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The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner

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I. INTRODUCTION

Canada's competition law consists of a bifurcated model with separate statutory bodies for enforcement and adjudication. One agency—the Competition Bureau, which is headed by the Commissioner of Competition—investigates potential anti-competitive activity, and a separate decision-making body—the Competition Tribunal—performs the adjudicative function.¹ Over the past several years, however, the functions carried out by the Commissioner, supported by the Competition Bureau, have been expanding in terms of their significance to businesses. Meanwhile, the role of the Competition Tribunal, partly as a result of legislative amendments, has been diminished in relative terms. As the roles of the Canadian competition law institutions continue to evolve, it will be important for policymakers and stakeholders to continue to assess whether the Canadian framework achieves the right balance: enabling mergers and other business conduct to be reviewed and resolved in an efficient, effective, and time-sensitive manner, while ensuring that such review and case resolution maintain important principles of procedural fairness.

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1. As explained later in this paper, the Competition Tribunal was created for adjudication of matters pertaining to mergers and civilly reviewable practices. Superior courts of criminal jurisdiction continue to carry out the adjudicative function for cases that concern the criminal provisions of the Competition Act.

This paper explores these issues by first describing, in Part II, the institutional framework used for Canadian competition law. Part III of this paper explains how the roles of the Competition Bureau and the Commissioner have evolved over the past several years due to factors such as the desire for businesses to negotiate rather than litigate, especially in merger cases, and a number of recent important legislative changes. This paper concludes by offering some suggestions for finding the right balance between an effective competition law enforcement regime and due process principles.

II. THE CANADIAN INSTITUTIONAL FRAMEWORK FOR COMPETITION LAW

This Part will briefly address the history of competition law in Canada, and then explain the structure and function of the current framework.

A. Historical Development of Competition Law in Canada

Competition law enforcement has a long history in Canada dating back to 1889, when a predominantly criminal law approach was applied primarily for federal constitutional reasons. The criminal law approach, set out for instance in the 1910 Combines Investigation Act, was not very effective in some areas such as merger review.² Prior to reforms in 1976 and 1986, those accused of violating Canadian competition law were entitled to the criminal law standard's presumption of innocence, and the Crown (the prosecutor in Canadian criminal procedure) had to prove contravention of the law, including *mens rea*, beyond a reasonable doubt. With this heavy burden of proof on the Crown, relatively few cases proceeded to court, except for cartel and price maintenance cases, and many competition law prosecutions failed. By way of example, proving that a merger, with requisite *mens rea*, contravened the criminal provision was an excessive burden. The result was a paucity of jurisprudence for the nineteenth and most of the twentieth century, except for a number of cartel and resale price maintenance cases.³

This led to calls for substantial reforms to the system, which were initially made with legislative amendments in 1976 that created a new civilly reviewable class of offenses and a quasi-judicial tribunal called the Restrictive Trade Practices Commission. Building on the 1976 amendments, Canada's Competition Act in its present form was largely

2. Combines Investigation Act, 1910 S.C., ch. 9 (Can.).

3. BRIAN A. FACEY & DANY H. ASSAF, COMPETITION & ANTITRUST LAW: CANADA & THE UNITED STATES 3-4 (3d ed. 2006).

created in 1986. The 1986 amendments in particular made a major break from the earlier competition legislation that was based almost entirely on criminal law enforcement. While it retained the existing criminal offenses relating to agreements between competitors, price maintenance, and consumer advertising fraud, the 1986 Competition Act substantially overhauled the merger and abuse of dominance provisions, designating them civilly reviewable matters and establishing the Competition Tribunal to adjudicate such matters. It was after significant debate both in Parliament as well as among academics, industry representatives, and the bar that the new competition legislation and its attendant institutions were created and the existing approach to contemporary competition law and policy chosen.⁴ Related to that development, as a result of a successful challenge in the early 1980s to the then existing legislation's lack of sufficient separation between the investigative and adjudicative functions, there was a real concern among policymakers that the investigative and adjudicative functions should be carried out by separate bodies to avoid potential fairness issues.⁵ The Supreme Court of Canada explained this concern in *Hunter et al. v. Southam Inc.*, a unanimous decision:

[I]nvesting the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity . . . This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the Act) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state.⁶

Under the new system, the Commissioner (at the time, the statutory office was called the Director of Investigation and Research) supported by the Competition Bureau (the "Bureau") retained authority and responsibility for the investigative aspects of matters that fell under the

4. Although there were challenges to whether the federal Parliament could go beyond its criminal law power, the Supreme Court of Canada (SCC) in *City National Leasing* approved of this new approach by concluding that the federal Parliament also could enact civil competition laws under its constitutional power to regulate trade and commerce. See *Gen. Motors of Can. v. City Nat'l Leasing*, [1989] 1 S.C.R. 641 (Can.).

5. See Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25 *WORLD COMPETITION* 361, 391-92 (2002).

6. *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, 164 (Can.).

Act. Those administrative powers were set out in *Hunter et al. v. Southam Inc.*:

Under the scheme envisaged by s.10 of the *Combines Investigation Act* it is clear that the Director exercises administrative powers analogous to those of the Minister under s.231(4) of the *Income Tax Act*. They too are investigatory rather than adjudicatory, with his decision to seek approval for an authorization to enter and search premises equally guided by considerations of expediency and public policy.⁷

A specialized administrative tribunal in the form of the Competition Tribunal (the “Tribunal”) (with judicial and non-judicial members as discussed below) was created with the intention of providing an efficient and reliable mode of decision-making for civilly reviewable matters. Courts continued as the adjudicative bodies for criminal cases.

Accordingly, today, the Canadian institutional framework for competition law operates under a bifurcated model, in which separate statutory entities oversee the investigative and adjudicative functions, as opposed to an integrated agency model in which a single agency would oversee investigation and adjudication.⁸

B. Overview of the Current Canadian Institutional Framework

The institutional framework and relevant law are embodied in the federal Competition Act⁹ (the “Act”) and the federal Competition Tribunal Act¹⁰ (CTA), both of which were introduced in 1986. As described in more detail below, the Act contains both criminal and non-criminal (also known as “civil”) provisions. The Act also creates the statutory office of the Commissioner of Competition (“the Commissioner”).¹¹ The Commissioner, who is appointed by the Governor in Council (which is effectively the Prime Minister and Cabinet), heads the Bureau¹² and has statutory responsibility for the

7. *Id.* at 163.

8. Trebilcock & Iacobucci, *supra* note 5, at 362.

9. The Competition Act, R.S.C., ch. C-34 (1985).

10. The Competition Tribunal Act, R.S.C., ch. 19 (1985).

11. The Competition Act § 7.

12. The Canadian Competition Bureau website is located at <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/home>. The Bureau’s news releases usually state, (as in the one dated July 21, 2009, in relation to the consent agreement reached with Suncor Energy Inc. and Petro-Canada): “The Competition Bureau is an independent enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice.” See *e.g.*, Press Release, Competition Bureau, Competition Bureau Acts to Preserve Competition in Suncor / Petro-Canada Merger (July 21, 2009), <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03103.html> (last visited Mar. 10, 2010).

investigation of conduct that may be contrary to the provisions of the Act.¹³ Where, after investigation and assessment, the Commissioner concludes there is a likely contravention of the Act (which is not resolved), she brings the matter to either: (1) the Tribunal, a specialized administrative tribunal created for adjudication of civil matters; or (2) the provincial superior courts of criminal jurisdiction for criminal matters. Before a criminal matter comes before a provincial superior court, the Commissioner refers it to the Attorney General for prosecution.¹⁴

1. The Commissioner of Competition

Under Section 7 of the Act, the Commissioner is responsible for the administration and enforcement of the Act. The Commissioner derives her investigative powers from the general and administrative provisions (Part II) of the Act. Section 10(1) permits the Commissioner to “cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.”¹⁵ Inquiries usually follow preliminary examinations of a matter. Most inquiries commence when the Commissioner has reason to believe that a violation of the Act has occurred; inquiries must be conducted in private. This authority is accompanied by investigatory powers under section 11(1) to obtain information on *ex parte* applications. If an inquiry has been initiated under section 10 and a person or affiliate “is likely to have information that is relevant to the inquiry,” a court may order attendance or document production upon *ex parte* application by the Commissioner. Such orders have effect anywhere in Canada.¹⁶

Prior to 1952, Canada left competition law decisions to a Minister selected by the Prime Minister, usually from within his own political party.¹⁷ This model entailed a high level of political accountability, but little independent decision-making. Today, the Commissioner is

13. The Commissioner is also charged with enforcing the Consumer Packaging and Labelling Act, R.S.C., ch. C-38 (1985), the Precious Metals Marketing Act, R.S.C., ch. P-19 (1985), and the Textile Labelling Act, R.S.C., ch. T-10 (1985).

14. As discussed below, all prosecutions are brought by the Attorney General representing the Crown, prior to which there is a referral by the Commissioner. Another relatively unique feature of Canadian competition law is the fact that the Commissioner plays a role outside of the four corners of competition law enforcement. Under sections 125 and 126 of the Act, the Commissioner may, on his or her own initiative or on direction from the Minister, make representations and call evidence before federal or provincial boards, commissions or tribunals. The Competition Act §§ 125–26.

15. *Id.* § 10(1).

16. *Id.* § 11(4).

17. See Trebilcock & Iacobucci, *supra* note 5, at 364.

appointed by the Governor in Council,¹⁸ which is a cabinet level appointment, and is given a significant degree of independence to exercise her enforcement mandate. The independence of enforcement officials is essential for ensuring that the balancing of competing interests and objectives will occur in an unbiased and objective manner, guided by established legal rules and enforcement policies.¹⁹

The Commissioner is, to a very limited degree, overseen by the Minister of Industry (the "Minister"). The Minister does not oversee competition investigations, and has only limited powers to review or discontinue inquiries,²⁰ or to instruct the Commissioner to make further inquiries,²¹ but the Commissioner is ultimately responsible for the administration and enforcement of the Act. This degree of independence from government is important in that it depoliticizes enforcement decisions, reduces the risk of perceived bias, and provides consistency from one political term to the next. In this connection, as noted above, the Commissioner has the statutory authority to commence inquiries "into all such matters as the Commissioner considers necessary."²² It also is the Commissioner who decides which sections of the Act should be the subject of the inquiry, the overall scope of the inquiry, what enforcement proceedings should occur as a result of the inquiry, and to an increasing extent, the terms of resolution, if any, that may be required at the conclusion of the inquiry.

Related to the independence of the Commissioner is the need for adequate funding for the Commissioner and the Bureau.²³ The amount

18. The Competition Act § 7(1).

19. For a more detailed discussion of process issues, see Calvin S. Goldman & Joel T. Kissack, *Cross-Border Issues In Competition Policy: Lessons from the Canadian Experience*, Conference on Trade And Competition Policy, Pacific Economic Cooperation Council, Montreal, Canada (May 13, 1997) (unpublished paper, on file with author).

20. The Competition Act § 22(1).

21. *Id.* § 22(4).

22. *Id.* § 10(c). See also *Ravenshoe Services Ltd. v. Canada* (Commissioner of Competition), [2001] 15 C.P.R. (4th) 543 (F.C.) (Can.) (the Commissioner has the authority to commence and to expand inquiries; the investigatory power of section 11 does not contravene the *Canadian Charter of Rights and Freedoms* protection against unreasonable searches and seizures); *Canadian Pacific Ltd. v. Canada* (Dir. of Investigation & Research), [1997] 74 C.P.R. (3d) 65 (Can.) (an inquiry under the Competition Act does not end until the Director is satisfied that he has determined the relevant facts, sufficient for him to refer the matter to the Attorney General and the Attorney General brings charges against those individuals or corporations); *Charette v. Canada* (Comm'r of Competition), [2002] 20 C.P.R. (4th) 61 (F.C.) (Can.); *Ashley v. Canada* (Comm'r of Competition), [2006] 47 C.P.R. (4th) 379 (F.C.) (Can.) (the Commissioner cannot be forced by private parties to commence or to continue an inquiry).

23. Nearly 30 years ago, the Economic Council of Canada remarked that "[as] a form of social control of industry, well-working competitive markets supported by competition policy are

of resources devoted to competition enforcement has to be constantly re-evaluated to account for changes in markets, government action such as deregulation, which may increase the Commissioner's mandate, and other factors. Increasing demands on the Bureau's resources have led to some comments that increasing the Bureau's resources and ensuring the Commissioner has control of those resources is necessary to ensure the Bureau can continue to effectively fulfill its mandate in a timely manner.²⁴ This may be particularly so in light of the recent amendments to the Competition Act passed in March of 2009,²⁵ which established a supplementary information request process for mergers, similar to the Hart-Scott-Rodino filing requirement and second request process in the United States. The 2009 amendments will inevitably require more resources for the Mergers Branch of the Bureau to allow it to complete such reviews in a properly informed manner without unnecessarily delaying proposed mergers. Moreover, as the Commissioner's role is evolving toward one that necessitates in our view additional steps to ensure process fairness, particularly in the resolution of merger cases, additional funding for such steps may also be required; for example, increasing the staff and advisers, including counsel, available to the Commissioner may be needed to assist the Commissioner's responsibilities in this context, as discussed below.

2. The Competition Tribunal

In Canada, cases involving enforcement of the civil provisions of the Act, such as mergers, refusals to deal, abuses of dominance, and other anticompetitive acts (termed "civilly reviewable practices") are heard by the Tribunal upon application by the Commissioner. The Tribunal was created and designed to combine business, economic, and legal

remarkably cheap by comparison with alternatives such as direct regulation." ECONOMIC COUNCIL OF CANADA, INTERIM REPORT ON COMPETITION POLICY 193 (1969).

24. For example, in the 1996 Report of the Consultative Panel formed by the Department of Industry Canada to consider proposed amendments to the Act, the Panel remarked that "cost recovery measures should be explored as an alternative means of addressing resource constraints, particularly if it could be assured that the Bureau would directly benefit from the imposition of any such fees that might be introduced." DEPT. OF INDUSTRY CANADA, REPORT OF THE CONSULTATIVE PANEL ON AMENDMENTS TO THE COMPETITION ACT 33 (1996). The Commissioner's mandate has increased since 1996 as a result of continued deregulation, the addition of other statutes to the Commissioner's mandate, and broader merger powers as discussed below. *See also* Calvin S. Goldman, Robert E. Kwinter & Crystal L. Witterick, *Enhancing the Efficiency, Effectiveness and Accountability of the Competition Bureau: A Proposal for Change*, Remarks at the Competition Law Roundtable of The Law and Economics Programme at the University of Toronto 7-9 (Dec. 13, 2002).

25. *See* The Competition Act §§ 114, 123.

expertise.²⁶ The Supreme Court of Canada remarked in *Canada (Director of Investigation and Research) v. Southam Inc.*:

The aims of the Act are more “economic” than they are strictly “legal.” The “efficiency and adaptability of the Canadian economy” and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested it with responsibility for the administration of the civil part of the *Competition Act*.²⁷

Accordingly, the Tribunal is comprised of no more than six judicial members selected from the Federal Court as well as no more than eight experts appointed by the Governor in Council.²⁸

Questions of fact, or of mixed law and fact, are determined by all of the members sitting in the proceedings, while pure questions of law are determined only by the judicial members.²⁹ The Tribunal has all such powers as are vested in a superior court of record, including with respect to the examination of witnesses and the enforcement of its orders,³⁰ to make rules,³¹ to award costs,³² and to order a variety of prohibitions or remedial orders.³³ In fact, the remedial powers of the Tribunal are quite broad, and may include, in the case of anticompetitive practices, the power to order such actions “as are reasonable and as are necessary to overcome the effects of the practice.”³⁴ The Tribunal may also dissolve mergers or order divestitures³⁵ and, in the case of abuse of dominance cases, as a result of the 2009 amendments, impose administrative monetary penalties of up to C\$10 million on corporations.³⁶ Breach of a Tribunal order may be punished by contempt proceedings before a judicial member³⁷ or by prosecution either by summary conviction or by indictment.³⁸ Appeals

26. FACEY & ASSAF, *supra* note 3, at 31.

27. *Canada (Dir. of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, ¶ 48 (Can.).

28. The Competition Tribunal Act, R.S.C., ch. 19, § 3(2) (1985).

29. *Id.* § 12.

30. *Id.* § 8(2).

31. *Id.* § 16.

32. *Id.* § 8.1.

33. *Id.* § 9(5).

34. The Competition Act, R.S.C., ch. 19, § 79(2) (1985).

35. *Id.* § 92.

36. *Id.* §§ 74.1, 79.

37. The Competition Tribunal Act § 8(3).

38. The Competition Act § 66.

from the decisions of the Tribunal go directly to the Federal Court of Appeal and from there to the Supreme Court of Canada.³⁹

From a substantive perspective, the civil provisions of the Act, which the Tribunal enforces and are contained in Part VIII, can be divided into mergers and other (non-merger) civilly reviewable practices. With respect to mergers, if a proposed (or a completed) transaction is likely to give rise to a substantial prevention or lessening of competition in a market in Canada, then the Commissioner may apply for a remedial order (such as an injunction or an order to divest specified assets or shares) to the Tribunal pursuant to the merger provisions of the Act.⁴⁰

Additional provisions in the Act deal with certain civilly reviewable practices that are not objectionable *per se*, and are therefore not prohibited. However, if certain conditions are fulfilled—notably, where the conduct has a substantially negative effect on competition—the Commissioner may refer the matter to the Tribunal for review. If the Tribunal finds that the statutory conditions are met, it may issue an order prohibiting the continuance of the offending conduct and, in some cases, make additional orders to overcome the anticompetitive effects of the conduct. These include: abuse of dominance, price maintenance, exclusive dealing, tied selling, and other practices included in the civil provisions of the Act. A more detailed description of the key civil provisions is provided in Appendix A.

3. Enforcement of Criminal Provisions

Criminal matters under the Act, such as conspiracy, bid-rigging, and certain false or misleading representations, are referred by the Bureau to the federal Attorney General for prosecution through provincial superior courts of criminal jurisdiction.⁴¹ In criminal matters, the decision to lay charges will be ultimately up to the Attorney General.⁴² In practice,

39. The Competition Tribunal Act §13. But an appeal on a question of fact alone requires leave of the Federal Court of Appeal. *See id.* § 13(2) (1985).

40. If a proposed transaction meets certain tests relating to (i) the combined size of the parties and their respective affiliates, and (ii) the size of the business being acquired, then the pre-merger notification provisions of Part IX of The Competition Act require that completion of the transaction be delayed until certain information concerning the parties and their affiliates has been filed and a prescribed waiting period has expired.

41. Criminal prosecution by the Attorney General may proceed simultaneously with continuing investigations by the Bureau. *See Canadian Pacific Ltd. v. Canada (Dir. of Investigation & Research)* [1997] 74 C.P.R. (3d) 65, ¶ 7 (Can.).

42. The Commissioner may recommend to the Attorney General that individuals or firms be granted immunity as a result of their cooperation in the detection and investigation of criminal offenses, but only the Attorney General is able to grant immunity from prosecution.

however, the two agencies work closely together and the Attorney General will often follow recommendations by the Commissioner.⁴³

As noted above, significant amendments to the conspiracy provisions of the Act were recently enacted in 2009 by Canada's Parliament. The provisions of the Act dealing with horizontal agreements were amended to create a "dual-track" approach to the treatment of agreements and arrangements between competitors. While most other amendments to the Act came into force on March 12, 2009, the amendments to the provisions dealing with agreements between competitors came into effect on March 12, 2010.

The consequences of violating the criminal provisions of the Act can be severe. The Act makes certain types of criminal offenses punishable by fines in the discretion of the court and/or imprisonment for periods of up to fourteen years. In this regard, it is important to note that once the amendments to the conspiracy provisions of the Act come into force in 2010, potential fines for criminal conspiracies will increase from \$10 million to \$25 million and the maximum term of imprisonment will increase from five to fourteen years.⁴⁴

4. Limited Scope for Private Actions

The extent to which private parties participate in competition law enforcement in Canada has been the subject of much debate. On the one hand, private actions may contribute to competition law enforcement, free up government resources, and produce a body of jurisprudence and reasoned judgments necessary to explain for businesses how the rules might apply to specific and concrete facts of each case. On the other hand, increased scope for private actions raises the prospect of frivolous "nuisance suits," a potential chilling effect on business development, and overly complex economic issues being heard by unspecialized courts.⁴⁵

Historically, private parties have not played a significant role in Canadian competition law enforcement. In the United States, private actions before general civil courts for violations of antitrust laws account for the majority of all formal enforcement actions. The United States' approach has been fostered by a combination of treble damages, contingency fees, one-way cost rules, and liberal class-action

43. See FACEY & ASSAF, *supra* note 3, at 30.

44. The Competition Act, R.S.C., ch. C-34, §§ 45(1), 45(2) (1985) (effective Mar. 12, 2010).

45. Jack Quinn, Navin Joneja & Prakash Narayanan, Public Good Through Private Action – Enhancing Compliance Through Private Enforcement 7, Remarks at the 2006 Competition Law and Policy Forum at the Northwinds Professional Institute (Apr. 24–26, 2006).

procedures.⁴⁶ In Canada, by comparison, private actions were relatively rare until recent years. Canada has, however, been opening the door to increased private participation in competition law enforcement, particularly in relation to class actions alleging damages for cartel cases.

Section 36 of the Act provides for the ability to recover damages to compensate for harm suffered as a result of conduct that contravenes a criminal provision of the Act contained in Part VI, such as price-fixing and bid rigging (or conduct that is contrary to an order of the Tribunal). While a criminal conviction is not necessary to pursue a claim under section 36, such a conviction would constitute *prima facie* evidence in a civil suit.⁴⁷ With respect to the civil provisions, there are no private rights of action for damages for conduct contrary to the mergers, abuses of dominance, or other civilly reviewable trade practices provisions. However, 2002 amendments to the Act created limited rights of private access to the Tribunal for certain provisions.⁴⁸ In this regard, section 103.1 of the Act permits any person to apply to the Tribunal for leave to make applications for remedial orders (not damages) with respect to refusals to deal, exclusive dealing, tied selling, and market restriction. The most recent 2009 amendments added price maintenance to this list.⁴⁹ In addition to these statutory rights, private parties may also have recourse to common law actions, such as the torts of conspiracy, inducing breach of contract, or unlawful interference with economic relations.⁵⁰

Accordingly, unlike in some other jurisdictions, especially the United States, in Canada the Commissioner obtains little assistance from private antitrust litigants with respect to antitrust law enforcement. Except for the limited rights of private action, under sections 36 and 103.1 of the Act, it remains the sole prerogative of the Commissioner to investigate violations of the provisions of the Competition Act and to determine whether a case should be brought. It should be noted that also unlike the United States, there are no provincial or state antitrust authorities that actively pursue cases in conjunction with their federal counterpart.

46. See Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461 (1996).

47. FACEY & ASSAF, *supra* note 3, at 481.

48. Bill C-23, An Act to Amend the Competition Act and the Competition Tribunal Act, 1st Sess., 37th Parl., 2001, which came into force in June 2002.

49. See The Competition Act § 103.1(7.1).

50. FACEY & ASSAF, *supra* note 3, at 484–85.

III. EVOLUTION OF THE ROLE OF THE COMMISSIONER

Even though Canada uses a bifurcated model, it is clear that the role of the Commissioner is critically important to the institutional design, given her central role and increasing mandate over enforcement and case resolution. In addition, there are a number of other features of the Canadian fabric that have progressively enhanced the importance of the Commissioner's role since the current institutional framework was largely established in 1986. Among other things, these include: the desire of many parties to reach negotiated resolutions to business conduct cases, particularly in the merger context; legislative changes to the consent order process; more recent amendments to the merger review process and criminal conspiracy provisions; and the proliferation of agency enforcement guidelines, which are widely viewed as expressions of the Bureau's enforcement approach. This Part examines these factors and their impact on the institutional framework in Canada, pointing out that the Commissioner's role is in some respects evolving to include a *de facto* decision-making function rather than solely an investigative one.⁵¹

A. *Desire to Pursue Negotiated Resolutions*

Businesses in Canada (and elsewhere) place a significant emphasis on a reasonable level of predictability and certainty in order to arrange their affairs. This is true particularly in the merger context: protracted delays coupled with the use of the litigation process (which may include a public adversarial setting) are not generally favored by parties planning a proposed transaction.⁵² Businesses usually make every reasonable effort to predict with relative specificity: whether or not a particular transaction may raise significant substantive competition law concerns; what type of information needs to be furnished to address concerns that may be raised; and ultimately if approval will be granted, approximately when, and under what remedial terms, if any, it will be granted. This type of relative certainty is critical to business planning, especially in the merger context. Mergers are different than other business conduct as they often involve "sea changes" to corporations or at least major changes to corporations' businesses as well as the positions of many executives. Mergers are also usually time-sensitive: the longer they are "in limbo" and the parties are unable to fully

51. Trebilcock & Iacobucci, *supra* note 5, at 374.

52. See Calvin S. Goldman, *The Merger Resolution Process Under the Competition Act: A Critical Time In Its Development*, 22 OTTAWA L. REV. 1, 11 (1990).

integrate and forward plan, the greater the anxiety of many executives, coupled with loss of potential synergistic integrated business revenues.

Conversely, unnecessary delays and lack of predictability of the enforcement process can add to uncertainty, which may have a chilling effect on potentially pro-competitive business activity. The possible consequences of excessive uncertainty in enforcement policy may include: the inhibition or prevention of innovation and the achievement of potential efficiency gains; limitations on growth and the creation of new businesses; inhibiting and distorting international investment; and the reluctance of business persons to ultimately work with government in the creation of new structures used to carry on business. These factors are not unique to mergers within, or that affect, Canada.

Despite the fact that the Canadian merger review process is of relatively recent design (i.e., less than twenty-five years old), we believe that the increasing dynamism of markets generally have created unanticipated pressures on the timeliness of enforcement decisions. We do not think that the impact of this change in Canadian markets is limited to merger review; it has implications for enforcement decisions that the Commissioner must make under the Act generally. In postulating that Canadian markets have become more dynamic, we refer to an increase in the rate of change in market and competitive conditions. The speeding-up in the evolution of competitive conditions increases pressures for management because it amplifies the risk of misreading or otherwise missing out on new market developments, risks, and opportunities. If this tendency for markets to evolve more rapidly continues, it will create increased pressure for change in the design of the functions of competition authorities, including the Commissioner and the Bureau.

Therefore, in the merger context, parties usually prefer to have discussions and dialogue with the Bureau to determine at an early stage whether potential competition concerns can be resolved. If the Bureau's concerns are not readily addressed by additional information, submissions, or by altering or "fixing" the scope of the proposed merger, then the parties will usually at least attempt to negotiate a mutually acceptable remedy with the Commissioner, rather than proceed to litigation, which can be relatively uncertain, time-consuming, costly, and public. Time and uncertainty factors are real considerations for many businesses deciding whether to litigate or resolve a merger in accordance with terms acceptable to the Commissioner. The fact that parties have little desire to litigate cases, particularly in the mergers area, due to the business uncertainty that litigation inherently entails, clearly gives the Commissioner significant

bargaining leverage in negotiation discussions. As discussed below, this additional authority should be exercised in a procedurally fair manner.

We are not suggesting that there will no longer be contested merger cases in Canada. There is always a litigation contingency, particularly in certain types of merger cases. For example, there may be circumstances where parties can close the transaction, sometimes on a hold separate basis, and then take the time to engage in contested proceedings. That likelihood increases when parties are able to isolate one or two issues to be determined. However, in our view, the incidence of contested merger cases will still be exceptional for all the reasons summarized above.

The unwillingness of parties to take their disputes to the Tribunal is reflected in the numbers. Reportedly, about 99% of all mergers notified to the Bureau have been resolved through negotiation with the Bureau without the involvement of the Tribunal.⁵³ In 2008, the Tribunal held fourteen proceedings, seven of which concerned either the registration or variance of a consent agreement and therefore were not contested proceedings. Five others dealt with leave applications under the refusal to deal or exclusive dealing provisions (only one of which was granted) and two dealt with deceptive marketing practices cases. Similarly, in 2007, the Tribunal held ten proceedings, five of which concerned either the registration or variance of a consent agreement. Three others concerned leave applications under the refusal to deal or exclusive dealing provisions.⁵⁴ There has been only one contested merger case before the Tribunal over this recent time period (the *Labatt-Lakeport* merger), even though the Bureau examined approximately 300 mergers in 2007–2008 and approximately 340 mergers in 2006–2007.⁵⁵ Indeed, since 1986, there have been only a handful of fully contested merger cases heard by the Tribunal.

53. Trebilcock & Iacobucci, *supra* note 5, at 374.

54. Information on all cases brought before the Tribunal can be found at the Canadian Competition Tribunal website, <http://www.ct-tc.gc.ca/CasesAffaires/CasesDateDecided-eng.asp> (last visited Mar. 10, 2010).

55. See COMPETITION BUREAU, ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2008, at 65 (2008), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Annual-2008-web-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Annual-2008-web-e.pdf/$FILE/Annual-2008-web-e.pdf); COMPETITION BUREAU, ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2007, at 37 (2007), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/annual-report-2006-2007-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/annual-report-2006-2007-e.pdf/$FILE/annual-report-2006-2007-e.pdf).

B. Legislative Changes to the Process for Negotiating Consent Orders

Prior to 2002, in reviewing a proposed negotiated remedy in the form of a proposed consent order between the Commissioner and the parties whose conduct was at issue, the Tribunal would undertake a substantial approval process wherein it would examine the evidence and decide whether or not the proposed consent order, as agreed to by the Commissioner and the parties, would eliminate concerns regarding the anticompetitive effect of the practice at issue. The consent order process was described in *Director of Investigation and Research v. Air Canada*⁵⁶ as follows:

It is clear that the Tribunal's constituent legislation does not contemplate that the Tribunal will be a mere rubber stamp. The legislation, for example, does not provide for the automatic filing, by the Director, of settlements which he reaches with respondents so that they automatically become orders of the Tribunal. . . . The Tribunal is composed of judicial members and of non-judicial members who have special expertise in areas relevant to the work of the Tribunal. It is required to sit in panels of three, even for the purpose of granting consent orders. It is clear that Parliament intended the Tribunal to exercise an independent judgment with respect to such orders*At the same time, the legislation sends a very clear message to the Tribunal that it is not anticipated that the Tribunal should take a detailed role in the crafting of consent orders.*⁵⁷

The Tribunal also took into account views of third party interveners in connection with its review of a proposed consent order; some of those interventions were in writing, others were both in writing and in oral argument made by counsel before the Tribunal.

In *Canada (Director of Investigation & Research) v. Imperial Oil Ltd.*,⁵⁸ the Tribunal made it clear that “[P]roposals which the Director puts forward are treated with initial deference. There is an initial assumption that they will accomplish what the Director asserts they are designed to do.”⁵⁹ Under this process, the Tribunal, as an independent adjudicative body, ultimately played a relatively active role; in practice, the Tribunal's reviews may have gone too far. For example, the Tribunal declined to grant the proposed consent order in the very first proceeding brought before it, the *Palm Dairies* case, which involved the proposed purchase by four major western dairy co-operatives of their

56. *Dir. of Investigation and Research v. Air Canada*, [1989] 27 C.P.R. (3d) 476, 482 (Can.).

57. *Id.* at 100–01 (emphasis added).

58. [1990] 31 C.P.R. (3d) 277 (Comp. Trib.).

59. *Id.* (emphasis added).

major competitor.⁶⁰ The Tribunal expressed concerns about the perpetual and mandatory nature of the proposed arrangement and the effectiveness of some of the terms contained in the proposed order. In that case, the Tribunal stated:

Under the Act the Director has wide discretion to determine what acquisitions or mergers should be challenged. He has authority under section 74 to approve acquisitions and mergers without involvement of the Tribunal. But once the Director has invoked the adjudicative powers of the Tribunal, the Tribunal has a duty to determine the nature of the anti-competitive conduct and to fashion an order *which in its judgment* serves the purposes of the Act. Or, at the very least when the Tribunal is asked to issue a consent order it is incumbent on it *to satisfy itself* that that order will *be effective to accomplish, with due regard to the circumstances of the case, the objectives of the Act.*⁶¹

The Tribunal also noted that counsel for the Director argued that:

[I]t is essential in order to accomplish the purposes of the *Competition Act* that the Tribunal be amenable to issuing consent orders negotiated by the Director and the respondents. This last point, it is argued, is based on the fact that *Parliament's intention was clearly to encourage the negotiation of consent orders. . . . Consent orders save the parties the attendant costs of protracted litigation; they are more acceptable to respondents who do not, from a business point of view, find it easy to tolerate the lengthy delays which can be imposed upon them by the Director in pursuing cases before the Tribunal (and through the appeal courts); consent orders save the Tribunal, itself, time and cost.*⁶²

From the end of 1986 until the early part of 1989, no further applications for consent orders were made to the Tribunal; the consistent reaction of counsel at the time was one of reluctance to pursue consent order discussions because of the uncertainty generated in large part by the *Palm Dairies* decision.⁶³ And notwithstanding the Tribunal's statement about "initial deference" in *Canada (Director of Investigation & Research) v. Imperial Oil Ltd.*, the consent order hearing involved many weeks of near adversarial proceedings and required the parties to substantially revise the proposed order before the Tribunal approved it in 1990. Accordingly, while the pre-2002 consent order process did hold true to the bifurcated model approach, it also

60. *Dir. of Investigation & Research v. Palm Dairies Ltd.*, [1986] 12 C.P.R. (3d) 540 (Can.).

61. *Id.* ¶ 11 (emphasis added).

62. *Id.* ¶ 16 (emphasis added).

63. Goldman, *supra* note 52, at 9, 20, 27. This occurred even though the Tribunal attempted in the *Air Canada* case, *supra* note 56, to narrow the broad review mandate it had established for itself in the *Palm Dairies* case in relation to consent orders.

signified problematic effects in the form of perceived risk of possible costly evidentiary and adversarial requirements of litigation. Parties that sought to resolve their issues through negotiated remedies lost a measure of predictability and relative expediency, which is considered essential particularly in the merger context.⁶⁴ While there indeed were a number of consent orders which were approved by the Tribunal from 1989–2000, in *Commissioner of Competition v. Ultramar Ltd.*, the Tribunal again refused to endorse a draft consent order that had been negotiated between the Commissioner and the parties; it concluded that it was not satisfied that certain terms of the draft order dealing with prices and terms of sale in the context of behavioral remedies were “sufficiently clear to be enforceable and justifiable in order to provide an effective remedy that meets the objectives of the Act.”⁶⁵ In particular, the Tribunal felt that the establishment of a maximum price and an obligation to negotiate in good faith in the draft order, without any reference to price formulae, fair market value, or other justifiable guideline for determining price, were insufficient.⁶⁶ This led the Commissioner at the time to recommend changes to the consent order process:

In February 2000, in response to the announced purchase of Coastal Canada Petroleum Inc. by Ultramar Ltd., we filed an application for a Consent Order with the Competition Tribunal. Our examination of the proposed acquisition concluded that removal of Coastal as the largest supplier of petroleum products to independent marketers in the Ottawa market would likely substantially lessen or prevent competition. To address these concerns, Ultramar agreed to a draft consent order containing several measures to ensure continued access to a competitive source of supply to the independent marketers. In addition, Ultramar agreed to refurbish and reactivate its Ottawa terminal and offer for sale the Coastal terminal in Ottawa at fair market value if it failed to abide by the terms of the Consent Order. On April 26, 2000, the Tribunal issued its decision refusing to grant the order as it was not convinced that the terms were effective or sufficiently clear to be enforceable. Following the Tribunal decision, Ultramar and Coastal decided to abandon the proposed transaction.

64. The advantage of negotiated resolutions has long been emphasized. See generally Goldman, *supra* note 52 (analyzing the consent order resolution procedure pertaining to merger review under the 1986 Competition Act). Moreover, if parties to a public resolution in the form of a proposed consent order anticipate a likely full review before an adjudicative body with active third party intervention, they may hold back their willingness to make certain concessions in order to keep something in reserve for possible additional concession before the Tribunal. This adds to further time delays and lack of reasonable predictability.

65. *Comm’r of Competition v. Ultramar Ltd.*, [2000] 6 C.P.R. 50, 2000 Comp. Trib. 4 (Can.).

66. *Id.*

As a result of the Tribunal's decision, we are considering recommending the adoption of a process of registration of consent orders similar to that provided for by section 74.12 in Part VII.1 of the *Act*, the civil track for deceptive marketing practices.⁶⁷

Accordingly, the law regarding the consent order process was significantly changed in 2002 in a manner that diminished the role of the Tribunal and, as an important corollary, effectively expanded the role of the Commissioner.⁶⁸ Pursuant to that amendment, which is in

67. Konrad von Finckenstein, Comm'r of Competition, Speech to the Annual Meeting of the Canadian Bar Association, Competition Law Section (Sept. 21, 2000), available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01200.html>.

68. In *Canada (Commissioner of Competition) v. Burns Lake Native Development Corp.*, the Tribunal stated that:

The DCO Approval Process was time-consuming, unpredictable and expensive. The Commissioner who filed applications for the approval of DCOs and parties who settled with the Commissioner would not know how long the process would take, whether there would be a hearing and, if so, whether any third parties would intervene. They also had no idea whether the terms of their settlement would be approved or whether changes to the DCO would be required. The usual benefits of a settlement which include an end to litigation, certainty about ongoing obligations and reduced costs were not features of settlements with the Commissioner because of the DCO Approval Process and, for this reason, the process was much criticized.

A report prepared by the Organisation for Economic Co-operation and Development in 2002 (OECD, *The Role of Competition Policy in Regulatory Reform — Regulatory Reform in Canada*. Paris, OECD, 2002, p. 16) includes the following statement about the DCO Approval Process:

The consent order process at the Tribunal has been problematic. All orders, including those from negotiated settlements, must be issued by the Tribunal, which is the first-instance decision-maker. The process of reviewing a proposed consent order takes at least 60 days, for publishing notice and providing an opportunity for intervention and so on. It can stretch out to 6 months, though. Moreover, the Tribunal has sometimes demanded changes to the deal that the Bureau and the parties have reached. The risk of uncertainty and delay has reportedly encouraged firms to seek more informal resolutions rather than negotiating consent orders.

[emphasis added]

An article entitled "Rethinking the Role of the Competition Tribunal" stated that, "[...] time, cost and uncertainty of consent proceedings has [...] given the Director a powerful incentive to resolve reviewable practice complaints through undertakings." (Neil Campbell, Hudson Janisch and Michael Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997) *Can. Bar. R.* 297 at p. 313)

The Current Consent Agreement Registration Process

The House of Commons Standing Committee on Industry Science and Technology (the "Standing Committee") held hearings to consider Bill C-23, which contained proposed amendments to the Act, and accepted the views of witnesses who supported the portion of the Bill which introduced registered consent agreements to replace the DCO Process. One such witness was Mr. Tim Kinnish, then Chairman of the National Competition Law Section of the Canadian Bar Association. He testified, in part, as follows:

We agree that the existing consent process has been unsatisfactory virtually from

current section 105, the Commissioner may now sign a consent agreement and file it with the Tribunal for immediate registration as an order based on terms that could be the subject of an order of the Tribunal.⁶⁹ Thus, as long as the terms are ones that could have been made by the Tribunal, the proposed terms are to be given effect as if made by the Tribunal. Upon registration, an agreement has the same force and effect as an order of the Tribunal itself.⁷⁰ Furthermore, the revised consent agreement process provides that a person directly affected by a consent agreement may apply to the Tribunal to have its terms rescinded or varied, but the Tribunal may only grant such an application “if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.”⁷¹ This very high standard significantly limits the role of third parties compared to that which existed prior to the 2002 amendment. The contrast between pre-2002 and post-2002 consent order regimes was summarized by the Tribunal in *RONA Inc. v. Commissioner of Competition* in the following manner:

Previously, the Tribunal had to consider the terms and conditions of the agreement and ensure that, at a minimum, it eliminated the substantial lessening or prevention of competition (see for example *Commissioner of Competition v. Trilogy Retail Enterprises L.P.*, 2001 Comp. Trib. 29). Under the new scheme, the consent agreement is

its inception. It is uncertain in its operation, time-consuming and costly. We support the need for reform in this area and generally support the provisions of Bill C-23 providing for the registration of consent agreements. [Standing Committee on Industry, Science and Technology, Evidence, November 7, 2001]

The subsequent amendments to the Act in 2002 increased the reliability of the Commissioner’s settlements by eliminating the DCO Process and replacing it with a “Consent Agreement Registration Process” in which the terms of settlements are incorporated in consent agreements. They are then simply registered with the Tribunal. This change has had two consequences. First, the Tribunal no longer approves the Commissioner’s settlements before they became final and second, intervenors who are directly affected no longer have an opportunity to express their concerns before the settlements are finalized. Instead, subsection 106(2) was enacted to give third parties an opportunity to persuade the Tribunal to rescind or vary the terms of the settlement after it had been finalized and registered. However, this right is circumscribed in that:

- it must be exercised within sixty days of the registration of a consent order
- it can only be exercised by “directly affected” third parties.
- it can only succeed if the third party can show that the Tribunal could not have ordered the remedies that appear in the terms of a consent agreement

Comm’r of Competition v. Burns Lake Native Dev. Corp., [2006] C.C.T.D. 16, ¶¶ 28–32 (Can.).

69. The Competition Act, R.S.C., ch. C-34, § 105(2) (1985).

70. *Id.* § 105(3)–(4).

71. *Id.* § 106(2).

simply filed with the registry of the Tribunal “for immediate registration” under subsection 105(3) of the Act.⁷²

Even if the evidence adduced before the Tribunal to obtain a consent order under the former section 105 need not have been as substantial as the evidence required, for example, in section 92 merger cases, some evidence had to be filed as provided by the *Competition Tribunal Rules*. For a consent order, the parties were required to submit an impact statement (Rule 77(1)(b)) providing “an explanation of the draft consent order, including an explanation of the circumstances giving rise to the draft order or any provision of the draft order, the relief to be obtained if the order is made and the anticipated effects on competition of that relief (Rule 77(3)).⁷³

Under the current scheme, the Tribunal sees none of the evidence supporting the Commissioner’s decision to deny a merger without a consent agreement and is not to engage even in the most cursory assessment of the proposed remedial measure. The Tribunal must register the consent agreement immediately, whereupon it “has the same force and effect . . . as if it were an order of the Tribunal” even though it is not, strictly speaking, such an order.⁷⁴

Accordingly, as of 2002, the Tribunal’s ability to review proposed consent orders and act as an independent adjudicative body or a gatekeeper to implementing a decision has been greatly diminished. Consequently, parties are left to deal with the Commissioner, especially in relation to resolution of most mergers, and the Tribunal often acts as little more than a registrar.⁷⁵ There is now much more than a mere “initial assumption” that a draft consent agreement should be made an order of the Tribunal; rather, there is virtually a blanket assumption assuming the jurisdictional threshold is met. No proposed consent order since the 2002 amendment has been set aside by the Tribunal. Thus, in Canada there is now likely a significantly greater presumption that a consent agreement will be given adjudicative effect than under U.S. antitrust law, where the Tunney Act states that “[b]efore entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest.”⁷⁶ The provision has been used, for example, in relation to

72. *RONA Inc. v. Comm’r of Competition*, [2005] Comp. Trib. 18, ¶ 72 (Can.).

73. *Id.* ¶ 73.

74. *Id.* ¶ 74 (emphasis added).

75. See The Competition Act § 106 (delegating to the Tribunal the power to rescind or vary a consent order under the Act).

76. Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. § 16(b)–(h) (2000)). The extent to which U.S. courts are to pay deference to consent judgments has been a matter of intense debate. See, e.g., John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the*

proceedings pertaining to Microsoft Corp.⁷⁷ While the Tunney Act has not been the source of nearly as much judicial activism as we have seen in Canada in relation to proposed consent orders in antitrust cases prior to 2002 (in proportionate terms), it still ensures that United States courts are not just registries for orders negotiated by the Justice Department, which is effectively the current law in Canada for orders negotiated by the Commissioner.

C. THE IMPACT OF THE 2009 STATUTORY AMENDMENTS

As mentioned above, in March 2009, the Canadian Parliament enacted legislative amendments which constituted a number of significant changes to Canada's competition law. Compared to other amendments of similar significance, there was not nearly the same degree of stakeholder consultations prior to being enacted. A key aspect of the amendments was to make the Canadian Competition Act more aligned with U.S. antitrust law in several key areas. While the impact of the recent amendments is still being analyzed (and the amendments to the criminal conspiracy provisions come into effect in March 2010), it appears that the recent amendments will likely further enhance the role of the Commissioner, supported by the Bureau, in competition law enforcement.

1. Merger Review Process

The recent amendments align the Canadian merger review process even more closely with the United States' "second request" process for merger review: under the amended Canadian statutory provisions, there is an initial thirty-day waiting period followed by a possible demand for information through the issuance, at the Commissioner's discretion, of a more detailed Supplementary Information Request (SIR) in cases where further information (and time) is required for the Commissioner to conduct her review.⁷⁸ The parties are not permitted to close the transaction until 30 days after compliance with the SIR, and the Commissioner retains the ability to seek an injunction to prevent closing or extend the review period even at that time. Under the previous law,

"Microsoft Fallacies," 34 LOY. U. CHI. L.J. 749, 750 (2003) (analyzing two Microsoft Corporation cases in regards to "the standards of judicial review that should apply in a Tunney Act consent decree proceeding where no litigation has taken place").

77. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002); *United States v. Microsoft Corp.*, No. CIV.A.94-1564, 1995 WL 505998, at *7 (D.D.C. Aug. 21, 1995); see also Goldman, *supra* note 52, at 38-41 (comparing the Tunney Act review standards for consent decrees with the Competition Act's review standards pre-2002).

78. The Competition Act §§ 114, 123.

the Bureau had to rely on section 11 of the Act, which requires issuance of a court order to require production of such detailed information, unless the parties provided the information on a voluntary basis. Although an application by the Commissioner for a section 11 order may be made on an ex parte basis, there at least was a form of prior judicial check on the scope and reasonableness of the Bureau's information demand prior to the March 2009 amendments.

In proposing the United States' style "second request" process, a number of commentators voiced concerns over the significant powers that would be given to the Bureau. There was relatively little time for these concerns to be heard and addressed as the amendments to the Act were coupled with the federal Budget bill and enacted on a "fast track." For example, the Canadian Bar Association (CBA) emphasized the need for "adequate judicial oversight of any administrative power to delay closings or to compel document and oral productions,"⁷⁹ and cautioned that "it is not necessary to provide the Bureau with unfettered discretion to issue production orders, and to dramatically alter a system that has worked well for over two decades"⁸⁰

In addition, the CBA advocated a more active role for the Tribunal in the merger review process. The CBA noted:

While the current law contemplates an active role for the Tribunal in the merger review process preceding any section 92 application, the Tribunal's role in that process has been marginal, at most. Since 1985, only two section 100 applications have been brought to the Tribunal, and no contested section 104 applications have been brought in merger cases. Hence the resources of the Tribunal are underutilized, and it is not performing its intended role under the Act.⁸¹

Since the new merger review process has been in force, the Bureau (to its credit) has issued draft Merger Review Process Guidelines for consultation. These guidelines attempt to address many of the issues raised by the adoption of the new merger review process. However, submissions by the American Bar Association, Section of Antitrust Law and Section of International Law (collectively, "ABA"), and the CBA point out that the draft guidelines could benefit from the addition of certain procedural protections. For example, the ABA submitted the

79. Letter from John D. Bodrug, on behalf of the Nat'l Competition Law Section of the Canadian Bar Ass'n, to Ron Parker, Senior Assistant Deputy Minister, Industry Canada 4 (Feb. 3, 2009), available at <http://www.cba.org/CBA/submissions/pdf/09-04-eng.pdf> (regarding "Potential Amendments to the *Competition Act* Merger Review Process").

80. *Id.* at 9.

81. *Id.*

following with respect to section 3.8(a) of the draft guidelines which proposes that any party that objects to the scope of the SIR may, after discussing the matter with the responsible Assistant Deputy Commissioner, submit a request to the Senior Deputy Commissioner of the Mergers Branch to have the SIR reviewed through the Bureau's internal appeal process:

This process is similar to the appeals process defined in the United States, where merging parties may pursue an internal appeals process in which senior officials of the Agencies review and decide parties' objections to the scope of Second Requests.

Based on the experience of its members, the Sections invite the Bureau to consider designating a third party—such as a retired Competition Tribunal member or practitioner acceptable to the Bureau—to rule on any appeals concerning the scope of Supplementary Information Requests. The Sections believe that the internal appeals process followed in the United States has not been successful. As noted in the Antitrust Section's 2005 submission to the AMC, private practitioners have expressed concerns regarding 1) the lack of transparency of the internal appeals process, 2) the failure of the process to produce any precedents resulting from such decisions, and 3) the impartiality of the process

The Sections recommend that, as with scope disputes, the proposed review process set out in the Draft Guidelines be placed in the hands of a retired Tribunal member or practitioner acceptable to the Bureau, rather than a Bureau Deputy Commissioner.⁸²

The CBA expressed similar reservations about the fairness of a process in which an internal Bureau panel reviews decisions made by Bureau staff which then have a significant impact on Canadian businesses:

In the absence of a mechanism for the judicial review of SIRs, some sort of review is necessary to ensure procedural fairness. However, the *internal* review mechanism set out in the Guidelines, in which other Bureau staff is responsible for carrying out the review, although better than nothing, is unlikely to be accepted as impartial and effective. A review process could be improved if the reviewer were neutral. Involving a lawyer from outside practice, or a former judge,

82. RESPONSES TO THE CONSULTATION ON THE DRAFT ENFORCEMENT GUIDELINES ON THE REVISED MERGER REVIEW PROCESS, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE COMPETITION BUREAU (CANADA) DRAFT ENFORCEMENT GUIDELINES ON THE REVISED MERGER REVIEW PROCESS § II(H), (J) (May 2009), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03106.html>.

for instance, would be an improvement over the procedure in the draft Guidelines.⁸³

The Canadian Chamber of Commerce concurred:

The Canadian Chamber agrees with the concept of some sort of oversight of the conduct of the supplemental information request internal review and approval process (section 3.4). However, the process contemplated by the Draft Bulletin raises some issues, as it arguably does not constitute a meaningful neutral review. It is unclear, for example, why a neutral review process would include two individuals with carriage of the file. The Canadian Chamber urges the Bureau to consider instead a review process under which a third party arbiter be engaged to resolve all disputes that may arise in the context of compliance with a supplementary information request.⁸⁴

The above organizations were not the only ones who have suggested use of an experienced third party, rather than an internal review, to decide issues related to the scope of the SIR as well as compliance with it. The writers of this paper have also suggested this, as have other counsel, in the course of the Bureau's 2009 consultative process.

2. Abuse of Dominance

Canada's abuse of dominance laws also were amended in March 2009; these provisions now allow the Tribunal to impose Administrative Monetary Penalties (AMPs) of up to ten million dollars (up to fifteen million dollars for repeat offenders) for contraventions of the abuse of dominance provisions in addition to the typical remedy available for abuse of dominance in Canada, which is a prohibition on the abusive conduct on a going-forward basis. While the increased penalties are designed to deter anticompetitive conduct by companies that occupy a dominant presence in the marketplace, concerns have been expressed that they may have a chilling effect on vigorous competition, and may potentially raise constitutional issues given that significant penal

83. NAT'L COMPETITION LAW SECTION OF THE CANADIAN BAR ASSOC., DRAFT ENFORCEMENT GUIDELINES: REVISED MERGER REVIEW PROCESS 9 (June 2009), *available at* [http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Canadian%20Bar%20Association-Merger%20Review%20Process-comments.pdf/\\$FILE/Canadian%20Bar%20Association-Merger%20Review%20Process-comments.pdf](http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Canadian%20Bar%20Association-Merger%20Review%20Process-comments.pdf/$FILE/Canadian%20Bar%20Association-Merger%20Review%20Process-comments.pdf).

84. RESPONSES TO THE CONSULTATION ON THE DRAFT ENFORCEMENT GUIDELINES ON THE REVISED MERGER REVIEW PROCESS, CANADIAN CHAMBER OF COMMERCE SUBMISSION ON THE DRAFT MERGER REVIEW GUIDELINES § F (May 26, 2009), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03107.html>.

consequences are possible for contravention of a civil provision of the Act.⁸⁵

Given that the Bureau has a monopoly on enforcement of the abuse of dominance provisions, only the Commissioner can decide whether or not a company will be potentially subject to AMPs by exercising her discretion to bring an application to the Tribunal. Moreover, under section 105(2) of the Act, it seems conceivable that a consent agreement negotiated by the Bureau and the target of an abuse of dominance investigation could include the imposition of AMPs of up to ten million dollars (or fifteen million dollars in some cases). This means that the prospect of AMPs could be used as negotiating leverage by the Bureau.

This would significantly enhance the Commissioner's importance with respect to enforcement, including the manner in which abuse of dominance cases may be settled by negotiated resolution. Once again, because of the consent order amendments passed in 2002, as discussed above, the Commissioner is in a stronger position in relation to proposed consent orders than she was in prior cases. Parties may now have to address not only the terms of a remedial order but also a monetary penalty to reach a proposed consent order in certain types of abuse of dominance cases.

3. Criminal Conspiracy Provisions

The recent amendments also fundamentally change provisions dealing with agreements between competitors. Under the existing statutory provisions, agreements that unduly lessen competition or unreasonably enhance the price of a product are potentially subject to criminal sanctions. Under the amended statutory provisions, which come into force after March 12, 2010, there will be two enforcement tracks for agreements between competitors: one for hard core cartels and one for other agreements among competitors.

Hard core cartels and other specific activities (e.g., fixing prices or supply, allocating markets or customers) will be subject to serious criminal sanctions and possible private actions for damages. The new criminal standards will make it *per se* illegal for competitors (or persons who would be likely to compete) to enter into an agreement or

85. A penalty that amounts to a "true penal consequence" attracts the constitutional protections of the Charter of Rights and Freedoms. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (Can.). In particular, the penalty may be unconstitutional unless the criminal standard of proof is used, full disclosure is provided, and the vagueness of the statute is eliminated by proscribing practices prospectively rather than simply prohibiting them after review. See *Standing Comm. on Ind., Natural Res., Sci. and Tech.*, 1st Sess., 38th Parl., 2005 (Oct. 25, 2005) (testimony of Prof. Peter Hogg).

arrangement to fix prices, allocate sales, territories, customers and markets, or fix production or supply.⁸⁶ Breach of these *per se* rules could lead to a prison term of up to fourteen years or a fine of up to C\$25 million. A violation could also expose parties to civil liability for damages. There is, however, a defense available under the new law which places the burden on the defendants to prove, on the balance of probabilities, that: (1) the agreement in question is ancillary to a broader or separate principal agreement that includes the same parties; and (2) the agreement is “reasonably necessary” for implementing the principal agreement.⁸⁷

Other agreements or arrangements between competitors that lessen or prevent competition substantially are subject to civil investigation by the Bureau and potential remedial action by the Tribunal, although no fines or private damages can be awarded.

As with the amendments to the merger review process, this change has sparked more concerns about the enhanced discretionary powers handed to the Bureau and its Commissioner. Under the new framework, the Commissioner will decide whether the evaluation of an agreement or arrangement between competitors will proceed on a criminal or a civil track, and the Commissioner will decide when to announce the track selected. While the Bureau has attempted to alleviate many of these concerns through the issuance of Draft Enforcement Guidelines on Competitor Collaborations, some concerns still remain. As the CBA points out: “A delayed election to proceed on a civil track could create the perception that the Bureau is leveraging civil outcomes against criminal risk, particularly where possible resolution discussions take place prior to a determination of whether the matter would proceed as a civil or criminal matter.”⁸⁸ Similar concerns have existed in recent years in relation to the dual tracks available for misleading advertising matters; the Bureau and the Commissioner are already sensitized to these issues. The recent amendments extend the potential magnitude of such issues.

D. Proliferation of Agency Enforcement Guidelines

One of the byproducts of the limited scope of private actions under the Act, and the desire for parties (particularly in mergers) to seek

86. The Competition Act, R.S.C., ch. C-34, § 45(1) (1985).

87. *Id.* § 45(7).

88. NAT'L COMPETITION LAW SECTION OF THE CANADIAN BAR ASS'N, DRAFT ENFORCEMENT GUIDELINES ON COMPETITOR COLLABORATION 6 (Aug. 2009) available at [http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/09-47-e.pdf/\\$FILE/09-47-e.pdf](http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/09-47-e.pdf/$FILE/09-47-e.pdf).

negotiated rather than contested remedies, is the significant shortage of decided cases. While the Competition Act has been in force for over twenty years, there is relatively little jurisprudence on how its provisions are to be interpreted, particularly in the areas of mergers and abuse of dominance. As a result, businesses and their counsel have had precious few decisions to draw upon for guidance.⁸⁹

The Bureau appears to be doing its best to fill this void by issuing enforcement guidelines (typically with input obtained from consultation with the legal and business communities), as well as publishing speeches, press releases, backgrounders on investigations, annual reports, studies, and other resource publications.⁹⁰ For example in the mergers area alone, the Bureau has released the following guidance:⁹¹

- very detailed Merger Enforcement Guidelines;⁹²
- an Information Bulletin on Merger Remedies in Canada;⁹³
- draft Merger Enforcement Guidelines as Applied to a Bank Merger;
- draft Enforcement Guidelines on the Merger Review Process; and
- a Bulletin on Efficiencies in Merger Review.

In the area of abuse of dominance, the Bureau has published:

- draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions;
- guidelines concerning the Abuse of Dominance Provisions as Applied to the Retail Grocery Industry; and
- an Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry.

Enforcement guidelines and other informal guidance from the Bureau contribute greatly to the business community's interest in achieving transparency, accountability, and relative certainty of process without

89. Quinn et al., *supra* note 45, at 5.

90. In fact, Canada was one of the first countries to begin issuing public news releases in cases where there was "no challenge" explaining the reasons for the decision. Calvin S. Goldman, Navin Joneja & Prakash Narayanan, Merger Enforcement Guidelines: Lessons from the Canadian Experience, India's New Merger Notification Regime Benefits of and Scope for Merger Enforcement Guidelines 11–12 (Mar. 16–18, 2008).

91. A complete list of the Bureau's enforcement guidelines and bulletins is available online. Competition Bureau, Publications, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00139.html (last visited Mar. 10, 2010).

92. Canadian Competition Bureau, Merger Enforcement Guidelines, <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/01245.html> (last visited Mar. 10, 2010).

93. Canadian Competition Bureau, Information Bulletin on Merger Remedies in Canada, <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html> (last visited Mar. 10, 2010).

imposition of unnecessary cost and delay. For instance, among the key benefits that merger guidelines provide are: greater predictability to facilitate business planning, and explanation of resolution tools to help both predictability and avoidance of unnecessary litigation. The publication of enforcement guidelines also enhances the ability of competition law authorities to coordinate and cooperate in multinational transactions and provides significant benefits for international businesses that must navigate the merger review processes in various jurisdictions for any given transaction. By way of illustration, the Bureau's "Merger Remedies Bulletin fulfills this role with an entire chapter devoted to International Coordination and Cooperation."⁹⁴

While the Bureau's informal guidance is certainly helpful, from an institutional perspective, an over-reliance on administrative enforcement guidelines has its own potential drawbacks. For example, there may be a strong disincentive for the Bureau to take hard positions on complex issues with uncertain outcomes or outcomes that can go differently depending on certain variables. This means there may prove to be a number of important issues that need clarification that is not available from the Bureau either because the Bureau is reluctant to provide it or because the Bureau cannot anticipate every possible practical scenario when drafting guidelines.

In addition, the enforcement guidelines usually do not address the "hard" cases (i.e., cases where the outcome is in no way certain before courts apply their minds to it and determine the legal approach to take). This is important in the competition law context because the primary rationale for competition law is to permit businesses to compete as aggressively as they can without crossing the line into anticompetitive behavior. If there is uncertainty about competition law, the "chilling effect" on businesses may be damaging to Canada's economic growth and the competitiveness of particular markets.

In addition, because both markets and the legal process are dynamic and constantly evolving, the Bureau and its Commissioner need to be careful not to become too embedded in their own guidelines. This is discussed in more detail below.

E. Finding the Right Balance—Ensuring Fairness of Process

The role of the Commissioner supported by the Bureau has grown in importance since the establishment of the current institutional framework in Canada in 1986. In the area of negotiated resolutions, the

94. Goldman et al., *supra* note 90, at 13.

Commissioner's role has effectively expanded to include in a *de facto* manner, quasi-adjudicative functions, whereas the role of the Tribunal has been significantly diminished as a result of the 2002 amendments.⁹⁵ This is particularly so in regard to the resolution of merger cases, for the reasons discussed earlier in this paper.⁹⁶ Similarly, due in large part to a lack of Tribunal case law, the heavy reliance on Bureau enforcement guidelines runs the risk that such publications may be treated in a quasi-legislative and binding manner. Guidelines require a certain trade-off. On the one hand, they are designed to and do actually provide benefits in terms of enhancing planning, transparency, agency accountability, and business certainty. On the other hand, some of the checks and balances inherent to an impartial review by an independent adjudicative body may be sacrificed if the Bureau and its Commissioner do not sufficiently account for individual case specifics and novel relevant points. Enforcement discretion must be preserved, and this is especially so when such enforcement moves to a *de facto* adjudicative power. In the latter cases, such as when the Commissioner is resolving a proposed consent order in a merger case, discretion must be preserved to ensure each case is decided on its own merits.

This paper does not propose major structural changes to the institutional design of the Canadian framework. We are not proposing, for example, that the 2002 amendments to the consent agreement process be changed having regard to the relative activism of the Tribunal seen in the pre-2002 period. In real world terms, there is no turning back the clock; the Tribunal's lack of sufficient workload since its inception means there is a real risk it will become overly active in relation to a proposed consent order, and many of us do not want that to re-occur. Regrettably, the Tribunal has not, since its inception in 1986, had enough of a caseload to fully occupy the time of its members; this may explain in part why Tribunal members tend to find particular cases exceptionally interesting and probe them more actively than, for instance, an over-worked trial judge. Finding the right model for the Tribunal (e.g., part-time judges, full-time lay members) is a topic that

95. While there have been cases that looked at specific aspects of the consent order process since the 2002 amendments, and there were earlier cases which examined the role and duties of the Commissioner as an enforcement official, no cases since 2002 have focused on the degree to which the 2002 amendments and other factors discussed in this paper may be imposing new process responsibilities on the Commissioner.

96. The Commissioner's direct influence over the terms of a proposed order is not only derived from the consent order process under section 105 of the Act for merger and abuse of dominance cases, but arises in a parallel manner for consent orders in deceptive marketing cases under subsection 74.12 of the Act. The Competition Act, R.S.C., ch. C-34, § 74(12) (1985).

may be worthy of further study as we have now had some twenty years experience with the current framework; however, that question is beyond the scope of this paper. Rather, experience shows that most stakeholders want the Commissioner to effectively and fairly resolve issues in an expeditious and more time-certain manner, particularly in merger cases.

This paper does not advocate specific structural reforms, but it does propose a careful in-depth consideration of additional safeguards that may be needed as a consequence of the increasingly dominant role played by the Commissioner and the Bureau. A different model worthy of consideration is the Federal Trade Commission ("FTC"), which is comprised of five presidentially-appointed commissioners, one of whom acts as the Chairperson.⁹⁷

One salient feature of the FTC scheme is its procedural safeguards that restrict the degree of contact and discussion agency officials conducting an investigation have with the agency commissioners. There are no doubt other procedural safeguards applicable to cases before the FTC. We are not experts in FTC process, but we assume such rules and safeguards are in place to protect the integrity of, and respect for, the FTC's decision-making authority. Another integrated enforcement agency that adopts a model similar to the FTC is the Ontario Securities Commission. It also has operating restrictions on the degree of contact between its enforcement staff and the Commissioners

97. The FTC may commence an inquiry based upon letters from consumers or businesses, congressional inquiries, or articles on consumer or economic subjects, at the Attorney General's request, or as a result of a mandatory filing in the case of proposed mergers. The FTC's investigative authority includes the power to subpoena documents and/or individuals and to require the filing of annual or special reports.

If the FTC determines that a violation has occurred, it may issue a complaint setting forth its allegations and offer the respondent an opportunity to settle the charges before any enforcement proceedings are commenced. If the respondent elects to settle the charges, a consent agreement will be executed which, if accepted and approved after sixty days of public comment, results in a final order. If the respondent elects instead to contest the charges, the FTC may issue a complaint and have the matter adjudicated before an administrative law judge (ALJ) in a trial-type proceeding. Section 13(b) of the FTC Act also empowers the FTC to obtain preliminary (or permanent) injunctive relief from a federal court for violations of any provision of law that the FTC enforces; the FTC has used section 13(b) primarily for the purpose of obtaining preliminary injunctive relief against mergers pending completion of an FTC administrative hearing. The FTC may commence an administrative proceeding for a trial on the merits whether or not injunctive relief is granted by the federal court. At the conclusion of the administrative proceeding, the ALJ issues an initial decision setting forth his or her findings of fact and conclusions of law and a recommendation for an order to cease and desist or dismissal of the case. The ALJ's initial decision may be appealed to the full Commission, which in turn conducts a hearing and issues a final decision. The Commission's final decision may be appealed to the U.S. Court of Appeals and ultimately the U.S. Supreme Court.

with responsibility for adjudication in connection with any given investigation. The Commission also enjoys the advantage of dedicated funding arrangements financed through levies on industry participants.

In two papers published in 2002, one of the authors proposed the adoption of an institutional structure for the Bureau that is in many respects similar to that of the United States' FTC.⁹⁸ Those papers outline a proposal to create a panel of three commissioners who would constitute the "Competition Commission" rather than having all decisions be the responsibility of a single Commissioner. This panel, consisting of one Chair and two Commissioners, would make all decisions to initiate inquiries, grant clearances to modify or challenge a merger, or initiate consent order proceedings by a majority vote.

At the same time, because we are assuming that further amendments to the Competition Act and the Competition Tribunal Act are not forthcoming in the near term, we think that formulating additional checks and balances *within* the Bureau's operating mandate can constitute a more realistic, practical and expeditious set of steps that can be taken to ensure a sense of due process in determining remedies, particularly in merger cases. The challenge, then, is to find the right balance. Below, we offer a few suggestions for further discussion about this topic.

First, as a guiding principle, it is well established under Canadian administrative law that:

The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.⁹⁹

In other words, as the Commissioner becomes not only the statutory officer responsible for the investigation but starts to take on responsibilities akin to quasi-adjudicative functions, there is rising demand and a strong argument for more fulsome procedural fairness

98. Goldman et al., *supra* note 24; C. Goldman, R. Kwinter & K. Lawal, Institutional Design Issues—*Competition Bureau and Competition Tribunal: Synopsis of Recent Perspectives and Issues Going Forward* (May 8–10, 2002) (unpublished manuscript, on file with the the Loyola University Chicago Law Journal).

99. Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817, ¶ 23 (Can.), *citing* Old St. Boniface Residents Ass'n Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170; Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Comm'n), [1989] 2 S.C.R. 879 (Can.); *see also* Knight v. Indian Head Sch. Div. No. 19, [1990] 1 S.C.R. 653 (Can.) ("[B]oth the duty to act fairly and the duty to act judicially have their roots in the same general principles of natural justice.").

rights before a final decision is made; this is particularly so in merger cases.

We have already outlined the practical realities in merger cases that lead most merging parties toward trying to resolve issues on a comparatively expeditious and certain basis so that the merger can go forward to the extent so resolved. This context gives the Commissioner significantly more bargaining leverage than most other types of cases. That authority should be exercised in a properly informed, careful, and procedurally fair manner, particularly given the fact that since 2002 the Tribunal has been lacking any effective oversight before the consent agreement becomes a consent order. Some of the terms of such orders are extensive, both in the number of commitments and requirements to which parties consent. Some of the terms also extend over many years. Moreover, breach of the terms of such orders may give rise to either contempt proceedings before the Tribunal or a prosecution. Prosecutions may be brought against not only the corporation, but in some circumstances, also against any directors or officers who authorized or acquiesced in the alleged breach.¹⁰⁰ Thus, such consent agreements have potentially serious and enforceable obligations and penalties if breached. All of these considerations reinforce the changing role of the Commissioner when resolving a merger case by way of a consent agreement. These could include more broadly: the right for parties to be heard directly by the Commissioner (supported by her own advisors), particularly at the assessment and decision-making stages of a case; the right to continuous consultations with Bureau senior officials prior to being heard directly by the Commissioner; and other process fairness protections.

With respect to specific aspects of merger remedy negotiations in particular, given the diminished role of the Tribunal in consent agreement oversight, resolution discussions between the Commissioner and the affected parties should look toward some sense of process fairness and flexibility. In this connection, the Commissioner may consider procedural mechanisms to ensure that the Commissioner is somewhat independent from the Bureau's investigation. For example, the conduct of the merger review and critical assessment can almost be entirely delegated to the Senior Deputy Commissioner in the Mergers Branch. Pursuant to section 8 of the Act, such delegation does not impede the Commissioner's powers or duties under the Act. In this manner, the Commissioner should maintain a willingness to keep an open mind until she hears from not only her Deputy and officials, but

100. The Competition Act, R.S.C., ch. C-34, § 65(4) (1985).

also the parties directly (in writing and verbally) or even third-parties, thereby giving the Commissioner a level of impartiality. The Commissioner also may retain her own counsel and advisers to assist her decision-making functions; these individuals would not be involved in the Mergers Branch investigations, but would be available to assist the Commissioner with her decisions. This is again more critical at the assessment and decision-making stages of a case. We are not suggesting that Bureau officials and their counsel do not do their best to try to present the facts to the Commissioner fairly in summarizing the parties' positions, but the fact is that parties and their counsel will normally present arguments in their own style, with their own emphasis. Furthermore, parties and their counsel would likely be more effective in explaining certain aspects of the businesses and industry at issue, of which Bureau staff may not be fully cognizant. In any event, the ability for parties to meet with the Commissioner directly at least contributes to the appearance of fairness. Whatever the Commissioner decides, it should be explained to the parties directly affected with sufficient reasons.¹⁰¹

Next, with respect to the use of agency enforcement guidelines, two key principles ought to be kept in mind based on the experience in Canada. First, the issuance of agency enforcement guidelines cannot fetter the Commissioner's discretion to apply the law on a case-by-case basis. Fundamental principles of administrative law provide that the Commissioner must not fetter her statutorily-conferred discretion by mechanically applying enforcement guidelines that the Bureau previously formulated (unless legislation explicitly authorizes it to do so, i.e., through a statutory power to make subordinate legislation whereupon the guidelines are of a regulatory nature). For example, leading administrative law scholars in Canada have remarked that:

An agency may not fetter the exercise of its statutory discretion, or its duty to interpret and apply the provisions of its enabling statute, by mechanically applying a rule that it had previously formulated, other than where it is properly enacted pursuant to a statutory power to make subordinate legislation.¹⁰²

101. While earlier cases have determined that, as a statutory enforcement official, the courts will not substitute their discretion for that of the Commissioner in relation to enforcement matters (leaving aside statutory duties required by the legislation), those cases did not consider the effect of the 2002 amendments and the other factors noted in this paper relating to the evolving role of the Commissioner.

102. 3 D.J.M. BROWN & J.M. EVANS, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA* § 12:4410 (Canvasback Publishing 2004).

It is not in itself unlawful for the Bureau to take informal rules, policies or guidelines, or previous precedents into account in exercising its discretion or interpreting and applying the provisions of its enabling statute. However, the Bureau risks acting unlawfully if it is not prepared to entertain and consider submissions that are designed to show not only that—properly interpreted—a rule, policy, guideline, or precedent does not cover the facts of a particular case, but also that even if it does, an exception should be made in light of the facts of the particular case.¹⁰³ Blind adherence to a policy, rule, guideline, or precedent is improper even when it reflects—and attempts to balance—a number of different policy considerations.¹⁰⁴ In practice, this means that the Commissioner and her staff need to be cognizant of the fact that enforcement guidelines do not, in and of themselves, serve as binding law. Rather, they should be interpreted in a flexible manner to adapt to the facts of a particular case.

We are not suggesting that the Commissioner has used Bureau guidelines in an overly binding or improper manner; however, as the Commissioner's decision-making function becomes more quasi-judicial, particularly in relation to proposed consent orders in merger cases, we can anticipate greater attention focused on the manner in which the Commissioner reaches her conclusions. Thus, a caution in this area is intended to be a constructive suggestion.

Second, as a corollary, an important point to note from the Canadian experience is that any guidelines developed by the Bureau need to remain consistent with the governing legislation, regulations, and case

103. See, e.g., *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 6–7 (Can.) (describing the discretion available to the Minister); *Ha v. Canada* (Minister of Citizenship & Immigration), [2004] 3 F.C. 195 (Can.) (noting that “While administrative decision-makers may validly adopt guidelines to assist them in exercising their discretion, they are not free to adopt mandatory policies that leave no room for the exercise of discretion.”); *Glaxo Wellcome PLC v. Canada* (Minister of Nat’l Revenue), [1998] 162 D.L.R. 433 (Can.); *Carpenter Fishing Corp. v. Canada* (Minister of Fisheries & Oceans), [1997] 155 D.L.R. 572, 581 (Can.) (discussing the “long-settled principle governing the exercise of discretion” that “the donee of a power must ‘act fairly’”); see also *Capital Cities Commc’ns Inc. v. Canadian Radio-Television Comm’n*, [1978] 2 S.C.R. 141, 169–71 (Can.) (discussing “whether the Commission or its Executive Committee acting under its licensing authority, is entitled to exercise that authority by reference to policy statements or whether it is limited in the way it deals with licence applications or with applications to amend licenses to conformity with regulations”); *British Oxygen Co. v. Bd. of Trade*, [1971] A.C. 610, 625 (Can.); *Re Hopedale Devs. Ltd. & Town of Oakville*, [1965] 1 O.R. 259, 263 (Can.); *Halfway River First Nation v. B.C. (Ministry of Forests)*, [1999] 64 B.C.L.R. 206, 230 (Can.) (discussing qualifications to decide legal issues arising under the respective treaty); *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 596 (Can.).

104. See, e.g., *Heisler v. Saskatchewan (Minister of Env’t & Res. Mgmt.)*, [1999] 16 Admin. L.R. 215, 35–36 (Can.) (reasoning that it would have been improper for the Minister to blindly apply the policy at issue).

law. Competition authorities should be careful not to adopt guidelines that are in any way inconsistent with the legislation or indicate that its approach is inconsistent with the legislation. However often the guidelines adopted by the competition authority may be used by merging entities, and, if those guidelines are not consistent with the overriding legislation, courts will always look to the legislation and not the guidelines in determining the appropriate interpretation.

Finally, for purposes of this paper we suggest that the Commissioner give serious consideration to enhancing the perception of fairness in relation to those areas of new powers enacted with the March 2009 amendments. First, by indicating that issues pertaining to the scope of a supplementary information request, or compliance with such, will not be decided in-house by the Bureau but rather will go to an experienced third-party arbiter as many have suggested. Second, by clearly articulating, to the extent possible, what criteria will determine whether an administrative monetary penalty will be sought in an abuse of dominance case (whether in addition to or along the lines of the statutory criteria set out in section 79(3.2)) and what criteria will govern whether a restrictive agreement is to be investigated under the non-criminal provisions of the Act (beyond the views contained in the Draft Guidelines on Competitor Collaborations). Taking all or at least some of these constructive steps will enhance the appearance of fairness in the administration and enforcement of the Act; enhanced respect for the Commissioner's mandate and responsibilities will likely follow.

IV. CONCLUSION

Canada's modern competition law framework was established in 1986, less than twenty-five years ago. Since that time, the roles of the key statutory authorities, namely, the Commissioner and the Tribunal, have evolved considerably such that the Commissioner's role and mandate has increased significantly in importance. Steps can and should be taken, within the bounds of the applicable statutes and case law, to see that the appropriate checks and balances are in place in order to ensure that process fairness is maintained while the Commissioner's objectives in enforcing the competition law are fulfilled effectively and on an efficient and timely basis.

However, none of us—including the authors of this paper—should be presumptuous in readily delineating a definitive and unqualified answer to the fundamental question of what is the right balance. Rather, attaining the right balance is a process that requires continuous evaluation of case experience and consultative input, both in relation to structural and procedural safeguards. Comparative law and experience

in other jurisdictions is an important consideration in meeting this objective as the issues and relevant factors are often quite similar. We are optimistic that the new Commissioner will be oriented toward consultations with stakeholders and policymakers in an ongoing effort to ensure that the enforcement of Canada's competition laws evolves in an effective, timely, and fair manner.

On a more specific going forward basis, we believe that an intensive study of the decision-making process of entities like the FTC and the OSC would be a desirable initiative. In order to allow input from stakeholders, such a study could be undertaken by the Canadian Bar Association and the Bureau in consultation with participants from the business community, the Bar, and academic experts. We would suggest that legal scholars who have already given these matters significant thought, such as Professors Trebilcock and Iacobucci from the University of Toronto, Faculty of Law, and other panellists in this symposium, be invited to participate in this consultative process.

APPENDIX A

CANADIAN COMPETITION ACT: KEY CIVIL PROVISIONS

Abuse of Dominance. In Canada, possessing a dominant position is not in itself illegal. Abuse of a dominant position by resorting to anti-competitive acts in a market can, however, give rise to an order by the Tribunal if such abuse results in a substantial lessening or prevention of competition. In order for the Tribunal to issue an order in respect of abuse of dominance there are essentially three conditions that must be met: (1) substantial or complete control of a class of business in Canada by a firm or firms; (2) a practice of “anti-competitive acts”; and (3) the practice must have the effect of preventing or lessening competition substantially in a market. Pursuant to recent amendments to the abuse of dominance provisions of the Act, conduct that contravenes these provisions can lead to administrative monetary penalties of up to \$10 million (\$15 million for repeat contraventions).

Price Maintenance. A person engages in price maintenance when, “by agreement, threat, promise or any like means,” he influences upward or discourages the reduction of the price at which his customer—or any other person to whom the product comes for resale supplies—offers to supply, or advertises a product within Canada. A refusal to supply a product to, or otherwise discriminate against, any person engaged in business in Canada because of that person’s low pricing policy may also amount to a form of price maintenance. The Tribunal may make an order prohibiting a person from continuing to engage in price maintenance or requiring the person to accept another person as a customer if the Tribunal determines that the relevant conduct has had, is having, or is likely to have an adverse effect on competition.

Exclusive Dealing. Exclusive dealing is the practice of requiring or inducing a customer to deal only or primarily in products of the supplier by means of more favourable terms or conditions. Exclusive dealing arrangements are subject to review if: (1) the supplier is a major supplier of the product; (2) the practice impedes entry or expansion of a firm or product in a market or has some other exclusionary effect in the market; and (3) the practice is likely to substantially lessen competition. If the practice is carried on for a reasonable time only in order to facilitate entry of a new supplier or a new product into the market, the Tribunal will not prohibit the practice.

Tied Selling. Tied selling is the practice of requiring or inducing a customer to buy a product as a condition of supplying the customer with another product. The Tribunal will not prohibit this practice unless the conditions referred to above relating to exclusive dealing are met. However, even if such conditions are met,

no order will issue if the Tribunal finds that the practice is reasonable, having regard to the technological relationship between the products.

Market Restriction. Market restriction is the practice of requiring a customer to sell a product only in a defined market as a condition of supplying that product. Again, if the practice is engaged in by a major supplier and is likely to substantially lessen competition, the Tribunal can put an end to the practice. It will not, however, make an order if the practice is engaged in for a reasonable period of time only to facilitate entry of a new supplier or a new product into a market.

Refusal to Supply. If the Tribunal finds that there is a refusal to supply and that: (1) the would-be purchaser is substantially affected in its business by the refusal; (2) such person is unable to obtain adequate supplies because of insufficient competition among suppliers (e.g., the refusing supplier has a monopoly or a very strong market position); (3) such person is willing and able to meet the usual trade terms of the supplier; (4) the product is in ample supply; and (5) competition is adversely affected, the Tribunal may order the supply of the product on usual trade terms.