if the Tribunal "has reason to believe that the applicant is directly and substantially affected *in the applicant's business* by any practice referred to in one of those sections that could be subject to an order under that section" (emphasis added); and
- under section 76 (resale price maintenance), if the Tribunal has reason to believe that "the applicant is directly affected" by any conduct referred to in that section that could be subject to an order.

The former are thus confined to applications by businesses, while the latter permits applications by others, such as consumers, and is subject to a slightly lower standard.

The test applied by the Tribunal is "whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order."[231] Justice Rothstein of the Federal Court of Appeal (as he then was) noted with respect to the latter part of the test:

> The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower

230 *Competition Act*, above note 28, s 103.1(4), (5).

231 *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 at para 16, citing *National Capital News Canada v Canada (Speaker House of Commons)* (2002), 23 CPR (4th) 77 (CCT).

> standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.[232]

New entrants to the market face a challenge in cases such as refusal to supply, because they lack a track record from which to prove a substantial effect on their existing business. While projections can provide a foundation for an application, they must be based on credible evidence. The Court of Appeal upheld the Tribunal's rejection of projections when they disclosed only the "mere possibility" of substantial effect, were "speculative" and not sufficiently supported by "background or explanation as to how [they] were established."[233]

While the most active provision for applications to the Tribunal for leave under section 103.1 has been refusal to supply, such difficulties have made the leave requirement a significant hurdle. The success rate of leave applications in refusal to supply cases has historically been less than 50 percent.[234]

iv) Costs

As part of the 2002 amendments, the Tribunal was given the power to award costs.[235] The Tribunal has held that it has broad discretion under this provision consistent with the costs requirements of the *Federal Courts Rules* and has awarded costs against an unsuccessful section 103.1 applicant.[236]

v) Impact of Civil Actions on Tribunal Proceedings

In *B-Filer Inc v Bank of Nova Scotia*, the Tribunal held that the prior dismissal of a tort claim for the same conduct did not render a Tribunal application for refusal to supply *res judicata*, finding "the issues before the Tribunal are not the same as the issues that were before the Alberta court." The Tribunal also found that the claim was not subject to estoppel or an abuse of process because of the Tribunal's exclusive jurisdiction to deal with issues under the refusal to supply and vertical restraints provisions of the *Competition Act*.[237]

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232 *Ibid* at para 17. See also *Safa Enterprises Inc v Imperial Tobacco Company Limited*, 2013 CACT 19 at para 15; *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, [2015] CCTD 26.

233 *CarGurus, Inc v Trader Corp*, 2017 FCA 181 at para 27, aff'g [2016] CCTD 15.

234 Brown, ed, above note 83 at 96 indicates that, to the year 2016, twenty refusal to supply applications for leave were filed and seven were successful.

235 *Competition Tribunal Act*, above note 121, s 8.1.

236 See, e.g., *B-Filer Inc v Bank of Nova Scotia*, [2007] CCTD 32.

237 *Ibid* at para 13.

3) Adjudication

a) The Courts

The federal and provincial courts, *inter alia*, receive requests for investigative orders and may hear and try criminal matters.[238] The Federal Court may also receive requests for judicial review; the Federal Court of Appeal hears appeals from the Federal Court and from the Competition Tribunal.[239] Private actions for damages under the statutory cause of action in section 36 of the Act may be brought in any court of competent jurisdiction, which includes the Federal Court.[240]

b) The Competition Tribunal

i) Jurisdiction

The Tribunal's jurisdiction covers the civil practices provisions in Part VIII of the *Competition Act*. Under those provisions, including such matters as mergers, abuse of dominant position, and vertical restraints, the Commissioner of Competition may challenge conduct and bring forward a case to the Tribunal. As discussed above, private parties can also initiate proceedings in respect of refusals to supply, resale price maintenance and other vertical practices with leave of the Tribunal.

The Tribunal is given the powers of a superior court of record in respect of proceedings before it, including the compulsion of evidence and witnesses. In *Chrysler Canada Ltd v Competition Tribunal*,[241] the Supreme Court confirmed that these powers include the power to sanction for contempt of the Tribunal's orders. The Court found that the Tribunal's powers extended to the enforcement of an order against Chrysler Canada related to Chrysler's refusal to supply automotive parts.

The Competition Tribunal's jurisdiction was enlarged by the 2009 amendments creating new civil practices. A new civil agreements provision permits a case-by-case analysis by the Tribunal to determine whether an agreement results in a "substantial prevention or lessening of competition."[242] The criminal predatory pricing provision was repealed and left to consideration under the existing abuse of dominance provision on the

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238 *Competition Act*, above note 28, ss 67 and 73.

239 *Federal Courts Act*, RSC 1985, c F-7, ss 18 and 28; *Competition Tribunal Act*, above note 121, s 13.

240 *Competition Act*, above note 28, s 36(1), (3).

241 *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 [*Chrysler Canada*].

242 Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 40th Parl, 2d Sess, 2009; passed as *Budget Implementation Act, 2009*, above note 59. See chapters 6, 8, and 9.

same "substantial prevention or lessening of competition" standard.[243] Resale price maintenance was decriminalized and made subject to a new civil practice, reviewable by the Tribunal where it is "likely to have an adverse effect on competition in a market."[244] The 2009 amendments therefore carried on the trend of having those provisions which require a case-by-case economic assessment addressed before the expert Competition Tribunal, and removing or simplifying the criminal provisions.

ii) Structure

The Competition Tribunal is a specialized civil tribunal with the expertise and other tools enabling it to conduct a weighing and analysis of economic factors. The *Competition Tribunal Act* lays out the structure of the Tribunal. It is composed of up to six judges of the Federal Court and eight lay members. Both groups are appointed by the Governor in Council.[245] No particular background is specified for the lay members, although the Tribunal website notes that current members "provide expertise based on their individual backgrounds in economics, business, finance, accounting or marketing."[246]

The Chairperson of the Tribunal is designated by the Governor in Council from among the judicial members. Only judicial members may make determinations of questions of law in proceedings before the Tribunal. On the other hand, questions of fact and mixed fact and law may be determined by all members.[247] The scheme ensures judicial expertise is brought to the legal issues before the Tribunal. Lay members are involved in those matters for which their expertise qualifies them most strongly: fact-related determinations, which may involve an appreciation of economic evidence, statistics, and particular analytical approaches.[248]

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243 See Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (7 March 2019) at paras 59–61, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html.

244 *Competition Act,* above note 28, s 76.

245 See *Competition Tribunal Act,* above note 121, s 3(2).

246 Canada, Competition Tribunal, *Member Appointments* (20 March 2020), online: www.ct-tc.gc.ca/en/tribunal/members.html. The *Competition Tribunal Act*, above note 121, s 3(3) provides for an "advisory council to advise the Minister with respect to appointment of lay members," which council is to be "knowledgeable in economics, industry or public affairs." However, the appointment of the council is discretionary and based upon a review of Orders in Council (Canada, Orders in Council Division, *Orders in Council Search*, online: https://orders-in-council.canada.ca), no such council had been appointed as of 1 July 2020.

247 *Competition Tribunal Act*, above note 121, s 12.

248 *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 53: "over questions of fact and of mixed law and fact, the judicial members share their jurisdiction with the lay members. . . . This makes sense

Hearings are presided over by judicial members. Hearing panels for applications are composed of three to five members, with at least one lay member.[249] Reflecting a Parliamentary desire that the Tribunal's rules of evidence be more flexible than those of the criminal courts (which were perceived to have created problems for proof and enforcement of the law), the *Competition Tribunal Act* states in subsection 9(2):

> All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.[250]

Hearings before the Competition Tribunal have in general more closely resembled those of a civil trial than a hearing before an administrative tribunal, such as the Canadian Radio-television and Telecommunications Commission (CRTC). The Competition Tribunal is a more court-like body than the one envisaged by the Economic Council in 1969. For example, while suggesting that it retain some resemblance to a court, the Council recommended a tribunal possessing a "small expert staff of its own . . . to provide factual information and analysis . . . which was not forthcoming from any other source."[251] It was also to have a role in "education and persuasion" through such means as "issuing general guidelines . . . in respect of certain types of merger or trade practices."[252] These functions have more in common with a regulatory agency (such as the CRTC) or inquisitorial body (such as the European Commission Directorate-General for Competition) than a court. These are not the kinds of functions currently carried out by the Competition Tribunal.

iii) Appeals and Standard of Review

Appeals from the Tribunal are made to the Federal Court of Appeal. Leave from the Court of Appeal is required from appeals raising questions of fact.[253] In *Canada (Director of Investigation and Research) v Southam Inc*, the Tribunal's determination of whether or not the Vancouver daily newspapers were in the same competitive market as regional newspapers was characterized as a "question of mixed fact and law."[254] The Supreme Court of Canada had to decide to what extent

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because, as I have observed, the expertise of the lay members is invaluable in the application of the principles of competition law" [*Southam*].

249 *Competition Tribunal Act*, above note 121, s 10.

250 The Tribunal has made *Rules* by regulation pursuant to the Act: *Competition Tribunal Rules*, SOR/2008-141.

251 *Interim Report* 1969, above note 86 at 111.

252 *Ibid* at 192.

253 *Competition Tribunal Act*, above note 121, s 13(2).

254 *Southam*, above note 248.

judicial deference should be accorded to the Tribunal's decisions. Justice Iacobucci held that a court hearing an appeal from the Tribunal should not intervene on a question such as the assessment of market definition unless the decision is unreasonable. That standard "instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise."[255] Under its more recent formulation by the Supreme Court, a reasonable decision evidences "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and law that constrain the decision maker."[256] In applying the reasonableness standard in *Southam*, the Court made it clear that it did not consider that it had to agree with the Tribunal's conclusions to sustain its decision.

Determinations of law by the Tribunal, such as statutory interpretation, are subject to appeal to the Federal Court of Appeal.[257] The standard is correctness, meaning that the appellate court accords no deference to the decision under review.[258]

iv) Explaining the Tribunal's Structure

Why is the Competition Tribunal structured as it is, essentially a hybrid somewhere between a civil court and an administrative tribunal? In considering this question, it is useful to think of a spectrum of alternative structures for adjudication or final determination, with institutions which most closely resemble the ordinary courts at one end, and those which involve more political decision making on the other.

FIGURE 2.9.

At the judicial end of the spectrum are the regular courts, with decisions made by judges, full procedural rights afforded to parties, the strict application of the rule of law and precedent, and judicial review or appeal confined to errors of law or palpable and overriding errors

255 *Ibid* at para 62.
256 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85.
257 *Competition Tribunal Act*, above note 121, s 13(1).
258 *Tervita Corp v Canada (Commissioner of Competition)*, [2015] 1 SCR 161 at para 34 [*Tervita*]. Justice Abella dissented on this point; see paras 169–80.

of fact. At the other end, decisions are made by, or through, politically accountable persons or their staff, there are few procedural rights, and precedents are not binding. In between are a range of possible models which mix some or all of these features. An agency such as the CRTC, for example, is independent from any government department, but has a large specialized staff and Commissioners drawn from a range of expertise relevant to its mandate and thus bears some similarity to a department.

One of the key factors mentioned by the Economic Council of Canada in its 1969 *Interim Report* which affects the position on this spectrum of a competition law tribunal was the need to leave certain conduct, such as mergers and abuse of dominance, to a case-by-case assessment governed by tests that involve balancing sometimes complex economic evidence. The applicable tests, such as "substantial lessening of competition," are written in flexible language to permit the adjudicator to screen out mergers or other conduct which are *de minimis* or which have a beneficial impact on competition. These tests must also tolerate the differing assessments necessary when applied across varying industries. The *Competition Act* is a law of general application and therefore can apply to virtually any market, product, or service. For these reasons, it is simply not possible to spell out in advance or in great detail precisely what conduct may be harmful; it is the effect of the conduct, based on structural and behavioural analysis in a given case, which must be assessed.

The current merger provisions also require the Tribunal to assess whether a merger with a clearly anti-competitive impact should nonetheless be permitted because of counterbalancing efficiencies. The greater procedural flexibility and expertise of a specialized tribunal may accommodate this kind of balancing test better than the regular courts. An expert tribunal can use its judgment in the reception of economic evidence and its familiarity with specialized concepts and terminology to assist at getting at the facts more quickly, efficiently, and accurately. The Supreme Court of Canada confirmed the specialized nature of the legislative scheme in an appeal from a merger determination by the Tribunal in *Southam*:

> The aims of the Act are more "economic" than strictly "legal." The "efficiency and adaptability of the Canadian economy" and the relationship among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested

> it with responsibility for the administration of the civil part of the *Competition Tribunal Act*.[259]

The Competition Tribunal seeks to marry the benefits of a specialized body with lay membership chosen for its expertise with the greater certainty, known procedures, and judicial decision making found in the Federal Court. The government's *Guide* accompanying the 1986 amendments explained the rationale for a judicialized tribunal in a passage worth citing at length:

> The Economic Council of Canada's 1969 Interim Report on Competition Policy stated that any shift of competition policy legislation out of the criminal law should be accompanied by the formation of a specialized tribunal to adjudicate these matters.
>
> The issue of adjudication of competition matters has been the subject of much discussion over the long history of competition law reform. Many interested parties have proposed reliance on the ordinary courts to adjudicate competition matters. One factor often cited in support of the courts is their ability to produce consistent results with clear and full rights of appeal. Others have expressed a preference for the use of a specialized tribunal because it would provide greater potential for expertise in economics and business, and would permit more scope for response by the decision maker to social and economic change. In particular, lay experts are better able to reflect the reality of the business world.
>
> On balance, the Government believes it is more appropriate that these matters be adjudicated by a highly judicialized tribunal. This hybrid will allow the use of expert lay persons as well as judges in the decision-making process. Nevertheless, the Government agrees that it is very important to have in the law an adjudication system that ensures the impartiality, due process and certainty which is associated with the courts.[260]

The Competition Tribunal's court-like structure and processes have led to questions and concerns concerning the cost and delay required to obtain a final ruling.[261] For example, the prospect of spending several years and substantial legal costs in litigation can lead businesses to abandon transactions when challenged by the Commissioner, regardless of

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259 *Southam*, above note 248 at para 48. See also *Chrysler Canada*, above note 241 at 406.

260 Canada, Consumer and Corporate Affairs, *Competition Law Amendment, A Guide* (Ottawa, Consumer and Corporate Affairs, 1985) at 10–11.

261 See Neil A Campbell, Hudson N Janisch & Michael J Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997) 76 *Canadian Bar Review* 297.

the merits of a challenge under the Act.[262] This has contributed to the lack of contested cases being heard before the Tribunal.[263] The level of case load has in turn fuelled concern that the Tribunal may not easily develop or refine its expertise in competition law matters.[264]

The difficulty is finding an alternative adjudicative structure which can achieve greater expedition while supplying the fairness and certainty that a judicialized body offers.[265] If the authority to approve conduct was given to a body capable of dispensing speedy summary justice, but without according the procedural safeguards, evidentiary rules, and appeal rights available through the Tribunal,[266] other concerns, such as arbitrariness or lack of procedural fairness, would inevitably be raised.[267] A move toward an "integrated agency model" along the lines of the European Commission, in which investigation and first-level adjudication are married in the same body,[268] may lead to a greater

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262 See, e.g., William T Stanbury, "The Merger Review Process in Canada: Information and the Structure of Incentives" (1995) 16 *Canadian Competition Record* (no 3) 73.

263 Edward M Iacobucci & Michael J Trebilcock, "Critical Reflections on the Institutional Design of Canadian Competition Policy" (2011) 24 *Canadian Competition Law Review* 39 at 42 [Iacobucci & Trebilcock, "Critical Reflections"]:

> The consensus among interviewees, however, is that timeliness of disposition is still a major concern with Tribunal proceedings in contested cases. It is possible, for example, that parties are especially reluctant to take more complex cases to the Tribunal because of doubts about timeliness, which may explain the continued consensus concern about timeliness despite the clearly observed improvement in the timeliness of Tribunal decision-making recently.

264 Michael Trebilcock & Edward Iacobucci, "Designing Competition Law Institutions" (2002) 25 *World Competition* 361; Iacobucci & Trebilcock, "Critical Reflections," above note 263.

265 Iacobucci & Trebilcock, "Critical Reflections," above note 263 at 46:

> The difficulty for reform is that while there is a consensus on the shortcomings of the *status quo*, there is no such agreement over fundamental aspects of reform. In particular, while our interviews suggest that there is general support for the idea of a multi-person commission, there is division over its particular role, as well as the institutional framework for review of its decisions.

266 As noted above, appeal may be brought on questions of law to the Federal Court of Appeal on a correctness standard of review. Appeals on questions of fact and mixed fact and law require leave; reasonableness is the standard of review in such appeals (*Tervita,* above note 258, paras 34–39).

267 See, e.g., the kind of challenge made, and rejected, in *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, [2003] CCTD 24.

268 The European Commission, through the initiation of the Competition Directorate, investigates, enforces, and adjudicates all issues relating to competition law within its jurisdiction (hence an integrated agency model). The case team writes the draft of the decision, albeit usually after a hearing and after much vetting within the Competition directorate, by the directorate's Legal Service,

body of published decisions but could raise the kinds of concerns, such as predictability, which surfaced in the 1970s in Canada with the business community's rejection of a more inquisitorial civil tribunal in Bill C-256.[269] It is also not clear that an inquisitorial system, with added appeals of first-level administrative decisions to the courts, would lead to faster final determinations.[270] Giving the Tribunal a more proactive role to issue guidelines or to participate in evidentiary collection and assembly, as the Economic Council suggested, may also affect its perceived independence and impartiality as a fact finder. Thus, it may be hard to improve on the compromise reflected in the structure of the Competition Tribunal, even though it is a more judicialized body than the Economic Council envisioned in 1969.

The Tribunal has taken steps both to streamline its rules of procedure and to adopt an expedited timetable for hearing matters.[271] Permitting a streamlined consent order process through a 2002 amendment has also introduced greater expedition and certainty, and some transparency, to settlements achieved between the Commissioner and respondents.[272] Efforts toward procedural and other improvements are likely to be ongoing, as the complexity of the issues in this area of the

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and by a committee of member-state experts. The Commission does not sit as an adjudicating body. Appeal lies to the European General Court, and further to the European Court of Justice on matters of law.

269 See Section B(3)(d)(ii), above in this chapter.

270 In reviewing policy options for competition issues in digital markets, the UK Competition and Markets Authority observed in *Online Platforms and Digital Advertising* (1 July 2020), online: www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report at 330:

> Of those cases that have been brought by the European Commission against Google in recent years, *Android* took more than five years, *Shopping* took more than seven years and *AdSense* took nine years, not including their appeal processes. The CMA's most complex competition enforcement cases also tend to take several years to reach a final decision. Such timescales create a material risk that, even if a platform is ultimately found to have acted anti-competitively, the harm to competition and consumers will have become irreversible before such a conclusion is reached.

271 Canada, Competition Tribunal, *Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal* (January 2019), online: https://ct-tc.gc.ca/en/procedure/practice/expedited-proceeding.html:

> The Tribunal considers that a period of five (5) to six (6) months between the filing of a Notice of Application ("NOA") and the commencement of the hearing on the merits will typically be a reasonable timeline for the Expedited Process, subject in each case to the nature of the particular application.

272 See Chapter 5, Section F(2)(c). Transparency is limited to the filing of the agreed-upon consent order and publication on the Tribunal's website, and any public statement or backgrounder released by the Commissioner.

law will continue to create tensions between the goals of expedition and fairness under the current adjudicative structure.[273]

D. CONCLUSION

For almost a century from the first legislation in 1889, Canadian competition law was confined to the constitutional straightjacket of the criminal law. Criminal prohibitions governed not only conduct seen as morally reprehensible, such as price fixing, but other commercial behaviour, such as mergers and monopoly, which required a case-by-case assessment of their prejudicial impact on the economy to determine whether a remedy was justified. Such an assessment was unsuited to the criminal law courts, which lack economic expertise and flexible remedial powers. The result was an ineffective regime that provided little protection against increasing concentration of the economy or abusive or exclusionary practices by dominant firms.

While there was a gradual improvement in the authority and sophistication of competition law enforcement with the first permanent agency created in the 1920s, followed by greater enforcement powers and resources in the 1950s, federal authority to pass competition prohibitions on a non-criminal law foundation remained uncertain into the 1980s. It was only after the Economic Council of Canada issued a comprehensive set of recommendations for reform in 1969 that Parliament in 1976 took the first tentative steps by adopting provisions for civilly reviewable practices, including refusal to supply, exclusive dealing, and tied selling. A more comprehensive package followed in 1986, making mergers and abuse of dominance reviewable before the new civil Competition Tribunal, using flexible tests focused on the impacts of these practices in competition. The Supreme Court finally placed civil competition laws on a firm constitutional foundation in *General Motors of Canada Ltd v City National Leasing* in 1989. A further important step in implementing the Economic Council's template occurred with the 2009 amendments, which repealed the criminal predatory pricing, price discrimination, and

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273 In *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, [2020] CCTD 1, the parties to a merger opposed an expedited schedule, and the Tribunal held:

> [T]he Commissioner has not persuaded the Tribunal that using the Expedited Process is a reasonable and advisable option in light of the circumstances of this specific matter and the considerations of fairness, or that the period of three to four months that could be gained with the Expedited Process option justifies imposing the Expedited Process against the strong objection of P&H.

resale price maintenance offences and expanded the civilly reviewable practices. Significantly, the criminal conspiracy prohibition was simplified to remove the need for the courts to engage in any economic assessment of price fixing, market sharing, or supply limitation agreements.

With reduced reliance on the criminal law and greater use of civil provisions reviewable before an expert tribunal, the current *Competition Act* prohibitions are better tailored to assessment by the adjudicative bodies that enforce them. Tensions and areas of potential improvement, however, remain. For example, the trial-focused adjudicative model adopted in the quasi-judicial Competition Tribunal (a hybrid body composed of Federal Court judges and lay members) continues to raise concerns, as it does in other areas of civil litigation, relating to the time and cost needed to obtain a resolution. On the other hand, efforts to adopt a more expeditious agency-based model in the 1970s were forcefully rejected by the business community as likely to produce uncertainty and an unpredictable business climate, suggesting that any improvements may require changes within the existing adjudicative architecture rather than moving toward a European-style agency model.

An emerging area of enforcement is private civil damages actions. Aided by advances in the important procedural tool of class proceedings, which permits groups of plaintiffs such as consumers harmed by price fixing or misleading representations to seek redress, such actions hold the promise of providing a helpful complement to public enforcement. Recent decisions by the Supreme Court permitting class actions by indirect and umbrella purchasers may facilitate such proceedings.

On the other hand, private applications to the Competition Tribunal, confined mainly to vertical and distribution-related practices, have not generated the hoped-for body of jurisprudence or remedies for private parties. This is due to a number of factors, including fairly stringent leave requirements, and the tests in the underlying substantive law, which mean that relief is either uncertain or that remedies are limited (confined as they are to a remedial order rather than compensatory damages). Further consideration could be given to expanding the scope of such applications, as recommended by a House of Commons Committee in 2002, to cover abuse of dominance (and beyond that, to mergers and civil agreements) and to permit the Tribunal to award damages.[274] This could yield more work for and further jurisprudence from the Tribunal, provide additional remedies to promote dynamic markets, and take some of the pressure off the limited resources available to the Competition Bureau in its enforcement efforts.

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274 *A Plan to Modernize Canada's Competition Regime*, above note 223 at 50.

CT-2025-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

IN THE MATTER OF an application by Alexander Martin for an order pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34, as amended, for leave to make an application under sections 79 and 90.1 of the *Competition Act*.

B E T W E E N:

ALEXANDER MARTIN

Applicant

– and –

ALPHABET INC., GOOGLE LLC, GOOGLE CANADA CORPORATION APPLE INC. and APPLE CANADA INC.

Respondent

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