HOUSE OF COMMONS
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A Plan to Modernize Canada's Competition Regime

Report of the Standing Committee on Industry, Science and Technology

Walt Lastewka, M.P.
Chair

April 2002

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has the honour to present its

EIGHTH REPORT

Pursuant to Standing Order 108(2), the Committee proceeded to a study of Canada's competition policy and framework, including the *Competition Act*. After hearing evidence, the Committee agreed to report to the House as follows:

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CHAIR'S FOREWORD

In June 2000, the House of Commons Standing Committee on Industry, as the current Committee was then known, produced an *Interim Report on the Competition Act*. This report followed an independent review of the anticompetitive pricing provisions of the *Competition Act* and the Competition Bureau's enforcement record, as was requested by the Bureau at the insistence of The Honourable John Manley, Minister of Industry. Professors J. Anthony VanDuzer and Gilles Paquet, both of the University of Ottawa, conducted this in-depth study dealing with predatory pricing, price discrimination and price maintenance. Their work, entitled *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, and subsequently known as the VanDuzer Report, was completed and presented to the Committee in October 1999.

After receiving this report and while the Committee was conducting its hearings process, the Bureau engaged the Public Policy Forum (PPF) — a non-profit, non-partisan organization dedicated to improving the quality of government in Canada — to consult the Canadian public widely on changes to the *Competition Act* and the *Competition Tribunal Act*. The changes contemplated in its consultations were those proposed in four Private Member's bills: Bill C-402, Bill C-438, Bill C-471 and Bill C-472. Two of these bills covered much the same policy ground as the Committee's study. Because the Committee did not want to prejudice this consultative process, it decided not to provide an opinion on any of the specifics of these bills and to make its report an interim one. The Committee would weigh in on these matters only after these consultations were complete and a report issued.

In December 2000, the PPF published its report, entitled *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations*, which summarized both the written submissions it had received and the discussions at the roundtables it had held. The Government of Canada then decided to wrap some of the contents of the four Private Member's bills into a government bill. The government chose the parts where a consensus could be obtained, including selected inputs from both this Committee's *Interim Report* and the PPF's report. All these efforts culminated in Bill C-23: *An Act to Amend the Competition Act and the Competition Tribunal Act*, which was assigned to this Committee for study after First Reading in the House of Commons. This course of action, rather than the traditional procedure of assigning the bill to a parliamentary committee only after Second Reading, permitted a more thorough review of the bill and the Acts that it sought to modify. This procedural route also allowed the Committee to study more deeply the changes contemplated and, if necessary, to recommend additional changes.

The bill dealt with four issues: (1) creating a new offence for "deceptive prize notices," including "scratch and win cards"; (2) facilitating cooperation with foreign competition authorities for the enforcement of civil competition and fair trade practices laws; (3) streamlining the administrative processes of the Competition Tribunal by

providing for cost awards, summary dispositions and references; and (4) broadening the scope under which the Tribunal may issue temporary orders. After extensive consultation with competition law experts and selected business interests, the Committee subsequently amended the bill in two important ways. The bill, if it receives Royal Assent as amended, will permit private parties to have access to the Tribunal for resolving disputes on a limited number of business practices that are considered civilly reviewable by the Acts. The Tribunal will also now be able to impose an administrative penalty of as much as $15 million if an air carrier is found guilty of abuse of dominance (sections 78 and 79 of the *Competition Act*, which would include acts of predatory behaviour).

The Committee believes that Bill C-23 amendments to the two competition Acts provide a good start, but more amendments are needed to address contemporary antitrust concerns. In some cases, the *Competition Act* captures too many business practices, which leads to a "chilling effect" on perfectly legitimate, pro-competitive behaviour on the part of Canada's most productive firms. At the same time, and in other cases, both competition Acts fail to capture and properly address many business practices that at least appear to be anticompetitive and may even constitute egregious anti-social behaviour. Therefore, more change is necessary, and the Committee agrees with the government's multi-stage approach to reform. Looking beyond the immediate horizon, the Committee undertook four roundtables that included more than 20 eminent competition law experts, as well as formal and informal meetings with the Bureau and members of the Tribunal, respectively, to suggest options and a timetable for reform.

Although interesting and varied opinions exist amongst competition policy experts on a number of business practices and their current legal status, as well as the way in which they should be reviewed and pursued by the Bureau and Tribunal, these views were not so diverse as to prevent a consensus. The Committee believes this consensus is captured in this report. However, the first-time reader of this Committee's reports is encouraged to read our *Interim Report* before tackling this one; a better understanding and appreciation will be gained on the necessary trade-offs in objectives presented by competition issues.

At this time, I would like to thank those who participated in our extensive hearings process and who shared their insights with us. I am confident that the public will agree that this report reflects both their concerns and common Canadian values and priorities in the domain of competition policy, law and enforcement. Finally, on behalf of the whole Committee, I wish to express our appreciation for the dedicated efforts of Ms. Susan Whelan, the former Chair of the Committee, and to acknowledge her important role in the creation of this report.

PREFACE

Competition legislation, or antitrust legislation as it is sometimes called, has existed in Canada for more than 100 years. While the name or title of the governing Act has changed several times over the years,[1] each revision has refined it and made it a more effective instrument of the public interest. These revisions were necessary to fill major breaches in the Act because serious limitations in its enforceability became obvious almost immediately from the law's earliest contested cases. Canada was the first industrial country out of the gate to adopt an antitrust law in 1889 but, from a practical sense, Canada fell well behind most major industrialized nations fairly early on in the realm of competition matters. In the intervening years between the original Act of 1889 and the current Act of 1986, Canada's competition law could hardly have been touted as being on the vanguard of competition policy; much more work had to be done, and on a limited number of important issues still remains to be done, to realize such a lofty status.

The primary goal of the legislation — from the first to the latest — remains the same: the quashing of conspiracies and monopoly-making restraints of trade (except those created by federal and provincial legislation). The Committee's *Interim Report on the Competition Act* (hereinafter the "*Interim Report*") provides some limited chronology of the revisions taken to date. In this report, the Committee wants to limit the amount of rehashing of this history. Our point of departure will be the adoption of the *Competition Act* and the *Competition Tribunal Act* in 1986; in the interest of brevity, we will revisit only the most significant amendments to these Acts and the economic conditions that spawned them.

At the outset, the Committee observes five relatively recent economic trends that are becoming pervasive in today's society — trends that, in all probability, cannot be divorced from the knowledge-based economy that we are building. These economic phenomena include: (1) a shift in corporate strategies that seek a competitive advantage through the attainment of economies of scale and scope and towards innovation; (2) the organizational drive to delayer many large corporate hierarchies through spinning off non-core activities to separate businesses and the forging of strategic allies or, alternatively put, the development of business networks in the hopes of raising productivity; (3) the adoption of new technologies, particularly digital technologies, that require substantial up-front investments with low or next-to-zero incremental unit costs that may lead to very aggressive pricing policies in economic downturns; (4) the adoption of products, most notably software programs such as Microsoft Windows, that may eventually develop into an industry standard, which will often be accompanied by network

[1] The original Act was called *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* in 1889, which was repealed and replaced by the *Anti-Combines Act* of 1915. This new Act was repealed and replaced by two Acts: the *Board of Commerce Act* and the *Combines and Fair Price Act* in 1919, which were later ruled *ultra vires*. These Acts were then replaced by the *Combines Investigation Act* of 1923, which was in turn repealed, thoroughly reworked and replaced by the *Competition Act* of 1986.

effects[2] and may consequently lead to unusually high levels of market concentration (including near-monopolization); and (5) the internationalization of commerce — trade and investment — in the wake of new transportation and communications technologies, with their attendant lower costs, and government policy favouring the removal of significant tariff barriers to trade around the globe. Each of these new developments has been a catalyst for changes to the *Competition Act* and the *Competition Tribunal Act*.

These economic phenomena and the competition concerns that they raise can be seen as the main causes of a flurry of government and Private Member's bills that have made it to the *Order Paper* of the House of Commons. Indeed, one of the best barometers a democratic country has for measuring the public's dissatisfaction with what is going on in the marketplace may be found in the number of bills or amendments for change. In the case of amendments to the *Competition Act* and the *Competition Tribunal Act*, nine Private Member's bills and two government-sponsored bills (Bill C-26 of the 36th Parliament and Bill C-23 of 37th Parliament) have arisen in the last two years alone.

The Committee suggests that the almost simultaneous appearance of these bills and the above-cited economic trends are no accident; there is a causal relationship flowing from economic trend to *Competition Act* amendment. For example, the local telephone network is the perennial case of a "network economy or externality." Cable television, rail freight services, electrical power and natural gas distribution also belong to this special industrial species, as is the recently deregulated airline industry. Some of the technologies used by airline companies also display very low incremental unit costs relative to total costs. The traditional way of handling these cases of near or "natural monopoly" has been to regulate them. Since the late 1980s, however, airline, rail freight, long distance telephone and international telecommunications services have been partially deregulated because technology developments suggest that they no longer harbour the natural monopoly characteristic. Only the deregulation of the airline industry has proven controversial. Here, the relatively small Canadian market and the federal government's maintenance of foreign ownership restrictions on the operation of air carrier services have conspired to produce a highly concentrated market, frustrating both the travelling public and would-be start-ups in the industry. Bill C-26, an amendment passed in the 36th Parliament in 2000, was an attempt to address this problem subsequent to the imminent failure of Canadian Airlines International Inc. and its merger with Air Canada Inc. The failure of many smaller airline companies in the past few years (Royal Airlines, Greyhound Airlines, Canjet, Canada 3000) and the sheer dominance of Air Canada in the Canadian market were the stimulus for an amendment to Bill C-23. This amendment would give the Competition Tribunal the power to assess an administrative penalty of as much as $15 million if an air carrier is found guilty of abuse of dominance. As such, the

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[2] A "network effect," or as it is sometimes called a "network economy," refers to an enhanced value an individual already subscribing to a business network would assign to the service with the addition of more customers. Using the local telephone network as an example, the larger the number of telephone subscribers to the local network, the greater the willingness to pay for service on the part of each subscriber. Such a "network economy" is also often referred to as a "network externality" because it is a value that is external to the firm but internal to the industry. Regulatory agencies across the world have been notorious in capturing and exploiting this externality through mandatory and implicit cross-subsidy pricing regulations.

government is departing from the traditional approach of arming the industry's regulator with the necessary powers to directly control these aspects of competitive behaviour. The government has instead taken a "special rules for special industries" approach, which calls into question the claim that the *Competition Act* is framework legislation, justifying it on the grounds that this industry comes under federal regulatory jurisdiction.

Bill C-23 addresses the increasing internationalization of commerce in two important ways. First, this bill would facilitate cooperation between the Competition Bureau and foreign competition authorities for the enforcement of civil competition matters now that monopolization practices can transcend country boundaries. Second, the Committee amended this bill to give private parties access to the Competition Tribunal for resolving disputes on a limited number of business practices that are considered civilly reviewable by the Acts. This amendment should comfort many small- and medium-sized businesses that may have to combat large multinational enterprises which attempt to abuse their dominant position.

Finally, increased innovation across most sectors of the economy demands quicker resolution of disagreements between private parties and the Bureau on controversial competition issues. Bill C-23 responds to such demands by proposing to streamline the Tribunal's administrative processes through the provision of cost awards, summary dispositions and references.

Bill C-23 will provide a good first step to strengthening the *Competition Act*. More steps, however, must be taken. Industry and competition experts complain that the law is over-inclusive in some areas of antitrust, but under-inclusive in other areas. The typical example of over-inclusiveness has been the law's inability to properly distinguish between a strategic alliance and a conspiracy to raise prices to the detriment of the public, which has a "chilling" effect on some profitable and competitively benign opportunities that the business sector would otherwise undertake (despite the development of the Bureau's bulletin: *Strategic Alliances Under the Competition Act*). Conventional thinking suggests that a strategic alliance is preferred to a full-blown merger as a means of gaining cooperative behaviour between rival companies with distinct core competencies. The perennial example of the law's under-inclusiveness is found in the term "unduly" in section 45 of the Act — again dealing with a conspiracy — which makes it hard to obtain a conviction in a contested case; this is true even when the case is, for all intents and purposes, a "naked hard-core cartel" with no redeeming social value.

Furthermore, a growing number of stakeholders believe that the *Criminal Code* is not well suited to distinguish between anticompetitive conduct and perfectly legitimate pro-competitive conduct when it comes to price discrimination, predatory pricing and vertical price maintenance practices. Shifting these pricing provisions over to the civilly reviewable side of the Act deserves further consideration. Competition Bureau resource issues, including the thresholds for merger review, are also a cause for concern and so are the processes and powers of the Competition Tribunal. Resolution of these issues is the task of this report.

LIST OF RECOMMENDATIONS

1. **That the Competition Bureau designate conspiracies as one of its highest priorities and that it allocate enforcement resources consistent with this ranking. That the Competition Bureau continue implementing existing enforcement strategies that target domestic and international conspiracies against the public, independently and jointly with competition authorities of other jurisdictions. As a matter of routine, that the Competition Bureau review its tactics of crime detection with a view to improving its existing record of success.**

2. **That the Competition Bureau review its enforcement guidelines, policies and practices to ensure appropriate emphasis is placed on dynamic efficiency considerations in light of new challenges posed by the knowledge-based economy, including factors such as: (1) high rates of innovation; (2) declining or zero marginal costs on additional units of output; (3) the possible desirability of market dominance by a firm where it sets a new industry standard; and (4) the increasing fragility of dominance.**

3. **That the Government of Canada empower the Competition Tribunal with the right to impose administrative penalties on anyone found in breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. Such a penalty would be set at the discretion of the Competition Tribunal.**

4. **That the Government of Canada repeal all provisions in the *Competition Act* that deal specifically with the airline industry (subsections 79(3.1) through 79(3.3) and sections 79.1 and 104.1).**

5. **That the Government of Canada provide the Competition Bureau with the resources necessary to ensure the effective enforcement of the *Competition Act*.**

6. **That the Competition Tribunal develop and articulate a policy to allocate costs in a fair and equitable manner having regard to the resources available to the parties to the proceeding. That such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.**

7. **That the Competition Tribunal, in consultation with the Tribunal-Bar Liaison Committee, continue its ongoing review of procedures with the aim of creating an adjudicative system that**

will ensure "just results" in an expeditious and timely manner. Such procedures should aim at reducing parties' costs, as well as the time required, in bringing contested cases to a conclusion while, at the same time, continuing to ensure that due consideration is given to principles of procedural fairness and the appearance of justice.

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).**

9. **That the Government of Canada amend section 124.2 of the *Competition Act* to permit a party to a contested proceeding under Part VII.1 or VIII to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII.**

10. **That the Government of Canada amend section 12 of the *Competition Tribunal Act* to permit questions of law to be considered by all the members sitting in a proceeding.**

11. **That the Government of Canada amend section 13 of the *Competition Tribunal Act* to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.**

12. **That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.**

13. **That the Government of Canada repeal the term "unduly" from the conspiracy provision (section 45) of the *Competition Act*.**

14. **That the Government of Canada amend the *Competition Act* by adding paragraphs to section 45 that would provide for exceptions based on factors such as: (1) the restraint is part of a**

broader agreement that is likely to generate efficiencies or foster innovation; and (2) the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation. The onus of proof, based on the "beyond a reasonable doubt" standard, for such an exception would be placed on the proponents of the agreement.

15. That the Government of Canada amend the *Competition Act* to add a paragraph to section 45 that would prohibit any proceedings under subsection 45(1) against any person who is subject to an order sought under any of the relevant reviewable sections of the *Competition Act* covering essentially the same conduct.

16. That the Government of Canada amend the civilly reviewable section of the *Competition Act* to add a new strategic alliance section for the review of a horizontal agreement between competitors. Such a section should, as much as possible, afford the same treatment as the merger review provisions (sections 92 through 96), and should authorize the Commissioner of Competition to apply to the Competition Tribunal with respect to such agreements that have or are likely to have the effect of "preventing or lessening competition substantially" in a market.

17. That the Government of Canada ensure that its newly proposed civilly reviewable section dealing with strategic alliances, as found in recommendation 16, apply to agreements between competing buyers and sellers, but not to vertical agreements such as those subject to review under sections 61 and 77 of the *Competition Act*.

18. That the Competition Bureau establish, publish and disseminate enforcement guidelines on conspiracies, strategic alliances and other horizontal agreements between competitors that are consistent with recommendations 12 through 17 that would amend the *Competition Act*.

19. That the Government of Canada amend the *Competition Act* to allow for a voluntary pre-clearance system that would screen out competitively benign or pro-competitive horizontal agreements between competitors from criminal liability pursuant to subsection 45(1) of the Act. That the Competition Bureau levy a fee on application for a pre-clearance certificate that would be based on cost-recovery principles similar to that of a merger review. That a reasonable time limit upon application for a certificate be imposed on the Commissioner of Competition,

failing which the applicant is deemed to have been granted a certificate.

20. That the Government of Canada amend the *Competition Act* to allow individuals who have been refused a pre-clearance certificate for a horizontal agreement between competitors by the Commissioner of Competition be given standing before the Competition Tribunal for a fair hearing on the proposed agreement. That such standing be granted only if the agreement remains proposed and has not been completed.

21. That the Government of Canada repeal paragraphs 50(1)(*b*) and 50(1)(*c*) of the *Competition Act* and amend the Act to include predatory pricing as an anticompetitive act within the abuse of dominant position provision (section 79).

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

23. That the Government of Canada repeal the price discrimination provisions (paragraph 50(1)(*a*) and section 51) of the *Competition Act* and include these prohibitions under the abuse of dominant position provision (section 79). This prohibition should govern all types of products, including articles and services, and all types of transactions, not just sales.

24. That the Government of Canada amend the *Competition Act* by deleting paragraph 79(1)(*a*).

25. That the Competition Bureau revise its *Enforcement Guidelines on the Abuse of Dominance Provisions* in order to be consistent with the addition of the anticompetitive pricing practices (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) to section 79 of the *Competition Act*.

26. That the Government of Canada amend section 110 of the *Competition Act* to require parties to any merger (i.e., asset or

share acquisitions) involving gross revenues from sales of $50 million in or from Canada to notify the Commissioner of Competition of the transaction.

27. That the Government of Canada amend the *Competition Act* to have a parliamentary review of the notification thresholds contained in sections 109 and 110 within five years and every five years thereafter to ensure optimal enforcement of the *Competition Act*.

28. That the Government of Canada immediately establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the *Competition Act,* and that the report of the task force be submitted to a parliamentary committee for further study within six months of the tabling of this report.

29. That the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.

INTRODUCTION

Canada's original competition law was born out of the public's dislike for some of the business combinations that were being formed just prior to the turn of the 20th century. However, as history would later show, the large-scale businesses that were fashioned from key mergers and acquisitions in related activities at that time were, for the most part, an organizational response to innovation in products and processes that resulted in vast economies of scale. These scale economies dictated new business strategies based on massive investments in physical capital as well as a commitment to building integrated operations extending backward into core raw materials and forward into marketing and distribution networks. Furthermore, these strategies could only just then be implemented with the opening up of more distant markets as integrated railway and telegraph networks were developed.

I … encourage the Committee to rise to the challenge and provide a more ambitious blueprint for the modernization of our Act … It's my hope that this blueprint will form the basis of a government white paper that will … launch the next round of amendments. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

Unfortunately, this good came with the bad. The unprecedented cost advantages bestowed upon large-scale operators led to the elimination of many small-scale merchants. So the world's first antitrust law — Canada's *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* — was enacted in an attempt to assure the public on two grounds: first, this industrial transformation would occur in an orderly way, only the inefficient would be driven out of business and not efficient small-scale operators through predatory means; and second, in the end, the ultimate beneficiaries of technological and organizational change would be consumers. The original antitrust legislation, as well as the three Acts that would replace it, had three targets: conspiracies to raise prices; mergers and acquisitions that would monopolize markets; and a dominant firm's abusive business practices and predator policies that would injure, rein in or drive out its smaller rivals.

[Y]ou … need amendments … to make the Act more effective in addressing anti-competitive conduct and … to reduce the chilling effect the Act … has on a broad range of pro-competitive conduct, whether it's these pricing practices …, or horizontal cooperation, which … in the vast majority of circumstances is pro-competitive once you get outside this limited category of hard-core criminal cartel conduct. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:45]

The modern version of the original antitrust Act, now known as the *Competition Act*, is a well-crafted economic instrument designed to preserve and enhance the process of competition. It is a law of general application; it applies to

I think the proposals for the two tracks, criminal versus civil in section 45, is something that will have to be done … it's the sensible thing to do. [Jeffrey Church, University of Calgary, 59:10:55]

all industries in equal measure (except those provided an exemption by federal or provincial legislation) and puts the interest of no one competitor or class of competitor ahead of those of any other. Canada's *Competition Act*, the Competition Bureau and the Competition Tribunal have supplemented the competitive process in producing an economic environment in which non-compliance with the law is more the exception than the rule. This has been accomplished by:

- establishing a broad competition framework, thereby setting "the rules of the game";
- making the guidelines of the enforcement agency — the Competition Bureau — widely available to the business community;
- having the Bureau fulfil its advocacy role at many regulatory hearings and other public events, thereby making the rules known to all players; and
- judiciously enforcing the many provisions of the Act under the watchful eye of the referee — the Competition Tribunal — so that the game is called according to the rules.

The difficulty with the reform of section 45 is not … that there's any disagreement around the evil of hard-core cartels. The difficulty is whether you can … write … a law that is not massively over-inclusive. [Neil Campbell, McMillan Binch, 59:12:55]

At the turn of the 21st century, a similar set of circumstances to that of the turn of the 20th century appears to be unfolding. The source of change is again innovation, but this time it has less to do with cost advantages of scale and scope associated with new physical capital and more to do with creative advantages associated with "human capital." Rather than exploiting the size and scope of a firm, or more succinctly, the efficiencies obtained through central direction of an industrial hierarchy, the business corporation is focusing on being lean and nimble. Many modern corporations are, therefore, spinning off non-core competency activities, while weaving ever-larger webs of business networks. This organizational structure — which relies on independent, highly specialized, interdisciplinary work teams — provides focus to the firm at a time when the currency of the so-called "Information Age" is the creative talents of the workforce. The business sector is thus banking on increased productivity through a strategy of creative competitive advantage. When one combines these corporate developments with innovations (such as containerization in transportation and digitalized broadband in wired and wireless telecommunications) and policy shifts

[W]hy do we not have a Microsoft case in Canada? Seventeen states in the U.S., the federal government in the U.S., and Europe have all looked at that. There's no argument that the impact in Canada … is any different. … [T]he answer: We don't have the funding to take that abuse case in Canada. [Robert Russell, Borden, Ladner & Gervais, 59:09:50]

to more liberalized trade and deregulated industries, the business landscape is increasingly becoming global rather than national.

My own reading of what the Bureau has … in the merger area is that … they are probably pretty well funded … The user fees have provided a cashflow to assist in that. [Neil Campbell, McMillan Binch, 59:12:35]

Firms using today's newest business models, such as "just-in-time" production and "Big Box" retailing, are exerting tremendous pressure on small and medium-sized businesses that are not adjusting. As a result, new stresses and fracture points in the competition policy framework are appearing once again. Although the *Competition Act* is a modern piece of legislation that reflects contemporary economic thinking and provides a balanced approach to enforcement, there are signs that it can be made more effective in certain areas and, where it is already effective, can be made more efficient. Amendments to selected provisions of the *Competition Act* and to the administrative processes of the Competition Tribunal are the order of the day.

The Committee began answering the call for a modern and effective competition law regime in its *Interim Report*. We broached, amongst other issues, the private right of action in respect of some civilly reviewable matters, such as refusal to deal (section 75), exclusive dealing, tied selling, and market restriction (section 77) and delivered pricing (section 80). With the Public Policy Forum's subsequent finding of a favourable consensus (provided that adequate safeguards against vexatious and frivolous suits were put in place), the Committee amended Bill C-23 in favour of such rights (excluding section 80). Consequential amendments were also necessary. The Committee further amended section 75 to ensure that an "adverse effects on competition" test was added, which would eliminate any incentive for frivolous commercial disputes, given that the Commissioner would no longer be the gatekeeper of these sections.[1]

In terms of … enforcement … there are really three things that can be dealt with … There is this question of funding … the question of alternative enforcement mechanisms like private access, which … for civil cases would help the Bureau a great deal by taking some of the workload away from them. The other area on the agenda … is … reform of the Tribunal process. [Margaret Sanderson, Charles River Associates, 59:11:20]

[1] Typically, the "competitive effects test" used in the Act is that of a "substantial lessening of competition." Section 75 will, however, use an "adverse effects on competition" test. The meaning of "substantial lessening of competition" has been refined to a degree by judicial interpretation and the meaning of "adverse effect on competition" will have to be similarly clarified. The use of the "adverse effects" test in section 75 is to permit small and medium-sized enterprises the opportunity to have their cases heard in the new private access regime. In the case of a firm with a small market share, a refusal to deal might not "substantially lessen" but still "adversely affect" competition. The requirement to show a "substantial lessening of competition" in a market would be likely to exclude private action in all but the largest cases.

The Committee's actions will not stop there; we intend this report to become a blueprint for a government White Paper that will launch the next round of amendments to the *Competition Act* and the *Competition Tribunal Act*. The report will identify both the relevant sections of the two Acts needing reform and the pertinent issues related to the options under consideration. Once these options for reform are clarified, the Committee will weigh them, look for consensus amongst the various stakeholders, and recommend a course of action; where warranted, a timetable for reform may also be provided. The reasoning for the Committee's preferences will be spelled out in detail where possible, as the Committee finds transparency an essential ingredient to the reform of complex issues involving competition policy and its many varied stakeholders.

[T]here's been a tendency to describe private action as … a … way of helping the Commissioner out, … putting more resources into his pocket and doing some of his work … but I don't see it that way … [O]ne has to think much more broadly about private action … [as] a way of … enlarging the scope of competition cases. … [W]e should get a much richer case law and a much richer body of decisions from which to draw. [Roger Ware, Queen's University, 59:11:35]

Although the Committee is not under the illusion that only one combination of reforms is possible or desirable, we do caution both the reader and policy-maker that the recommendations offered here are a package of reforms that are not easily cherry-picked due to the *Competition Act*'s complex set of interrelationships within its different sections. Attempts to select among these recommendations to craft a different competition framework or different strategy are not without consequences.

[T]here's a theme percolating that jurisprudence is just inherently good and we should have lots of it. I'm concerned about that, because it's a very costly way to create law, relative to legislation that's fleshed out by regulations or guidelines, which have their imperfections but can also play a much more efficient and faster role in many areas. The real question … is how do we ensure that we get good, economically sound competition law enforcement …? [Neil Campbell, McMillan Binch, 59:12:15]

The plan of this report is as follows. In Chapter 1, the Committee picks up the discussion on the historical background of competition law and policy and the key economic developments that are challenging Canada's competition framework today, as set out in this introduction, by placing it in three settings. We first venture into the proper role of competition law given our understanding of the workings of the process of competition and the impacts of other complementary government policies. Gaining an appreciation for the interplay of these influential factors, we are able to establish a suitable role for competition law in Canada. In the second setting, a comparative analysis of different competition law provisions, involving both criminal and civil matters, is undertaken; this analysis suggests an optimal enforcement strategy for a mid-sized, open-trading economy — the Canadian circumstance. Finally, the merits of framework law versus "special provisions for special

industries" approach are debated, concluding in favour of a return to a framework law, but one that is bolstered by more general enforcement powers than in the past.

In Chapter 2, the Committee reports on the state of competition in Canada and the state of enforcement. In analyzing the latter's contribution to the former, we distinguish between the Bureau's array of enforcement instruments, enforcement guidelines and resources, and its Commissioner's independence and accountability structure. We also evaluate the role of the Tribunal and the courts, the deterrence incentive structure of fines and jail time, as well as the enforcement potential that private rights of action are likely to provide. In Chapter 3, the Committee discusses the role of the Competition Tribunal and its decision-making procedures.

Innovation is a lot faster. Transactions are taking place in nanoseconds, as opposed to quill pens on parchment. The pace of market behaviour is so fast today that it really imposes a very difficult challenge on an enforcement agency. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

In chapters 4, 5, 6 and 7, the Committee addresses the important provisions of the *Competition Act*: conspiracy; the anticompetitive pricing practices; acts constituting abuse of dominance; and merger review. In each chapter, we assess the economic content of the law, the merits and appropriateness of whether the relevant practices should be placed in the criminal or civil part of the Act, the substantive elements of each provision and the Bureau's administration. The contentious issues will be identified, sorted out and thoroughly assessed in light of modern economic exigencies. The Committee will advance reforms where a consensus can be reached; where it cannot, further study is recommended.

[I]t would be very helpful if your final report provided a strong endorsement of the principle that competition law as framework legislation ought not to be expanded to include a hodgepodge of industry-specific amendments. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

In Chapter 8, the Committee considers a narrow but important issue dealing with the application of the refusal to deal provision (section 75) in gasoline retailing. That industry presents particular competition concerns because independent retailers must necessarily depend on large, vertically integrated producers who both supply and compete with them. Could a large, vertically integrated producer restrict competition by withholding supply to a competing independent retailer in the case of a general supply shortage? And, if so, how would the *Competition Act* respond? Answers to these questions are necessary because there may be competition implications for other

sectors of the Canadian economy where vertical integration is also a structural characteristic. Finally, in the Conclusion, the Committee summarizes its recommendations for improvement of the competition policy framework.

CHAPTER 1: CANADA'S COMPETITION REGIME IN CONTEXT

Competition and Competition Policy Interplay

The interplay between the process of competition and competition policy and law is an interesting one. Competition is a means to an end, not an end in itself. We have competition so the business sector can deliver the best combination of products at the best prices to consumers. The best deal a consumer can receive comes from a free and open market, one with as few barriers to entry by new competitors and as few exit barriers,[2] including government-imposed barriers such as product, investment or trade regulations.[3] Indeed, certain government policies other than competition policy deliberately or inadvertently restrict competition, and competition policy (although sometimes controversial) is required to restore some sort of balance. However, even in the absence of government-imposed barriers, unfettered competition alone may not be enough. A complementary competition law is required in circumstances where, owing to technological barriers, competition will not automatically and immediately flourish.

[T]here's a need for something to be said about competition policy being broader than simply the competition law. There's a need to extend our competition policy to address the broader range of federal, provincial, and municipal government restraints to competition. In aggregate, these have a far greater adverse impact on consumers, small businesses, and large businesses in Canada than all private restraints combined. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:20]

I think the theme or principle behind the Competition Act*, which is that competition as a process is going to generate tremendous benefits, is a valid one that applies across industry segments.* [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

This interdependence of the process of competition and competition policy also runs in the opposite direction when governments adopt policies that, deliberately or inadvertently, foster competition. For example, trade liberalization provided by the Canada-United States Free Trade Agreement (FTA), followed by the North American Free Trade Agreement (NAFTA), was not only good trade policy, but also good competition policy. The deregulation and privatization of key industrial sectors of the economy,

[T]he Competition Act *is intended to and should protect the competitive process, and it is intended to ensure market conditions where a good company … can survive and do well … it should not be protecting any individual company.* [Donald McFetridge, Carleton University, 59:10:00]

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2 This last condition is particularly relevant in recent years to the retail sector with the move to the "Big Box" sales format, and, in particular, gasoline retailing given the exit barriers presented by environmental laws governing the decommissioning of underground gas tanks.

3 Government policies — such as CRTC telecom and cable and satellite television regulations, the dairy and poultry quota systems, airline ownership and cabotage services restrictions, Ontario's beer and liquor distribution system, first-class postal mail and interprovincial trade restrictions — represent a number of such barriers.

[A]n open international trade policy is in many ways a better way of creating competition than through a legal enforcement of one's own competition laws and, I should add, open foreign investment policy. [Roger Ware, Queen's University, 59:13:05]

while proving controversial as an industrial policy, has in general been good competition policy.

Regulated markets, or deregulated markets where the proper institutions for fostering competitive entry are not put in place in the transition period, can also distort a competition policy regime. Indeed, twisting the competition law to accommodate an anticompetitive regulatory environment is likely to compromise and even corrupt competition law. In the 1980s, Canadians witnessed the intervention of their competition authorities in what otherwise might have been an efficiency-enhancing merger of dairies (*Palm Dairies Ltd*.) because of production quotas and interprovincial trade barriers that limited competition in the downstream sector. In the 1990s, Canadians again witnessed their competition authorities intervening in book retailing (the merger of SmithBooks and Coles Book Stores Ltd. in 1995 to form Chapters Inc. and in 2000 with the merger of Chapters and Indigo) because of entry barriers that were built by government-imposed ownership restrictions. Today, Canadians are witnessing the enactment of "special rules for a special industry" — the air carrier services industry — into a framework law, as a result of the absence of a suitable deregulatory framework.

There are at least two cases that have preoccupied the resources of the Competition Bureau and the Competition Tribunal in the last five years that might not have even been there had we had a more open, continent-wide approach to these industries. I'm referring, of course, to airlines and book retailing. [Roger Ware, Queen's University, 59:11:35]

In general, we have this problem that when we move from regulation to deregulation, the regulator is involved, and it takes an active role in making sure that the right policies are in place to facilitate competition. We haven't had that in airlines. I don't think you should be looking for the Commissioner to save Canadian consumers … You should be looking at … Transport Canada. [Jeffrey Church, University of Calgary, 59:10:30]

An Optimized Competition Framework

Any competition framework, if it is to improve consumer welfare and economic efficiency, must incorporate the most up-to-date economic analysis. There is, nevertheless, considerable room to manoeuvre in the choice of framework. Competition law usually reflects the country's culture, business customs, legal history, political philosophies, as well as its geographic size and demographic makeup.

The statute is still … an economically sophisticated law, and is recognized as such around the world. [Lawson Hunter, Stikeman Elliott, 59:10:50]

For example, the United States antitrust agency — the U.S. Federal Trade Commission — begins to get tough on mergers at much lower levels of industrial concentration than does Canada's Competition Bureau. This approach is taken because in the much larger

U.S. economy, there is much less risk that firms will not achieve the necessary economies of scale and scope to be efficient. Furthermore, Canada's competition legislation is unique in that it provides an efficiencies defence which explicitly requires that the review of a merger balance the anticompetitive effects against the "gains in efficiency." Whichever of the two impacts is greater determines the merger proposal's acceptability or unacceptability.[4] This provision appears to be more lenient than in the United States, where the efficiency gains must be so great that prices will not rise as a result of the merger. However, the Committee heard evidence to suggest that even Canada's consideration of efficiencies is not adequate.

I don't think the system is irreparably broken. I think it is a system we can continuously improve … We should be doing that on an ongoing basis. [George Addy, Osler, Hoskin & Harcourt, 59:12:55]

Although the much smaller Canadian economy dictates a less vigilant merger enforcement framework than exists in the United States, it could be argued that Canada ought to have a more vigilant conspiracy enforcement framework than the United States to achieve similar levels of enforcement. This view follows from two realities: Canada is a smaller market that is more susceptible to technological barriers to competition; and its economy is subject to more government-imposed regulatory barriers to competition. As such, leniencies found in Canada's merger review process can be made up elsewhere, for example, by having a more stringent provisions on: conspiracy, anticompetitive pricing practices, market restriction, tying and abuse of dominance. A careful balancing of factors is required to produce an optimal competition policy mix.

Certainly in 1986 we were able to hold up the Competition Act *at that time in a very proud manner and point to a number of aspects of the legislation that really did bring it to the attention of other jurisdictions. But one of the ongoing deficiencies continues to be section 45 … it is out of kilter in relation to hard-core, naked cartels. It's out of kilter with other jurisdictions …* [Calvin Goldman, Davies, Ward & Beck, 59:09:40]

Indeed, the needed balance can be a subtle one, particularly at the enforcement stage. For example, one witness appearing before the Committee in early 2000, a former Director of Investigation and Research at the Bureau of Competition Policy (as the title and the agency were known prior to the mid-1990s) said that not enough attention was paid to the significance of the consolidation going on in the refining sector in the oil industry in the 1980s. The Bureau allowed the consolidation to take place, and this development explains, in part, why we are today experiencing many problems in the downstream petroleum

[4] This interpretation has been put into doubt due to recent events, i.e., the Federal Court's ruling on appeal of the *Superior Propane* case.

products sector.[5] If this view is indeed correct, then the organizational structure of the oil industry may present an almost unsolvable competition problem, far too complex for the anticompetitive pricing provisions of the *Competition Act*. Yet, at the same time, the Committee recognizes that the government has and continues to work on improving this situation. In any event, this hypothesis, whether correct or not, confirms the importance of correctly crafting the competition framework — one that fits Canada's unique economic circumstances.

You could give the Bureau as many resources as you wanted, and that wouldn't address the basic point that it's very difficult to establish beyond a reasonable doubt that any competitive predatory pricing has occurred. It wouldn't address the point that if someone chose to contest a section 45 case — we're talking about hard-core criminal behaviour … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:50]

According to many competition policy and law experts, the above problem is more widespread than is generally perceived. Some witnesses immediately pointed to the newspaper and grocery retailing industries as examples. Whether right or wrong, these comments suggest that Canada may indeed have a less-than-optimal competition enforcement strategy than what is required by a small, regulated or mixed economy.

When you're running an operation like that [Competition Bureau], you're constantly worried about two things. You're worried about … the "type one" errors, where you haven't taken enforcement action when you should have. You're also worried about the "type two" errors, where you have taken enforcement action in a benign case that may have caused narrow damage to those parties or a chilling effect on the marketplace. Dealing with those challenges in the environment we face in today's business climate is very, very difficult. [George Addy, Osler, Hoskin & Harcourt, 59:13:00]

Many competition law experts have three perennial criticisms of the *Competition Act*. First, Canada's conspiracy law, relative to other countries, is ineffective due principally to overly restrictive wording found in the provision (section 45). Consequently, the Commissioner of Competition has a poor record in contested conspiracy cases relative to the competition authorities in other jurisdictions. Second, Canada's conspiracy provision is both over-inclusive of some business arrangements in some circumstances and under-inclusive in others. In other words, the conspiracy provision is a very blunt instrument (see Chapter 4).

5 However, these events may themselves be inadvertent consequences of federal government regulations imposed on product formulas related to environmental emissions and export controls on crude petroleum in the 1980s that forced Canadian refiners to rely more heavily on the more costly heavy crude oil feedstock. The ensuing lower productivity levels may thus have meant that greater efficiencies through rationalization were needed to remain competitive with U.S. producers in what is a North American market for petroleum products.

Third, the Competition Bureau focuses its resources too heavily on merger review and too little on conspiracy enforcement.[6]

With respect to the second inference — the right mix of enforcement priorities — one would think that a small economy such as Canada would have a less vigilant merger enforcement regime than a large country such as the United States, relatively speaking and holding overall competition objectives the same, for the reasons already stated; and exactly the opposite situation in terms of conspiracy enforcement. Yet if the above complaints are true, Canada either has an inappropriate mix of competition law enforcement for its particular circumstance, or it is simply more lax on competition matters than are other major industrialized countries. This position further suggests that those who heralded the *Competition Act* as a watershed advancement over that of the *Combines Investigation Act* were much more critical of the predecessor Act than is commonly understood. In any event, consensus opinion appears to support that Canada moved from having a relatively ineffective competition statute prior to 1986, due principally to the higher burden of proof associated with the Act's criminal rather than civilly reviewable approach, to having one that, although more up to date in its economic content and legal treatment, is still somewhat misguided in a strategic sense. The Committee's report will, therefore, devote its efforts to correcting this defect. We will propose reform to the conspiracy provision that will make it more effective. Upon such change, we want the Bureau to aggressively pursue conspiracies against the public. The Committee, therefore, recommends:

[T]he Bureau's approach to merger review over-commits it in this area. If you examine statistical data, as compared with the U.S. experience with Hart-Scott, we're spending longer on cases, there are more cases, and they're getting extended reviews. This is absorbing a tremendous amount of time. I think we need to recognize that a very small proportion of them really do raise any significant issues. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:55]

I think a lot of the resource emphasis within the Bureau has been placed on merger review. Part of that is understandable. … From an enforcement perspective, I would like to see increasing attention paid to other provisions of the Act … [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

1. **That the Competition Bureau designate conspiracies as one of its highest priorities and that it allocate enforcement resources consistent with this ranking. That the Competition Bureau continue implementing existing enforcement strategies that target domestic and international conspiracies against the public, independently and jointly with competition authorities of other jurisdictions. As a matter of routine, that the Competition Bureau review its tactics of**

[6] However, if the first two complaints are indeed correct, then the third may not be correct.

crime detection with a view to improving its existing record of success.

Framework Legislation and Special Provisions

[A]s has been stated many times, the Competition Act *is a statutory general application. I'm not sure it's still true, with specific provisions now dealing with travel agents and so on, but I think it should be.* [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

The *Competition Act* is framework legislation; it applies to all industries in equal measure (except those monopolies created by the federal or provincial legislations). There are both good economic and legal reasons for this. The economic reasons are the long-standing belief that, by and large, free and open markets provide the best combination of products and services at the best prices to consumers. Except on occasion, when the *Competition Act* or some other (usually industry-specific) statute is needed, the process of competition disciplines suppliers in their decision making and thereby induces them to fulfil the needs of consumers in the most efficient manner. In the cut and thrust of competition, efficient firms survive and prosper, and inefficient firms fail and withdraw. The outcome of this dynamic is that only the interests of consumers and efficient suppliers are protected. The legal reasons are simply that, for constitutional reasons, most industries fall under provincial jurisdiction.

Generally speaking, the *Competition Act* only operates when: (1) the marketplace fails to deliver on the above expectations; and (2) compliance with the Act would produce a better outcome. Such situations arise only occasionally when, owing to technological and/or regulatory barriers, the pre-conditions for healthy competition are not present. In such cases, the Commissioner of Competition does not regulate the outcome, but instead lays the groundwork for a more competitive outcome.

There are industries that warrant special treatment. To the extent that they are regulated, there is a principle of regulated conduct, which is somewhat uncertain in its operation. I think it would be helpful if there were clarification of its operation, but to the extent that an industry is regulated, it is withdrawn from the coverage of the Act. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

Firms in special industries requiring special dispensation from selected provisions of the Act and/or from competition itself are not ordinarily provided refuge through special rules in the Act. Rather, specific statutes and regulatory regimes, which are usually industry- or firm-specific, are permitted to override the *Competition Act*

This is how the regulated conduct defence was born; although the boundaries of the defence are not clear. More jurisprudence will, perhaps, provide greater clarity in time.

At least this was the case for 111 years of antitrust law in Canada. In 2000, however, the Government of Canada departed from this principle and adopted special provisions that armed the Commissioner with the extraordinary power to issue an interim injunction (section 104.1), or an interim cease and desist order as it is often called, against any air service provider, as defined in the *Canada Transportation Act*, to prevent any anticompetitive behaviour (predatory pricing, paragraph 50(1)(*c*), and abuse of dominant position, section 79). Bill C-23 would extend the duration of this order (beyond a maximum of 80 days if all renewals are put into effect) to allow for good faith, but belated information exchanges between the contesting parties; the bill would also subject an airline company guilty of such offences to an administrative penalty of up to $15 million. The government justifies these measures on the grounds of the current crisis in the competitive structure of the airline industry in Canada.

[T]he government felt that there was a need to add some definition in terms of the airline industries is because of the special characteristic of the airline which is somewhat unique. You've got an industry where you have an overwhelming dominance by a carrier, you've got some restrictions in terms of the amount of foreign ownership that you can have in the industry, you've got assets that can be moved fairly rapidly which could be targeted at new entrance. [André Lafond, Competition Bureau, 64:09:40]

Specialists in competition policy and law are not convinced by the government's arguments. They claim many reasons why special airline provisions are not credible: (1) the crisis is partly of the government's own making, the foreign ownership restrictions prevent competitive entry that would discipline Air Canada's pricing behaviour, moreover, the government also failed to provide the proper institutional framework during the industry's deregulatory transition period; (2) although the cost and pricing structures of airline services are prone to seasonal and other forms of price cutting to equilibrate demand and supply, possibly (but only rarely) leading to predatory price cutting, so are most other transportation services — rail, bus, cruise liners — that are conveniently handled by Canada's transportation regulator, the Canada Transportation Agency; (3) the sheer dominance of Air Canada, with a market share exceeding 80%, is not out of line with that of incumbent local telephone and cable television companies that are currently being deregulated under supervision from the Canadian Radio-television and Telecommunications Commission (CRTC); and (4) the precedent these measures set for other industries seeking

Although every industry … is unique in some way, by and large the kinds of competition problems are fairly generic. You have problems of price fixing and you have problems of abuse of strong market position. You worry about mergers in any kind of industry, so in principle these problems come up or could come up in any industry. [Tom Ross, University of British Columbia, 59:10:15]

special treatment, namely the grocery and newspaper industries, is a slippery slope. These very compelling objections are not exhaustive.

[C]ompetition legislation as it exists in many parts of the world is designed to be a protector of free markets — a referee, so to speak — not a regulator. Regulation is done in industry-specific statutes, and when you mix the two you risk creating not only a hodgepodge but also a series of matrices that may not be effective in accomplishing either generic goal. [Calvin Goldman, Davies, Ward & Beck, 59:10:35]

In its *Interim Report*, the Committee sided against special provisions for the newspaper industry and suggested an alternative approach modelled on the special banking and financial services provider statutes. The Committee also suggested other ways of realizing the government's stated objectives in providing the Commissioner with special interim cease and desist powers with respect to the airline industry — and with respect to all other industries, for that matter — through expanding Competition Tribunal powers under section 100 to cover abuse of dominance and predatory pricing provisions. This option would at least preserve the Act's general application.

I think this is very dangerous … turning this from framework legislation into a regulatory regime put in the hands of somebody who not only doesn't have the resources but who, frankly, is very ill-equipped to deal with it. [Stanley Wong, Davis and Company, 59:11:30]

Although the government has not responded to the Committee's *Interim Report*, its decision not to revoke section 104.1, when Bill C-23 would generalize this power in the hands of the Competition Tribunal, suggests that other policy considerations are at work. For example, although the time required for the Commissioner to seek an interim order from the Tribunal may be quite short, this delay could, in some circumstances, be critical. In any event, the government appears adamant to any return to direct regulation of air services and fares or to unilateral free trade in air carrier services, and is steadfast in its decision to attempt to correct structural problems within the industry through the *Competition Act*.

We have a scenario where we're not quite at the framework model and we're not into regulation, and we're asking the Commissioner, in exercising his powers, to straddle the fence. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

At this time, the Committee acknowledges that the special provisions related to the airline industry are temporary measures that will be removed when healthy competition is realized within the industry. At the same time, the Committee is deeply concerned that this expectation will be long in coming, as even the United States (with about ten times the population of Canada) appears to be able to sustain only five or six nationally hubbed airline companies. Without the removal of the ownership and cabotage services restrictions, the industry may be destined to dominance by Air Canada for a protracted period. As such, the Committee is apprehensive about the government's move from a law of general application to one that includes special provisions for a specific industry when other equally effective options may be available through forward-looking reform. Moreover,

[Y]ou either have to go in and regulate the business — and if you're going to regulate it, you shouldn't be regulating just Air Canada — or you're going to have to stand back and say "This is a dynamic business … and the chips will fall where they may." Unfortunately, at the moment we're in this really untenable halfway house ... [Lawson Hunter, Stikeman Elliott, 59:10:30]

the government's current policy course is possibly undermining the credibility of Canada's competition regime. Many competition specialists — including international organizations such as the Organisation for Economic Co-operation and Development (OECD) — are beginning to question the Competition Bureau's independence from Parliament and government. The Committee will broach this issue in some detail in the next chapter.

In this report, the Committee will be proposing changes in the abuse of dominant position and predatory pricing provisions (respectively, section 79 and paragraph 50(1)(*c*)) that should satisfy the government, competition lawyers and economists, while providing balanced competition enforcement to the business community and the consuming public. These changes will permit the return of the *Competition Act* to law of general application, with no "special provisions for special industries."

[W]hat I would actually urge the Committee to consider is to look at the airline-specific regulations we have, and look at them for general application. It just happens to be that crisis precipitates change. That's happened before with the Competition Act*, and it's now happening again. But we shouldn't leave it like that. It shouldn't be that Air Canada is bound by special rules, but the Act should be able to deal with any conduct we need to deal with in a partially deregulated industry.* [Robert Russell, Borden, Ladner & Gervais, 59:10:35]

CHAPTER 2: COMPETITION LAW ENFORCEMENT

The State of Competition

At the outset of this report, and in the *Interim Report* as well, the Committee asserted that Canada's economic environment could be characterized as one in which non-compliance with the law is more the exception than the rule. We paid tribute to the *Competition Act*, the Competition Bureau and the Competition Tribunal for this state of affairs. To this list, we could have added the litany of competition lawyers and economists who keep these government institutions abreast of developing trends in the marketplace and the newest analytical techniques used to judge economic behaviour.

I think right now in Canada, when you look at our position … in the world and the economy we're in today, we should be proud of the fact that we have a productive and efficient economy. I think that our Act has served us well in trying to get there. [Robert Russell, Borden, Ladner & Gervais, 65:10:30]

This belief is supported by: the testimony from economists who tell us that, in the main, the *Competition Act* uses modern economic analysis; the Competition Bureau's staff of economists who are well qualified and competent to the task at hand; and the Competition Tribunal's unique expertise in this complicated field. Competition lawyers tell us that, by and large, the *Competition Act*, the Bureau and the Tribunal provide us with as close to an optimal level of due process and economic justice as one could expect. Adding all of these inputs to competition policy and enforcement to the fact that Canada is a relatively open marketplace, we are confident that competition reigns in Canada.

At the same time, the Committee would be remiss in its obligation to the public if it were to conclude that all is well in the competition regime. In fact, the Committee's study of competition policy over the past three years has demonstrated deficiencies and that the regime can be made to work better. But before addressing these systemic issues and making suggestions for improvement, it is worth reviewing the statistical data on enforcement for clues on where our efforts for reform would best be applied.

It may be that in a number of areas we simply don't have that many meritorious cases. [Neil Campbell, McMillan Binch, 59:12:15]

The Enforcement Record

Evaluating the enforcement record of the Competition Bureau requires understanding of both what is being asked of it and, in particular, what market behaviour it can pursue from a practical sense. We are asking the Bureau to pursue all four objectives listed in the purposes section of the *Competition Act*, as well as to uphold the spirit of this Act. Section 1.1 states that the purpose of the *Competition Act* is to maintain and encourage competition in Canada in order to:

- promote the efficiency and adaptability of the Canadian economy;
- expand opportunities for Canadian participation in world markets and recognize the role of foreign competition in Canada;
- ensure that small and medium-sized enterprises have equitable opportunity to participate in the Canadian economy; and
- provide consumers with competitive prices and product choices.

It was my experience that one or two litigated cases by the Bureau, especially if they're large cases, could pretty much wipe out the litigation enforcement budget … This means the Bureau has to be extremely selective in terms of the kind of cases it can actually take on, especially if they're likely to be cases that get complex in a hurry. [Douglas West, University of Alberta, 59:10:10]

These objectives are mostly qualitative in nature and are not amenable to objective measurement; only subjective evaluations are possible. This is why we ask the Commissioner of Competition to report annually on his agency's enforcement and advocacy activities, rather than on his effectiveness in realizing the objectives of the Act. People are then left to form their own opinions on the Bureau's effectiveness in enforcing the Act and realizing its purpose.

In the Committee's view, an evaluation of the Competition Bureau's enforcement record cannot be divorced from the costs of litigation. The Committee was told on several occasions that the Bureau incurs enforcement costs, on average, of approximately $1 million per litigated case.[7] This cost presumably varies according to the type of case, whether a criminal or civilly reviewable practice, a merger or an abuse of dominant position case, an

[7] These comments were confirmed in a recent study commissioned by the Competition Bureau, entitled *Study of the Historical Cost of Proceedings Before The Competition Tribunal (1999),* which involved section 75 and 77 cases.

anticompetitive pricing practice or a conspiracy case, etc. More importantly, however, this large enforcement cost drives a huge wedge between the goal of complete compliance with the law and the economic behaviour we observe in the marketplace; so this cost must, among other factors, figure into the Bureau's enforcement strategy.

I would like to … talk about the generic necessity of ensuring … that the Bureau's resources and institutional framework are indeed as strong as they should be, so the mandate can be carried out in an efficient and effective manner. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

We must clarify what we are asking of the Bureau. The Committee is not asking the Commissioner and his staff to pursue every case with a positive net economic benefit; nor should the Commissioner strictly engage in profit maximizing law enforcement. Rather, the Commissioner should pursue those meritorious complaints with a substantial economic impact. This will deter egregious anticompetitive behaviour given the resources the government is able to allocate.

There are good reasons to take the last of these three approaches. The first approach would require the Commissioner to pursue all cases that would generate fines in excess of the public enforcement costs. This could require unlimited resources, which taxpayers would be reluctant to pay given the limited benefit each would receive. The second approach, which involves fines reflecting, not their deterrence value, but their profit-making potential, would undermine the public good, which the government and Parliament are entrusted to promote. Canada wants no part in such a litigious society. The Committee is not willing to sacrifice economic justice, nor is it prepared to live with the "chilling effect" on economic activity, which such an unwavering approach implies.

I want to commend the Committee … in setting the scene — the market context within which this market behaviour is being assessed, enforcement decisions are having to be made, and discretion exercised by the Commissioner. [George Addy, Osler, Hoskin & Harcourt, 59:12:55]

In the realm of law and economics, optimizing the benefits of competition requires a balanced enforcement approach, where balance refers to the appropriate measure of pursuit of compliance with the Act. Such an approach recognizes that neither the threat of prosecution nor the education and voluntary compliance measures are by themselves the most effective enforcement strategy. The Committee is convinced that the Competition Bureau is appropriately armed with the array of enforcement instruments needed to ensure compliance with the Act. These instruments range from education through publications, communications and advocacy to voluntary compliance through monitoring, advisory opinions, advance ruling certificates to concerted action through negotiated

settlements, consent orders and prosecution. However, such a balanced approach will be very subjective; outsiders will find it difficult to distinguish good judgment from bad judgment — precisely because the law and economics of market behaviour is not an exact science; and, even if it were, there are numerous other pitfalls in collecting evidence in support of any position on any questionable activity. For all these reasons, the Committee will draw only cautious or the most obvious conclusions from the current enforcement record.

[T]he enforcement of the law would benefit from more resources … Underlying that question is a bigger question — namely, what is the role of the Commissioner, the role people are seeking to have funded? Obviously, there's always the overriding question … that amongst all the other competing public policy priorities, how much do we as Canadians want to invest in the enforcement of competition law? [George Addy, Osler, Hoskin & Harcourt, 59:12:40]

Table 2.1
Competition Bureau Enforcement Record
By Selected Provision in the *Competition Act*

Provision	Complaints	Disposition of Complaints		
		Investigations or Inquiries	Alternative Case Resolution	Formal Enforcement Proceedings
s. 50(1)(*a*)	88	5	4	0
s. 50(1)(*c*)	382	7	9	0
s. 61	461	7	77	3
s. 75	304	27	4	1
s. 77	214	28	7	0
Total	**1,449**	**74**	**101**	**4**

Note: Data on the pricing provisions (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) cover the five-year period commencing 1 April 1994 and ending 31 March 1999. Data on refusal to deal (section 75) and tied selling, exclusive dealing and market restriction (section 77) cover the four-year period commencing 1 April 1997 and ending 31 March 2001.

Sources: J. Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, 1999; Competition Bureau, undated letter to the Committee in response to hearings on Bill C-23.

Table 2.1 provides a partial statement of the Bureau's enforcement record over the past few years by selected provision in the Act. The Committee is aware that many conclusions can be drawn from data, including diametrically opposing conclusions. For example, based on the number of complaints, one might conclude that more vigilant enforcement should be directed against price maintenance violations than any other anticompetitive practice (i.e., refusal to deal, and tied selling, exclusive dealing and market restriction). However, one might just as reasonably conclude that, based on the number of investigations relative to the number of complaints, the Bureau is relatively lax, and possibly too lax, on predatory pricing, refusal to deal, and tied selling, exclusive dealing and market restriction

complaints. Both views are possible given the lack of critical and pertinent facts to each case.

Obviously, the Committee is in no position to quantify the economic fallout of each case. Neither can we assess the relative merits of cases according to the different provisions in the Act; and nor can we gauge the exact legal or economic inadequacies of each provision in the Act. We do understand that different marketing and pricing practices spark different public reactions, and thus lead to different levels of reporting; but there is no way of knowing the exact correlation between the outrage and the number of complaints for a meaningful evaluation. Is the ratio of investigations to complaints with each provision in the law related more to the cost of litigation, merit, economic impact or the clarity of terminology used in the Act?

If we have a lot of behaviour that is offside … it can be reined in by litigated cases or it can be reined in when the Commissioner gets somebody to stop their behaviour because that party knows the alternative is to face litigation. You see the Commissioner settling cases with alternative case resolutions all the time, and that's highly, highly cost-effective for all of us. [Neil Campbell, McMillan Binch, 59:12:15]

The VanDuzer Report broached these very issues in terms of the anticompetitive pricing provisions, and we see no reason to second-guess its main conclusions. The report assessed the Bureau's case selection criteria. There are four, not equally weighted, criteria to which points are assigned to each complaint based on the facts. The criteria are: (1) economic impact; (2) enforcement policy; (3) strength of the case; and (4) management considerations. The Committee highlights the following excerpts from the VanDuzer Report:

> The statistics show that few cases have been pursued to resolution, except through ACR's [alternative case resolution] in price maintenance complaints. The relative absence of formal enforcement proceedings raises several concerns regarding the certainty and, ultimately, the effectiveness of the law. More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it. More cases would also expose the weaknesses in the law which would, in turn, be an important catalyst for law reform. One might hope and expect that increasing certainty brought about by greater formal enforcement activity by the Bureau would encourage greater interest in private actions under

What has obviously happened is that the Bureau has essentially built into its internal case prioritization the principle that cartels are viewed as quite a problem, and price maintenance and price discrimination laws, for example, are viewed as laws that are not economically sound, that are overreaching, and that should not be enforcement priorities. [Neil Campbell, McMillan Binch, 59:11:25]

> section 36. To date the possibility of civil actions alleging violation of the criminal provisions has been little used.[8]

> A disjunction is created between the expectations of people complaining to the Bureau about pricing practices and what the Bureau is prepared to deliver. This is most serious, in relation to price discrimination and predatory pricing, where the complete absence of formal enforcement actions opens the Bureau to the charge that it is choosing not to enforce the Act. This suggests either that the case selection criteria be revised so as to minimize impediments to bringing pricing cases and that the Guidelines be revised to more closely follow the Act or that the provisions be reformed to provide clearer direction for bureau enforcement policy. Either way, the result would be closer coincidence between what the law says and the Bureau's enforcement policy.[9]

I believe they can and do win conspiracy cases in both big and small settings, particularly in the modern environment, with their current immunity program, which allows them to approve the agreements they used to have so much difficulty approving in the 1980s. The pre-1992 statistics really aren't relevant in helping you decide whether you need to do something in that area. [Jack Quinn, Blake, Castles & Graydon, 59:12:40]

More generally, the Committee would like to report that, given the rather steady and holding trend in both the number of all complaints and investigations in the four- and five-year periods considered in Table 2.1, at a time when economic activity was buoyant and growing steadily, the business community has been relatively more compliant with the law. However, we cannot because even the number of complaints is dependent on people's knowledge of what an offence is under the law and their perceptions of the attention the Bureau will give their complaint. Because these important factors are not known nor recorded, we cannot adjust the data accordingly.

In terms of … enforcement issues, there are really three things that can be dealt with … There is this question of funding … There's also the question of alternative enforcement mechanisms like private access … The other area on the agenda … is we need to radically reform the Tribunal process. [Margaret Sanderson, Charles River Associates, 59:11:20]

The record level of fines collected by the federal treasury as a result of the Bureau's recent intensive pursuit of conspiracies could be interpreted as a sign of greater vigilance that will soon pay off in a more robust economic activity based on more efficient firms and the adoption of aggressive, competitive pricing policies. But even here most of these fines can be attributed to convictions made from international conspiracies. The Bureau might be just riding on the coattails of competition authorities of other jurisdictions. Furthermore, guilty pleas in conspiracy cases are just as likely to reflect the high cost of litigation and the potential for private information to be transferred to the public domain in other jurisdictions such as the United States where rivals may seek treble damage awards. These

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8 J. Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act*: *Theory, Law and Practice*, p. 70.

9 Ibid., p. 71.

facts suggest guilty pleas are more likely to reflect the cost benefit of going to trial in Canada than actual guilt or the deterrent effectiveness of the law.

Given the foregoing analysis, the Committee will concentrate its efforts on reforms that will directly lower the cost of enforcement, without unduly compromising legal rights, and thus reduce the wedge between the goal of complete compliance with the law and the economic behaviour we observe in the marketplace. First on everyone's list as a means of reducing enforcement costs is the Tribunal's current processes; these will be discussed in the next chapter. The development of jurisprudence and the Bureau's enforcement guidelines also have a direct bearing on enforcement and litigation costs; their examination will immediately follow this section.

It's even more expensive to deal with a criminal proceeding because of the criminal standards. So decriminalization, in some respects, and going to a per se approach should cut the cost down, because overall it's a cost to society. [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

The Committee will also examine indirect impacts on the cost of enforcement. We will review the most contentious provisions of the Act to ensure their legal treatment appropriately reflects their economic motivations and consequences. As such, any shift of important provisions from the criminal to reviewable section of the Act, quite apart from a reduced chilling effect on economic activity such a move might have, may reduce the overall cost of enforcement (see chapters 4 and 5). Furthermore, such changes would undoubtedly shift the burden of enforcement from the Attorney General of Canada to the Commissioner of Competition, and this may, in turn, have consequential budgetary and resource impacts on both these government agencies. In terms of enforcement tactics and formal powers, the Committee will evaluate the merits of a cease and desist order relative to an award of damages and fines as means for deterring anticompetitive conduct, in particular predatory behaviour. Finally, the Committee will examine the impact of granting private rights of action on a limited number of practices covered under the Act's civil section as set out in Bill C-23. The Committee will, at the same time, review the adequacy of resources provided to the Bureau for enforcement of the Act.

Part of the debate … around splitting section 45 into both a per se and a civil offence … [is] … that, it will be more costly for the Commissioner to prosecute a civil offence. Under the criminal model now, responsibility is split between two departments, so there are two budget funds to address the cost of prosecution. The Commissioner's office acts as an investigator, and the Department of Justice acts as the prosecutor. To the extent the role of the Commissioner is revisited, part and parcel of … that should always include the resource implications … to the Bureau. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

Jurisprudence and Enforcement Guidelines

[T]he way the law evolves is decision after decision … it gets fine-tuned that way. What seems to happen in Canada is a decision that leaves a fair amount of uncertainty, and then nothing happens for eight or ten years. [Donald McFetridge, Carleton University, 59:10:50]

The enforcement of any law, including that of competition, cannot be conducted in a vacuum. Anchors upon which behaviour is assessed are essential; moreover, clear markers distinguishing acceptable from unacceptable market behaviour are required. The economic content of the written law is simply insufficient. Jurisprudence and enforcement guidelines are required to flesh out the sometime abstract economic thinking on which the law is based. Indeed, when jurisprudence and enforcement guidelines properly reflect economic theory, they serve to guide the business sector in voluntarily complying with the law and the Bureau in enforcing it.

I think we need far more testing of the interpretations of the Act made by the Commissioner … not just more powers for the Commissioner. [Stanley Wong, Davis & Company, 59:11:30]

Competition law experts appearing before the Committee reached virtual unanimity on this score. In their opinion, there is simply insufficient jurisprudence to properly guide market participants. Uncertainties in the law and its application abound. Where these competition law experts begin to differ, however, is in terms of the principal cause. Some suggest a weak law is the culprit, while others suggest a risk-averse Competition Bureau is to blame. The rift widens when it comes to the proposed solution of providing greater financial incentives to develop the needed jurisprudence. Some maintain that it would be worthwhile to do so, yet others believe this is an expensive way of realizing greater certainty in the law, preferring instead more clarity in the Bureau's enforcement guidelines. For its part, the Committee will come down the middle on both these issues. We believe that more jurisprudence is needed and this might be partially realized with the implementation of private rights of action, as prescribed in the amended version of Bill C-23. In addition, the Committee recognizes that refinements in the enforcement guidelines are needed.

First, nobody really wants to have to go to court or before the Tribunal for the sheer sake of providing jurisprudence for others. That's kind of a public service that perhaps nobody necessarily wants to provide. [Donald McFetridge, Carleton University, 59:10:50]

The Bureau's enforcement guidelines are meant to fill the cracks in the public's understanding of the law left by insufficient jurisprudence. As the VanDuzer Report, in terms of the anticompetitive pricing provisions, put it:

> Through its Price Discrimination Enforcement Guidelines and Predatory Pricing Enforcement Guidelines the Bureau has attempted to provide, for enforcement purposes, a coherent rationale for enforcing the criminal provisions dealing with price discrimination and predatory pricing. … [F]or the most part, this has been a very effective approach to enforcement. Guidelines are significantly more cost effective than litigation for the purposes of clarifying interpretive uncertainty relating to the provisions of the *Competition Act*. As well, they can deal with issues comprehensively and within an analytical framework, while decisions in individual cases contribute only incrementally to the understanding of the law and the analysis may be tied to the facts of each case. Guidelines increase the likelihood of consistent and accurate decision making by commerce officers who make the difficult assessments of cases at the critical preliminary assessment stage. By disclosing a clear approach to enforcement, guidelines may facilitate ACR's and, more generally, will ease the compliance burden for business.[10]

[I]f there had been more cases, we would not … have so many guidelines. We would not … consider, for example, in section 78, all the illustrative anti-competitive acts or abusive acts that a dominant firm can do. This could have been explored before the Tribunal, and we would see that in the jurisprudence. [Donald McFetridge, Carleton University, 59:10:50]

From the business community's perspective, the guidelines are not reassuring. The guidelines have never been binding on courts, the Competition Tribunal or the Bureau. It was reported to the Committee that the Tribunal routinely ignores the guidelines; recently, the Competition Bureau abandoned its own merger enforcement guidelines in the *Superior Propane* case. The Committee finds this disconcerting; we can only conclude that the enforcement guidelines need to be revised. The VanDuzer Report made a number of specific recommendations on the Bureau's enforcement guidelines, which, in general, we support; however, the Committee will sort out each in later chapters. The Committee also agrees with the VanDuzer Report's recommendation 16 that deals with the enforcement guidelines in a general sense. This recommendation follows from the recognition of a general shift from an industrial economy to a knowledge-based economy characterized by innovation and industrial structures in which market dominance, when it occurs, is likely to be relatively short-lived. The Committee, therefore, recommends:

I think the elements are in the Act. I think the interpretations are very poor. I don't think you need separate rules for separate industries. But I do think you need clear and consistent application of clear guidelines. [John Scott, Canadian Federation of Independent Grocers, 59:09:45]

[10] J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 86.

Our experience is that the guidelines are … ignored when it comes to a specific case. We have the example recently of the Competition Bureau abandoning its merger enforcement guidelines when it came to arguing the Superior Propane case. We have other cases in which the Tribunal has taken no notice of guidelines. … But to think that guidelines … will necessarily result in less uncertainty … I think only jurisprudence can do that, and we don't have a heck of a lot of it. [Donald McFetridge, Carleton University, 59:10:05]

2. That the Competition Bureau review its enforcement guidelines, policies and practices to ensure appropriate emphasis is placed on dynamic efficiency considerations in light of new challenges posed by the knowledge-based economy, including factors such as: (1) high rates of innovation; (2) declining or zero marginal costs on additional units of output; (3) the possible desirability of market dominance by a firm where it sets a new industry standard; and (4) the increasing fragility of dominance.

Once these revisions are completed, we expect the Commissioner of Competition to keep to the enforcement guidelines. Major deviations from them are not acceptable. If further changes are required, the enforcement guidelines should first be amended then enforced, not the other way around.

"Time is of the Essence" Enforcement Tools

If you were on the inside and if you saw the difficulty and extent to which they have tried to comply with this law, I think you would come to the conclusion that the answer is, yes, it is effective, the Commissioner is very vigilant, and Air Canada has struggled daily with trying to understand what they can and can't do under the current regime. [Lawson Hunter, Stikeman Elliott, 59:09:45]

On a number of occasions before the Committee, the Commissioner of Competition has argued for amendments to the law granting him new powers to issue cease and desist orders of his own right, without allowing the affected party a right to be heard prior to the making of the order, and without any authorization from the Competition Tribunal. Such a power was granted under section 104.1 of the *Competition Act* in respect of any domestic air service, as defined in the *Canada Transportation Act*, in terms of any anticompetitive behaviour (predatory pricing, paragraph 50(1)(*c*), and abuse of dominant position, section 79). Bill C-23 would extend the duration of this order (beyond a maximum of 80 days if all renewals are put into effect) to allow for good faith, but belated information exchanges between the contesting parties. Bill C-23 would provide this same power (adding a new provision, subsection 103.3(2)) to the Competition Tribunal in respect to all industries and all civilly reviewable conduct in the Act.

A new subsection 103.3(2) in the Act specifies the circumstance in which the Tribunal may make an interim order. The order may issue if:

- An injury to competition will occur that cannot be adequately protected by the Tribunal.
- A person is likely to be eliminated as a competitor.
- A person is likely to suffer: a significant loss of market share; a significant loss of revenue; or other harm that cannot be adequately remedied by the Tribunal.

Critics mention that the *ex parte* procedure — without notice to any other party — presents, as a *fait accompli*, an order that has the same force as a court order and a breach of which is punishable by fine or imprisonment. Once the order is made, the party may bring an application to set the order aside. In normal litigation practice, motions and applications made *ex parte* are the exception rather than the rule. Moreover, the test that is asked of the Tribunal in granting the order, particularly that of a significant loss of market share or a significant loss of revenue, is so low a hurdle that it treads on having the Commissioner cross over the boundary of protecting the process of competition to protecting individual competitors. This concern is supported widely across the economics field because of the strongly held belief that competition by its very nature means that there will be winners and losers in terms of revenues and market share. Thus, the *Competition Act* now risks interfering with the competitive process. As an alternative, these critics argue in favour of an award of damages and possibly fines as the appropriate method of deterring anticompetitive behaviour.

For his part, the Commissioner believes that these extraordinary powers are necessary owing to the inadequacy of the procedures and/or the remedies currently available to the Bureau to use against the threat of price predation and other anticompetitive conduct in a timely fashion. The *ex parte* procedure is adopted because the alternative of providing notice of the proceedings would impose a process that would involve the Commissioner in time-consuming litigation before the Tribunal in support of the interim order, which would significantly reduce the "time

I just want to distinguish between two ways of dealing with predatory pricing. One is the cease-and-desist type of power the Commissioner has and is maybe trying to have enhanced … to a "Don't even think about it" power, which would be issuing orders in advance of the incumbent firm even doing anything. That's one way to go, and it can have the virtue of appearing to protect a specific competitor and make sure they don't get hurt in the short run. I think it's definitely the wrong way to go, whether it's airlines or any other industry. [Donald McFetridge, Carleton University, 59:10:40]

I think the way to deal with predatory pricing is to wait and look at the offence. I think where we have a problem in this country is that it doesn't do much good after finding that an offence has been committed if we take the civil branch and abuse of dominance and say, "Well, don't do it again", and then issue an injunction. That type of remedy is simply insufficient. I think what we really want … is to use the civil branch and use fines. And ultimately, perhaps … damage awards. [Donald McFetridge, Carleton University, 59:10:40]

is of the essence" aspect for which the power is being sought.

There's the predatory pricing. Clearly, you need a remedy besides cease and desist. A remedy based on damages and fines seems to be a sensible deterrent. [Jeffrey Church, University of Calgary, 59:10:55]

In wrestling with these arguments, the Committee recognizes that, in a perfect world where all predatory and other anticompetitive behaviour could be easily detected and there would be no uncertainty in the application of the law, there could not be any predation or anticompetitive behaviour. The cease and desist order would stop this anticompetitive behaviour the minute it started and an award of damages and fines from the Tribunal would remove any incentive to engage in such anticompetitive conduct in the first place. Both enforcement methods — an interim cease and desist order and an award of damages and fines — have a similar impact in such an environment. However, in our imperfect world, enforcement methods are not equivalent; each has a different impact. In a world where "Type 2 errors" are possible (where an enforcement action is taken but should not have been), the interim cease and desist order will impair the process of competition and impose losses on consumers by forcing them to pay higher prices for the period of the order. On the other hand, in a world of uncertain application of the law or a flaw in the design of the law, damage awards and fines may chill rivals from engaging in aggressive but pro-competitive pricing strategies. Clearly, these impacts are not the same.

[T]here's a fallacy in … saying … that the cease-and-desist powers … because they act very quickly, are necessarily desirable. … It is perfectly possible to have an enforcement provision against predatory pricing through the Act, working through the normal process with the Tribunal, not using any injunctive relief. Provided one introduces fines and makes the disincentives for a conviction high enough … [Roger Ware, Queen's University, 59:12:15]

In assessing the pros and cons of these "time is of the essence" enforcement tools, the Committee looks to the data, which clearly show that predation is often alleged but seldom occurs. Between 1994 and 1999, there were 382 cases of alleged predatory behaviour, but the Bureau found only 7 deserved investigation. Nine were solved by alternative case resolution (ACR) and none justified prosecution. Although the high incidence of allegation would favour the damages award and fines enforcement method, the Bureau's decision to investigate only seven cases brings somewhat back into balance the choice of either method (assuming that we are willing to live with prosecutorial discretion to achieve this balance, rather than a systemic basis for balance). At the same time, the Committee is unaware of any incidences of the "chilling" pro-competitive behaviour that the current competition regime has had on the business sector, let alone what incidences of chilling

might arise from a deterrence system based on an award of damages and fines.

Although lack of information does not permit the Committee to judge which of the two enforcement tools would be better, other considerations suggest that this debate need not be framed in an either-or context. Adopting both enforcement methods has a number of advantages: (1) a cease and desist order would help mitigate damages in egregious predatory cases; (2) an award of damages and fines would rebalance the incentive structure to better deter such behaviour when anticompetitive opportunities present themselves (in turn reducing the opportunities for the exercise of prosecutorial discretion); and (3) the special airline industry provisions would become redundant and thus could be repealed. This third advantage is particularly appealing to the Committee, as it would hasten the return of the *Competition Act* to a law of general application. With the adoption of other reforms, as laid out in this report, the Committee is convinced that more jurisprudence would reduce both any uncertainty in the law and its chilling effect on aggressive but pro-competitive pricing practices. For all these reasons, the Committee recommends:

You need to create that type of penalty in the abuse-of-dominance provisions of the Act to retain the deterrence effect of the law. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:20]

3. That the Government of Canada empower the Competition Tribunal with the right to impose administrative penalties on anyone found in breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. Such a penalty would be set at the discretion of the Competition Tribunal.

These changes will permit the return of the *Competition Act* to law of general application, with no "special provisions for special industries." For this reason, the Committee recommends:

What we have right now is a Commissioner of Competition who by statute is independent and reports to the Minister of Industry but who takes no direction from the Minister of Industry other than for the purposes of starting an inquiry. [Stanley Wong, Davis & Company, 59:11:30]

4. That the Government of Canada repeal all provisions in the *Competition Act* that deal specifically with the airline industry (subsections 79(3.1) through 79(3.3) and sections 79.1 and 104.1).

Commissioner Independence and Accountability

What we have now is really decision-making in the hands of a single individual who is really unaccountable. Every time we see an unsuccessful case, there is immediate pressure to amend the Act. [Stanley Wong, Davis & Company, 59:11:30]

A particularly surprising (and disturbing) issue — that of the Commissioner's independence from government — surfaced around the time of the Committee's first set of hearings in 2000. This issue continued to percolate and has since boiled over to include questions of accountability. Doubts on the Commissioner's independence first arose when the Commissioner conducted a review of his own merger enforcement guidelines, as they would apply to the banking sector at the request of the Minister of Finance, suggesting that he too had reservations on their general application. The questions began to multiply as the Commissioner acquiesced to the government a second time when he sought extraordinary cease and desist powers to deal with potential predatory behaviour on the part of Air Canada — once again putting into doubt the Act's general application. More recently, in the *Superior Propane* case the Commissioner abandoned the very merger enforcement guidelines that he confirmed as fit to the Minister of Finance.

Essentially what's happened in … cases, where speed is of the essence, such as predatory pricing … the Commissioner has been concerned that the process doesn't work expeditiously enough; therefore he's sought additional powers, turning his own office into an investigator and an adjudicator. As soon as a single body is performing both of those functions, concerns are going to be raised about independence. So if we can solve the adjudication model, if we can have the Tribunal play a more active, effective role as an independent check, and procedurally allow it to balance these concerns … its very important that there be … an expeditious process and … a full due process for the various parties. [Margaret Sanderson, Charles River Associates, 59:11:55]

However, the Committee does not share all these views and believes that it is important to distinguish perception from reality. In terms of independence, a consensus within the competition law community appears to have formed on the belief that the Commissioner is indeed independent from government in terms of case selection, administration and disposition. The Commissioner is not independent from government in terms of his budget and reporting obligations.

On the matter of enforcement direction, no one could point to any case where the government intervened in the Commissioner's enforcement decision making. On the matter of the Competition Bureau's organization within government, the Committee understands that the Commissioner is subordinate to the Minister of Industry and Cabinet so that, at the end of the day, the government can be held to account to the people for the actions of the Commissioner, one of the most influential public servants in Canada. For example, from time to time, competition experts have judged the Commissioner's enforcement record based on what they call Type 1 and Type 2 errors. A Type 1 error is defined as not taking an enforcement action when there should have been (the market behaviour in question was

anticompetitive). A Type 2 error, on the other hand, is defined as taking an enforcement action when one should not have occurred (the market behaviour was benign from a competition perspective). However, there is also a Type 3 error. The Committee will define this error as wasting the taxpayer's money through inefficient enforcement action. After accounting for deficiencies in the law, at the Competition Tribunal and in his budget, for which the government may be held accountable, any remaining deficiencies in enforcement may be attributable to the Commissioner and his administration of the Competition Bureau. This error can only be corrected by executive decisions and thus institutional independence from government is not advised.

There are really two important things about enforcement policy … One is independence and the other is accountability. The Commissioner needs to be independent, needs to have the resources required to do the job, but needs to be accountable, too. That means we have to be able to go to Tribunal and test the Commissioner's decision. That's one way of keeping him accountable. [Jack Quinn, Blake, Castles & Graydon, 59:11:45]

On the matter of accountability, competition law experts identified a number of ways the Commissioner might be held to account for his enforcement actions. We have already mentioned his accountability to the people through the government of the day. He is also accountable to the people through Parliament — and specifically by way of appearance before this Committee. Beyond bureaucratic means, the Commissioner is accountable for his enforcement decisions to the Competition Tribunal, which can rescind or vary all civilly reviewable decisions he makes, as well as judge his request for a cease and desist remedy.

The Commissioner is independent today in exercising enforcement direction. He is not independent from an institutional perspective. The deputy minister owns his people, so the staff and organization budgeting is all subject to the Department of Industry's priorities. … [W]e should ensure he has both institutional and enforcement independence. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

If there is weakness in the accountability regime, it has been in decisions not to take an enforcement action with respect to civilly reviewable matters. However, the Committee is confident that forthcoming private rights of action — with the adoption of Bill C-23 — will partially address accountability with respect to sections 75 and 77. In terms of mergers — that is, on the release of private information relating to a merger proposal where no enforcement action is taken — the Commissioner must perform a careful balancing act. He must weigh the merger participants' privacy rights with that of the public's right to know. According to the competition law experts appearing before this Committee, there is little issue here, but they do note that both U.S. and European competition authorities are more forthcoming in providing information than Canada's Competition Bureau. However, the Committee must reiterate the point that Canada, as a small market, is and should be more lenient on mergers relative to larger

The Commissioner … is one of the most highly accountable officials in the Government of Canada, and that comes in part from his oath under the Act and it comes in part from … your ability to take him to court on a judicial review. It comes in addition from the fact that any six residents can force him to conduct an inquiry and can go to the Minister of Industry and ask … to reopen an inquiry that's been discontinued. [Neil Campbell, McMillan Binch, 59:11:55]

Another very important part of his accountability comes from this committee, which has put the Commissioner under a spotlight for the last three years. We've had numerous studies and we have the Commissioner appearing and taking questions and justifying what he does and does not do on a literally monthly basis … You play a very significant role, and you should be continuing to ask him how he's performing with respect to policy and the general administration of the Act. [Neil Campbell, McMillan Binch, 59:11:55]

jurisdictions, including on issues of information disclosure. At the margin, strategic market information released to the public is of less value in larger and less concentrated markets. Finally, this leaves only section 79, the abuse of dominant position provision; here, the public itself has been most vocal, and parliamentarians have heard them loud and clear and this has spurred many amendments for reform.

Private Rights of Action

A limited private right of action currently exists in respect of criminal matters, but such action has been rarely initiated. Under section 36 of the *Competition Act*, a person may bring an action for damages (and costs) if the person has suffered loss or damage as a result of either: (1) conduct contrary to Part VI ("Offences in Relation to Competition"); or (2) the failure of a person to comply with an order of the Competition Tribunal or of another court under the Act. Accordingly, a right of private action for damages may arise in three circumstances:

[W]e do have a leverage problem in the context of a merger or in the context of an abuse-of-dominance inquiry, where the Commissioner's say-so often governs, particularly for parties who are in a small market and have difficulty looking at the current costs and time of a Tribunal proceeding. That is why it's important to streamline the Tribunal process. [Neil Campbell, McMillan Binch, 59:11:55]

1. The Department of Justice successfully prosecutes a violation of a criminal provision under Part VI (conspiracy, bid rigging, price discrimination, price predation, false advertising, deceptive telemarketing, double ticketing, pyramid selling, or price maintenance).
2. After the Commissioner and a party have entered into a consent order, a court has issued the order, and the party fails to comply with it.
3. If an aggrieved party succeeds in a private prosecution.

Under current law, the Commissioner of Competition is the only party with standing to make an application for civil review before the Competition Tribunal. But this is about to change. After considerable study, the Committee amended Bill C-23 to allow private parties to have access to the Tribunal for resolving disputes on a limited number of civilly reviewable business practices: refusal to deal (section 75); and tied selling, exclusive dealing and market restriction (section 77).

One other way to bring more resources into enforcement and to get more jurisprudence is the issue of private actions and allowing standing for private actions before the Tribunal. [Donald McFetridge, Carleton University, 59:10:55]

Witnesses appearing before the Committee on Bill C-23 were generally supportive of amendments leading in this direction. The main argument against private access

was the potential for abuse in the form of "strategic litigation" that is, legal action commenced not for the purpose of seeking a remedy to anticompetitive behaviour, but rather to gain an advantage over a competitor. The Committee, however, is satisfied that the safeguards included in Bill C-23 adequately address these concerns.

Throughout the Committee's hearings on the *Competition Act* there was broad agreement on the principle of granting private access to the Tribunal; there was less consensus on the relief that should be available. Many witnesses did support a right to claim for damages, yet others did not. The Committee therefore ran with the consensus it did obtain, proposing to limit the plaintiff to injunctive relief. As previously stated, the primary reason for denying claims for damages would be to discourage strategic litigation. In the longer term, however, we believe damages and maybe even fines will be necessary to realize effective enforcement.

I'd just point out that the costs for a plaintiff to bring a case to a conclusion are very substantial, and that is all the more an issue for small and medium-sized enterprises. So they most definitely will need to continue to use the Commissioner as the point of first contact on competition cases. I don't think private actions will be a solution to the resource issue, or indeed really to the accountability issue. [Neil Campbell, McMillan Binch, 59:11:55]

The expected benefits of private enforcement differ slightly based on whom you believe. Some argue it will bring a litany of cases which the Bureau does not have the mandate or resources to pursue. Private enforcement will complement public enforcement and, perhaps, generate savings that will stretch the Bureau's current enforcement budget. Yet others believe it will bring only a very limited number of cases; however, these will be pivotal cases that will enrich our body of jurisprudence; bring more certainty into the law; and discourage anticompetitive behaviour that might otherwise slip between the cracks of law and practice.

The Committee believes that, with only injunctive relief as the carrot, private parties in most cases may only be exchanging the costs associated with the alleged anticompetitive conduct for litigation costs (hopefully less than $1 million per case on average with reforms in Tribunal processes). Indeed, if this scenario does in fact unfold over the next few years, it will very quickly become common knowledge across the business sector and Canada will be no further ahead. Rights with no value attached to them are but window dressing — something that, as many observers have described, has adorned Canada's antitrust Acts for too long.

Competition Bureau Resources

A number of witnesses suggested that the enforcement problems in competition policy being encountered by Canada are not solely the result of inadequate legislation, but also stem from a lack of sufficient enforcement resources allocated to the Bureau. Moreover, some witnesses claimed that the Bureau has staff retention problems due principally to low salaries compared to what some of its veteran staff could earn in the private sector doing similar work, or following other pursuits. In fact, these commentators identified a number of reorganization models to get around this recruitment and retention problem, but they failed to provide an assessment on any weaknesses from which these models are likely to suffer. The VanDuzer Report further pinpointed a shortage of, and consequently the need to acquire and develop, industry-specific expertise to complement enforcement officers and ensure that they can make accurate assessments in a timely manner. In these witnesses' opinion, learning on the job is not always efficient.

[W]hen the mandate itself was unfolding — and the mandate was not as broad as it is todal — I can assure you the challenges that face one individual at the top of the Competition Bureau are such that … they warrant consideration of a three-person body. [Calvin Goldman, Davies, Ward & Beck, 59:09:15]

However, the Committee is also aware that part of the enforcement problem over the past decade was the result of uncontrollable factors such as the deregulation and liberalization of transportation, telecommunications and energy sectors. Increased funding in this period did not match the increased responsibility that these developments imposed on the Bureau. A second uncontrollable factor was the unforeseeable merger wave, which, as a number of witnesses remarked, seems to be abating and is mostly behind us now. The Committee believes the Competition Bureau does need additional enforcement resources to fulfill its mandate in an effective manner and, therefore, recommends:

I would suggest that the Bureau cannot be effective … without adequate resources in trying to administer a law of general application in an environment that is increasingly deregulated. They need the resources to act in a properly informed manner. That doesn't necessarily mean bringing many more cases. [Calvin Goldman, Davies, Ward & Beck, 59:10:50]

5. That the Government of Canada provide the Competition Bureau with the resources necessary to ensure the effective enforcement of the *Competition Act*.

Deterrence: Crimes, Fines and Jail

Probably the single most important enforcement instrument in Canada's competition policy toolbox is the

court fine. Unlike cease and desist orders that prohibit future use of a practice, fines levied by the Court have the dual purpose of punishing the assailant and deterring others considering the same anticompetitive activity. Jail time — which is also an important deterrence weapon — has played a relatively minor role. Together these enforcement instruments are used only in the most egregious criminal cases.

When we've had $150 million worth of fines under this section in the last few years, you need to be careful about saying that the law doesn't have sufficient strength. [Lawson Hunter, Stikeman Elliott, 59:09:20]

In Canada, corporations or individuals found in contravention of the general conspiracy provision (section 45) may receive fines of up to $10 million per offence, and individuals can face up to a five-year jail term. These fines are among the most severe found in the world. Fines for bid rigging (section 47) are set at the discretion of the Court, which is not constrained by a maximum monetary penalty. On the other hand, an historical examination of actual fines assessed by the Court shows that they had not even come close to the maximum permitted; however, the most recent past is marked by a sharp increase.

In 1990, the Manitoba Court of Appeal held that the earnings of the accused are relevant in assessing a fine and promptly raised the initial fine from $100,000 to $200,000 in a case involving price maintenance (paragraph 61(*a*)) and gasoline distribution. In terms of bid rigging, eight flour milling companies were assessed fines totalling $3.4 million in 1990. Furthermore, the largest conspiracy case in Canadian history — an international cartel to fix prices of bulk vitamins — netted the government $91.5 million in 1999-2000. Finally, the aggregate data indicate that, since 1980, convictions in 32 cases under the conspiracy provision (section 45) yielded fines totalling $158 million; $14 million in penalties was levied under the foreign directives provision (section 46); and a further $8.8 million was levied under bid rigging (section 47). More than 80% of these fines were collected in the past two years alone as a result of guilty pleas by large multinational corporations engaged in global conspiracies.

When you think about the biggest multinational companies in the world coming and paying attention very closely, after the United States, to Canada, paying huge fines and having individuals pleading guilty to crimes in Canada, that is fairly remarkable. I think the Bureau is a very credible enforcer on the world stage on cartels. It has also done perfectly well on local cartel activity in Canada. It has sent people to jail. It has obtained convictions. [Neil Campbell, McMillan Binch, 59:12:55]

The Committee is pleased with Canada's recent enforcement record. Although we remain concerned that some conspiracies could possibly earn more than the $10 million maximum fine they would be subject to pay if

caught, the Bureau contends that the business community does not take these fines as a “licence fee” or as simply another cost of doing business.

CHAPTER 3: COMPETITION TRIBUNAL

Tribunal Organization and Composition

The Competition Tribunal was created in 1986 as part of the major reform of Canada's competition law that saw the *Combines Investigation Act* replaced with the *Competition Act*. The Tribunal is a specialized court combining expertise in economics and law that hears and decides all applications made under Parts VII.1 and VIII of the *Competition Act* (including merger review, abuse of dominance and other reviewable trade practices). It is an adjudicative body, operating independently of any government department, and is composed of not more than four judicial members and not more than eight lay members. Judicial members are appointed from among the judges of the Federal Court, Trial Division, while lay members are appointed by the Governor in Council on the recommendation of the Minister of Industry.

You should look going forward at opening up the system to allow participants more access to the Tribunal. I find it hugely ironic that in an act devoted to competition the Commissioner has a monopoly or near monopoly on access [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Tribunal deliberates on complex questions of economics and law, and makes decisions affecting not only the rights and economic well-being of the parties, but having implications for businesses and consumers in Canada and abroad. In order to be able to adjudicate on these matters, the Tribunal is given the same powers found in a superior court of record, including the power to hear evidence, summon witnesses, order production and inspection of documents, enforce orders, and generally to do whatever is necessary to exercise its jurisdiction. Ultimately, these procedures serve one aim: to ensure that the Tribunal is able to gather the evidence it needs to make a just and correct decision on the facts of the dispute. The Tribunal does not gather evidence or facts; rather, it relies on the parties themselves (or more commonly, their lawyers) to collect and present the evidence it needs to make a decision. Parties adduce their evidence, each trying to prove their case. Parties are also given the opportunity to "test" their opponent's evidence in cross-examination. This system — known as the "adversarial" model — is used commonly by Canadian courts as well as by other adjudicative bodies.

By and large, most and virtually all of the experience of the Tribunal is on the part VIII side, in particular mergers. Remember, in the 1986 amendments mergers were decriminalized, put into the non-criminal section, and given into the exclusive jurisdiction of the Competition Tribunal. [Stanley Wong, Davis & Company, 65:09:10]

[T]he Tribunal doesn't have a lot of experience. This body was created in 1986 and really started operating in 1987. The first contested case of mergers went in 1990. Now, we've not had that many cases. If you look at the experience of the United States or even the European Union, we don't have a lot of cases, so the significance of every case is magnified. [Stanley Wong, Davis & Company, 65:09:10]

In the "adversarial" tribunal system, the Commissioner of Competition is one of the parties, initiating cases by making an application to the Tribunal. Therefore, the Tribunal and Bureau operate in a manner wholly independent and separate from each other. There is no sharing of resources or consultation on proceedings outside of the formal dispute resolution process. Indeed, this strict separation of functions is considered essential to preserve the integrity of the decision-making process. The Committee is aware that other jurisdictions (notably the European Union) employ a different model, one that fuses the role of investigator and adjudicator. The Committee is of the view that our current model is correct and appropriate, having regard both to the operational dynamics of our system of law, and to the requirements of the Canadian Charter of Rights and Freedoms. Moreover, the separation of functions in the adversarial system produces consistently good and just results. However, the system can be quite slow and procedurally intense. The proceedings are also frequently made more complex by the presence of multiple parties and interveners, as well as the need to consider interlocutory motions on issues of procedure. Contested proceedings often involve very complex issues of economics, i.e., determining market definition, market power, barriers to entry, etc. Parties will frequently retain many experts to address every facet of the economic debate. These experts may produce reports and may give evidence before the Tribunal that will be subject to cross-examination. At least in some measure, the high cost of proceedings before the Tribunal is attributable to what appears to be an increasing trend towards hiring more and more experts. Some witnesses, however, remarked on an increasing tendency of expert witnesses to advocate on behalf of their client, i.e., asserting conclusions of law, rather than limiting themselves to their proper role of assisting the Tribunal in arriving at correct findings of fact.

[W]hen we talk about truncating the procedures or having special procedures for the Tribunal, we should not forget that what we're dealing with is commercial litigation within a certain sphere. We have a lot of history in our courts, if not in our Tribunal, on how to manage those things, and we have various models, not only in Canada, but in other jurisdictions like the U.S., where they have started to manage commercial litigation more effectively and more efficiently. [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

In a lot of the thinking about what sort of process we want to have in the Tribunal, there is typically an attempt to impose a full-blown traditional trial model. That kind of enforcement activity is not appropriate in a public law enforcement context. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

The Committee is particularly aware that the high cost of Tribunal proceedings may discourage small and medium-sized enterprises from bringing meritorious cases to the Tribunal. The Committee heard little evidence on costs awards, but the Tribunal appears to have broad discretion in this regard; in fact, the Tribunal need not award any costs in

a proceeding. Perhaps, the public would benefit from an expressed policy on costs awards. Accordingly, the Committee recommends:

6. **That the Competition Tribunal develop and articulate a policy to allocate costs in a fair and equitable manner having regard to the resources available to the parties to the proceeding. That such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.**

I have perhaps been a lone voice in suggesting that this is a tribunal where judges have not played a helpful role in the sense that they have formalized and judicialized it. I would prefer to see a tribunal that really is administrative and that could make decisions more quickly on an expert basis. [Neil Campbell, McMillan Binch, 59:11:25]

Many of the witnesses appearing before the Committee, both in the context of the study in June 2000 leading to the *Interim Report* and during our most recent roundtable meetings, expressed a measure of dissatisfaction with the Tribunal adjudicative process. At the same time, however, witnesses were quick to point out that the system is, on balance, a very good one, and not in need of major reform. The timeliness of interim relief as well as the time required to reach decisions were two problems identified. Furthermore, the costs of bringing a case to the Tribunal appear to many to be excessive, owing in some part, it seems, both to an overly procedural discovery process, as well as to the lengthy lists of expert witnesses the parties are permitted to call to give evidence.

Timeliness

With respect to the criticism that the Tribunal fails to provide interim relief in a timely way, the Committee anticipates that this problem will be addressed in great measure by the new powers conferred on the Tribunal in section 103.3 of the Act by Bill C-23. The new powers will permit the Tribunal to make an interim order to prevent certain anticompetitive practices. The legal test for the granting of the order is quite low — the Commissioner is not required to show that competition will be irremediably harmed, but merely that a person is likely to be eliminated as a competitor, or that a person is likely to suffer a significant loss of market share, revenue or other irremediable harm.

[O]ur ability to get good enforcement in the sense of formal proceedings does depend in part on streamlining and improving the Competition Tribunal proceedings without undermining the ability of people to make a defence for the particular activity they have. … [A]n administrative tribunal, an expert tribunal, would be a much more useful structure. [Neil Campbell, McMillan Binch, 59:11:25]

The Committee believes that granting any manner of relief — interim or final — merely on the grounds that a

[T]he Tribunal decisions have taken far too long. … The most recent consent case, which was done with agreed statements of facts and a high degree of collegiality among counsel on both sides, took something like 18 months on a consent basis. It took 18 to 20 months on a merger. [Stanley Wong, Davis & Company, 59:11:30]

competitor is losing revenue (something which happens all the time, and which is not, in itself, evidence of any anticompetitive activity) represents a serious departure from the well-established and important principle that competition law aims at protecting competition, not competitors. However, the relief contemplated here is *temporary* and is meant to allow the Commissioner to prevent a competitor from suffering immediate and irreparable harm, i.e., being forced out of the market. So, although the interim order may, on occasion, result in inefficiency by protecting an uncompetitive competitor, this impact will, in any case, be temporary. The Commissioner or applicant will still be required ultimately to prove the substantive elements of the relevant section in order to get an order in the final result.

The Tribunal process needs to be streamlined and improved quite dramatically. … There have been four contested mergers before the Competition Tribunal. The average time the Bureau has dealt with those transactions has been about eight and a half months … [and] the average was 19 months from the start until the remedy. [Margaret Sanderson, Charles River Associates, 59:11:20]

Still, the Committee is concerned that setting the bar for interim relief so low may prompt the Commissioner to seek interim relief in cases of questionable merit, with perverse results on competition. In a normal civil proceeding, this would be less likely to occur because the party who applies for the injunction does so subject to an undertaking that, if he loses the case in the final result, he will have to pay the damages accruing to the other person as a result of the injunction. This rule is designed to prompt the party seeking the injunction to take a hard look at the merits of the application. However, this important disincentive does not appear to exist in the *Competition Act*. Moreover, even if such a rule were implemented, it would not necessarily have the desired effect, since the damages payable by the Commissioner to the injured party would be payable out of government revenues, not out of the Commissioner's own pocket (as would be the case with a private litigant in normal civil proceedings). As such, the Commissioner has very little "downside" to seeking an interim order and there is little to make the Commissioner accountable for his decision to seek interim relief.

By having a rules committee, you don't have to have a wholesale set of rules drafted, which may take five years to do, because this is a complex area. You have an incremental process to move the rules along with the change in the law, with the change in procedures, with the change in technology that allows us to adapt to that. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

In addition to the issue of the timeliness of *interim* relief, there is also the issue of the timeliness of *final* relief, the Tribunal's final order. In the case currently before the Tribunal involving the Commissioner's allegation of abuse of dominance by Air Canada, we see that interim relief was swift. The final resolution of the matter, however, appears to be a long way off. The Commissioner issued a section 104.1 order on 12 October 2000 and extended it for a further 30 days on 31 October 2000. The Tribunal

subsequently extended the order to 31 December 2000. The Committee is disturbed to learn that the hearing is not scheduled to commence until fall 2002. Justice delayed is justice denied. We believe that the resolution of this matter is important for all Canadians.

What has fuelled a lot of the acrimony in litigation before the Tribunal is the sense that there is an imbalance of information and power between the Commissioner … and respondents … This concern is very pointed at the moment, or will become so by virtue of the amendments to Bill C-23, because Parliament has seen fit to give the Commissioner the power to seek an interim order on very limited grounds, ex parte ... [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

Procedural Fairness

Owing to its "high stakes" proceedings, the Tribunal aims to ensure that the procedures it implements are sufficient so that litigants receive the appropriate degree of procedural fairness. "Procedural fairness" refers to the rights and obligations that flow from a party's right to have "due process" (as it is called in the United States) in an quasi-judicial adjudicative setting. Procedural fairness, at a minimum, usually involves the right of a party to tell his story to an impartial (i.e., unbiased) decision-maker; and the right to expect that the decision-maker will act in accordance with applicable laws. If the decision-maker does not act according to his legal authority, then the party would have a right to apply to a court for judicial review (reconsideration of the issue by a court).

The lawyers always argue for more protections, more safeguards, more hearings, and more redeterminations. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

The essential question of procedural fairness is: how far does it go? Does it permit the rule maker (in this case, the Tribunal) to make rules limiting the scope of examination for discovery, or the time to complete it? What about time limits on presenting one's case? Or limits on the number of expert witnesses one can call to give evidence? Indeed, can "corners be cut" at all without prejudice to the rights of parties?

By providing the appropriate degree of procedural fairness, the Tribunal aims to ensure that parties appearing before it are able to present their case adequately. Traditionally, each party has the right to determine how best to present its case; courts are generally reluctant to intervene unless it is absolutely necessary.

Whichever side of a case we're on, we can be unhappy. We always do that in the courts, but nobody has ever suggested we abolish the courts or limit the powers of the courts in their area of jurisdiction. We seem to have a tendency every time somebody doesn't like a decision of the Tribunal to immediately say, gee, now shouldn't they do something less? [Stanley Wong, Davis & Company, 65:09:15]

When it comes to the question of procedural protection, there cannot be said to be any definitive answer to the question: "how much is enough"? As a general rule, the "higher the stakes" for the parties, the higher the degree of procedural protection to which they should be entitled.

For example, proceedings which could lead to jail time would attract the highest degree of procedural fairness (that of a criminal court, with the criminal procedures, rules of evidence and a "beyond a reasonable doubt" burden of proof). At the other end of the continuum, small civil matters (such as licensing decisions) would warrant a lesser degree of procedural protection. However, "small stakes" for a large firm may, in fact, be very "large stakes" for a small firm. For that reason, procedural protections must also address the concerns of small business.

The Tribunal, like any court, should have the flexibility to manage its docket as it sees fit. That is what the Tribunal has at this point, albeit there seems to be an ever-increasing desire to put fixed time limits around various activities in the pre-litigation phase. But that discretion to determine the appropriate balance between expedition and fairness should be left with the Tribunal going forward. [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

Questions of "how much fairness is enough?" seldom admit easy answers. As an example, it would seem reasonable to suggest that a person is entitled to be put on notice if a legal proceeding is commenced against him. It offends our sense of justice to think that a court proceeding could take place — and an order made against a person — without that person having any notice or chance to respond. Indeed, the right to notice is an important principle often reiterated by civil courts. For that reason, courts generally permit applications without notice (*ex parte*) only in exceptional circumstances.

But when we pursue the idea of the "right to notice" a little further, it becomes less clear. First, giving "notice" of a proceeding is meaningless if the person being put on notice (the respondent) can do nothing to influence the outcome of the proceeding. For the notice right to have any kind of meaning or purpose, there must at least be some opportunity to affect the outcome of the proceeding. This is done by permitting the respondent to challenge the evidence upon which the applicant seeks to rely. But to do that, the defendant will need to have some way of "discovering" the applicant's case, and so the discovery process becomes necessary. And what will be done if one party refuses to disclose the information the other requests? There must be some way to compel the parties to disclose their documentary evidence. Also, there must be a procedure in place to allow the parties to settle disputes over the proper procedures to apply in a proceeding. This is done by way of motions. Each of these motions must be properly resolved on their merits. Furthermore, the respondent should be given the opportunity to present evidence on his own behalf, and this will likely involve hiring expert witnesses. In this way, the simple right to notice may develop into an extensive set of procedural and substantive entitlements. The adversarial

The difficulty is if we insist too much on this full due process system, which takes tremendous time, and for which we have this judicial model … [S]ometimes you wonder, is this process really designed to get to the truth? If we could solve that side of things, that would go a long way to dealing with questions of independence and so forth. [Margaret Sanderson, Charles River Associates 59:12:00]

process produces results that are consistently fair and just, but frequently at very high cost.

Out of consideration for principles of procedural fairness, the Tribunal aims to provide more, rather than fewer, procedural protections. This means that parties are generally given the time they need to complete the proceeding "in the fullness of time," without strong direction from the Tribunal. As well, parties will often agree to timetables for dealing with cases, production of documents, etc., and these time frames may be quite lengthy in complicated cases.

Case management also means limiting witnesses. You might be interested to know that in the Microsoft case … they had only 24 witnesses and the decision was 46 pages long. The Superior Propane case that you've heard about a lot had 91 witnesses and a 109-page decision. I think, frankly, that's reflective of something short of aggressive case management. [George Addy, Osler, Hoskin & Harcourt, 59:11:35]

Case Management

The Committee shares the concerns of those who complain that Tribunal proceedings are long and expensive. Commentators focused on several areas where procedures could be improved:

- the time in which the steps in the proceeding must be completed;
- the time allocated for, and the scope of, examinations for discovery; and/or
- the amount of expert evidence the parties may adduce.

The Tribunal currently has authority, under section 16 of the *Competition Tribunal Act*, to make general rules (subject to the approval of the Governor in Council) regulating the Tribunal's practice and procedure. Those rules currently exist in the *Competition Tribunal Rules*,[11] which set out a complete code of procedure for the adjudication of disputes before the Tribunal, including the substantive steps the parties must complete and the time within which the steps must be completed. The steps in the proceeding include the exchange of pleadings, discovery, the pre-hearing conference, granting of interim relief, applications by interveners, interlocutory motions and the hearing itself.

Frankly, many of my colleagues … fought tooth and nail, saying, "Well, that's not justice. Justice means you can have as many witnesses as you want, you can plead as long as you want, and you can get whatever adjournments you want." I think the hesitancy on the part of the Tribunal to do more is because there's this view of a private bar to say the model is like court. [Stanley Wong, Davis & Company, 59:12:20]

11 SOR/94-290 as amended SOR/96-307; SOR/2000-198.

The tendency is always to say, well, let's tinker with the Tribunal process rules, and hopefully that will solve the problem. That's not always the case. That can help, but there also has to be aggressive case management on the part of the Tribunal as well. By way of example, a recent case, one of the many involving Air Canada, was adjourned for six months without any reasons being given. [George Addy, Osler, Hoskin & Harcourt, 59:11:30

The Tribunal is aware of these criticisms and has made, and continues to make, constructive efforts to address them. Most notably, the Tribunal established a Tribunal-Bar Liaison Committee in 1997 comprised of Tribunal members, members of the Competition Law Section of the Canadian Bar Association and the General Counsel of the Department of Justice's Competition Law (who represents the Commissioner of Competition). The Liaison Committee reviews Tribunal procedures to determine how they might be refined and improved. At the time of drafting of this report, a number of procedural improvements are anticipated. One set of procedures will replace The current discovery process — traditionally the part of the process that takes the most time and results in the most interlocutory litigation — will be replaced with the following set of procedures:

- a reciprocal obligation upon the parties to deliver a disclosure statement setting out a list of the records upon which they intend to rely at the hearing;
- "will say" statements of non-expert witnesses who will be appearing at the hearing;
- a concise statement of the economic theory in support of the application.

Moreover, the new procedures will permit certain information provided by the respondent to be read into evidence rather than having the witness testify.

I would urge that the Tribunal continue to maintain a broad and flexible discretion to manage cases in both the parties' and the public interest. I am concerned about the attempt by the rules and by members of the Tribunal to think that this can be done by fixed rules, which mostly relate to the timing of when things should be filed and the like. In my judgment that is simply tinkering at the edges of substance. [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

Equally important, the new procedures will depart from the traditional model of permitting each party to adduce all of its expert evidence in turn. Instead, the Tribunal will group experts on a particular issue together in panels. Each expert will make a statement setting out his opinion, which will then be subject to cross-examination by the other experts, rather than by their lawyers. Counsel will still have the right to question experts in a limited manner. Apparently, this approach has been used in Australia with some success reported.

The Committee is also aware that the Tribunal-Bar Liaison Committee is preparing a discussion paper to explore the possibility of creating similar rules with respect to mergers. These amendments would relate to electronic filing and hearing, attempting to limit the number of witnesses to

be called at the hearing, and the introduction of time limits (four months or less from the date of filing of the notice of application) for the issuance of reasons and orders by the Tribunal. The new procedures are aimed not only at reducing the time for the matter to be resolved, but also to bring a greater degree of certainty to the proceedings, which will ultimately benefit the parties in conducting their affairs.

In my judgment, the Competition Tribunal is now managing its caseload very effectively, and recent litigation before the Tribunal evidences that. That's not to say that there won't be long cases in the future; indeed there will be. If there are, I don't believe this committee should engage in hand-wringing over that process. It's in the nature of litigation. [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee commends the Tribunal for its timely and thoughtful reforms, and encourages it to continue the process. However, the Committee cautions that any contemplated limits on the right of a party to present its case fully and fairly must always be approached with special consideration for established principles of fairness and justice. Restricting the number of witnesses that a party may call, for example, or the amount of time within which the party must complete their submissions, always runs the risk of creating the reality or appearance of injustice.

The Committee has assessed several possible options to address the issue of perceived shortcomings in Tribunal proceedings. We could, for example, recommend that the government amend the *Competition Tribunal Act* to impose procedural limits on Tribunal proceedings; or we could recommend that the government amend the Act in order to require the Tribunal itself to change its rules to create limits on its proceedings.

[Y]ou have to be able to say to the parties, "I want experts on this issue and this issue, and you'd better file experts in this area," instead of saying, "You do what you want, you do what you want, and then you can reply and you can reply." That is not case management in this area. This is one where you have to be extremely aggressive, running the case from the first day it comes into the Tribunal. The Tribunal can do that without amendment to the process. Every time you have amendment, it leads to more jurisprudence about what it really means. The framework is good enough for the Tribunal to make these changes. [Stanley Wong, Davis & Company, 59:12:20]

The Committee, however, believes the first option is problematic for several reasons. The Committee has no direct experience with, and no particular expertise in, the conduct of Tribunal proceedings. Furthermore, the *Competition Tribunal Act* clearly anticipates that Parliament originally intended for the Tribunal to determine its own procedures, and it appears to be actively engaged in doing so. For these reasons, the Committee does not find that there is a compelling reason to depart from this model.

The second option would impose an obligation on the Tribunal to make rule changes, but would leave the consideration of how exactly to do so in the hands of the Tribunal. Again, however, it is clear that the Tribunal already has the necessary authority under its statute to

impose case management procedure, and is actively considering ways of doing so.

[A]s we strengthen the Tribunal process and improve the adjudication mechanism through the Tribunal, we should not at the same time give the Commissioner powers to avoid the Tribunal. I think the interim injunction provisions that have been granted to the Commissioner in the context of airlines are a special case, but if one wants to have separation of investigation and adjudication, one should have a revitalized Tribunal. It doesn't help to give, at the same time, the Commissioner powers whereby he can avoid the Tribunal. [Margaret Sanderson, Charles River Associates, 59:12:30]

Ultimately, the Committee believes that the Tribunal is in the best position to enunciate the rules governing its procedures. For that reason, the Committee recommends:

7. That the Competition Tribunal, in consultation with the Tribunal-Bar Liaison Committee, continue its ongoing review of procedures with the aim of creating an adjudicative system that will ensure "just results" in an expeditious and timely manner. Such procedures should aim at reducing parties' costs, as well as the time required, in bringing contested cases to a conclusion while, at the same time, continuing to ensure that due consideration is given to principles of procedural fairness and the appearance of justice.

Balancing the Incentives: Damages, Court Costs and Fines

I believe that administrative penalties and damages are something that are necessary to make our Act effective. Currently, abuse of dominance is a provision that can be read this way: do it until you're told not to. And what's the cost of that? The advice we have to give is that it's not unlawful until the tribunal says so. Of course, the clients can potentially read into that, do it until they say no. [Robert Russell, Borden, Ladner & Gervais, 65:09:35]

The relief available to a prospective applicant is a critical factor in determining whether to proceed with a case to the Tribunal. Although, with the adoption of Bill C-23, the right to bring a private action before the Tribunal will exist in a limited sense, the incentives contained in Bill C-23 are clearly designed more to discourage than to encourage the applicant to commence private proceedings. The absence of any remedy of damages is the most obvious incentive against litigating cases. Denying the plaintiff what would be, in most civil cases, the most important available remedy might reasonably be expected to have an impact on the decision of whether or not to start an application, i.e., is the remedy (an order) worth the time, effort and expense? The possibility of damages awards is also an important deterrent to anticompetitive behaviour. Currently, the only relief available to the applicant is a cease and desist order of the Tribunal, or in some cases, an order for divestiture. But there is no right to sue for damages.

The right to sue for damages is a fundamental right accorded to plaintiffs in civil proceedings throughout the world. It is an injustice that applicants in Tribunal proceedings should be denied the same fundamental right as any other litigant to claim restitution for the losses they have sustained as a result of another person's anticompetitive conduct. The ostensible reason for the policy is that providing a damages remedy would lead to a rash of litigation, as has been the case in the United States and that this, in turn, would cause business to leave Canada, oppressed by the high cost of defending vexatious lawsuits.

But unless we have significant penalties, we have no teeth in these provisions. We simply litigate, and litigation can be a tool in itself to draw things out until the damage is done, until the competitor disappears from the landscape. Only with the threat of significant penalties with these sorts of provisions will we have true deterrents in our economy. [Robert Russell, Borden, Ladner & Gervais, 65:09:35]

The Committee is fully aware of the many differences that exist between the Canadian and U.S. approaches to antitrust enforcement, and we are of the view that the differences are so fundamental that no meaningful comparison can be drawn between the two. In addition to permitting treble damages to the successful plaintiff, the U.S. approach also contains other incentives to encourage litigation including, for example, civil jury trials and costs awards that overwhelmingly favour the plaintiff. For that reason, the Committee is firmly of the view that there is no merit to the argument that creating a right of damages in Tribunal proceedings would have an adverse impact on the business environment. In fact, quite the opposite could occur. Creating a fair system in which all persons and enterprises are able to protect their rights and economic interests would tend to attract investment, not drive it away. This conclusion is supported by the United States experience where, despite having the most litigious antitrust regime in the world, investment still flocks to the business environment of the United States ahead of any other in the world.

[A]dministrative penalties and damages to parties that are harmed. Without that, we don't have teeth in this legislation for important reviewable matters. If you put a company out of business today, all that will be said to you is, you shouldn't have done it. That's not a good enough deterrent. If you're going to abuse your dominant position in this country, you should be called to pay for damages to the party, costs for the proceedings, and penalties because the public interest has been affected. We need those teeth. [Robert Russell, Borden, Ladner & Gervais, 65:10:45]

Moreover, the argument is not borne out by the experience of ordinary civil courts in Canada. Our courts routinely assess and awards damages in civil cases, and there is absolutely nothing to suggest that the availability of the remedy has led to a rash of strategic litigation in those venues. For the same reason, there is nothing to support the position that permitting applicants to claim for damages before the Tribunal would result in a significant increase in litigation, particularly if the relief is limited to "single damages," i.e., the actual provable loss. The threat of strategic litigation would also be kept in check by the

Tribunal's new cost rules, as well as its power of summary dismissal and to refuse leave to commence an application.

As we note from the area of hard-core cartels, even a $10 million fine may not suffice. I know when I was at the Competition Bureau, when we were looking at a particular case, we calculated the overcharge to be hundreds of millions of dollars, so even a $10 million fine in that particular case, had it gone forward, would have been a mere fraction of the profits. If you're going to introduce an administrative monetary penalty for abusive dominance, I think you really want to give the Tribunal the greatest flexibility by allowing it to impose a penalty at its discretion. That will enable it to set the penalty at any level. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:55]

The Tribunal is composed of very experienced members of the judiciary and experts in economics, who certainly have the necessary expertise to assess damages. The Committee does not recommend under any circumstances the consideration of treble damages, such as are available to litigants in the United States, and which is said to have led to the growth of a massive antitrust litigation industry in that country.

Until claims for damages are permitted under the *Competition Act*, it is likely that the balance of litigation incentives in the Act will remain less than optimal. Some good cases likely will not be brought given no possibility of recovering damages. These would-be applicants will simply decide that the limited injunctive relief available from the Tribunal is just not worth the high cost of pursuing a case to hearing. Accordingly, from the perspective of the applicant, there is a good argument to be made for creating a right to sue for damages.

Historically, Canada's antitrust legislation has been principally concerned with the public interest in competition as opposed to the private interests of individual competitors. If you amended the legislation … to afford a litigant the right to damages, I think the implications would be quite profound … I think inevitably where you would end up is that the Tribunal would become a court like any other, only it would be a specialized court. So a lot of thought has to be given on whether it is in the public interest to migrate the legislation in that direction. [John Rook, Osler, Hoskin & Harcourt, 65:10:55]

Moreover, damages would provide excellent deterrence. The possibility of being liable for damages would certainly provide additional incentive for dominant firms to refrain from anticompetitive practices by raising the potential cost of embarking on such a course. Increasing compliance with the Act would, of course, also relieve the Canadian taxpayer of some of the expense of having the Bureau solely responsible for enforcing the Act. Currently, there is little disincentive to a dominant player from abusing its market power. The abusive firm knows that the worst that will happen is that, at the end of the proceeding, it will be ordered merely to cease and desist the anticompetitive behaviour, and perhaps to pay a portion of the applicant's legal costs. It will not be required to pay damages, no matter how much its victim or victims may have lost. Compare this, on the other hand, to the enormous profits that the abusive firm may realize while the case is before the Tribunal. The absence of damages creates a very strong incentive for the abusive firm to prolong the litigation; doing so will, of course, raise its legal costs somewhat, but it will not increase its exposure in the much larger area of damages. In the meantime, the victim of the conduct will continue to suffer losses (and will thus be under increasing pressure to settle

the case), while the abusive firm will continue to realize its ill-gotten gains, without any concern of ultimately having to pay damages to its victim.

With the adoption of Bill C-23, the Tribunal will now have the authority to award court costs to a successful litigant. This is also expected to have an impact on the prospective applicant's decision of whether to take a case to the Tribunal, although it cannot be said to be a strong incentive either way. The spectre of having to pay a successful defendant's cost would tend to deter an applicant not strongly convinced of the merits of his case, certainly as much as the prospect of recovering costs would tend to encourage it. Furthermore, at least some cases, it is anticipated, will not obtain the leave of the Tribunal required to bring an application under sections 75 and 77, which is another possible disincentive to commencing an application.

The Committee also found considerable support among witnesses for giving the Tribunal the authority to levy administrative monetary fines as a further deterrent to egregious anticompetitive conduct. Although the threat of damages is certainly an effective deterrent, fines would be a useful additional remedy in situations where: (1) an award of damages would not, in itself, be a sufficient deterrent; (2) the victims of the conduct could not be easily ascertained, for example, where the loss has been shared by a large number of consumers; or (3) where the losses of each is too minimal to make a damages award a practical remedy.

Administrative penalties, in order to have any effect, would have to be large enough to deter anticompetitive behaviour. In fact, to deter the conduct in the future, the penalty must be greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct. For that reason, there should be no ceiling placed on the size of the potential fine that the Tribunal might levy. The size of the fine should be left to the discretion of the Tribunal, having regards to the profits realized by the abusive party and such other factors as it considers correct in the circumstances of the case.

I think some real benefit can be derived from looking at other case management models where a judge is assigned not only to schedule, but to manage what issues are coming forward before theTribunal. We have, I believe, a very good example in the commercial list in Toronto....There are judges, typically six at a time, who are assigned to the list — three fairly permanent members, and three members who are rotated in every six months. It has a specific protocol in dealing with commercial litigation, and a very tight case management system, where a judge not only manages all of the pre-trial hearings, if you will, but also enforces that the parties go through methods of mediation, typically before they get to a trial. ... Effective case management by a judge *... is something that would, I believe, definitely assist our procedures in terms of the Tribunal.* [Robert Russell, Borden, Ladner & Gervais, 65:09:25]

I think there is a need to review the whole scheme as to what we're trying to do … [I]n Bill C-23 there's now a penalty of $15 million in the airline situation. I think that's too hasty. I appreciate there are all sorts of political considerations, but … you need to look more generally at what principles you want enshrined in the act to deal with reviewable matters. … [I]t's not a question of what we can do to stop the big business. When you have these penalties in place, they will apply equally to smaller businesses. [Stanley Wong, Davis & Company, 65:10:15]

When … we take a holistic approach and think about the institutional structures and the incentives that are put in place … that will go a long way towards dealing with some of these cost concerns. [Margaret Sanderson, Charles River Associates, 59:11:25]

Accordingly, the Act must provide the optimum mix of incentives to promote compliance with the Act and to encourage meritorious cases to come forward. The Committee was presented with two options:

1. That the Government amend the *Competition Act* to permit the Tribunal, in addition to the other remedies available to it in civil proceedings, to order the compensation to a party in the form of a damages award, and to levy administrative monetary penalties under section 79 as a deterrent to anticompetitive behaviour and the just and expeditious resolution of Tribunal proceedings.

Parliament should ask itself, how much of the public resources we have to allocate amongst many valuable objectives can we afford to put into this kind of adjudication? [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

2. To wait and see the impact of Bill C-23 reforms (i.e., private access, hearing of references) on the operation of the Tribunal and its procedures.

It is not clear whether the creation of the new right of private access, as well as the Bureau's new procedures to hear references and to summarily dismiss applications, will actually achieve the desired objective of encouraging positive litigation. The Committee is not convinced that these narrow reforms will, in themselves, strike the right balance. For this reason, the Committee recommends:

We just have to open up to the possibility of allowing private actions, possibly including damages or at least cost awards for some of these other offences. [Tom Ross, University of British Columbia, 59:12:45]

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).

Jurisprudence — Bringing Cases

[W]e should be focused on … what are the right, economically sound designs of the law, and the jurisprudence should follow. [Neil Campbell, McMillan Binch 59:12:15]

There was a broad consensus among witnesses that simply not enough cases are being brought to the Tribunal. This is not to suggest that litigating disputes is to be encouraged for its own sake; however, bringing cases to the Tribunal will lead, over time, to the development of judicial interpretation that will ultimately serve to clarify the meaning of, as well as improve compliance with and enforcement of, the Act. The challenge for lawmakers is to create a system in which good cases (i.e., cases with merit) may be brought.

At the same time, we must be careful that we do not encourage frivolous, vexatious or strategic litigation.

Why would one bring an application to the Tribunal as a private litigant if you can convince the Commissioner to make an ex parte *application to stop your competitor from doing what it is doing in the marketplace? Why spend your money when you can spend the money of the public …?* [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

The Committee is satisfied that the new Tribunal powers created by Bill C-23 are well designed to discourage frivolous litigation. However, whether the reforms will function to encourage good cases to come forward is far from clear.

Many disputes will undoubtedly be resolved by the Tribunal's new power to hear references.[12] At the same time, it is reasonable to anticipate that some cases will be dealt with summarily under the Tribunal's new powers of summary judgment. Cases obviously devoid of merit will be "stopped at the gate" by the Tribunal's right to deny leave to commence the application.

Parliament has surrounded this right of public access with a number of fences … and it remains to be seen whether it's practicable and will be used. … [I] don't see the incentives there particularly for a private litigant to proceed … [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee expects that the new right of private access to adjudicate disputes under sections 75 and 77, created by Bill C-23, will add to the Tribunal's caseload, as private individuals look to the Tribunal for protection from anticompetitive business practices. However, owing to the non-availability of any remedy in damages, the Committee does not anticipate the flood of litigation that some opponents of private access have predicted. Still it is anticipated — indeed, hoped — that stakeholders will use the legislation in good faith to assert their rights before the Tribunal and protect their civil rights and, more generally, to protect healthy competition.

We all benefit from having a reasoned decision. Not only will the complainant benefit, members of the public will benefit by understanding the way the Bureau is applying the law in a particular situation. You get an accountability benefit from seeing what the Bureau has done or has not done. [Neil Campbell, McMillan Binch 59:11:25]

On the subject of references, the Committee heard several criticisms of Bill C-23. That bill contemplates that the Commissioner alone, or both parties if they agree, may direct a reference to the Tribunal on a question of law, mixed law and fact, jurisdiction, practice or procedure. The Commissioner may, of his own accord, refer these matters (except for a question of mixed law and fact), but a responding party may not. The Committee does not find

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12 The Tribunal will be able to hear references on questions of law, mixed law and fact, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 (*Deceptive Marketing Practices*) or Part VIII (*Matters Reviewable by the Tribunal*), whether or not an application has been made under those sections. Similarly, the Commissioner may, of his own accord, refer a question of law, jurisdiction, practice or procedure (but not of mixed law and fact) in relation to the application or interpretation of Part VII.1, VIII or IX (notifiable transactions, i.e., mergers).

In private litigation, the parties have the freedom to spend as much money on their cases as they think their interests bear, so there's a natural competition in spending money on cases. Part of the resistance to the bureau bringing more cases has been the amount of money they consume. This is simply saying that the process becomes a kind of pearl without price. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

any compelling policy justification for this apparent inequity and the Committee, therefore, recommends:

9. That the Government of Canada amend section 124.2 of the *Competition Act* to permit a party to a contested proceeding under Part VII.1 or VIII to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII.

Tribunal Resources

I think there is a general support for the idea that Tribunal proceedings should start and finish in six months, including a four-month period for adjudication and two months to write the decision. My sense is that the Tribunal itself is predisposed to pursue that and obviously requires the cooperation of the parties as well as sufficient resources. I understand one of the problems with delay in the past has been that there have been insufficient judicial resources. [Stanley Wong, Davis & Company, 65:09:25]

The Committee heard little evidence on the adequacy of the Tribunal's resources. However, some witnesses did point to a shortage of economist members in some cases, and this has reportedly resulted in occasional delays in cases proceeding in a timely fashion. We anticipate that the Tribunal's current budget may need to be increased in order to deal with cases brought by private parties after the adoption of Bill C-23. How many new cases will result remains to be seen. At the same time, it is possible that the power to grant summary judgment and to hear references may result in a greater number of cases being resolved short of a full-blown hearing, and this may result in some saving of resources.

I do not think just throwing more money there will solve the problem. If we kept the model we have today … you can have a situation such as the Superior Propane case where the Commissioner can lead ten economists as experts. … I think we have to change this process, or the quantity of resources that will have to be devoted to it … [W]hat the general taxpayer would view is a reasonable allocation, given competing and highly desirable goals for government policy. [Margaret Sanderson, Charles River Associates, 59:12:35]

In any case, the Committee is of the view that the Tribunal itself is in the best position to determine its resource requirements and that the current budgetary process provides the means to address this issue. For this reason, the Committee does not feel the necessity to comment on the adequacy of the Tribunal's current budget. The Committee intends to monitor the operation of the Tribunal as part of our oversight of the operation of Canada's competition law framework.

The *Competition Tribunal Act*

The Committee heard that subsection 12(1) of the Act, as it is written, does not reflect current Tribunal practice. That section states that questions of law shall be determined

only by the judicial members, while questions of fact or mixed law and fact shall be determined by both judicial and lay members.

Distinguishing questions of law from questions of fact or mixed fact and law often presents difficulties, particularly in a statutory regime that is driven by market forces. The Tribunal, in its practice, does not preclude lay members from expressing opinions on questions of law. In one case, in fact, the appeal court affirmed the dissenting opinion of a lay member on an issue of the Tribunal's jurisdiction.

One area that in my judgment would add a lot of accountability, particularly in merger cases, is if a merger is before the Tribunal the reference power that exists in Bill C-23 should be amended to permit the respondent to bring an application to the Tribunal for a ruling on a summary point … If the respondent … had the power to go to the Tribunal and say, "this is wrong, this is outside the mandate of the Commissioner in these circumstances, and you ought to do something about it", that would have a very healthy disciplinary effect on the exercise of discretion … [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee believes that there is no compelling reason to maintain the artificial and somewhat unwieldy distinction between questions of fact and question of law or mixed fact and law in Tribunal proceedings. Accordingly, the Committee recommends:

10. That the Government of Canada amend section 12 of the *Competition Tribunal Act* to permit questions of law to be considered by all the members sitting in a proceeding.

Automatic Right of Appeal

Section 13 of the *Competition Tribunal Act* creates an automatic right of appeal[13] from any decision or order of the Tribunal, including interim (temporary) orders.[14] One exception exists to this automatic right of appeal: an appeal on a question of fact alone may only be brought with leave (permission) of the Court. This approach reflects a principle known as judicial deference. It is based on the notion that the Tribunal, with its specialized expertise and full hearing of the evidence, is in a better position than the appeal court to determine evidence-based findings of fact. But should the idea of deference extend to questions of law as well?

Judicial members have the exclusive right to decide on questions of law and then all other questions decided by the entire panel. … [I]t's a bit awkward for the Tribunal to operate in that way … in reality the Tribunal members probably look at everything together [Stanley Wong, Davis & Company, 65:09:15]

13 To the Federal Court of Appeal.

14 However, section 103.3 interim orders (created by Bill C-23) would not be reviewable.

Right now there is an automatic right of leave to appeal except on questions of fact. I know of no skillful lawyer who can't at least make a question of mixed fact and law to launch an appeal. This, I think, unnecessarily delays the adjudicative process, given that the purpose of the Tribunal is to be a specialized Tribunal. [Stanley Wong, Davis & Company, 65:09:15]

Judicial members of the Tribunal are judges of the Federal Court. It is evident to the Committee that, with such a depth of legal knowledge and experience, the Tribunal warrants a very high degree of deference on matters of law. Moreover, it has been clearly shown that lay members of the Tribunal can, and do, comment meaningfully on issues of law in Tribunal decisions. For this reason, the Committee believes that the principle of deference should extend to the Tribunal not only in questions of fact alone, but equally in questions of law of general application and laws specific to competition proceedings.

It is important to be clear that requiring a party to obtain leave to appeal does not deprive the party of its right to appeal. It simply requires that the appellant first convince the Court of Appeal that there is sufficient merit to the appeal to warrant a hearing. The Court of Appeal might, if it finds no merit in the appeal, summarily dismiss it without the necessity of going through a full appeal proceeding. In this way, many proceedings might be abbreviated without sacrificing principles of procedural fairness. Accordingly, the Committee recommends:

It is not good for the system to have a very prolonged period for adjudication of appeal and subsequent appeal because, certainly in the merger context, very few mergers will be held up. That is, mergers that were not completed would not wait. [Stanley Wong, Davis & Company, 65:09:15]

11. That the Government of Canada amend section 13 of the *Competition Tribunal Act* to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.

CHAPTER 4: CONSPIRACIES AND OTHER HORIZONTAL AGREEMENTS

The Organizational Continuum

Cooperation among competitors is a double-edged sword. On one hand, it may offer prospects of economic benefits; on the other hand, it may bear the costs of dulled competitive performance. The economic benefits develop from the synergistic effects when individuals and organizations with different competencies and resources are brought together. More specifically, such collaboration may: (1) result in new and less costly production processes; (2) facilitate the attainment of scale and scope economies; and/or (3) lead to a more efficient allocation of resources or improved product quality. A typical example in today's knowledge-based economy would be the combining of research, development and marketing resources of two or more firms to reduce the time needed — as well as risk exposure — to develop and bring new products to market. An additional social benefit would be the elimination or mitigation of duplicative work and facilities. Unfortunately, sometimes these benefits accrue, in part, to a market sharing or a coordinated pricing agreement needed to make such cooperation profitable. This may lead to, in varying measure, restricted supply, higher prices, less product selection and/or less-than-optimal product quality. Hence, an intricate weighing of economic factors is required to offer a definitive conclusion on the ultimate impact of such cooperation.

In many cases, a strategic alliance is just a contractual joint arrangement similar to a merger. It may be dictated by tax considerations rather than any particular overriding purpose in having a contractual arrangement. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

At the outset, one should be aware that such cooperation could take several organizational forms. It can be purely contractual, purely combinational, or it can be located anywhere between these polar opposites. The Committee will, for simplicity, include the diverse set of business relationships on this organizational continuum

It's also reasonable to think about these arrangements between firms that fall short of mergers but are not hard-core cartel behaviour, like many strategic alliances and joint ventures. There's … [the] example of a joint venture to develop a vaccine. A lot of these arrangements are wonderfully efficient on the one hand, but pose some certain competition challenges on the other. They need a more sensitive, nuanced evaluation of the sort we give to mergers. [Tom Ross, University of British Columbia, 59:09:30]

under the term "strategic alliance."[15] This integration can be contrasted with that of a merger or acquisition of assets or capabilities.

There are many agreements that incidentally affect prices or incidentally affect customers but are not in essence price-fixing agreements. If you stick to prohibiting agreements to fix prices, i.e., agreements the object of which is to fix prices, as opposed to agreements that simply affect prices as an ancillary matter, you'll get much closer to truly hard-core criminal behaviour. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

Public concern over cooperation among competitors, when it is simply a veil for a cartel, begins to rise not only because it potentially redistributes income (from buyers to sellers) in a covert way that is tantamount to fraud, but it may also reduce economic efficiency as resources are misallocated in the economy. Indeed, such monopolization results in lower economic welfare and is, therefore, deemed to be a crime against society. However, a thorough competitive effects review would ensure that both types of cooperation, whether a merger or strategic alliance, receive similar treatment because neither can a priori be categorized as pro-competitive or anticompetitive.

Theoretically, a strategic alliance that is not what competition specialists call a "naked hard-core cartel" may be afforded criminal or civil treatment under Canada's *Competition Act*, even though it may be strictly pro-competitive and restrict competition only in an ancillary way. Law enforcement may proceed by way of a criminal trial under the conspiracy provision (section 45) or by way of a civil review under either joint dominance (section 79) or a merger (section 92). Uncertainty abounds on the possible course to be taken, but a strategic alliance would meet the public policy ideal of a "level playing field" with respect to that of a merger only if it received a section 92 through 96 review. Unfortunately, as many witnesses told the Committee, a strategic alliance may be inadvertently swept into section-45 treatment, where criminal law is not well suited to judge it. Specific court deficiencies in a section 45 case are:

It's somewhat odd that if two firms or competitors get together in a merger, they get a civil review where they get to talk about efficiencies, and there's a kind of cost-benefit evaluation of the proposal, yet if they do something less than a merger, they're subject only to criminal law, and people can go to jail and pay fines. [Tom Ross, University of British Columbia, 59:09:25]

- the absence of specialized expertise in the criminal courts;
- the tendency of structural considerations (market share or concentration) to dominate the very limited analysis;

15 In the past few decades, the business sector has preferred the strategic alliance, which usually takes the form of a joint venture, to that of a full-blown merger because this form involves fewer financial trappings associated with increasing integration. These horizontal agreements typically provide for formal supply arrangements, access to technologies and specialized expertise, distributional channels and customers (particularly in foreign markets where there are trade barriers), capital funding, risk sharing, and/or collaboration on research and development.

- the lack of consideration given efficiencies or innovation; and
- the limitation of sanctions to fines, in the absence of behavioural solutions.

I don't think the strategic alliance bulletin provided the comfort the business community was looking for, because it was very evident that there is an overlapping potential application of not only the merger provisions but also the criminal provisions of section 45 … and even joint dominance provisions. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:20]

A "chilling effect" on pro-competitive strategic alliances results, and the Committee intends to provide a solution to this design flaw. However, before doing so, the Committee will review and address the circumstances that have led to the over-inclusiveness and under-inclusiveness of the conspiracy provision.

History of the Legal Treatment of Conspiracies

The prohibition against horizontal agreements (i.e., between competitors in the same product market) to fix prices, allocate markets and/or restrict the entry of competitors has been a central feature of Canada's antitrust Act since 1889. However, for most of the original Act's history, the prohibition was ineffective due to the presence of the word "unlawful" and the lack of a permanent investigative and enforcement body. Between the *Combines Investigation Act* of 1923 and the enactment of the *Competition Act* in 1986, the enforcement of the prohibition varied according to the legal interpretation given to the term "unduly" in the provision's reference to "prevent or lessen competition unduly" when assessing the agreement's economic effects. In this period, several unsuccessful attempts were made to rid the Act of this word in order to strengthen the prohibition. After the Supreme Court decisions in *Aetna Insurance* (1977) and *Atlantic Sugar* (1980), the Crown had to prove that the alleged conspirators both intended to enter into the agreement and intended to lessen competition "unduly." The double intent proved hard to establish, as can be seen by the drop in the Crown's success rate from 90% to 55%.[16]

We have not had great success with this provision. Particularly because of some of the burdens and the wording of the section, it's made it much more difficult to use it against hard-core cartels … [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

However, the enactment of the *Competition Act* de facto reversed these court decisions. Section 45 of the *Competition Act* provides that "everyone who conspires, combines, agrees or arranges" to lessen or prevent competition "unduly" is guilty of a criminal offence and is

[T]he $150 million in fines recently collected is the coattail argument. We have collected $150 million in fines in Canada after other jurisdictions have enforced against those international cartels. We've done very well at getting guilty pleas on them, but I don't consider that to be a success of our statute. [Robert Russell, Borden, Ladner & Gervais, 59:09:40]

16 William Stanbury, "The New Competition Act and Competition Tribunal Act: Not With A Bang, But A Whimper," *Canadian Business Law Journal*, Vol. 12, 1986/87, p. 20.

liable to fines and/or imprisonment. This provision incorporates a defence for horizontal agreements between competitors for:

[W]hen we analysed the cases back in the early 1980s, … we found that the government lost as many if not more of the cases because they couldn't prove agreement. It wasn't that they couldn't prove undueness; they couldn't prove there was actually an agreement. That is the cornerstone of a conspiracy section. [Lawson Hunter, Stikeman Elliott, 59:09:25]

- the exchange of statistics, defining product standards, or the sizes or shapes of product containers and packaging;
- the exchange of credit information, research and development, placing restrictions on advertising, promotion or measures to protect the environment; and
- the adoption of the metric system of weights and measures.

There are also specific defences for export consortia and specialized agreements.

The Act's most significant changes, however, were introduced in subsections 45(2.1) and 45(2.2). These provisions permit the Court to infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence; and while it is necessary to prove that the parties intended to and did enter into the agreement, it is not necessary to prove that the agreement was intended to have the effect of lessening competition "unduly." Subsequent jurisprudence has been consistent with this interpretation.

The question of whether to strike unduly from section 45 rather than go to a two-track approach has been raised before. The simple response to why we wouldn't do it is because it would make the section too inclusive. It would trap many agreements, which are innocent. For example, agreements between a franchise and a franchisee might be captured by section 45 if it simply said that any agreement that restricts competition, supply, production and so on. … [R.W. McCrone, Competition Bureau, 64:09:15]

The Supreme Court further provided the more controversial interpretation on the meaning and implications of the word "unduly" when it handed down its decision in the *Nova Scotia Pharmaceutical Association* case, which is commonly referred to as the *PANS* case. The courts are now required to conduct a two-part test on price-fixing arrangements before condemning them as lessening competition "unduly." The first part would be a market power test, while the second would be a test to establish injurious behaviour to competition that would qualify as "undue." This legal framework in fact establishes a partial rule of reason because agreements are neither treated as per se illegal, even those that are patently "naked hard-core cartels" with no redeeming benefits to society, nor treated under a "rule of reason," whereby the economic advantages and disadvantages of the agreement would be weighed. A strategic alliance that

restricts price competition only in an ancillary way would then be subject to less than a thorough review to determine its ultimate economic impact.

As it currently stands, the Crown must establish four elements beyond a reasonable doubt when bringing forth a section 45 case:

1. The existence of a conspiracy, combination, agreement or arrangement to which the accused is a party.

2. The conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly (i.e., it does not have to be implemented);

3. The accused had the subjective intent of the first two elements; and

4. The accused was aware, or ought to have been aware, that the effect of the agreement would prevent or lessen competition *unduly*.

A review of the enforceability of the law on conspiracies is revealing.

I participated in a special council for the Attorney General of Canada in the Nova Scotia pharmaceutical proceedings, where we tried to bring clarification in the submissions to the Supreme Court of Canada in the early 1990s to the meaning of "undueness" in order to give broader certainty to the public and to the Bureau. And my own view today is that despite all those good intentions, section 45 really does warrant priority consideration. The reasons are … [i]t is both under- and over-inclusive. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

[Canada is] the only jurisdiction in the world that requires the level of analysis in order to prove a conviction under section 45. Most jurisdictions, … Europe, the United States, Australia, New Zealand, South Africa, … have adopted a per se approach to hard-core cartel behaviour, while providing for a civil track approach … to deal with strategic alliances … [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

The Enforceability of Section 45

Competition law experts believe, almost unanimously, that section 45, as currently written, is hard to enforce in a contested trial setting, even when applied to a "naked hard-core cartel." They also believe the two-step "market structure-behaviour" tests provide too much room for litigating irrelevant economic matters in the case of a "naked hard-core cartel." Public enforcement costs are therefore excessive. Given that these views are so widely held, the Committee sees no reason for going to great lengths to validate them. The Committee will exclusively rely on Bureau data, analyses and conclusions.[17]

It's recognized that our standard of undueness is a partial rule of reason, but it doesn't embrace any recognition of efficiencies. Efficiencies are one of the objectives of competition law, and are something that ought to be considered in determining whether or not some action or arrangement ought to be condemned. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

[17] Harry Chandler and Robert Jackson, *Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act*, Competition Bureau, http://strategis.ic.gc.ca/SSG/ct01767e.html, May 2000. The Committee relies on the authors' assertion that none of the 51 cases constituted a pro-competitive strategic alliance.

[O]f the 22 contested cases, three were successful. Is every Department of Justice lawyer or those retained from the outside incompetent? No. The provision is a criminal standard. It requires, beyond a reasonable doubt, the proving of all the elements. That standard should be maintained. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

The Competition Bureau reports that 51 cases have been prosecuted under section 45 or its predecessor between 1980 and 2000. Almost 60% of these cases (29 of 51) resulted in a guilty plea. The conviction rate in contested trials was exceptionally low, somewhere between 10% and 15% (3 of 22). The Bureau estimates that slightly more than 35% of cases (6 of 17) were acquitted at trial or discharged at a preliminary hearing because of insufficient evidence of an agreement — the first element described above. Almost 65% of cases (11 of 17) were acquitted or discharged because of insufficient evidence of an undue lessening of competition (the second element) or of the parties' intent that the agreement would have that effect (the third and fourth elements). These data and analyses indicate that the burden of proof "beyond a reasonable doubt" is a formidable one, but the "undueness" element poses the greatest obstacle to a successful conviction under section 45.

The Two-Track Proposal: Criminal and Civil

[T]he Bureau contracted three independent studies [on the issue horizontal agreements amongst competitors]. … [T]hey all agree that hard-core cartel behaviour, such as price fixing, market sharing and output restrictions, should be a criminal offence without a competition test. [Gaston Jorré, Competition Bureau, 64:09:10]

At this point, the Committee must remind the reader that the object of competition policy is not about winning or losing litigated cases; it is about prescribing a framework for an efficient business sector that delivers products and services at competitive prices. We strongly believe that section 45 is meant to only apply to certain types of agreements, and the current law does not give fair warning of what type of agreement constitutes a serious indictable offence. Furthermore, although the Committee understands that writing law with so much precision as to preclude uncertainty is unattainable — watertight compartments are not possible — the law should not, at the same time, be written so loosely as to capture all horizontal agreements between competitors in achieving its objective.

There have certainly been prominent examples where the problem was evaluating the undueness of the lessening of competition. Clarifying this is the way to go, by breaking the law into two pieces — a criminal part without the word "undue" for naked price-fixing, hard-core cartels, and then a civil branch for the more complicated arrangements. [Tom Ross, University of British Columbia, 59:09:25]

As it currently stands, section 45 excessively relies on prosecutorial discretion, which can be exercised differently by different individuals, rather than on a law crafted to properly discriminate between the two forms of cooperation — an anticompetitive cartel arrangement and a competitively benign or pro-competitive strategic alliance. By the same token, the Committee does not think it is appropriate for criminal liability, which may involve fines and jail terms, to depend on a court's assessment of complex economic factors — such as the cross-price elasticity of

demand, the height of barriers to entry in the industry, the extent of sunk costs, the strength of other competitors or potential competitors, market power, etc. — that a court is not well suited to judge.

I don't see any basis for treating one type of horizontal arrangement, such as a merger, analytically differently from another type … such as strategic alliance. … So outside what would be the new criminal track under a revised two-track approach to conspiracies … you would … have … the same efficiency provision … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

Advocates for change have successfully persuaded this Committee to accept this view; in all respects, change is long overdue. The conspiracy provision of the *Competition Act* must be reformed to reflect modern business tendencies to form strategic alliances and joint ventures, circumstances in which the current Act is unnecessarily restrictive, while at the same time being under-restrictive in clearly anticompetitive cases. The Committee, therefore, recommends:

[Y]our interim report suggested if we go the two-track approach, the hard-core criminal per se provision might be limited to price-fixing and output restrictions. I would encourage you to expand that list to include market allocation — and by that I mean geographic market allocation and customer allocation — as well as certain types of group boycotts, such as group boycotts in support of price-fixing or keeping new entrants out of the market. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:45]

12. That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.

The Criminal Track

When we're going to go after hard-core cartel behaviour the standard should be met, but we shouldn't have to go into the economic effects. That's what every other regime in the world has done. Per se simply means if I engage in a price-fixing arrangement, you don't have to look to see whether it has an anti-competitive effect, with the huge cost of litigation that goes to that issue, because that is the main issue. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

The necessary elements in a contested section 45 case must accurately reflect contemporary economic thinking on conspiracies; they should not require excessive labouring on irrelevant economic factors coincidental to the agreement or to the industry under scrutiny. We believe that a conspiracy should be a per se criminal offence and should be guided by the simple and pertinent facts of the case at hand. The Committee, therefore, recommends:

I strongly favour reform of section 45, to narrow its criminal law focus to hard-core cartel behaviour activity, such as price fixing, customer and territorial allocations, and production curtailment. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

13. That the Government of Canada repeal the term "unduly" from the conspiracy provision (section 45) of the *Competition Act*.

A per se criminal offence without a provision for exceptions would cast a wide net — too wide a net. Horizontal agreements other than that of a cartel would be captured by a strict per se offence. Therefore, a provision for exceptions is necessary. Although recognizing that a long list may have to be drawn to sufficiently reduce the uncertainty surrounding such a specific prohibition, the Committee believes the best approach for an exception would be based, rather than a so-called laundry list of items, on guiding principles. These guiding principles would be premised on known characteristics of a pro-competitive horizontal agreement, such as the existence of economic factors, other than the restraint in question, incorporated into the agreement. Other economic factors would include efficiencies (whether technical or organizational) and innovation. The Committee, therefore, recommends:

[Y]ou need to be careful. The United States, as we all know, has a per se offence, but it is judge-interpreted. It is not statutorily defined. I think you also need to watch that the exemptions don't overwhelm what you're catching. [Lawson Hunter, Stikeman Elliott, 59:09:20]

14. That the Government of Canada amend the *Competition Act* by adding paragraphs to section 45 that would provide for exceptions based on factors such as: (1) the restraint is part of a broader agreement that is likely to generate efficiencies or foster innovation; and (2) the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation. The onus of proof, based on the "beyond a reasonable doubt" standard, for such an exception would be placed on the proponents of the agreement.

[C]reating that sort of bifurcated approach puts an incredible amount of discretion and authority into the hands of the Commissioner. … If you think of a situation where there is a conspiracy that could go one way or the other … the Commissioner would have incredible authority to say, for instance, if you don't do what I like, then I will throw you on the criminal side. [Lawson Hunter, Stikeman Elliott, 59:09:20]

The Committee further recognizes that the two-track approach of pursuing horizontal agreements between competitors provides considerable prosecutorial discretion — although less than provided under the current law. To limit this discretion, the Committee recommends:

15. That the Government of Canada amend the *Competition Act* to add a paragraph to section 45 that would prohibit any proceedings under subsection 45(1) against any person who is subject to an order sought under any of the relevant reviewable sections

of the *Competition Act* covering essentially the same conduct.

[I]t may be that two pharmaceutical companies need to collaborate in the development of the vaccine and need to fix the price for some short period of time to recoup the development costs. That sort of activity would be examined as a strategic alliance and may be exempt. [Robert Russell, Borden, Ladner & Gervais, 59:09:15]

The Civil Track

In its *Interim Report*, the Committee suggested that the government consider modifying the abuse of dominant position provision (section 79) to allow for a civil review of horizontal agreements between competitors. This suggestion may have been premature. Although section 79 deals with joint dominance cases and could in some way be modified to accommodate horizontal agreements that fall under the joint dominance category, we believe that such modifications should not be made. The nature of these horizontal agreements is fundamentally different and incompatible with practices that would be considered potentially abusive behaviour. In other words, a proposed agreement between competitors that may restrict competition only in an ancillary way is an agreement between allies; it is not about an abuser-victim relationship. Consequently, modifications to section 79 to accommodate horizontal agreements that may or may not be anticompetitive may not be the most effective way of pursuing these agreements, and, at the same time, such an approach may risk a loss in effectiveness in pursuing abuse of dominance cases. Indeed, two instruments designed to target two different types of behaviour would be the prudent approach to take.

It strikes me that it will be better if … we can look at these arrangements the same way we look at mergers, with the full panoply of economic analysis ... [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

The Committee is also reluctant to propose that these agreements be afforded a section 92 through 96 merger review. A horizontal agreement may not easily meet the definition given a merger under section 91 and there is no compelling reason dictating that we modify one to accommodate the other when unforeseen consequences may inadvertently arise. Nevertheless, a strategic alliance should be afforded a similar review to that of a merger. The Committee, therefore, recommends:

Our proposal was to focus on the question of whether the agreement was … in … substance price-fixing … or price-fixing element only ancillary to some larger agreement that itself would not be found in violation of section 45. If it were just ancillary to a larger agreement, then the whole agreement would go down the civil track and be reviewed, very much like a merger. [Tom Ross, University of British Columbia, 59:09:30]

16. **That the Government of Canada amend the civilly reviewable section of the *Competition Act* to add a new strategic alliance section for the review of a horizontal agreement between competitors. Such a section should, as much as possible, afford the**

same treatment as the merger review provisions (sections 92 through 96), and should authorize the Commissioner of Competition to apply to the Competition Tribunal with respect to such agreements that have or are likely to have the effect of "preventing or lessening competition substantially" in a market.

[In the] merger provisions of the Act, we have a considerable degree of turmoil now in understanding what the objective … is in terms of recognizing economic efficiency … it's rather premature to try to extend the notion of efficiency to other sections of the Act … until we know … what the view of Parliament is on the role of efficiency in competition law. [Roger Ware, Queen's University, 59:12:15]

The Committee intends that this new section only apply to horizontal agreements between competitors, whether suppliers or buyers, and not to vertical agreements, i.e., agreements between a seller and many buyers or between a buyer and many sellers. The Committee, therefore, recommends:

17. That the Government of Canada ensure that its newly proposed civilly reviewable section dealing with strategic alliances, as found in recommendation 16, apply to agreements between competing buyers and sellers, but not to vertical agreements such as those subject to review under sections 61 and 77 of the *Competition Act*.

In addition to the prospect of a fine or incarceration for committing a criminal offence under the Act, would-be offenders must also consider that (if they are convicted) they may also be ordered to pay monetary damages to any person suffering loss as a result of their criminal conduct. The Committee is aware that moving a practice from criminal treatment and subjecting it to civil review will remove the availability of damages awards under section 36 of the Act. This could have an adverse impact on deterrence and compliance, since it lowers the potential "cost" to the offender of engaging in the conduct. This would not be the case, of course, if the government amends the Act to permit the Tribunal to award damages (as set out in recommendation 8).

[O]utside what would be the new criminal track under a revised two-track approach to conspiracies … you would want to have basically the same efficiency provision … But the nature of that efficiency provision would have to be different from the one we have today in section 96, which never worked for almost 10 years … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

At the same time, however, it does not appear to be the case that damages are commonly awarded as a result of a criminal conviction, and for that reason we do not wish to overstate their value as a deterrent. The Committee believes that, for the same reasons that it is inappropriate to treat certain pricing practices under criminal law, it is equally

inappropriate to permit a remedy of damages to attach to such conduct. If we were to permit damages awards with respect to only a few select practices, but not to other civilly reviewable matters, inconsistency would result in the Act. This underscores the importance of extending the right to claim damages under all civil practices, including those for which transfer into the civil steam is recommended.

When you go down that road and look at that bifurcated model for section 45, … I would alert you to the fact that as the law is currently cast, all activity within the criminal part of the Act can be the basis for a claim for damages. To the extent you remove any part of that activity and put it into the civil part of the Act, it will no longer be subject to a possible claim for damages. It's something you might want to factor into your deliberations. [George Addy, Osler, Hoskin & Harcourt, 59:12:30]

Given the numerous changes we are recommending, the Competition Bureau's Strategic Alliance Bulletin will have to be thoroughly reworked and upgraded to the status of enforcement guidelines. The business community, in the absence of jurisprudence, will need ample guidance from the Commissioner on how the Bureau will treat horizontal agreements between competitors. The Committee, therefore, recommends:

18. That the Competition Bureau establish, publish and disseminate enforcement guidelines on conspiracies, strategic alliances and other horizontal agreements between competitors that are consistent with recommendations 12 through 17 that would amend the *Competition Act*.

Strategic Alliances and a Pre-Clearance Process

As stated above, the Committee accepts the general proposition that no conspiracy law can be written with perfect precision; a number of pro-competitive horizontal agreements will be inadvertently caught by any per se provision, no matter how carefully it is written. The above exception provides some measure of certainty for some contemplated pro-competitive horizontal agreements, yet more is needed to reduce the uncertainty and "chilling effect" that arises in some of the more controversial or borderline agreements. A systematic way of reducing or eliminating a horizontal agreement's prospective liability to criminal sanctions prior to being consummated is required. On this point, there have been two suggestions: a notification process and a pre-clearance process.

Others have suggested approaches based on whether the agreement itself is public. If it were a public agreement, it would get the civil review, whereas secretive agreements would be viewed as per se, illegal, and there are other approaches as well. [Tom Ross, University of British Columbia, 59:09:35]

The notification system would prohibit all secret or covert conspiracies to directly or indirectly fix prices, but would provide an exemption from subsection 45(1) to all

overt horizontal agreements provided that their proponents notify the Bureau before the agreement takes effect. Major deviations from the original agreement would be subject to criminal prosecution. The notification of such an agreement would be optional; there would be no obligation to disclose the facts of any agreement. The Commissioner would also be entitled to request additional information in order to determine whether the agreement should be opposed or altered under a civil proceedings or, as others have coined it, the civil track.

The pre-clearance system would operate much like the advance ruling certificate for mergers pursuant to section 102 of the *Competition Act*. This would be a voluntary reporting system, with a limited cost-recovery fee assessed in return for providing an advance ruling. Under such a system, the Commissioner of Competition would be authorized to issue a clearance certificate if he is satisfied that the agreement, as proposed and implemented, does not substantially lessen competition or poses a threat under section 45 or under the newly proposed civil track. The certificate might or might not grant a time-limited exception from criminal liability and, like the notification system, major deviations from the original agreement would be subject to criminal prosecution.

[T]here have been a number of suggestions that the salvation for some trade-restraining agreements would be the public notification of those agreements that would enable the parties to them to be assured that they wouldn't be challenged. As a policy matter, I think it's undesirable to have agreements that are in contradiction to our general principles simply on the theory — a naive one, I think — that public disclosure of them will deter people from dealing with people who have entered into these kinds of restrictive arrangements. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:20]

The Committee is of the opinion that both systems have their advantages and disadvantages; however, for a number of reasons, we favour a pre-clearance system. Such a system provides more assurance that contrived or "dressed up" cartel agreements will not slip through the cracks. The Committee, therefore, recommends:

19. That the Government of Canada amend the *Competition Act* to allow for a voluntary pre-clearance system that would screen out competitively benign or pro-competitive horizontal agreements between competitors from criminal liability pursuant to subsection 45(1) of the Act. That the Competition Bureau levy a fee on application for a pre-clearance certificate that would be based on cost-recovery principles similar to that of a merger review. That a reasonable time limit upon application for a certificate be imposed on the Commissioner of Competition, failing

which the applicant is deemed to have been granted a certificate.

In the case where the Commissioner does not grant a pre-clearance certificate, the applicant should be given fair hearing before the Tribunal. The Committee, therefore, recommends:

The experience in other jurisdictions will evidence the fact that lawyers are very clever in the way they write up these arrangements, and describe them using obfuscation and confusing legal documents or burying the filings with the appropriate agency such that people really don't have a good understanding of what in fact is being disclosed. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:25]

20. That the Government of Canada amend the *Competition Act* to allow individuals who have been refused a pre-clearance certificate for a horizontal agreement between competitors by the Commissioner of Competition be given standing before the Competition Tribunal for a fair hearing on the proposed agreement. That such standing be granted only if the agreement remains proposed and has not been completed.

CHAPTER 5: THE ANTICOMPETITIVE PRICING PROVISIONS

Predatory Pricing

Predatory behaviour occurs when a firm temporarily lowers its prices or expands output or capacity in an attempt to deter new competitors from entering the market or to drive out or discipline competitors who are already there. In all three cases, the predator incurs temporary losses in the expectation of, at the very least, recouping them by raising prices later and from an increased market share. Prior to the 1980s, most economists regarded predation as extremely rare because the barriers to entry in most markets were thought to be low. Consequently, it was believed that the subsequent high prices required to recoup the losses suffered in the predatory period would not be sustainable in the face of new entrants. Moreover, predation would be very expensive; the "prey" would be aware that the period of lower prices would be costly for the predator and might hold on in the hope of eventual profits (in the case of efficient capital markets), or to see the predator attempt to buy it out. Only in the extremely rare event that the predator had greater and better access to external capital would a predatory campaign pay off; although even a takeover or merger would generally be a more successful way of monopolizing the market.

I also would like to commend the Committee for its initiative in taking on reforms … to sections 50, 61, and 75, which have needed attention for a long time. [Donald McFetridge, Carleton University, 59:10:00]

In section 50, where we have the vague wording "at prices unreasonably low", we don't have much jurisprudence … to give an interpretation of it. [Douglas West, University of Alberta, 59:10:40]

Recent economic research, however, challenges this long-held position on the grounds that predation may be a more frequent occurrence than previously thought. Some believe the practice, although still infrequent, is not rare.

Predatory pricing is a criminal offence under paragraph 50(1)(*c*) of the *Competition Act*. Several elements must be established before an offence is proven. The alleged predator must be engaged in a business and have adopted a policy of selling products at prices that are unreasonably low. Both the "policy" requirement and the "unreasonably low" price requirement have raised difficult

[W]ith predatory pricing … [E]very case in Canada has failed because cost isn't properly defined. [Robert Russell, Borden, Ladner & Gervais, 59:10:35]

issues of interpretation. With respect to a policy, one of the following four requirements must be met:

1. It must have the effect or tendency of substantially lessening competition.

2. It must have the effect or tendency of eliminating a competitor.

3. It must be designed to substantially lessen competition.

4. It must be designed to eliminate a competitor.

[T]he Tribunal is dealing with the generic question about avoidable cost: what is avoidable cost, timing issues related to avoidable cost, when the cost became avoidable, and what revenues to consider as part of the test. [Douglas West, University of Alberta, 59:11:40]

The Committee was told that, as simple as the above definition seems, predatory pricing and behaviour are much more complicated to establish in practice. The firm's broad scope in pricing its services (in the case where its marginal cost can approach zero) makes it extremely difficult to distinguish predatory pricing from aggressive price competition. In the case of perishable goods, whose marginal cost is often as close to zero as you can get, selling below cost is a perfectly legitimate business practice.

Indeed, modern thinking even questions whether the hard-to-define marginal cost concept is the appropriate test of predatory pricing. The Committee was told to consider the case of Amazon.com; founded in 1995, the firm has yet to price above cost. Amazon.com is pricing less than its cost, but it is not engaged in predatory pricing. Through low prices, it is investing in a future market share as a new innovator. So there is a temporal aspect to pricing that may not be properly accounted for in the current cost test of predatory pricing.

[W]e create penalties, and the whole point of enforcement is to discourage people from doing bad things. … So a few successful cases on predatory pricing, no matter how long they take, might create the right kinds of incentives to get … the right enforcement stance on predatory pricing. We don't need regulatory powers from the Commissioner to do that. [Roger Ware, Queen's University, 59:12:15]

This example of below-cost pricing which is not predatory pricing was further extended to apply to simple goods such as a razor and razor blades or a number of other complementary products. Apparently, pricing razors below their accounting measures of cost makes good economic sense when it leads to greater sales of razor blades and ultimately greater profit. In this case, what should be compared to today's price is the following: today's average variable cost minus the present value of the firm's expected increased gross margin per unit in the future that is attributable to the low pricing policy. Needless to say, when the investigator has gathered this last bit of information, the

"prey" will have given up the struggle. Clearly, economic theory, as a practical guide to enforcement of predatory pricing, leaves something to be desired.

The VanDuzer Report was sceptical of both the legal framework and its economic underpinnings:

> Designing rules to deal effectively with predation is the thorniest problem related to anticompetitive pricing practices. The effects can be devastating but are extremely difficult to distinguish from the effects of aggressive competition, even with the expenditure of substantial resources. One thing seems clear, the existing criminal provision, suffers from some serious defects as an instrument to provide relief in circumstances where predation exists.[18]

A consensus of competition law experts supports the VanDuzer Report's proposed solution:

> Dealing with predation under section 79 is one solution to these problems. As prescribed by economic analysis … section 79 imposes market power as a threshold for obtaining relief. The abuse provision offers the lower civil burden of proof which may be important given the inherently contestable nature of claims regarding predation.[19]

I [do] not favour the high-penalty deterrence process, because unlike a cartel situation, where it's inherently bad conduct, aggressive price competition is usually good. You're on a sounder path … where you look at moving into a more refined treatment of predation in the context of the abuse-of-dominance provisions in the Act, because it really is a species of that area of monopolization. [Neil Campbell, McMillan Binch, 59:12:15]

The VanDuzer Report suggests other advantages of shifting the prohibition under section 79:

> As well, it requires an assessment of the effect on competition. The Tribunal would be able to consider not only whether there was a prospect of recoupment through supra-competitive pricing, but also the effects of predatory behaviour on the dynamic of competition in the market in which the predation took place. Such effects would include effect of the loss of particular competitors and their prospects for re-entry. The Tribunal could sort out the extent to which it was appropriate to take into account non-efficiency based considerations, such as the fairness of intentionally eliminating a competitor through low prices.
>
> The abuse provision would also permit account to be taken of the particular conditions in the marketplace, including the factors discussed in relation to the new economy ... Where a market was characterized by high levels of

[18] J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 75.

[19] Ibid., p. 75.

> innovation, declining costs and network effects, low pricing which eliminated a competitor might nevertheless be found to be pro-competitive, where the pricing was part of a strategy to introduce a new and better technology and any dominance which resulted was unlikely to be sustained in the face of future innovation.[20]

However, the Commissioner of Competition, the Canadian Bar Association and a number of other stakeholders oppose this suggested change because they believe the criminal status best deters egregious anticompetitive conduct; they favour more enforcement resources, believing the double layer of protection (paragraph 50(1)(*c*) and section 79) against predatory pricing is more appropriate at this time.

[T]his notion of trying to make some changes to the predatory pricing provisions and to bring them over to the civil side … I think it's important to consider the possibility of creating a new section that deals with predatory pricing, but not necessarily under the existing wording of the abuse-of-dominance provision. [Douglas West, University of Alberta, 59:12:40]

The Committee has reservations about this last position, because there is simply insufficient case law to validate the deterrent effect of paragraph 50(1)(*c*). The Committee cannot just ignore the predatory pricing provision's inactive and ineffectual history, which includes only two contested cases (both of which are more than two decades old). Moreover, the Committee is unsure about a court being the right venue for the intricate economic analysis needed to discern between predatory and aggressive, pro-competitive pricing; the Competition Tribunal appears better able to judge this behaviour. In any event, a consensus has formed on the use of the abuse of dominant position provision as a vehicle for bringing a predatory pricing case before the legal authorities — a provision that requires that the alleged predator has "market power" and that the practice in question would "prevent or lessen competition substantially." For these reasons, the Committee recommends:

21. That the Government of Canada repeal paragraphs 50(1)(*b*) and 50(1)(*c*) of the *Competition Act* and amend the Act to include predatory pricing as an anticompetitive act within the abuse of dominant position provision (section 79).

20 Ibid., p. 75.

Price Maintenance

Price maintenance is the practice whereby a firm attempts to either set or influence upward the minimum price at which another firm further down the manufacturer-wholesaler-retailer distribution chain can sell its product. Although resale price maintenance is not a pervasive practice throughout the business sector, it is one of the most common pricing restraints found in the marketplace. It may take place either vertically, for example between a wholesale supplier and a retailer that resells the supplier's products, or horizontally, for example between competitors who agree to impose resale price maintenance on those who resell their products.

In terms of vertical price maintenance, typically the example given would be ... Say, for example in the electronics industry, … You can sit down, you can go into a sound room, and you can listen to a whole bunch of different types of speakers. You can listen to a bunch of different types of CD players. You can get a real feel for the quality differences. But it costs … a lot of money to put that sound room in place. If somebody else could come along and free ride off that by locating down the street or a few blocks away, selling exactly the same products but at a substantially reduced price, … [the service providing store] wouldn't be able to continue to provide the consumer with the benefit of that. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

Since 1951, following the recommendations of the MacQuarrie Commission, price maintenance has been a criminal offence under section 61 of the Act. Thus, it is illegal for any person engaged in a business to try to "influence upward or discourage the reduction" of the price at which someone else engaged in a business sells the product by "any agreement, threat, promise or like means." In 1960, the law was amended to add the current defences to the related offence of refusing to supply a customer because of the customer's low pricing policy. These defences are listed in subsection 61(10) as:

- using products supplied as loss leaders (the "*Loss Leader Defence"*);
- using products supplied not for the purpose of selling them for a profit but to attract customers to buy a rival's products (the "*Bait and Switch Defence*");
- engaging in misleading advertising in respect of the products supplied; and
- not providing the level of service that purchasers of the products might reasonably expect (the "*Service Defence*").

So the pro-competitive aspect of it, of resale price maintenance is it provide dealers with a margin to invest in providing services, to expand the demand for the product. … when you expand the demand for the product, you increase aggregate wealth in the economy. So it's pro-competitive in that sense. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

On the other hand, requests, discussions, moral suasion, or suggestions to this end are considered to be much the same as setting a suggested list price and are permissible (subsection 61(3)). Similarly, under subsection 61(4), if the suggested price appears in an advertisement, it must be expressed in such a way that it is clear to any

person who looks at the advertisement that the product may be sold at a lower price; otherwise the supplier will be found to have attempted to influence the price upward.

In any vertical relationship, let's say between a manufacturer and a distributor, suppose the manufacturer owned the distributor? Then they could decide whatever terms and conditions they wanted that product to be sold under, including price, the quality of the sales personnel, their qualifications. The manufacturer could determine everything down to the lighting in the store. And we wouldn't consider that to be anti-competitive. So why would we consider it to be anti-competitive if Sony tried to do some of those things at arm's length? [Roger Ware, Queen's University, 65:12:30]

The Committee is more easily convinced of the economic rationale for prohibiting horizontal price maintenance. Where suppliers agree among themselves to set the resale price of their products, price competition among downstream competitors is precluded. Where the resale price is the more visible of the two, the maintenance of that price may facilitate collusion among suppliers. By subtracting the retailer and wholesaler profit margins from the minimum fixed retail price, manufacturers in effect fix their own prices of the product. The Committee was also made aware that resale price maintenance could facilitate the work of a retailer cartel. History suggests that this had long been the case of pharmaceutical retailers whereby drug stores pressured manufacturers of the products they carried to impose resale price maintenance.

You take price maintenance. We have a very strict law here. There's no necessity for an agreement to be in place … The necessity for agreement in U.S. law allows the so called Colgate doctrine, which means: they can unilaterally sell, you won't sell my product for less than, you just can't have an agreement. … So price maintenance that would be unlawful in Canada occurs in the U.S. all the time. That's a cross-border legal issue that I have to deal with monthly … [because] the law is different here. [Robert Russell, Borden, Ladner & Gervais, 65:11:15]

Vertical price maintenance is less obviously an anticompetitive act. The classical example of such price maintenance is where a supplier requires someone to whom it sells, perhaps a retailer but also a wholesaler, to maintain prices at a particular level as a way of encouraging that retailer or wholesaler to engage in competition on something other than price. A higher retail margin thus encouraged the retailer to engage in providing a high level of service to clients or to ensure that the brand image associated with the product is maintained and not sullied in any way.

[P]rice maintenance provision which deals with these vertical pricing arrangements you're talking about is a very effective section for us. [R.W. McCrone, Competition Bureau, 64:09:40]

From the consumer's perspective, vertical price maintenance results in more services, which we would regard as good, but higher prices, which we would view as bad. The Committee was told that, on balance, the decision of how to market a product and how to design a distribution system should be left up to the manufacturer. Prohibiting resale price maintenance under the per se rule is effectively regulating the manufacturer's decisions on how best to maximize the sale of his products. By way of an analogy, we do not prohibit by law high levels of advertising even when such advertising raises prices; for the same reason we should not prohibit vertical price maintenance under a per se rule. So to the extent that there are efficiency justifications

for price maintenance, the per se criminal prohibition in the Act is over-inclusive.

I just don't agree that criminal prohibition is warranted, especially where there is no requirement for demonstrating adverse effects on competition. They have to be presumed and … there are many potential circumstances in which there are pro-competitive benefits that come from it. In the vertical situation we're not talking about controlling the price of a product amongst all the competitors, we're talking about controlling perhaps the pricing and positioning of the product from one supplier which is going to be disciplined by other parties in the marketplace if in fact they're not dominant. [Tim Kennish, Osler, Hoskin & Harcourt, 65:12:35]

All witnesses, except Bureau officials, who commented on price maintenance had a recurring theme: vertical price maintenance should be decriminalized and horizontal price maintenance should be moved to the conspiracy provision. The Bureau, the lone dissenter, could only offer a higher success rate when prosecuting under a per se offence as its reason for departing from expert opinion. The Committee, however, must remind everyone that competition policy is not about winning and losing cases; it is about designing a framework whereby an efficient business sector can deliver products and services at competitive prices. Moreover, the Committee sees no social benefit in risking convictions of, and a "chilling effect" on, pro-competitive vertical price maintenance under the criminal section of the Act, when the civil section offers a more reasonable approach and a better result. In decriminalizing vertical price maintenance, competition experts suggested that shifting this act under the abuse of dominant position provision (section 79) would be the preferred route. In this way, the treatment of vertical price maintenance under the law will better conform to contemporary economic thinking.

[I]n the area of pricing practices … [y]ou've had the benefit of Professor VanDuzer's detailed report, which has examined the fact that some of those laws are economically no longer really very modern. [Neil Campbell, McMillan Binch, 59:11:25]

The Committee understands that a section 79 review has two advantages: the practice would receive a full hearing on its likely economic effects and would also be subject to a lower burden of proof (from "beyond a reasonable doubt" to "on the balance of probabilities"). Another difference, which could be an advantage or a disadvantage depending on one's perspective, is that section 79 will require an assessment of the market power of the individual firm engaging in price maintenance. According to the VanDuzer Report, the market power test is an advantage because economic factors can easily be identified for discerning anticompetitive from pro-competitive cases. Indeed, the VanDuzer Report suggests three economic indicators of anticompetitive vertical price maintenance:

I would encourage you … to look at the decriminalization of the pricing practices … those laws are out of date and out of sync with good economics. [Neil Campbell, McMillan Binch, 59:12:40]

1. The person implementing price maintenance (the "Supplier") has market power, which suggests that customers may have limited opportunities to switch suppliers.

2. The Supplier does not have an efficiency-based justification, such as the desire to increase service or prevent brand-impairing practices, which would include "loss leadering" or misleading advertising.

3. The Supplier was induced to implement price maintenance in relation to one customer by another customer who competes with the first.[21]

[There] is the need to reform the arcane criminal provisions in the Act — not just section 45, but many of the provisions relating to the pricing practices, including predatory pricing, price discrimination, and price maintenance. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

At the same time, the VanDuzer Report is unsure if the section 79 market power test is appropriate for vertical price maintenance cases.

The Committee accepts all of the above reasoning. We believe that where the law can be modernized to better reflect conventional economic thinking, which in this case is able to properly distinguish between anticompetitive and pro-competitive incidences of vertical price maintenance, we should change the law. Given the recommended changes of section 79 (Chapter 6), reducing the bluntness of the Act in terms of vertical price maintenance should lessen the "chilling effect" on pro-competitive instances. The Committee, therefore, recommends:

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

When it comes to horizontal price maintenance, that ought to be dealt with under a new section 45. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

21 Ibid., p. 44.

Price Discrimination

Price discrimination is a marketing practice whereby a supplier of goods or services charges different prices to different customers (whether other businesses or final consumers) and these price differentials do not accurately reflect differences in costs of serving the different customers. To be found discriminating on the basis of price, a firm has to meet the following conditions: (1) the firm must have market power to set prices (otherwise, consumers can choose to purchase from a competing supplier); (2) the firm must be able to identify classes of consumers with different price sensitivities; and (3) consumers have only a limited opportunity to resell to each other (otherwise, consumers would arbitrage these prices to the lower price offered).

If I were to come to you and say "I'll … come and pick the product up at your door, or I'll warehouse the product, or I'll perform some other function for you and save you money, if you give me a deal," it's arguable … whether you could give me a discount in recognition of that pro-competitive initiative. It may be that I'm just a better negotiator. That maybe I'm going to do something for you in a different market. Buy more goods on a different market from you if you give me a better discount. What [the criminal offence] does is it just chills the negotiation process ... It would be a criminal offence for you to give me a better discount. So the whole competitive process that one would normally see between supplier and customer is chilled. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

Price discrimination is a criminal act that extends only to "sales" of "articles" under paragraph 50(1)(*a*) of the Act and to promotional allowances under section 51. These provisions were introduced in 1935 in response to concerns of unfairness to small business, particularly in the grocery subsector, with the emergence of large retail discount and chain stores and following the *Report of the Royal Commission on Price Spreads*. Because paragraph 50(1)(*a*) only applies to "sales" of "articles," leases and services are not covered. If the purchasers do not carry on business in the same market, such as the case where one is a final consumer and the other is a business, there is no offence. Volume or quantity discounts are exempted. There must be knowledge of each element of the offence. The supplier must have knowledge that the sale is discriminatory. Section 51 makes discrimination other than on the basis of price (i.e., differential access to promotional allowances) a criminal offence in some circumstances.

On price discrimination, we're really weak in Canada compared to the U.S. because in the U.S. you can discriminate in price on the basis of volume. So you can, as a store for example, buy a product for less if you buy 100 than if you buy two. It's completely arbitrary in our law. You can make a differentiation between one and two, or one and 5,000 — whatever you want — and set your price on that level. That's the law in Canada. You don't have to justify it on the basis of cost as a manufacturer. In the U.S. what you have to do is you can't discriminate unless you can justify it. [Robert Russell, Borden, Ladner & Gervais, 65:11:15]

Although price discrimination by definition means treating individuals or groups of consumers differently and may create an "unlevel playing field" when the product is an input into another product, it is not an inherently anticompetitive practice. It is often pro-competitive to charge different prices to different consumers when there are different costs attached to serving them (in the same way as volume and quantity discounts imply different costs and are not anticompetitive in and of themselves). Price

discrimination may also result in additional sales, for example, to children and seniors who would not otherwise purchase the product. To the extent that the consumption of the good or service increases as a result, economic efficiency is being promoted.

Price discrimination is commonplace. For instance, a bank that offers students no-fee banking services in order to gain their loyalty later on in their lives is practising price discrimination. Many non-price techniques with similar aims to price discrimination could also be implemented to discriminate between consumers. Two classic examples are tied sales and multi-part pricing policies. The VanDuzer Report explains the tied selling technique:

There are questions as to whether the sections on predation and price discrimination, for example, should be decriminalized. People have been trying to address this for many years, and there are questions about the proper ambit of the abuse-of-dominance provision, among others. [Calvin Goldman, Davies, Ward & Beck, 59:10:50]

> At one time, IBM had a monopoly on certain types of tabulating equipment. Different customers valued IBM's equipment quite differently based on the amount that they used the equipment. However, instead of using price discrimination to get the maximum price that each customer was willing to pay, IBM forced customers to buy tabulating cards from the company, and by charging a price for tabulating cards in excess of their cost, IBM was able to discriminate among its customers according to the intensity of their use of the equipment. Block booking and commodity bundling are other examples of non-price requirements imposed by sellers that succeed in enforcing effective price discrimination.[22]

Examples of multi-part pricing techniques of executing price discrimination are: (1) cab fares that include a lump-sum fee upon engagement and charges per unit of distance and/or time; (2) newspaper, magazine, radio and television pricing with two revenue streams — one from advertisers and one from subscribers; (3) fairground entry fees and ride tolls; (4) cover charges at bars and night clubs that are in addition to prices for drinks; (5) automobile licence fees and automotive gasoline taxes; and (6) slotting fees or slotting allowances charged by retailers on top of the retail price mark-up.[23]

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22 Ibid., p. 6.

23 Most multi-part pricing policies are two-part, as they include only two sources of revenue.

The VanDuzer Report concludes that:

> There is no question that the current criminal price discrimination provision is not adequate to address anticompetitive price discrimination. The economic analysis … concludes that price discrimination is not anticompetitive in many circumstances. Whether there is any possibility that price discrimination will have an anticompetitive effect will depend on the facts of each case. The current provision does not require the discriminating supplier to have market power, a prerequisite to true discrimination, nor does it require any assessment of the effect of discrimination on competition. To this extent the provision is over-inclusive. At the same time, by failing to include discrimination in services and discrimination in forms of transactions other than sales, the provision excludes important areas of economic activity in the contemporary marketplace. In its present form, the criminal price discrimination provision is not an accurate tool for addressing anticompetitive behaviour and imposes excessive compliance and monitoring costs on business. Because price discrimination is a criminal offence, this chilling effect is exacerbated.[24]

[T]he best and most effective way to deal with predatory pricing, as well as geographic price discrimination and vertical price maintenance, is to repeal the current provisions and deal with this conduct under reinforced abuse-of-dominance provisions. By "reinforced" I mean you need to create an administrative penalty of the type you currently have in the deceptive marketing practices provisions of the Act. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

The VanDuzer Report makes a very compelling case for decriminalizing price discrimination cases, and a consensus among competition experts has followed. The Committee, therefore, recommends:

23. That the Government of Canada repeal the price discrimination provisions (paragraph 50(1)(*a*) and section 51) of the *Competition Act* and include these prohibitions under the abuse of dominant position provision (section 79). This prohibition should govern all types of products, including articles and services, and all types of transactions, not just sales.

[24] J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 72.

CHAPTER 6: ABUSE OF DOMINANCE

Substantive Elements

Sections 78 and 79 together form the so-called "abuse of dominance" provisions, constituting a key element of Part VIII of the *Competition Act* dealing with "reviewable practices." These sections were enacted in 1986 and replaced the previous criminal offence of being party to, or to the formation of, a monopoly.

Section 79 permits the Commissioner to apply for, and the Tribunal to make, an order prohibiting a person or persons from engaging in anticompetitive acts. Section 78 provides a list of some of these so-called "anticompetitive" acts for the purposes of invoking section 79; the list in section 78 is not exhaustive and so does not narrow the application of section 79 to only the practices specifically listed in section 78. In fact, the Tribunal has ventured outside this list on a number of occasions.

I think the Tribunal, when it has articulated the need for a market power test in the abuse-of-dominance provisions, has never gone further and told us what degree of market power you need. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

Some of the anticompetitive acts contemplated in Part VIII may also be addressed, in the alternative, in criminal proceedings under section 45 or 61, or paragraph 50(1)(*c*) of the Act. The Act requires that either one approach or the other be adopted, but not both.

To get an order under section 79, the Commissioner must convince the Tribunal, on the "balance of probabilities" (the standard of proof in civil law), of three elements:

1. That one or more persons *substantially or completely controls,* throughout Canada or any area of Canada, a class or species of business.
2. That the person or persons have engaged in or are engaging in a *practice* of uncompetitive acts.
3. That the practice has had, is having, or is likely to have, the effect of *preventing* or *lessening competition substantially* in a market.

Where these three elements are present, the Tribunal may make a cease and desist order. In addition to ordering the cessation of the anticompetitive activity, the Tribunal may also, to the extent that it is reasonable and necessary to overcome the effects of the activity, make an order requiring any person to take certain action, including the divestiture of assets or shares. The order must be only for the purpose of restoring competition in the relevant market and may not be for the purpose of imposing punitive measures.

The phrase "substantial or complete control" in the first element is the same wording used in the criminal monopoly section that preceded the current abuse of dominance rules.[25] But what degree of control is "substantial"? The case law interpreting the predecessor criminal provision suggests that control must approach 100% of the relevant geographic and product market, but subsequent cases have refined this analysis considerably.

Predatory pricing can be captured under section 79.… And also we had a panel of experts who suggested that price discrimination could already be dealt with under section 79 of the civil provisions also. [R.W. McCrone, Competition Bureau, 64:09:40]

The Tribunal must, as the first step to determining whether abuse of dominance exists, define the "relevant market." Market definition has two aspects: the product market and the geographic market. Determining the relevant market for a product is a complicated undertaking, involving consideration of such factors as direct and indirect evidence of substitutability and functional interchangeability of products, trade views on what constitutes the same product, and the costs of switching from one product to another.

In addition to defining the relevant product market, the Tribunal must also define the relevant geographic market. It does so by reference to the boundaries within which competitors must be located if they are to compete with each other and where prices either tend toward uniformity or change in response to each other. The Tribunal has recognized that the relevant market (so defined) will have a significant impact on any conclusion regarding the effect of the dominant firm's behaviour on competition. In general, however, the more broadly the market is defined, the less likely it is that the firm will possess market power and that its behaviour will be found to substantially lessen competition.

25 In section 2 of the *Combines Investigation Act*.

Once the market is defined, the Tribunal will address whether there exists "substantial or complete control" over that market. The Tribunal has equated this rather ambiguous phrase to mean market power. "Market power" may be understood to be the case of a dominant player that has the ability to raise its prices (or reduce product quality) in a non-transitory way (the longer term, usually defined as two years) without suffering a loss in profit.

With respect to market power, high market share alone will not give rise to a presumption of dominance. In *Laidlaw*,[26] the Tribunal held that dominance would not be presumed where market share is below 50%. The Tribunal has yet to deal with a contested claim of dominance where the allegedly dominant firm has a market share of less than 85%. Interestingly, the 50% threshold enunciated in *Laidlaw* is higher than the 35% threshold set in the Bureau's *Merger Enforcement Guidelines* and the *Predatory Pricing Enforcement Guidelines*. More jurisprudence on this issue would be helpful.

[I]n terms of pricing provisions … The current provisions under the abuse of dominance might cover that kind of conduct, but it's a bit of a grey area because the firm that's entering the new market may not in fact be dominant in that market. The abuse-of-dominance provisions refer to a firm having substantial or complete control of a class or species of business. Now, you could try to sandwich the conduct under the abuse-of-dominance provision. It's not clear that this is what it was intended for …
[Douglas West, University of Alberta, 59:12:40]

Barriers to the entry of new competition also constitute an important factor. In determining the existence of a barrier to entry, the Tribunal will examine factors such as sunk costs[27] and economies of scale, as well as technical and regulatory barriers. Sunk costs or economies of scale on their own are unlikely to be regarded as sufficient. The Tribunal must also consider the number of competitors, their relative market shares, and whether there is excess capacity in the market. Notwithstanding the guidance provided by the Tribunal in past cases, predicting when the Tribunal will find dominance will often be difficult.

The second element to be considered in section 79 is whether the practice has the effect of lessening competition substantially (this is more commonly referred to as an "SLC" test). Determining whether a practice will result, or has resulted, in an SLC is a difficult determination. What meaning is to be given to the term "substantial"? In *Nutrasweet*, approximately 90% of the market was controlled by the leading aspartame company. Although a

26 Director of Investigation and Research v. Laidlaw Waste Systems Ltd. (1992), 20 C.P.R. (3d) 289.

27 The costs that the new entrant will not recoup if he subsequently exits the market. Advertising is the most common example of a sunk cost.

high market share may suggest dominance, such a high level may not be necessary to prove dominance. The Committee anticipates that the meaning of the term will in time become clear through jurisprudence.

[Y]ou have the right … idea … with respect to modernizing and decriminalizing … the pricing provisions in the Act and moving them into … the abuse-of-dominance regime. This will provide a … coherent and single place in which you can think about those types of behaviour … where there is a competition concern as opposed to the many situations where there is not. [Neil Campbell, McMillan Binch, 59:11:25]

The final element that must be demonstrated under section 79 is a "practice of anticompetitive acts." Although "practice" was not defined in *Nutrasweet*, the Tribunal appears to have set the bar quite low, stating that a practice may exist "where there is more than an isolated act or acts." Moreover, a number of different isolated anticompetitive acts might constitute a practice when taken together.

Anticompetitive Pricing Practices: The Civil Approach

As discussed in the previous chapter, the Committee believes that the current approach of treating the practices in sections 50, 51 and 61 as criminal offences is inappropriate in the modern business environment. These provisions — owing to their possible efficiency-enhancing or pro-competitive effects — would be more effectively addressed as reviewable trade practices under Part VIII of the Act, and more specifically under the abuse of dominance rules. At the same time, as the VanDuzer Report and other commentators have suggested, there are certain conceptual difficulties in treating the pricing practices under section 79.

The first objection is that removing these practices from criminal treatment to civil review may undermine the deterrence value of treating them as criminal offences. However, the Committee believes that this same deterrence could be accomplished by empowering the Tribunal to levy monetary penalties under section 79. Furthermore, the criminal law treatment could remain in place for practices, such as hard-core cartel activity, that are without redeeming social value.

A remedy based on damages and fines seems to be a sensible deterrent. You can move that into the civil side without having the problems on the criminal side. [Jeffrey Church, University of Calgary, 59:10:55]

The second objection is not as simply understood. It requires the enunciation of a single legal test to unify under the abuse of dominant position provisions the different legal tests which the Crown, or the Commissioner as the case may be, must meet to succeed before the Court or Tribunal. In addition to the different legal tests existing under the criminal pricing sections and section 79, the different

standard of proof in the criminal provisions (i.e., "beyond a reasonable doubt") must be addressed.

To obtain a conviction under paragraphs 50(1)(*b*) or 50(1)(*c*), the Crown is merely required to show that the policy has, or is designed to have, the effect of lessening competition *or* eliminating a competitor. Paragraph 50(1)(*a*) and sections 51 and 61 require only that the practice itself be proven (the per se approach) in order to secure a conviction, that is there is no need to show that a lessening of competition has occurred. In both cases, the Crown must prove the offence according to the criminal standard of proof, that is, "beyond a reasonable doubt." By removing or shifting those provisions from criminal prosecution to section 79, the Tribunal would consider the competitive effects or the efficiencies resulting from the practice, and would make its determination accordingly. The result, in the Committee's view, would be a better approach for dealing with these practices, one that is more consistent with sound economic analysis. However, if we are going to treat these practices as civil matters, it is necessary to enunciate the single test that will apply to any application brought under section 79.

[I]f you put a civil administrative penalty power into the abuse-of-dominance provisions, you would retain that deterrence effect of the law. And if you further amended the abuse-of-dominance provisions to eliminate the words "substantially or completely control", then the anti-competitive test would simply be substantial lessening of competition, which is the same test that you have right now in the predatory pricing provisions. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

The obstacles to creating a single test under section 79 to permit both criminal and civil practices to be addressed may, in fact, not be as significant in practice as the legislation suggests. With respect to paragraph 50(1)(*a*) and sections 51 and 61, the Committee has already stated that those practices should be subject to an SLC test. Moving them to section 79 would have this effect. For its part, the Bureau does not appear to have pursued conduct that does not prevent or lessen competition substantially; this suggests that such an amendment would be in line with current enforcement practice.

The thing that comes with criminal sanctions is the possibility of prison terms in some cases, so you wouldn't replace that on the civil side. Also, just the stigma of a criminal record has a deterrent effect that you wouldn't get on the civil side. I don't think, really, that fines on the criminal side and administrative penalties on the civil side are really comparable. One is clearly designed to penalize for criminal behaviour, and the other I think is more designed to encourage compliance with orders of the Tribunal. [R.W. McCrone, Competition Bureau, 64:10:30]

Furthermore, the Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* seem (the "Abuse Guidelines") to suggest that the Bureau does not consider there to be any significant difference between the thresholds. This inference is drawn from the same 35% single-firm "safe harbour" found in the criminal *Predatory Pricing Enforcement Guidelines* and the civil *Merger Enforcement Guidelines*. So this suggests that the

amendment would only clarify the law and enhance its enforceability, without altering it in substance.

So the abuse-of-dominance provisions basically would have a similar anti-competitive threshold and similar deterrence power in the form of an administrative fine that the criminal provision today has, except you wouldn't have to deal with the criminal burden of proof. That's … the most effective way of dealing with not only predatory pricing but also price discrimination and the other pricing practices. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

With respect to the "eliminating a competitor" test in paragraphs 50(1)(*b*) and 50(1)(*c*), the Committee believes that this offends the overriding spirit of the *Competition Act*, which is to preserve the process of competition and not competitors specifically. Moreover, the Bureau's *Predatory Pricing Enforcement Guideline*s and the Abuse Guidelines, make it quite clear that the focus of the Bureau's analysis is upon the likely impact of conduct on competition, not on individual competitors. Moving these practices to section 79 would make them subject to the SLC test and to the civil standard of proof. This would remove the chilling effect that currently results from treating these practices as criminal offences. Instead, the practices would be subject to a more appropriate treatment, i.e., one that takes into consideration possible efficiency gains.

For all these reasons, the Committee recommends:

24. That the Government of Canada amend the *Competition Act* by deleting paragraph 79(1)(*a*).

In fact, the Supreme Court of Canada told us we need a greater degree of market power because of the presence of those words "substantially or completely controlled." So if we get rid of those words, we simply have the general market power requirement we have with respect to all of the other provisions of the Act that have this substantial lessening of competition test, which is a lower anti-competitive threshold, and the same one that you currently have in the predatory pricing provision. So you wouldn't be losing anything by shifting over to the abuse-of-dominance provisions. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

This amendment would bring the wording of section 79 into closer conformity with the concept of market power as it has evolved through judicial interpretation.

Finally, a word on guidelines. The Committee recognizes that the Bureau's current Abuse Guidelines may need to be revised and expanded in order to accommodate the expanded scope of section 79. Many issues may need to be addressed including, for example, a minimum market share for assessing market control, the best analytical framework for assessing when price discrimination and vertical price maintenance are anticompetitive acts, as well as appropriate approaches to dealing with so-called price predation in the civil context. The Committee, therefore, recommends:

25. That the Competition Bureau revise its *Enforcement Guidelines on the Abuse of Dominance Provisions* in order to be consistent with the addition of the anticompetitive pricing practices (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) to section 79 of the *Competition Act*.

I think we have a very good abuse-of-dominance framework that applies to most industries ... The abuse guidelines that have just been issued are very well done. They're exceptional. The Bureau is to be commended for that perspective. [Jeffrey Church, University of Calgary, 59:10:15]

CHAPTER 7: MERGER REVIEW

Merger Review Process

The *Competition Act* provides for the civil review of mergers (sections 91 through 96) by the Competition Tribunal. On application by the Commissioner of Competition, the Tribunal may issue a prohibition or divestiture order with respect to a merger that is deemed to prevent or lessen competition substantially. However, before such orders are granted, varied or denied by the Tribunal, a well-established review process must take place. As a starting point, the Committee will provide a simple sketch of this merger review process, which will provide the necessary background to comment on the operations and enforcement of the merger provisions in the Act.

On the other issue, from an enforcement perspective, there's a lot of discussion in the business about how few cases there are and how much guidance is available to the public at large and the business and consumer legal communities about how decisions are made. This issue has been debated probably longer than private access, but I think it's time we institute some form of formal decision publication process. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

Section 91 of the *Competition Act* sets forth the definition of a "merger," which is deemed to occur when direct or indirect control over, or significant interest in, the whole or a part of a business of another person is acquired or established. The principal issue in this section is the interpretation of the words "significant interest," which is considered to occur when a person acquires or establishes the ability to materially influence the economic behaviour of the business of a second person (i.e., block Director resolutions or make executive decisions relating to pricing, purchasing, distribution, marketing or investment). In general, a direct or indirect holding of less than a 10% voting interest in another entity will not be considered a significant interest. However, a significant interest may be acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving incorporated or non-incorporated entities.

The EU has a process where, even though a transaction isn't challenged, a decision is released describing how the agency went through its review, what its findings were, and what it considered important or not important. I think that would serve as a very useful public information service for the Bureau to adopt. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

In general, a merger will be found to be likely to prevent or lessen competition substantially when the parties to the merger would more likely be in a position to exercise a materially greater degree of market power in a substantial part of a market for two years or more. Market power can be exercised unilaterally or interdependently with other

competitors and its ascertainment will be determined according to the following Bureau screening processes:

1. The Bureau will define the relevant markets, each of which consists of determining substitute products and services of rivals of the merging parties, both from a product and a geographic dimension. This will include all products and services that customers would likely turn to in response to a small but significant, non-transitory increase in prices or a reduction in quality and variety of the products or services offered by the merging parties (the "hypothetical monopolist" test of a 5% price increase for up to two years). The geographic dimension of the market would be determined similarly; therefore, it is likely that different products will have different geographic dimensions.

The Bureau does publish, in each merger case, aspects of its decision. What people are saying is there's not enough core analysis necessarily there for us to judge the next case. The contest, however, is how much can you disclose of the confidential information that gives rise to the analysis? [Robert Russell, Borden, Ladner & Gervais, 59:12:05]

2. The Bureau will then calculate and analyze market share and concentration thresholds to distinguish markets that are unlikely to be anticompetitive. The markets that do not surpass the requisite thresholds (so-called "safe harbours") will be screened out. The unilateral exercise of market power threshold is 35% of the post-merger pro-forma market share of the merging parties (sales volume or production capacity). The interdependent exercise of market power threshold incorporates a 65% market share held by the four largest firms in a post-merger market and a 10% market share held by either of the merging parties.[28]

[W]hen you're sitting in the room negotiating the resolution, you also talk about what should be published, and it can interfere with some of the remedy. If you're having to divest of a core asset, if you put too much out there, it becomes a fire sale, which makes it more difficult to resolve. If you're going to give me a penny for my asset or $100 million for my asset, you're going to have a different negotiation coming up with a resolution. [Robert Russell, Borden, Ladner & Gervais, 59:12:10]

3. Given that the Act requires that the Tribunal shall not find that a proposed merger prevents or lessens competition substantially solely on the basis of evidence of concentration or market share, a complete competitive effects analysis will then be performed on those markets where the shares of the merging parties' sales or production surpassed the "safe harbour" thresholds. The Bureau will evaluate many relevant factors, as listed in section 93, such as: foreign competition, availability of acceptable substitutes, barriers to entry, absolute cost advantages, sunk or irrecoverable costs, the time it would take a potential competitor to become an effective competitor, effective

[28] There is no economic rationale for these thresholds over that of others. Simply put, an effective merger review process demands market share anchors, but why these thresholds were chosen over others has never been made clear.

remaining competition, the removal of a vigorous and effective competitor, change and innovation, business failure and exit, and other criteria.

4. The Act recognizes that changes in regulations, developments in new technologies, and the sweeping forces of globalization will have implications on the structure of industry. If the elements of the efficiency exception (section 96) are met (these are cost savings to the economy and are not merely purchasing power savings due to any enhanced ability to squeeze better prices out of a supplier, and that these efficiencies could not be attained if the merger did not proceed), where they would "offset" or are "greater than" the anticompetitive concerns, the Bureau would not pursue the merger any further. The onus of proof of this exception before the Tribunal is put on the merging parties.

[U]nder a total surplus approach, the Competition Tribunal would be prohibited from issuing an order in respect of an anti-competitive merger if it found that the overall effect of the merger on the economy likely would be positive. In other words, if the gain to producers resulting from the cost savings and other efficiency gains likely to be brought about by the merger were greater than the loss to society attributed to the anti-competitive effects, the Tribunal would not … issue an order in respect of the merger. In this very complicated analysis, wealth transfers from consumers to producers are treated as neutral, because they have no bearing on the aggregate level of wealth in the economy. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:11:55]

Merger Review Workload and Service Standards

Virtually every witness appearing before the Committee admitted that the Bureau has faced an unprecedented number of merger reviews over the past several years, which has, and continues to put, extraordinary pressure on its Mergers Branch staff. Table 7.1 provides the data to back up the first part of this claim. Excluding asset securitizations (which, since 1999, have been exempted from filing), merger filings have hovered about 340 per annum in the past four years, which is up more than 70% from the average of about 200 filings per year recorded in the first half of the 1990s. So the trend is definitely up over the past decade, but it is also up over the past five years, with 373 mergers being filed in 2000-2001, the highest ever.

I have submitted for consideration a one-month initial review followed by a four-month timeframe. If, after the first month, the Bureau does not go into a full-scale investigative mode, the merger is cleared. If they do go into that mode, then there is a fixed period … of four months … to complete the Bureau's investigation. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

I recommended earlier that in the area of merger review consideration be given to trying to define the time periods with statutory certainty so that business persons engaged in transactions, third parties interested in transactions and making submissions to the Bureau, … know there are fixed time periods, as opposed to the current service standard guidelines …This would promote certainty. [Calvin Goldman, Davies, Ward & Beck, 59:09:15]

Table 7.1
Number of Transactions (%) — 1995-2001

Business Line	1995-1996	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001
Pre-merger Notification Filing	57	58	84	109	92	73
Advance Ruling Certificate Request	117	181	219	174	209	255
Other Examinations	17	23	17	26	60	45
Sub-total	**191**	**262**	**320**	**309**	**361**	**373**
Securitization	36	52	72	52	64	0
Total	**227**	**314**	**392**	**361**	**425**	**373**

Source: Competition Bureau Merger Branch, *Merger Review Performance Report June 2001*, 2001.

Data submitted to the Committee provides evidence of the second part of the claim. The Mergers Branch at the Bureau averaged 38 full-time equivalent person-years in the early 1990s, but has gradually increased to 57 in 2000-2001. Therefore, the Bureau's Mergers Branch has grown by just less than 50% over the employment levels of the early 1990s, which is significantly below the merger filings growth rate of more than 85% in the same period.[29] Moreover, Table 7.2 indicates that the complexity of mergers that the Bureau has had to review is also increasing. Complex mergers and very complex mergers, which are increasingly resource intensive, have augmented their respective shares in the past four years by 4% each. Although non-complex mergers make up the vast majority of cases under review (between 80-90%), their share of total reviews undertaken by the Bureau has declined substantially in the past four years. This trend, the Bureau claims, is due largely to globalization and the inherent complexities associated with multi-jurisdictional cases.

It will be interesting, now that this merger wave is sort of down, to see how resources are reallocated. As a result of that, it is certainly true that the other areas of the organization, such as the civil reviewable practices areas and conspiracy, are not nearly as well funded relative to other international comparisons. [Margaret Sanderson, Charles River Associates, 59:11:20]

29 Competition Bureau Merger Branch, *Merger Review Performance Report June 2001*, 2001.

Table 7.2
Number of Cases by Level of Complexity (%)
1997-2001

Complexity	1997-1998	1998-1999	1999-2000	2000-2001
Non-complex	68 (89%)	212 (77%)	232 (80%)	282 (81%)
Complex	8 (11%)	56 (20%)	49 (17%)	53 (15%)
Very Complex	0 (0%)	6 (2%)	8 (3%)	14 (4%)
Total	**76 (100%)**	**274 (100%)**	**289 (100%)**	**349 (100%)**

Source: Competition Bureau Mergers Branch, *Merger Review Performance Report June 2001*, 2001.

The revenue generated from fees related to merger review has been a significant but not a fully compensatory help to the Bureau's budget constraint. The Bureau estimates that revenues from pre-merger notification, advance ruling certificates and advisory opinions will be in excess of $8.4 million in 2000-2001, $7.5 million of which will be available to the Bureau. Any fees the Bureau receives in excess of $7.5 million will be credited to the government's Consolidated Revenue Fund. Given that the direct costs of merger review is estimated to be $9.5 million for 2000-2001, merger review revenues clearly fall short of cost recovery.

[T]he Bureau's workload over the past few years has greatly increased. Unfortunately, our resources have not kept pace ... In a recent survey involving five comparable competition authorities, our Bureau had the second-lowest level of funding on a per-capita basis. Our demands continue to grow, largely due to globalization and our increased mandate. Ten years ago, the great majority of cases examined by the Bureau were domestic in nature. Today, not only are there more cases, but a very large number of them have an international dimension. This is demonstrated by the increasing number of multi-jurisdictional mergers and international cartels. [Gaston Jorré, Competition Bureau, 64:09:10]

In 1997, along with fees for certain services, the Bureau established and committed itself to meet a series of service standards when reviewing mergers. These standards are: non-complex mergers, 14 days; complex mergers, 10 weeks; and very complex, 5 months. Although the Bureau has, in a given year, met these targets 100% of the time, its performance level has varied without trend since 1997. In fiscal year 2000-2001, the Bureau met the three targets 95.7%, 92.5% and 100% of the time, respectively. The average and median turnaround times for merger review have at all times been shorter than the established standard. However, in every year since 1997, a relatively small number of merger reviews has fallen well outside the target date. These poor performances appear to be isolated cases that are not the result of systemic failures, but are more likely owing to human error — errors probably committed on the part of Bureau staff and merging parties. This performance and the targeted standards, the Committee finds, are reasonable. Although

there were complaints about the merger review process made to the Committee, stakeholders had not complained about this aspect.

The Committee believes that the routine merger review procedures of the Bureau are not the cause of selected protracted merger reviews of which people complain. These reviews bog down only when the Commissioner has unresolved issues with the merger (as proposed) and intense negotiation begins for restructuring the merger proposal or when seeking a consent order, or where a contested Tribunal proceeding is going to be launched. As a consequence, the Committee sees no benefit in enshrining strict deadlines for merger review in the Act, as some commentators have suggested. Indeed, the Committee sees more harm than good coming from such Act-imposed deadlines. Given an inviolable deadline, the Bureau would be forced to work more intensively on cases that are likely to run into difficulty and breach the deadline, sacrificing resources in other reviews and therefore delaying less problematic mergers. In effect, strict or Act-imposed deadlines will compress the time distribution of completed reviews, but only at the expense of higher average turnaround times.

From the Competition Bureau's perspective, it has limited resources … the Bureau is in fact fairly strapped when it comes to resources, so it has to make responsible decisions as to how it deploys those resources. It currently has case-screening criteria that would bias its decisions in favour of bringing cases that have a broader economic impact. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:10]

Merger Enforcement Record

The combination of an unexpected and uncontrollable merger review workload, growing at rates in excess of that of staffing, with that of quick turnaround times provided by the Bureau is a situation that lends itself to the perception that vigorous enforcement of the Act may have been sacrificed. The Committee will investigate.

Table 7.3 provides the Bureau's statistical record of merger enforcement under the *Competition Act*.[30] The Bureau's entire enforcement record over the 1986-2000 timeframe is included, but the data is broken down into three four-year periods to look for trends in the statistics while overcoming a small numbers problem from which the data suffers. What is clear from the statistical record is that the past four years has involved almost as many merger

30 Data from fiscal year 2000-2001 does not include asset securitizations and is, therefore, not directly comparable.

examinations by the Bureau than that of the previous two four-year periods. Very little else can be discerned with such a high degree of confidence.

Table 7.3
Merger Enforcement Activity Under the *Competition Act* 1986-2000

Fiscal Years	1988-1992	1992-1996	1996-2000	1996-2000
Examinations Commenced	798	816	1,492	3,292
Examinations Concluded:				
As Posing No Threat Under the Act	736	776	1,443	3,094
With Monitoring	38	8	3	61
With Pre-closing Restructuring	1	-	3	6
With Post-closing Restructuring/Undertakings	6	-	10	19
With Consent Orders	3	-	5	8
Through Contested Proceedings	1	3	2	6
Abandoned by Parties as a Result of Director/Commissioner Concerns	6	12	4	27
Mergers Posing an Issue/ Examinations Concluded	6.9%	2.9%	1.8%	3.9%
Mergers Posing an Issue (Excluding Monitoring)/ Examinations Concluded	2.1%	1.9%	1.6%	2.0%
Merger Abandonment/ Mergers Posing a Threat	0.82%	1.55%	0.28%	0.87%

Source: Competition Bureau, *Annual Report of the Commissioner of Competition*, various years.

The Committee will begin its investigation by considering the perennial complaint that a contested case at the Tribunal is expensive and becoming more so. As such, one would think that the Bureau and the parties to a merger proposal would both shy away from contested proceedings and seek alternative solutions with greater frequency as the cost of a contested case rises. Although the Committee recognizes that there may be other explanations for a trend to fewer contested merger cases — particularly when we introduce qualitative information into the analysis — the data, while limited, tends to (indirectly) confirm this complaint. Four contested cases of 1,614 merger examinations were taken to the Tribunal for resolution in the two four-year periods starting in 1988 and ending in 1996. Given 1,492 merger investigations and similar vigorous enforcement, one would have expected four contested cases would have gone to the Tribunal in the 1996-2000 period; however, there were only two such cases. Therefore, the behaviours of the Commissioner and prospective merging parties suggest

that contested Tribunal cases are becoming more expensive.

Virtually all the cases that have been brought in the 15-year period since the Tribunal was created and the merger provisions were decriminalized have involved mergers that had already been consummated. At that point the merging parties had every incentive to hunker down and fight. By contrast, business people invariably have no appetite whatsoever to become involved in contested proceedings where their transaction has not yet been consummated. [Paul Crampton, Davies, Ward, Phillips & Vineberg 65:09:55]

The vast majority of mergers pose no threat, or raises no issue, under the *Competition Act*. Donald G. McFetridge reports that about 1.6% of all publicly reported mergers (7.5% of those examined) between 1986 and 1994 raised an issue under the Act.[31] According to the data in Table 7.3, the number of issues raised in merger cases has further declined in the latter half of the 1990s. When one subtracts mergers in which monitoring was the chosen enforcement response by the Commissioner — because they were never later challenged or brought back under investigation — the number of mergers that raised an issue under the Act has average only 2% of examinations undertaken by the Bureau.

The Committee finds it rather curious that, except for contested proceedings, all enforcement responses fell out of favour with the Commissioner (then the Director) in the mid-1990s. However, except for monitoring, all other enforcement responses, such as pre- and post-closing restructuring/undertakings and consent orders, have come back into favour. Moreover, what the Committee finds disturbing is that the number of mergers abandoned by their proponents as a result of the position taken by the Commissioner has declined substantially over the late 1990s. For example, 18 merger proposals were abandoned by their proponents of 1,614 merger examinations undertaken by the Bureau in the two four-year periods starting in 1988 and ending in 1996. Given 1,492 merger investigations and similar vigorous enforcement by the Commissioner, one would have expected about the same number of abandonments, 18, in the 1996-2000 period; however, there were only 4 such abandonments; less than one-quarter of what would reasonably be expected.

[W]e can review any merger, no matter what the size. Where size comes in is whether you have to notify us. … And I guess … it's a trade-off … if the world were cost-free, it would be nice to look at every merger and have notification. But given the costs imposed, there has to be some level before you create a notification process, and that's why there is a threshold for notification. [Gaston Jorré, Competition Bureau, 64:09:30]

To the Committee the data suggest one of three explanations: (1) mergers have become less problematic from a competition perspective; (2) the business community at large has in the past five years come to realize that the Commissioner is a vigorous enforcer of his Act and has increasingly acquiesced to other restrictive undertakings

31 Donald G. McFetridge, *Competition Policy Issues*, Research Paper Prepared for the Task Force on the Future of the Canadian Financial Services Sector, September 1998, p. 11.

imposed by him/her as a means of realizing their mergers; or (3) the business community has in the past five years come to realize that the Commissioner's budget is insufficient to vigorously enforce his Act and that he must acquiesce to the merging parties by seeking other non-vigorous merger enforcement methods than that of contesting them under a costly Tribunal proceedings.

It's not just the filing fee. When you notify, you have to retain counsel, you have to provide the information. You need a good adviser. [Gaston Jorré, Competition Bureau, 64:09:30]

Without qualitative information on these mergers, the Committee cannot draw definitive conclusions. However, the Committee fears that the third explanation is more likely correct and, at least in part, explains the fewer merger proposal abandonments. Somewhat paradoxically, the lack of information published on mergers that the Commissioner did not oppose as a means of protecting private and strategic market information from being made public may be providing more protection, in terms of accountability, to the Commissioner — a state of affairs that the competition law community has long complained about.

In any event, vigorous enforcement of the merger review provisions can be accomplished by providing the Bureau with adequate resources and allowing it to exercise greater selectivity in the review of mergers that are likely to pose a competition issue — recommendations that this Committee advocates.

[I]f parties to smaller transactions — mergers, for example — want to proceed with their transaction without notifying the Competition Bureau and try to fly below the radar screen, they have to take the risk that the Competition Bureau isn't going to find out about the transaction for three years, because if the Bureau does, it can bring an application to the Tribunal for up to three years and force divestiture. That's a huge risk, and business people typically do not want to assume that risk without comfort. So I find myself frequently, at any given time, having several matters on the go that involve transactions that are not above the notification thresholds, but the parties nevertheless want comfort from the Competition Bureau in the form of a no-action letter or an advance ruling certificate before they put their money on the table and proceed with the transaction. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:10]

Review Thresholds

The claim that the Bureau receives insufficient funding for optimal enforcement of the Act, in particular mergers, is not new. In fact, the competition law community has made the Committee aware of this fact since it undertook its study of the *Competition Act* and its publishing of the *Interim Report*. The desire for a more complete evaluation that would consider other consequential impacts on enforcement has held the Committee from venturing beyond the call for more resources to be allocated to the Bureau. Given the concern raised in the preceding section, the Committee is now prepared to evaluate specific proposals to raise the merger review thresholds as a way of focusing scarce resources on the larger merger reviews and the enforcement of other aspects of the Act.

Since the adoption of the *Competition Act* in 1986, the parties to any significant merger — that is, a merger of a certain size as set out in the Act — are required to notify the Commissioner before closing the transaction. Although all proposed mergers may be reviewed by the Commissioner, only those mergers (i.e., asset or share acquisitions) involving more than $35 million in gross revenue from sales per annum in or from Canada, or involving more than $400 million in combined assets or sales (including affiliates) in Canada, must notify the Commissioner of the proposed transaction. The transactions threshold for amalgamations is $70 million. Both the gross sales and combined asset thresholds have remained unchanged since 1986.

One thing that would help … is the elevation of the thresholds to align them with the economic value of the threshold as it was when it first came in, in 1988. In 1988 a $35 million threshold on the transaction size was put in place. … In the meantime, the value of the dollar has eroded by more than a third, and if we were to make that adjustment today, I think it would release from the system, from the review, maybe 40% of the cases they now deal with, and would enable more people to be freed up to do other things. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

Between 1986 and 2001, inflation of more than 40% (as measured by the consumer price index or CPI) has occurred. Consequently, the $35 million and $400 million thresholds have captured many more mergers than Parliament had intended when the Act was adopted. Indeed, the possible over-inclusiveness of mergers that must automatically undergo review may have been a constraint on optimal enforcement of the Act — the Bureau suggests that the gross-revenue-from-sales threshold of $35 million has been particularly binding. In other words, some resources currently devoted to merger review may be more effectively allocated to other activities, either to the review of larger mergers or to the enforcement of other provisions of the Act.

From an enforcement perspective, I would like to see increasing attention paid to other provisions of the Act, perhaps becoming a little less risk-averse from an enforcement perspective in dealing with mergers. We also heard this morning about the possibility of increasing thresholds. That might help too. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

The Bureau performed a special request for the Committee that indicates that approximately one in ten mergers examined by its Mergers Branch in the past year fell within the $35 to $50 million transactions range. This statistic, one in ten, suggests that raising the transactions threshold to $50 million would reduce the total number of merger filings by about 40 per year. Unfortunately, we were unable to find out how many of these one-in-ten mergers posed an issue under the Act. Nevertheless, given the deficiency in filing revenues to cover the direct costs of merger review and the Committee's belief that there are more pressing needs for enforcement of other activities, we believe that it is best to raise the $35 million transactions threshold to $50 million. The Committee, therefore, recommends:

26. That the Government of Canada amend section 110 of the *Competition Act* to require parties to any merger (i.e., asset or share acquisitions) involving gross revenues from sales of $50 million in or from Canada to notify the Commissioner of Competition of the transaction.

There are two thresholds. There's the transaction size and there's the party size. And we think it would be appropriate to increase the transaction size threshold, which currently is $35 million. The party-size threshold, which is $400 million, is much higher and we see increasing the first, but not the latter, roughly in line with inflation for the period since the Act came in, which takes you to about $50 million. [Gaston Jorré, Competition Bureau, 64:09:30]

Furthermore, the Committee believes there is merit in formalizing such considerations and, therefore, recommends:

27. That the Government of Canada amend the *Competition Act* to have a parliamentary review of the notification thresholds contained in sections 109 and 110 within five years and every five years thereafter to ensure optimal enforcement of the *Competition Act*.

But in looking at it historically, in countries that have had strong competition laws, like the U.S., and countries that had very weak competition laws, like Japan, they found that they didn't end up with very productive and efficient economies when they didn't foster competition and make sure those efficiencies, that productivity and efficiency, were there. So when the cases are looked at, it's not just on the basis of the consumer or the small business alone, but the Canadian economy and what benefits consumers as a whole. [Robert Russell, Borden, Ladner & Gervais, 65:10:15]

Mergers and Efficiencies

Section 96 of the *Competition Act* sets Canada's competition legislation apart from those of other countries. This section states that: "The Tribunal shall not make an order if the merger brings about gains in efficiencies that are greater than, and will offset, the effects of any prevention or lessening of competition"; this has been interpreted by some as being consistent with what is known as the "total surplus standard."

The Act also goes to considerable lengths to explain both what should and should not be included as a gain in efficiency. For example, the Act states that "the gains in efficiency" to be considered are those that "would not likely be attained if an order were made in respect of the merger"; that is, they must be merger specific. This implies that if the efficiencies could be realized in a manner that generates less anticompetitive harm than that created by the merger, then the efficiencies would not be ascribed to the merger. For example, efficiencies that could occur through internal growth or unilateral rationalization would not be ascribed to the merger. Alternatively, there may exist other cooperative means of achieving the efficiencies, such as joint ventures or a restructured merger, which would create lesser anticompetitive effects. Additionally, the efficiencies must

The analysis of efficiencies in competition law in this country is in a state of disarray, to say the least. We've had 15 years or more of toing and froing on it, and still don't know if we have anything we can work with. So if you're going to go for the section 45 reform … [focus on] what constitutes the civil test. [Donald McFetridge, Carleton University, 59:10:05]

be real and not just pecuniary; that is, the merger must bring about a real savings in resources and must not stem from greater bargaining or purchasing power that is essentially redistributive among members of society.

Canada is the only country known to have a competition legislation that requires the efficiencies likely to be produced by a merger to be weighed against the likely anticompetitive effects of the merger. This approach occupies the middle ground between the European Union approach, whereby the merging parties are invited to make claim to efficiencies that the Merger Task Force will consider (which introduces lobbying into the mix), and the U.S. approach, which requires efficiency gains to be so great that prices will not rise as a result of the proposed merger (the so-called "price standard"). In retrospect, this is not an unreasonable approach and, in fact, may be a strategically sound one given Canada's relatively smaller and open market economy.

Although this legislative defence is unique among the industrialized countries of the world, its 15-year history has not been very hospitable to merger proponents. The Commissioner has not even once found the efficiency gains to a merger proposal sufficient to offset any lessening of substantial competition. This behaviour contrasts sharply with the Commissioner's findings of efficiency gains on many occasions pertaining to exclusive dealing and tied selling cases. Furthermore, in this same 15-year period, the Tribunal has only once decided (*Superior Propane*) and twice commented on efficiency gains (*Imperial Oil* and *Hillsdown*). The elucidations, however, have been confusing to say the least. Just when the Tribunal has come to agree with the Bureau's guidelines on the treatment of efficiencies according to the "total surplus standard" (*Superior Propane*), the Bureau abandoned its guidelines. To further confuse the issue, the Federal Court weighed in and partially overturned the Tribunal's decision in favour of expanding the strictly quantitative analysis of the "total surplus standard" to include redistributional and other qualitative effects of the merger, while neither advocating the "consumer surplus standard" or the American "price standard" approach. This Court direction had the consequence of opening the door to the Commissioner, as well as to the lone dissenting Trial judge sitting on the *Superior Propane* case, to advocate the

Within the merger review guidelines there's a part … about efficiencies which was written many years ago before Superior Propane. We have, in effect, withdrawn it. We've said that they've now been superseded by the Court of Appeal on Superior Propane and at some point once the Superior Propane case is finished we're going to have to re-write them because clearly they're not, after this litigation, a reliable guide. [Gaston Jorré, Competition Bureau, 64:10:00]

[T]he efficiency defence on the merger guidelines. I think it would be an appropriate time for the committee to readdress section 96 and have a look at what it means, at how it should be applied, and provide, perhaps, some guidance from Parliament's perspective in terms of what the efficiency test is supposed to be *in a merger context.* [Jeffrey Church, University of Calgary, 59:10:20]

[W]hether the efficiencies outweigh and offset the anti-competitive effect and really, in principle, that includes everything. It includes all the anti-competitive effects and some of those are measured quantitatively but … [t]hen you have other factors which are more qualitative and you can't really measure. To give you a very simple example, how do you weigh the impact of loss of choice. If you go from having two people you can buy something from to just having one, you've clearly lost something, apart from price and it's not something you can really value but it's certainly something that has to be weighed in. [Gaston Jorré, Competition Bureau, 64, 10:00]

"consumer surplus standard."[32] Sensing that the latter standard would render section 96 virtually ineffective, the majority opinion of the Tribunal panel chose to supplement the "total surplus standard" with a calculation of what is described as the "adverse social effects" of the merger, i.e., the wealth redistributed from "poor" Canadian consumers to the shareholders of the merging parties.

The Tribunal's decision in *Superior Propane* may or may not be satisfactory; it is not clear if such precise calculations of the wealth redistributed from "poor" consumers to the shareholders of producers will be possible in future cases. Moreover, so many different interpretations of Parliament's intentions when it stated that the "*effects* of a merger that would prevent or lessen competition" must be weighed against the "gains in efficiency" suggest that more expert study is required.[33] Accordingly, the Committee recommends:

28. That the Government of Canada immediately establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the *Competition Act,* and that the report of the task force be submitted to a parliamentary committee for further study within six months of the tabling of this report.

In my view, the guidance given by that Federal Court of Appeal decision is not adequate to this task. … broadly speaking it says the Tribunal, in considering weight given to efficiencies, should apply a flexible approach, not restricted to … a total surplus approach … It takes account of diverse factors, such as the effects on small business, the possibility of creating monopolies, and perhaps income-distribution effects. [T]his Federal Court of Appeal decision is quite flawed in some respects. I also think it doesn't, whether flawed or not, give a good guide to the future conduct of competition policy. I also believe there's a danger that Canada could move from a position of being more supportive of efficiency claims in merger review than the United States … to a position where we could be less supportive of efficiency claims than the Americans. [Roger Ware, Queen's University, 65:11:30]

32 The "consumer surplus standard" weighs the gains in efficiencies against the so-called "deadweight loss" arising from the merger, as does the "total surplus standard," as well as the wealth transferred from consumers to the shareholders of the merging companies. So the "consumer surplus standard" is a more restrictive test than is the "total surplus standard."

33 In *Superior Propane*, the Tribunal also heard testimony in favour of the "price standard," the "U.S.-modified price standard," and Professor Townley's" balancing weights approach."

CHAPTER 8: REFUSAL TO DEAL

The Committee listened with concern to the testimony of the Association Québécoise des Indépendants du Pétrole (AQUIP) as it described the experience of some of their members in the Quebec petroleum market. At the outset, it is important to understand the industry is unique in that it is comprised of a handful of large companies engaged in exploration, manufacturing, wholesaling and retailing. These vertically integrated companies compete at the retail level with many small independents. This unique market structure obliges independent retailers to negotiate directly with their competitors for the supply of their main product. The *Competition Act* must, therefore, consider this state of affairs, which is peculiar to the oil sector and ensure that all companies have access to supply without discrimination.

There were shortages, and they had to set an 80% quota. We are convinced that during the 80% cut, the major company retailers were still working at full capacity, without suffering from these cuts. At those times, we had to reduce our clients' inventories. We were fortunate that these were only brief periods of a week or two in the two cases I mentioned. In the first case, the problem was caused by cold weather on the St. Lawrence River. In the second case, it was the January 1997 ice storm in Quebec. I do not know if you are aware of this, but in January 1997, there was an ice storm and supplies had to be rationed. In both cases, our supply was reduced, but we are sure that the multinationals were still running their heating oil and gas station retail networks at full capacity. [Pierre Crevier, Association Québécoise des Indépendants du Pétrole 40:16:20]

The facts presented to the Committee at its Bill C-23 hearings, if true, suggest that AQUIP might have been the victim of an anticompetitive refusal to deal.[34] Of more immediate concern to the Committee, however, was the suggestion that section 75 would not apply to prohibit this manner of conduct. AQUIP suggested that a supplier could rely on the fact that "trade terms" (market conditions) were not "usual" and the section would not apply. The Tribunal would not be able to make an order, since it could only make an order for supply on "usual" trade terms.

> We put it to you that suppliers of petroleum products would only have to illustrate that they cannot supply products because of abnormal trade conditions to stall access to the Tribunal.[35]

The Committee has carefully considered this analysis of section 75 and, with all due respect, we cannot agree with the interpretation. Reading the section as a whole, it is clear that the section was enacted not to provide a defence to unscrupulous suppliers, but rather to enable a customer to get necessary supply on the same terms as a

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34 The Committee, of course, is not a court of law. Accordingly, we do not presume to offer any conclusions on questions of fact or the application of the Act in an individual case. These are matters for the Tribunal.

35 AQUIP, Brief to the Committee.

supplier's other customers. Moreover, for reasons set out below, we would suggest that "rationing" imposed by the supplier in response to supply shortages would fall within the definition of "terms of trade" in subsection 75(3). For that reasons, section 75 would appear to apply to ensure that a customer can get supply on the same terms as other customers, even in limited supply market conditions.

The fundamental difficulty with the AQUIP analysis is that it appears to treat the ideas "trade terms" and "market conditions" as synonyms. But as subsection 75(3) makes clear, the two ideas are quite distinct. It is a *condition* of the *market* that petroleum is in short supply, or that demand is unusually high. The terms of trade are the conditions of the *transaction*. The "terms of trade" in a transaction (such as a supply contract) may change in response to changing market conditions, that is, prices may go up or the quantities that suppliers are able to deliver might have to be reduced. Trade terms may be affected by market conditions, which necessarily implies that they are distinct concepts. AQUIP suggests that a supplier could plead "unusual *market conditions*" as a defence to section 75. But if we accept this interpretation, we would have to accept that section 75 would be of no effect in abnormal market conditions. This conclusion leads us to think that the interpretation may be incorrect.

By contrast, the Committee's interpretation finds strong support in subsection 75(3). That subsection defines "trade terms" as "terms in respect of payment, unit of purchase and reasonable technical and servicing requirements." The effect of subsection 75(3) is twofold. First, it limits the trade terms that the supplier may *impose* on the transaction. This ensures that suppliers cannot impose "unusual" trade terms (for example, rationing) as a pretext to withhold supply. Secondly, the section ensures that the customer is able to *receive* supply on the same terms as the suppliers' other customers, without being subject to any "unusual trade terms." So if other customers are receiving 100% of their orders, then all customers would be so entitled. Imposing a 20% cut on one customer, while not doing so to others would clearly be imposing an "unusual" term of trade on that customer, as the term is

contemplated in subsection 75(3). As a result, section 75 would apply and allow the Tribunal to order the resumption of supply on the same terms enjoyed by other customers.

AQUIP suggested that the phrase “usual trade terms” be deleted from section 75. This would presumably “untie the hands” of the Tribunal and give it flexibility to order supply on terms *other* than “usual” trade terms, i.e., order the supplier to accept a customer on *unusual* trade terms, e.g., pro rata shares of available supply. But again, the distinction betweens *market conditions* and *terms of trade* must be kept in mind. What AQUIP is really asking for is that the Tribunal order the supplier to continue to supply during *unusual market conditions* (e.g., supply shortages) but on the *same trade terms* (80% of usual supply using the previous example) as other customers, without discrimination.

Although the Committee does not concur that the phrase “usual trade terms” in section 75 undermines the effectiveness of the section, we do recognize that there exists another plausible interpretation of section 75, one that would lead us to the opposite conclusion, meaning that the section would *not* apply to prohibit discriminatory rationing of the type described by the AQUIP (the integrated producers supply its own retail outlets on terms more favourable than independent retailers).

Paragraph 75(1)(*d*) requires that, for the section to apply, the product must be in “ample supply.” On a plain reading, this would suggest that the section is meant to apply only in market conditions where supply is “ample,” that is at least sufficient to satisfy current demand. If this interpretation is correct, the section would not apply during periods of limited supply, and a supplier could choose to fill one customer’s order in full, while refusing another customer wholly or in part, using *discriminatory* rationing as a means of disciplining a non-integrated independent retailer.

This second interpretation is also consistent with the wording of subsection 75(3). To an ordinary observer, the term “units of purchase” might describe the manner in which the product is packaged for sale and delivery, such as in *litre* units, or in *shipping container* units, etc. In fact,

this interpretation might be more plausible than the other. Had Parliament, in drafting the legislation, wished to specify that “quantity” be included among the “terms of trade” set out in subsection 75(3), it could have drafted the legislation to that effect. Instead, Parliament used the phrase “units of purchase,” a phrase that does not clearly mean the same thing as “quantity.”

If this interpretation is correct, we would have to accept that section 75 was not meant to, and would not, apply in a market characterized by supply shortages. As such, an unscrupulous and dominant supplier could profit by the shortage to promote his own retail network and discipline independent retailers by selectively rationing their supply in a discriminatory manner. The current wording of the section might suggest that Parliament simply did not anticipate selective rationing being used in this way; or perhaps it was aware that such a practice might occur, but that it could be better addressed under the abuse of dominance provisions in section 79.

Rationing should not result in non-renewal of supply contracts on the pretext that the market situation is abnormal. On the contrary, we must ensure that abnormal market situations do not cause the elimination of efficient oil and gasoline businesses by depriving them of supply. We therefore propose that the words “on usual trade terms” be withdrawn from the bill. In this way, the new provisions would also be applicable in ordinary circumstances, where they could be particularly useful. [Pierre Crevier, Association Québécoise des Indépendants du Pétrole, 40:15:45]

The Committee is aware that the ambiguity could be resolved by simply deleting paragraph 75(1)(*d*). However, no witness raised this point and we have had no debate or analysis concerning the economic and legal implications of implementing such a change. For that reason, the Committee is reluctant to make such a recommendation. For the reasons we have set out, we believe that the more reasonable interpretation is that the section would apply in all market conditions, including markets characterized by supply shortages. Ultimately, however, the uncertainty can only be resolved in one of three ways: (1) a government amendment to clarify the application of the section; (2) the Tribunal’s judicial interpretation in the context of an application on these, or similar facts; or (3) an interpretation guideline from the Bureau.

Clearly, the preferred option is to be proactive now to clarify the application of section 75. Moreover, it is neither fair nor just that we should ask the AQUIP, or anyone else for that matter, to bear the brunt of what might turn out to be protracted and expensive litigation simply in order to clarify the law, when such a clarification is clearly

for the benefit of all. The Committee commends the AQUIP for bringing this important issue to our attention and recommends:

29. **That the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.**

CONCLUSION

Canadian competition policy, as embodied in the *Competition Act* and as carried out by the Competition Bureau and the Competition Tribunal, is a modern framework for dealing with contemporary antitrust issues. The *Competition Act* generally reflects modern economic analysis, though minor modifications might be desirable. The Competition Bureau's enforcement guidelines can claim to be clear and transparent, though some fine-tuning would be helpful. The Bureau manages its current caseload well, though more resources would enable it to be a more vigilant enforcer. The Competition Tribunal has provided clear and thoughtful jurisprudence that properly embodies economic principles, though its procedures could be adjusted in order to expedite its workload and make room for more activity as a result of the granting of carefully thought out rights of private action. These were the views, and indeed the exact words, of the Committee expressed in its *Interim Report*. The Committee maintains these findings and, in this final report, has been more specific.

The Committee believes that Canada's business landscape would be served best by making conspiracies one of its highest priorities. The Committee recognizes that the Bureau has well-developed strategies and tactics already in place for detecting and pursuing both domestic and international conspiracies, but is hampered by an ineffective law — a law that is under-inclusive in its treatment of naked hard-core cartels and over-inclusive of pro-competitive strategic alliances. The Committee has, therefore, recommended that the *Competition Act* be modified to create a two-track conspiracy law, where cartels are pursued more vigorously under a stricter criminal track and strategic alliances are pursued more sensibly under a civil track through a new section. Under the existing criminal provision, the term "unduly" would be dropped to eliminate the need to litigate wasteful and irrelevant economic factors. At the same time, specific defences for efficiencies will be created, thereby reversing the onus of proof, to ensure the two tracks are kept separate. Additionally, a voluntary pre-clearance system for strategic alliances would be organized to provide guidance to the business sector seeking assurances that they will not be subject to criminal

sanctions, and thus reduce any residual “chilling effect” the law creates.

In support of realigning the enforcement priorities away from smaller mergers and back towards conspiracies, as Parliament originally intended in 1986, the Committee has recommended that more resources be allocated to the Competition Bureau and that the merger transactions notification threshold be raised from $35 million to $50 million. The Committee further recommends amending the *Competition Act* to provide automatic parliamentary reassessments of all merger notification thresholds every five years. Furthermore, the Committee recommends extending a private right of action to include abuse of dominance and expanding relief to those who have been prejudiced by reviewable conduct under exclusive dealing, tied selling, market restriction, refusal to deal, and abuse of dominance to include awards of damages and fines in order to bolster private enforcement, as a complement to public enforcement, of the Act.

The Committee makes a number of recommendations to streamline Competition Tribunal processes for disposing of cases, most notably empowering it to assess and impose damage awards and monetary penalties on those found guilty of abuse of dominance. These unbounded penalties would provide a better balance of incentives to deter abusive conduct and hopefully reduce the caseloads of the Bureau and the Tribunal. They, along with the Tribunal’s forthcoming general power to issue interim cease and desist orders in an expeditious way, as would be granted under Bill C-23, would make the existing provisions that are specific to the airline industry redundant. The airline industry-specific provisions could then be abolished to permit the return of the *Competition Act* to its traditional status as a law of general application.

The Committee further recommends the deletion of the condition of “substantial or complete control” in the abuse of dominance section of the Act. This would bring the abuse of dominance provision closer to conformity with the concept of market power as it has evolved through judicial interpretation and other sections of the Act. This amendment, along with the Competition Tribunal’s new power to assess monetary penalties under abuse of dominance, would support the decriminalization of the

anticompetitive pricing provisions — predatory pricing, vertical price maintenance, and price discrimination — as reflected in contemporary economic thinking. Criminal-like deterrence could be maintained when such behaviour constitutes an abuse of dominance, while reducing, if not eliminating, the chilling effect on pro-competitive applications of these pricing practices.

In regards to the process of merger review, the Committee recommends the establishment of an independent task force of experts for the study of the role efficiencies should play in all civilly reviewable sections of the *Competition Act*. In terms of refusal to deal, the Committee recommends that the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.

In light of all of these recommended changes, the Competition Bureau must commit to rewriting its enforcement guidelines on strategic alliances, merger review and abuse of dominant position, not the least of which must be expanded to include predatory pricing, vertical price maintenance and price discrimination practices.

Finally, the Committee is convinced that these recommendations reflect the expert testimony it received; this testimony was thorough and comprehensive. A consensus was reached on most issues, allowing for specific and concrete recommendations to be made. Where a consensus was not immediately obtainable, further study was recommended. As such, we believe this report has the makings of a blueprint for a government White Paper on competition policy in Canada and the next round of amendments to the *Competition Act*.

APPENDIX A
WITNESSES

Associations and Individuals	Date	Meeting
As Individual	04/12/2001	59
George Addy, Lawyer, Osler, Hoskin & Harcourt		
A. Neil Campbell, Lawyer, McMillan Binch		
Jeffrey Church, Professor, University of Calgary		
Paul Crampton, Lawyer, Davies Ward Phillips & Vineberg		
Calvin Goldman, Lawyer, Davies, Ward & Beck		
Lawson Hunter, Lawyer, Stikeman Elliott		
Tim Kennish, Lawyer, Osler, Hoskin & Harcourt		
Donald McFetridge, Professor, Carleton University		
John Quinn, Lawyer, Blakes, Cassels & Graydon		
Thomas Ross, Professor, University of British Columbia		
Robert Russell, Lawyer, Borden Ladner Gervais		
Margaret Sanderson, Vice-President, Charles River Associates		
John Scott, President, Canadian Federation of Independent Grocers		
John Sotos, Lawyer, Sotos Associates		
Roger Ware, Professor, Queen's University		
Douglas West, Professor, University of Alberta		
Stanley Wong, Lawyer, Davis and Company		
Department of Industry	31/01/2002	64
Gaston Jorré, Acting Commissioner of Competition		
André Lafond, Deputy Commissioner of Competition, Civil Matters Branch		
R.W. McCrone, Assistant Deputy Commissioner of Competition, Criminal Matters		

Associations and Individuals	Date	Meeting
As Individual	05/02/2002	65
Paul Crampton, Lawyer, Davies Ward Phillips & Vineberg		
Tim Kennish, Lawyer, Osler, Hoskin & Harcourt		
John Rook, Lawyer, Osler, Hoskin & Harcourt		
Robert Russell, Lawyer, Borden Ladner Gervais		
Roger Ware, Professor, Queen's University		
Stanley Wong, Lawyer, Davis and Company		

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this report within one hundred and fifty (150) days.

A copy of the relevant Minutes of Proceedings of the Standing Committee on Industry, Science and Technology (*Meetings Nos. 59, 64 and 65 which includes this report*) is tabled.

Respectfully submitted,

Walt Lastewka, M.P.
St. Catharines

Chair

Supplementary Opinion — Canada's Competition Regime

Canadian Alliance Party
Charlie Penson
James Rajotte

Over the past two years, the Standing Committee on Industry, Science and Technology has studied the Competition Act extensively, including several private members bills, the VanDuzer report, the Committee's own interim report of June 2001, Bill C-23 and now a report from the Standing Committee. The Canadian Alliance commends the work of the members of the Standing Committee on this report and on their vigilance in studying the subject of competition policy in Canada.

Throughout these hearings, Canadian Alliance members of the Committee have consistently put forth the view that Canadian consumers and producers are best served not by a tribunal or by government interference in the marketplace, but by genuine, business-to-business competition. The focus of competition policy should not be to protect individual competitors, but should instead be to facilitate competition itself.

While the Canadian Alliance endorses the majority of this report, there are three areas where we disagree with the recommendations — specifically Chapters One, Three and Eight.

Chapter One: Competition Law cannot replace competition

Chapter One recommends that conspiracy-related crimes against competition (i.e. price fixing) should be one of the most important concerns for the Competition Bureau. It also supports the idea that there should be no special rules for specific industries within overarching framework law.

In the opinion of the Canadian Alliance, the underlying theme of market regulation contained in Chapter One is fundamentally flawed. The Liberal party's policy of tinkering with competition law and regulating the market place cannot replace the need for a healthy business environment.

The report acknowledges the monopoly-creating distortion of government policies, such as foreign ownership rules, which act as barriers to entry in the airline and retail book industries. Canada's small domestic market and large geography are usually used as justification for regulation, but the Canadian Alliance believes that these problems have been compounded by the Liberal government's approach to industrial policy. There are too many sectors in the Canadian economy that escape market forces — telecommunications, wheat marketing, and transportation being examples. It

is far better to have a proper business and tax environment for many competitors than regulation for a few.

Direct government interference in these sectors has resulted in reduced competition. The Liberal's reaction is not to reduce regulations, but to compensate by amending the Competition Act. This approach compromises competition law and does not facilitate competition. For example, the government has amended the *Competition Act* to regulate the airline industry using cease and desist powers, monetary penalties and a consumer complaints referee. Yet, all these changes cannot discipline Air Canada like a competitive marketplace would. In addition, framework law such as the *Competition Act* is not the right place to regulate industry.

There is a belief that certain industries must be protected from foreign ownership or interference, but at what cost to the Canadian consumer? The National Energy Program made no sense for the Canadian oil industry and the Canadian Alliance suggests that mandated national ownership is not advantageous for other industries. Even if the situation could be corrected completely by the *Competition Act*, which is doubtful, it would certainly cost much more for the same result a market solution would produce.

In recent years, the Competition Commissioner has approved large-scale mergers in the airline or retail book industry, with caveats that certain assets be sold to other interests. In both cases, the deadlines passed with no prospective buyers coming forward due to government-imposed domestic-ownership rules. The end result in both industries has been a more concentrated monopoly and less choice for the Canadian consumer.

The Canadian Alliance therefore recommends:

The Liberal government and the Minister of Industry should designate business-to-business competition as one of its highest priorities by making a concerted effort to reduce regulation and government interference in the marketplace.

Chapter Three — Delays at the Competition Tribunal

Chapter Three attempts to deal with difficulties at the Competition Tribunal. The Canadian Alliance would like to call attention to undue delays in reaching a final decision. The abuse of dominance case that WestJet and now defunct Canada 3000 (CanJet) brought against Air Canada case is certainly an example where justice delayed is justice denied. This case will play a part in determining the future of the Canadian airline industry, and yet Air Canada has managed to secure two six-month adjournments. At present, the case is scheduled to resume in Fall 2002 — a full two years after the Air Canada seat sale at issue had taken place.

The Canadian Alliance is very concerned about these developments. Not only is Air Canada not being held accountable for its actions, but much needed clarity on competition rules has been put off again. Continuing ambiguity discourages new entrants into the market. Delays in the process mean that it is very difficult to entice investors to put money into new passenger air carriers.

The Canadian Alliance therefore recommends:

That the Competition Tribunal should increase its efforts to ensure cases brought before it are heard in a timely manner.

Chapter Eight — Vertical Integration in the Oil and Gas Retail Industries.

Chapter Eight is particularly troublesome because the experts convened in preparation for this report did not raise the relationship between vertically integrated corporations and their independent retailers. Indeed, this Chapter is essentially based on one association's point of view and from testimony delivered in October 2001 when the association appeared before the Committee's study of Bill C-23.

The inclusion of this issue in the Committee's report serves to highlight the Liberal government's predisposition to politicize competition law and policy.

It is the opinion of Canadian Alliance members of the Committee that the recommendation to clarify the Bureau's guidelines with respect to Section 75 is not constructive. There are times when scarcity methods of allocation are necessary and retailers should not be able to use private access to leverage their contracts. The Canadian Alliance believes that the Competition Act should not interfere with contract law and these types of complaints would be better dealt with under Section 79 (abuse of dominance).

NDP Dissenting Opinion
Bev Desjarlais, MP Churchill, NDP Industry Critic

Introduction

The Majority Report focuses exclusively on fine-tuning Canada's existing competition laws and makes recommendations to that effect. What the Committee has failed to recognize is that competition laws, while important, are not the be all and end all of competition policy.

Due to its narrow focus, the Majority Report does not consider the implications of other government policies on Canada's overall competitive framework. Tinkering with competition laws, as this Report recommends, will have little impact on competition in Canada without addressing the broader policies government policies that undermine competitive markets.

The Social Benefits of Competitive Markets

It is worth underlining that social democrats support the establishment of competitive markets as a fundamental social good unto itself. Our history in the twentieth century has proven, beyond any doubt, that competitive market economies deliver better, more prosperous, more comfortable and fulfilling lives for citizens than any of the anti-market alternatives. Competitive markets maximize our prosperity by encouraging entrepreneurship and efficiency and by widening consumer choice.

The Liberals and the other right-wing parties talk incessantly about the benefits of markets. Unfortunately, all this talk is merely a smokescreen for policies that distort markets and promote monopoly at the expense of competition.

Perfect Competition

It should go without saying that competition is the basis of a properly functioning market. Economists evaluate the competitiveness of a given market against an idealized model of perfect competition. Perfect competition requires: 1) that buyers and sellers have all the information they need to make informed choices; 2) that there are enough buyers and sellers to prevent any one actor from influencing the market; 3) homogeneous products; 4) that there are no barriers to market entry; and 5) perfect mobility of production factors.

Eliminating Distortion

In real life, markets never achieve the ideals of perfect competition. Any real life factor that interferes with one of the five assumptions of perfect competition is a market distortion. The fewer distortions there are in a given market, the more its outcomes benefit society. Conversely, when markets are distorted, the benefits of competition are reduced or negated. Thus, the object of our government's competition policy should be to eliminate and/or mitigate market distortions.

Regulation vs Distortion: How the Right Distorts Competition

The political right has built a false mythology about markets. This mythology holds that all government regulation is, by definition, a market distortion. It follows from this that removing regulations removes distortions and moves markets closer to perfect competition. The Liberal government uses this ideological approach to justify deregulating everything they possibly can.

The problem with this approach is that regulation is <u>not</u>, by definition, a market distortion. Sometimes it is, but most government regulations actually promote competition by <u>reducing</u> market distortions, thereby making markets <u>more</u> competitive. This is due to the fact that, in the real world, markets have built in distortions. Effective regulations eliminate or mitigate these distortions and make markets more competitive.

Real Life vs Ideology: The Repeated Failures of Deregulation

Without sufficient regulation to eliminate or mitigate distortions, many markets inevitably become, to a greater or lesser degree, anti-competitive, inefficient and harmful to consumer choice. The kinds of markets that are prone to these outcomes when deregulated are those that, structurally, are the furthest from the ideal of perfect competition. The more distortions a market has in its unregulated state, the more anti-competitive it is in the absence of corrective regulations.

In our experience with deregulation in North America, markets with severe barriers to entry and limited numbers of sellers have consistently been the most failure prone when deregulated. Examples of such industries include the airline industry, electricity and health care.

Canada's airline industry is a striking example of an industry in which government deregulation has increased market distortion, leading to a single-airline monopoly. This is because the airline industry is, structurally, so far from the ideal of perfect competition that, in the absence of regulations to correct its distortions, it rapidly trends toward the elimination of competition. It has enormous barriers to market entry and far too few sellers to prevent market manipulation. For consumers, the end result of deregulation

has been the elimination of choice and higher air fares, the opposite of what the government promised when it deregulated the industry.

Outcomes have been similarly negative in the electricity and health care sectors. Jurisdictions that have deregulated electricity markets, such as California and Alberta, have experienced monopolistic price manipulation and, in the case of California, deliberate manipulation of energy supplies that led to blackouts.

America's supposedly free market health care system is, in fact, demonstrably less efficient than Canada's highly regulated system. The American system is also highly intrusive into personal medical decisions. Private insurance companies routinely second guess treatments and prevent Americans from switching doctors. Thus, Canada's highly regulated health care system delivers the benefits of competition, greater efficiency and choice, better than America's less regulated model.

When confronted with the real life failures of their mythology, the Liberal government and others on the political right respond with a convenient tautology. Any time deregulation fails, they simply claim that they did not deregulate enough and use this to justify further deregulation that further distorts the market. This refusal or inability to grasp when cold hard reality contradicts theory is classic ideological behaviour.

How Regulation Promotes Competition

All markets have built in distortions that reduce or negate the benefits of competition. Economists recognize that perfect competition is an unattainable ideal. Regulation promotes competition by eliminating or mitigating market distortions.

For an example of how regulation eliminates market distortion, look no further than your local supermarket. The government imposes very strict labelling regulations on most supermarket products to make sure consumers have information on nutritional factors and price per unit. Since consumer information is one of the requirements of perfect competition, these regulations eliminate a market distortion and help the market function more efficiently. The world is full of similar examples of regulations that expedite commerce, like government regulations of weights and measures and enforcement of standards and labelling on other products, like textiles and consumer durables.

Regulations can also mitigate market distortions to reduce their harmful effects on competition. Let us return to the example of the airline industry. No regulations can eliminate the barriers to market entry, such as the prohibitive start-up costs and the limitations of the supporting infrastructure like airports and air traffic control resources. However, more effective regulations to prevent the Air Canada monopoly from using its market power to systematically destroy all competition could at least mitigate the distortions inherent in this market.

New Democrats, New Vision for Competition

Canada's New Democrats propose a new approach to competition policy, beginning from the assertion that government has a positive role to play in promoting competition by eliminating and mitigating market distortions. This would mean a departure from the dominant mythology that government regulation is automatically distorting.

While New Democrats do not oppose the minor tinkering proposed by the Majority Report, we consider the report inadequate because it is constrained by its narrow focus. There is no discussion of, for example, the role that consumer rights play in competition policy. Well-informed consumers are a necessary part of a healthy competitive market, and one of the requirements for perfect competition, yet the Liberal government continues to ignore growing public demands for more information on the labels of consumer products.

New Democrats have been at the forefront of campaigns for mandatory labelling of genetically modified foods and changes to the Textile Labelling Act that would tell Canadian consumers whether or not the clothes they buy are produced with Third World child labour. By refusing to make this information available to consumers, the Liberal government is deliberately protecting the market distortions created by this lack of information. In so doing, they contradict their stated support for competitive markets and expose their real agenda — to protect companies with existing market power at the expense of new entrepreneurs and competitors who would offer the public a wider range of choices.

Labelling is just one example of an area where the Liberal government's ideologically driven antipathy to regulation results in less competition and choice. Another example is their headlong rush to deregulate industries, like the airline industry, which contain major structural distortions that require regulation to prevent natural monopolies from taking hold. The result of their "deregulate everything" approach is less competition, the rewarding of inefficiency, less choice and higher prices for consumers. The only winners are companies that already have market power, which are free to abuse their dominant market positions. The losers are consumers, smaller and newer businesses, entrepreneurs and society as whole, which loses out on the benefits of a dynamic and innovative economy.

When New Democrats challenge the Liberal government's ideological refusal to promote competition in the economy, the government typically responds with unfounded accusations that the NDP is an enemy of business and enterprise. Nothing could be further from the truth. We do not call for massive government intervention in the economy, but rather a balanced approach focused on promoting healthy competitive markets. Indeed, the real enemies of enterprise are the anti-competitive policies of the government that promote and protect inefficient monopolies, gouge consumers and squeeze the innovation out of our economy by blocking competition from newer, smaller and more dynamic businesses.

MINUTES OF PROCEEDINGS

Tuesday, April 9, 2002
(*Meeting No. 74*)

The Standing Committee on Industry, Science and Technology met *in camera* at 9:15 a.m. this day, in Room 308, West Block, the Chair, Walt Lastewka, presiding.

Members of the Committee present: Larry Bagnell, Stéphane Bergeron, Walt Lastewka, Serge Marcil, Dan McTeague, James Rajotte, Andy Savoy and Paddy Torsney.

Acting Member present: Cheryl Gallant for Charlie Penson.

In attendance: *From the Library of Parliament*: Dan Shaw and Geoffrey P. Kieley, Research Officers.

Pursuant to the Committee's mandate under Standing Order 108(2), the Committee resumed consideration of the Competition Law and Policy *(See Minutes of Proceedings, Tuesday, December 4th, 2001, Meeting No. 59)*.

It was agreed, — That pursuant to Standing Order 109, the Committee request that the Government table a comprehensive response to this report within one hundred fifty (150) days.

It was agreed, — That the Chair be authorized to make such typographical and editorial changes as may be necessary without changing the substance of the Draft Report to the House.

It was agreed, — That the Draft Report (as amended) be concurred in.

Ordered, — That the Chair present the Report (as amended) to the House at the earliest possible opportunity.

It was agreed, — That in addition to the 550 copies printed by the House, an additional 1000 copies of the Report be printed in a tumble format.

It was agreed, — That a News Release be issued.

It was agreed, — That a News Conference be held upon presentation of the Report.

It was agreed, — That the Committee express its appreciation for the professionalism and excellent work of Daniel Shaw and Geoffrey Kieley, Research Officers, Library of Parliament and to Norm Radford, Clerk Committees Directorate.

At 11:00 a.m., the Committee adjourned to the call of the Chair.

Normand Radford
Clerk of the Committee