SENATE SÉNAT

CANADA

Recent *Competition Act* Changes: A Work in Progress

Report of the
Standing Senate Committee on Banking, Trade and Commerce

The Honourable Michael A. Meighen, Q.C., Chair
The Honourable Céline Hervieux-Payette, P.C., Deputy Chair

JUNE 2009

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ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Thursday, March 12, 2009:

The Honourable Senator Cowan moved, seconded by the Honourable Senator Hubley:

That, notwithstanding any rules or usual practices, and without affecting any consideration or progress made by the Senate with respect to Bill C-10, the *Budget Implementation Act, 2009*, the following committees be separately authorized to examine and report on the following elements contained in that bill:

(*a*) The Standing Senate Committee on Energy, the Environment, and Natural Resources: those elements dealing with the *Navigable Waters Protection Act* (Part 7);

(*b*) The Standing Senate Committee on Banking, Trade, and Commerce: those elements dealing with the *Competition Act* (Part 12);

(*c*) The Standing Senate Committee on Human Rights: those elements dealing with equitable compensation (Part 11); and

(*d*) The Standing Senate Committee on National Finance: all other elements of the bill, in particular those dealing with employment insurance; and

That each committee present its final report no later than June 11, 2009.

After debate,

The question being put on the motion, it was adopted.

Paul C. Bélisle

Clerk of the Senate

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INTRODUCTION

In May 2009, after legislation implementing certain aspects of the 2009 federal budget had received Royal Assent in March 2009, the Standing Senate Committee on Banking, Trade and Commerce examined elements dealing with the *Competition Act*[1] contained in Part 12 of the *Budget Implementation Act, 2009*. These changes reflect, in part, recommendations in the 2008 final report of the Competition Policy Review Panel entitled *Compete to Win*(2) and proposed changes in Bill C-19 (1st Session, 38th Parliament), which died on the Order Paper with the dissolution of Parliament in 2005.

The changes recommended in *Compete to Win* include proposals in three areas: 1) modernizing the criminal conspiracy provision found in section 45 of the *Competition Act*; 2) harmonizing the pre-merger notification rules with the US regime; and 3) replacing airline-specific administrative monetary penalties for firms that abuse their dominant position in the market with a general administrative monetary penalty applicable to all sectors of the economy.

Changes similar to those in *Compete to Win* were also contained in Bill C-19, which proposed amendments in respect of administrative monetary penalties, the removal of provisions that apply to airlines, the creation of new court-ordered interim injunctions to freeze assets and orders to refund revenue obtained through reviewable conduct to the purchaser of the product, and the decriminalization of pricing provisions. Amendments similar to those in Bill C-19 were also mentioned in 2002 by the House of Commons Standing Committee on Industry, Science and Technology.(3)

In the course of our study, the Committee received submissions on various aspects of Part 12 of the *Budget Implementation Act, 2009*. In general, witnesses were concerned about the inclusion of proposed changes to the *Competition Act* in a budget implementation bill and the consequential absence of debate over important issues concerning competition law.

[1] R.S.C. 1985, c. C-34.

[2] Competition Policy Review Panel, *Compete to Win: Final Report*,(the Wilson report) June 2008, pp. 53-61, http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf. The Panel felt that "the primary focus of Canadian competition law and its administration and enforcement should be on anti-competitive conduct and outcomes more than on concerns about industry concentration."

[3] House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, 1st Session, 37th Parliament, April 2002, http://www2.parl.gc.ca/content/hoc/Committee/371/INST/Reports/RP1032077/indurp08/indurp08-e.pdf.

In spite of the relative lack of prior debate on the *Competition Act* proposals contained in the legislation implementing some aspects of the 2009 federal budget, the witnesses appearing before the Committee – which included government entities such as the Competition Bureau and Industry Canada, business associations such as the Canadian Chamber of Commerce and the Retail Council of Canada, competition lawyers from the Canadian Bar Association, lawyer Tim Kennish (as an individual),[4] and consumer groups such as the Public Interest Advocacy Centre and Option consommateurs – generally agreed that the changes to the *Competition Act* in the *Budget Implementation Act, 2009* were beneficial to competition. The Canadian Real Estate Association and the Association of Canadian Advertisers also submitted letters to the Committee.

However, certain areas of the *Competition Act* that were changed by the *Budget Implementation Act, 2009* remain contentious. This report summarizes the views and suggestions presented to the Committee by witnesses regarding those issues that they believe require improvement. Since the number of witnesses was necessarily limited, the range of viewpoints presented may not have been complete, the revised criminal conspiracy offence and the new civil conspiracy offence will not come into effect until 12 March 2010, and we lacked sufficient time in which to undertake our normal thorough review of the issues, we do not make any recommendations in this report. We will, at a later time, undertake a more complete examination of important competition law issues. Our later study will include an examination of the new pre-merger notification rules as well as other changes to the *Competition Act* resulting from the *Budget Implementation Act, 2009*.

[4] Tim Kennish works in the field of competition law for Osler, Hoskin & Harcourt LLP ("Osler"). According to Osler's website, he "is listed in Euromoney's *Directory of the World's Leading Competition and Antitrust Lawyers* and in the Competition and Antitrust law section of *The Best of the Best.* He is also among the top Canadian practitioners in the field according to *Chambers Global: The World's Leading Lawyers for Business 2004-2005* and the 2005 *Lexpert/American Lawyer Media Guide to the Leading 500 Lawyers in Canada."*

THE ISSUE: DUAL-TRACK CONSPIRACY PROVISION
"*Per se*" Criminal Offence (Section 45)

A. Background

The main criminal conspiracy offence in section 45 of the *Competition Act*, which prohibits conspiring, combining, agreeing or arranging with another person to prevent or lessen competition unduly, has been the cornerstone of the Act since 1889. The recent changes to the provision resulting from Part 12 of the *Budget Implementation Act, 2009* include a new "*per se*" offence that removes the "unduly" requirement; the result of the change should be application of the offence solely to "hardcore" cartels,[5] similar to the operation of conspiracy offences in other countries.[6] Further, the extensive list of exemptions to the original criminal offence has been replaced with a limited list of defences which includes agreements

- that are ancillary to a broader agreement or related to a separate agreement;
- related to the export of a product;
- between or among affiliated entities; or
- between parties involved in an activity regulated by a government.

These changes are expected to reduce the Competition Bureau's evidentiary burden for proving offences that fall within the definition of a conspiracy agreement or arrangement.

Under the old section 45, criminal conspiracy offence conduct that was approved by federal, provincial/territorial or municipal legislation did not constitute a conspiracy and was known as the "regulated conduct" defence.[7] The new "*per se*" criminal

[5] These include agreements among competitors to fix prices, to allocate markets or to restrict output. The new provision should apply to covert agreements to restrict competition.
[6] See subsection 45(1) of the *Competition Act*. The "*per se*" offence includes the following conspiracies, agreements or arrangements between or among competitors: "(a) to fix, maintain, increase or control the price for the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product."The revised offence removes the requirement for evidence of undue harm to market competition. Together, the listing of prohibited activities and the removal of undue harm to market competition is known as the "*per se doctrine.*" Thus, "per se" means that the act of a defined anti-competitive agreement is presumed to be illegal without the necessity of proving it effect on the market. For a discussion of "hardcore" cartels, see: Organization for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, 1998, http://www.oecd.org/dataoecd/39/4/2350130.pdf; in particular, according to page 3, "a 'hard core cartel' is an anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce."
[7] For a summary, see *Garland v. Consumers Gas Co.* [2004], 1 S.C.R. 629.

conspiracy offence attempts to import, into the *Competition Act*, previous case law which allowed the "regulated conduct" defence.[8]

New subsection 45(8) defines "competitor" as a person who the potential offender would likely compete with in the absence of a conspiracy, agreement or arrangement with that person.

Lastly, since the inception of competition law in Canada in 1889, the criminal conspiracy offence has never included a limitation period. As a result, entities that violate the conspiracy provision are liable for imprisonment and/or fines indefinitely. The United States currently has a five-year statutory limitation period for federal criminal antitrust violations.[9]

B. Witnesses' Views

1. Exemptions to the Offence

According to the Canadian Chamber of Commerce and Tim Kennish, the exemption for agreements made between affiliates in the "*per se*" criminal conspiracy offence should include a broader definition for qualifying affiliates; in particular, the definition should include "entities" as defined in the *Investment Canada Act*.[10] While the Competition Bureau assured the Committee that the *per se* criminal offence provisions will be applied only to cases "that seriously undermine competition," the Canadian Chamber of Commerce and Tim Kennish recommended a *de minimis* exception to the offence and exemption-granting power for the Commissioner of Competition.

A letter submitted to the Committee by the Canadian Bar Association highlighted the potential "chilling" effect of the new provision on legitimate competitor collaborations, especially between and among small businesses that do not have market power. It also gave the example of "buying groups" created by small businesses to obtain a volume discount for the purchase of goods from suppliers.

The Canadian Real Estate Association stated, in its letter to the Committee, that the new provision may apply to real estate businesses that cooperate to purchase

[8] See subsection 45(7) of the *Competition Act*.
[9] 18 U.S.C. § 3282.
[10] R.S.C. 1985, c. 28 (1st Supp.), s. 3, "entity" and "joint venture." "Entity" means "a corporation, partnership, trust or joint venture" and "joint venture" means "an association of two or more persons or entities, where the relationship among those associated persons or entities does not, under the laws in force in Canada, constitute a corporation, a partnership or a trust and where, in the case of an investment to which this Act applies, all the undivided ownership interests in the assets of the Canadian business or in the voting interests of the entity that is the subject of the investment are or will be owned by all the persons or entities that are so associated."

advertising and to referrals between real estate agents who work in overlapping geographic regions. Another concern presented in its letter was the principal-agent business model used for real estate brokers where the broker's agents receive commissions based on agreements.

2. Regulated Conduct Defence

According to the letter submitted to the Committee by the Canadian Bar Association and the testimony of Tim Kennish**,** the "*per se*" criminal conspiracy offence should include an explicit defence in the Act for "regulated conduct" approved by a legislature. The Canadian Bar Association expressed concern that, without an explicit defence, "it is possible that a court would conclude that provincially regulated conduct, including aspects of our agricultural supply management system, is no longer protected from the application of the Competition Act. This is a drafting problem. I think this is not what was intended and it needs to be fixed."

3. Definition of "Competitor"

In his submission to the Committee, Tim Kennish stated that the "competitor" definition should be amended by replacing the term "competitor includes" with the term "competitor means," thereby providing greater precision, and by ensuring that the definition is broad enough to include individuals who were competitors in the past or who may be competitors in the future.

4. Limitation Period

In its presentation to the Committee, the Canadian Chamber of Commerce recommended the creation of a limitation period.

Civil Conspiracy (Section 90.1)

A. Background

As indicated earlier, the 2008 *Compete to Win* report influenced the changes to the *Competition Act* contained in Part 12 of the *Budget Implementation Act, 2009*. The report determined that the criminal provision was a blunt instrument that should only apply to activities that fall within the "hardcore" cartel category. Thus, a new civil conspiracy offence was recommended that would be more flexible in its application to various types of conspiracies and would act as a corollary to the criminal offence. In a 2001 review of the conspiracy provisions it was fund that the courts had difficulty in applying the criminal conspiracy provision and the Competition Bureau has suggested that a new civil offence should be created.[11]

[11] Al Gourley, *A Report on Canada's Conspiracy Law: 1889-2001 and Beyond*, 2001, p. 2 and *Ontario Salt v. Merchant Salt Co.* (1871), 18 Gr. 540.

New section 90.1 of the *Competition Act*, which adds a civil conspiracy offence, permits the Competition Tribunal ("Tribunal") to issue certain remedies in respect of existing or proposed agreements among competitors or potential competitors that are likely to lessen substantially or prevent competition in any relevant market.[12] The potential remedies include: (a) an order prohibiting any person – whether or not that person is a party to the agreement or arrangement – from doing anything under the agreement or arrangement; or (b) an order requiring any person – whether or not that person is a party to the agreement or arrangement – to take any other action, with the consent of that person and the Commissioner of Competition.

New subsection 90.1(4) of the *Competition Act* creates an "efficiency" exemption to the civil conspiracy offence if the Competition Tribunal finds that the agreement or arrangement is "likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition" that would not be obtained if the order were made. This "efficiency" exemption also applies to mergers (section 96) and, during Tribunal cases, the Tribunal has determined that a "balanced weights" approach must be used; this approach considers the negative effects that could undermine the efficiency of the economy and the socio-economic desirability of a wealth transfer from consumers to the merging parties.[13]

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B. Witnesses' Views

In its presentation, the Canadian Chamber of Commerce was concerned that the Competition Bureau may elect to prosecute an offence under the criminal or the civil provision at multiple times during its investigations, which may increase the uncertainty for potential infringers and delay resolution.[14]

The Canadian Bar Association's presentation to the Committee noted that, because the civil conspiracy provisions lack an explicit regulated conduct defence, "you could have an agriculture marketing board, under the amended law, hauled in front of the competition tribunal and asked to explain itself. It may be difficult in light of the regime

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[12] See: Competition Bureau, *Competitor Collaboration Guidelines*, http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf.

[13] See *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417 (Competition Trib.); affirmed (2003), 23 C.P.R. (4th) 316 (Fed. C.A.).

[14] According to the Competition Bureau's *Competitor Collaboration Guidelines* (pp. 5-6), prosecution of an offence by way of the criminal or the civil regime is determined by the Commissioner of Competition and may be changed at any time, depending on the circumstances of the case. The guidelines are available at: http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf.

for it to pass the scrutiny under the new section 90.1. This is something that can be fixed with some relatively narrow amendments to the law. Those amendments would be in the spirit of what Parliament intended in the first place."

In his submission, Tim Kennish proposed changes to the new civil conspiracy offence that mirror his proposals for the new "*per se*" criminal conspiracy offence. In particular, he advocated:

- a broader definition for qualifying affiliates that includes "entities" as defined in the *Investment Canada Act*;
- an explicit defence in the Act for "regulated conduct" approved by a legislature; and
- an amendment to the "competitor" definition in order to replace the term "competitor includes" with the term "competitor means," thereby providing greater precision, and to ensure that the definition is broad enough to include individuals who were competitors in the past or who may be competitors in the future.

Regarding the civil conspiracy offence, Tim Kennish also told the Committee that the scope of powers granted to the Competition Tribunal should be broadened to include the power to order a person to do any other requirement that, in the Tribunal's opinion, is necessary to overcome the effects of the agreement in the market or to restore or stimulate competition in the market.[15]

In its testimony to the Committee, Option consommateurs urged consideration of a "consumer welfare" test rather than the current approach.

THE ISSUE: TWO-STAGE PRE-MERGER NOTIFICATION (Subsection 114(2), Sections 123 and 123.1)

A. Background

Prior to the 1986 amendments to the *Competition Act*, the merger offence was a criminal offence under the *Combines Investigation Act*.[16] In 1986, the merger offence was changed to a civil offence due to the difficulty of proving that competition would be "lessened to the detriment or against the interest of the public" to the criminal standard of "beyond a reasonable doubt." Moreover, in 1986, a provision was created that applied to parties contemplating certain mergers; the provision required the submission of advance notification to the Commissioner of Competition (Part IX – sections 108-124, "pre-

[15] His proposal is modelled on subsection 77(2) of the *Competition Act*.
[16] See R.S.C. 1970, c. C-23, section 33 and R.S.C. 1985, c. 19 (2nd Supp.).

merger notification"). Under the current provision,[17] if a proposed transaction surpasses the party-size and transaction-size thresholds in sections 109 and 110 of the Act, then – subject to certain exceptions described in Part IX of the Act – the parties are required to notify the Commissioner of Competition prior to completing the transaction. This notification begins a 30-day review period by the Competition Bureau to determine whether the proposed transaction is likely to result in a substantial lessening or prevention of competition.

From January 2002 to December 2007, there were 7,937 mergers in Canada, with 1,431 merger transactions being reviewed by the Competition Bureau.[18] Of these 1,431 reviewed transactions, 15 resulted in merger remedies, such as divestiture of assets or businesses. One of the reasons for the relatively low number of reviewed transactions is that investigations by the Bureau require information that may be difficult to obtain through existing methods, such as section 11 orders under the *Competition Act*.[19]

One of the goals of the recommendations proposed in the *Compete to Win* report was to harmonize Canadian competition laws with those of the US in order to minimize unnecessary procedural or substantive differences due to the high degree of integration of business operations in the two countries. The *Compete to Win* recommendations included a proposal for a new, US-style two-stage pre-merger notification regime, which would unify the pre-notification procedure for cross-border mergers.

Part 12 of the *Budget Implementation Act, 2009* created a new, two-stage pre-merger notification regime in the *Competition Act*. The regime is perhaps the most controversial aspect of the recent changes to the *Competition Act*. The changes include the establishment of a new mechanism for the Competition Bureau to obtain additional information required for a merger review through a supplementary request for information process ("supplementary information request") during the initial 30-day review period.[20] The supplementary information request will initiate a new 30-day review period, which begins after the Bureau has received the additional information. According to the Bureau's draft guidelines, after the 30-day period, the proposed

[17] Part 12 of the *Budget Implementation Act, 2009* increased the party-size and transaction-size thresholds from $35 million to $70 million and provided for yearly increases indexed to inflation.
[18] *Compete to Win* (2008), p. 55.
[19] See: Competition Bureau, *Review of s. 11 of the Competition Act*, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/FINAL%20Opinion%20Revised%20Post%20Delivery%20-%2019%20June%202008.pdf/$FILE/FINAL%20Opinion%20Revised%20Post%20Delivery%20-%2019%20June%202008.pdf.
[20] See: Competition Bureau, *Draft - The Revised Merger Review Process*, http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Merger-Guidelines-Final-20090324-e.pdf/$FILE/Merger-Guidelines-Final-20090324-e.pdf.

transaction may be completed by the parties unless the Bureau has obtained an order[21] to prevent the closing of the transaction.[22]

In the US, the costs associated with a supplementary information request are, on average, $5 million. The recent amendments to the *Competition Act*[23] also include a new administrative penalty for parties that close a transaction before the expiration of the initial 30-day review period or the 30-day supplementary information request period.

B. Witnesses' Views

The Interim Commissioner of Competition told the Committee that approximately four to six mergers each year are potentially harmful to competition and require additional information for the Competition Bureau's analysis.

The Canadian Chamber of Commerce was concerned about the lack of judicial oversight in respect of the supplementary information request procedure and the lack of closure after the expiration of the new 30-day review period, since the Commissioner of Competition is not required to complete the review or to obtain an order. The Canadian Bar Association, in a February 2009 letter to Industry Canada, also highlighted that the US two-stage merger review process increased costs and delays associated with mergers.[24] The Committee was told that the lack of a defined deadline in the amendments to the Act and the new administrative monetary penalty may result in increased costs for the merging parties.

The Committee also heard the concerns of the Canadian Bar Association, the Canadian Chamber of Commerce and Tim Kennish about the application of the new, two-stage merger-process to popular business transactions that may not result in industry concentration that would lessen competition, such as real estate acquisitions, upstream oil and gas acquisitions, trust conversions, sale and leaseback transactions, and corporate reorganizations where ultimate control was unaltered. We were told that US legislation contains a list of exemptions for transactions that would not result in industry concentration,[25] and recommended a list of exempted transactions for Canada.

Another potential problem brought to the Committee's attention was the interaction between existing Competition Bureau procedures, such as advanced ruling

[21] Under section 100 of the *Competition Act*, the Commissioner of Competition may seek an interim order from the Competition Tribunal to prevent the closing of a transaction where the Commissioner requires additional time to complete a review of the transaction.
[22] See: Competition Bureau, *Draft - The Revised Merger Review Process*, p. 5 and see subsections 114(2), 114(2.1) and paragraph 123(1)(b) of the *Competition Act*.
[23] See section 123.1 of the *Competition Act*, which creates a $10,000 penalty for each day a transaction is in violation of the pre-merger notification clause (section 123), and US legislation, which contains a $11,000 penalty for each day of the violation (15 U.S.C. § 18a(g)(1)).
[24] See the Canadian Bar Association, *letter to Industry Canada*, 3 February 2009.
[25] See: 16 C.F.R. §§ 802.1-802.71, http://www.access.gpo.gov/nara/cfr/waisidx_09/16cfr802_09.html.

certificates, no-action letters, service standard periods and section 11 orders, and the new, two-stage merger-review process. Tim Kennish felt that existing Bureau procedures could hamper the efficiencies expected from the new regime, since the US does not have similar procedures. In his view, service standards[26] for fees charged in relation to the merger review process will also have to be updated to reflect the recent changes to the process.

THE ISSUE: ADMINISTRATIVE MONERARY PENALTIES (Paragraph 74.1(1)(c) and Subsection 79(3.1))

A. Background

The provisions prohibiting deceptive marketing practices found in Part VII.1 of the *Competition Act* were created in 1999 with the repeal of the previous criminal provisions and the creation of a new civil offence with monetary penalties.[27] The recent changes to the Act (paragraph 74.1(1)(c)) resulting from Part 12 of the *Budget Implementation Act, 2009* include an increase in the maximum administrative monetary penalty from $100,000 to $1,000,000 for individuals who, and from $200,000 to $15,000,000 for corporations that, engage in deceptive marketing practices. These penalties will provide the Competition Tribunal, the Federal Court and the superior court of a province with an additional remedy for violations of the Act's deceptive marketing provisions.

The prohibition on abuses due to a person's dominant position in a market (section 79 – "abuse of dominant position") contained in the *Competition Act* was created in 1986 with the repeal of the previous criminal offence of being a party to, or to the formation of, a monopoly and the creation of a civil offence with monetary penalties.[28] The *Compete to Win* report also considered the use of penalties or fines in the Act to deter anti-competitive behaviour.[29] Fines include administrative monetary penalties for civil offences and awards of damages during criminal proceedings. The *Compete to Win* report recommended the repeal of the specific administrative monetary penalties for Air Canada in the abuse of dominant provisions in the Act (subsection 79(3.1)) and the creation of a general $5,000,000 penalty that would apply to all industries. Canada is one of the few countries where the competition authority does not have the general power to administer fines to entities that abuse their dominant position in the market.[30]

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[26] See: Competition Bureau, Competition Bureau fee and Service Standard Policy, http://www.cb-bc.ca/eic/site/cb-bc.n56/eng/01388.htlm

[27] S.C. 1999, c. 2. Please note that misleading advertising may be prosecuted under the criminal provision (section 52) or the civil offence in Part VII.1 of the *Competition Act*.

[28] R.S.C. 1985, c. 19 (2nd Supp.).

[29] Other countries use fines as a retribution remedy, including – for example – Japan. See: Organization for Economic Co-operation and Development, *Policy Roundtables - Remedies and Sanctions in Abuse of Dominance Cases*, 2006, http://www.oecd.org/dataoecd/20/17/38623413.pdf.

[30] Ibid.

The recent changes to the Act resulting from Part 12 of the *Budget Implementation Act, 2009* include a general administrative monetary penalty of a maximum of $15,000,000 for abuses of a party's dominant position in the market. Previously, the administrative monetary penalty applied exclusively to Canada's dominant domestic airline. The new penalty will provide the Competition Tribunal with an additional remedy after a party is found to be engaging in anti-competitive practices as a result of its dominant position in the market.

B. Witnesses' Views

In its testimony to the Committee, the Retail Council of Canada expressed concern about the magnitude of the penalties for infringers and the potential violation of safeguards guaranteed by section 11 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). To confirm this viewpoint, the Retail Council of Canada submitted a legal opinion by constitutional expert Peter Hogg which stated, among other arguments, that the administrative monetary penalties were more like penalties associated with criminal offences in other acts, such as administrative penalties in taxing statutes which are based on a mathematical formula related to the amount of tax evaded or the value of goods on which customs duty was evaded.

The legal opinion by Peter Hogg also noted that the administrative monetary penalty provisions also have a "true penal consequence," [31] and stated that the existing administrative monetary penalty for both deceptive marketing practices and the new administrative monetary penalty for the "abuse of dominant position" offence include mitigating factors which are similar to the factors considered by criminal courts in imposing a sentence on a convicted accused. Thus, according to the legal opinion, the similarities with criminal offences necessitate protection for offenders, as guaranteed by section 11 of the *Charter*.

In its submission, the Association of Canadian Advertisers agreed with the Retail Council of Canada's constitutional arguments and also argued that the monetary penalties for "deceptive marketing practices" were excessive and may decrease advertising activity in Canada.

Tim Kennish also argued that the administrative monetary penalties under the abuse of dominant position provision are excessive and may be harmful to legitimate practices that are difficult to identify as abusive behaviour under the current provisions.

THE ISSUE: MISCELLANEOUS

A. Background

[31] See *R. v. Wigglesworth* [1987], 2 S.C.R. 541, at paragraph 23.

Recent changes to the *Competition Act* resulting from Part 12 of the *Budget Implementation Act, 2009* also include a new restitution remedy (paragraph 74.1(1)(d)) for violation of the civil deceptive marketing practices offence. The new remedy will allow the Competition Tribunal, the Federal Court or the superior court of a province to order revenue obtained through false or misleading advertising of a product[32] to the public to be returned to the final purchaser of the product (i.e., the consumer).

B. Witnesses' Views

In respect of the new restitution remedy, Option consommateurs argued that any residual amount that is not claimed by a consumer should be allocated to consumer advocacy groups so that further abuses may be prevented.

Finally, the Canadian Chamber of Commerce recommended that an oversight body be created to ensure that the Competition Bureau is enforcing the law in an acceptable manner. In its view, the oversight body could be modelled on similar bodies created to oversee other law enforcement agencies or could consist of yearly parliamentary review of the Bureau.

[32] "Product" includes articles and services (subsection 2(1) of the *Competition Act*).

Appendix A – History and Overview of the *Competition Act*

1. History

Competition legislation has existed in Canada for more than 120 years. The first Canadian legislation in this area was passed in 1889 with *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*.[33] The statute, which created a criminal offence to combat conspiracies and combinations formed in restraint of trade as well as to provide penalties for violations, was motivated by concern over the emergence in Canada of smaller versions of the large trusts that existed in the United States and which were thought to increase the price of goods and limit supplies.[34]

In 1910, the Canadian Parliament passed the *Combines Investigation Act*,[35] which was designed to ensure that firms compete with one another on a fair basis and to ensure that markets operate efficiently.[36] The Act provided investigative powers and created a board to levy fines against individuals and companies found guilty of combines offences.

In 1969, a report by the Economic Council of Canada ("1969 Report") advocated major changes to the *Combines Investigation Act*.[37] The report identified the need for substantial reforms to the Act in order to ensure that market forces allocate resources in an efficient and impartial manner. Among the major changes it recommended was the shifting of merger and monopoly (abuse of dominant position) offences from criminal to civil matters.[38] Following the recommendations contained in the 1969 Report, the *Combines Investigation Act* was substantially amended in 1986, and was renamed the *Competition Act*.[39]

[33] S.C. 1889, c. 41, which created the criminal conspiracy offence in section 1 of *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*. The conspiracy offence is now section 45 of the *Competition Act* (R.S.C. 1985, c. C-34).
[34] House of Commons Standing Committee on Industry, *Interim Report on the Competition Act* (2nd Session, 36th Parliament), http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031742&Language=E&Mode=1&Parl=36&Ses=2&File=2. Also see: Al Gourley, *A Report on Canada's Conspiracy Law: 1889-2001 and Beyond*, 2001, p. 2 and *Ontario Salt v. Merchant Salt Co.* (1871), 18 Gr. 540.
[35] S.C. 1910, c. 9.
[36] Consumer and Corporate Affairs Canada, *Competition Law Amendments – A Guide*, 1985, p. 1.
[37] Economic Council of Canada, *Interim Report on Competition Policy*, 1969. Also see: R.S.C. 1970, c. C-23.
[38] Consumer and Corporate Affairs Canada, *Competition Law Amendments – A Guide*, 1985, p. 1.
[39] See: Commissioner of Competition, *Ahead to the Future: Challenges of Competition and Competition Policy*, Speech to the C.D. Howe Institute, Toronto, Ontario, 25 October 2004, http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/00881.html.

2. Act Prior to 2009 Amendments Resulting from the *Budget Implementation Act, 2009*

The purpose of the *Competition Act*[40] ("Act") is fourfold: a) to promote the efficiency and adaptability of the Canadian economy; b) to expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada; c) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and d) to provide consumers with competitive prices and product choices.[41]

The Act contains both criminal and civil provisions that apply to most industries and businesses in Canada. Headed by the Commissioner of Competition, the Competition Bureau ("Bureau") is an independent federal agency that administers and enforces the Act. In general, the Competition Bureau investigates anti-competitive behaviour that may violate the *Competition Act*; it does not set prices or regulate businesses directly.

The Act criminalizes some anti-competitive practices. The Act's criminal provisions include conspiracy to lessen competition unduly, bid-rigging, discriminatory geographic and predatory pricing, price maintenance and refusal to supply, and certain misleading advertising and deceptive marketing practices. These offences are investigated by the Competition Bureau and may be prosecuted in federal or provincial superior courts. Criminal prosecutions must be proven beyond a reasonable doubt and, upon conviction, can lead to fines, imprisonment or injunctions ordering the offender to cease its anti-competitive behaviour.

Practices that are not necessarily damaging to competition are "reviewable" by the Commissioner of Competition and are subject to civil, as opposed to criminal, sanctions. The Act's civil provisions include:

- certain deceptive marketing practices (part VII.1);[42]
- refusal to deal (section 75);
- consignment selling (section 76);
- tied selling, exclusive dealing and market restriction (section 77);
- abuse of dominant position (sections 78 and 79);
- delivered pricing (sections 80 and 81); and

[40] R.S.C. 1985, c. C-34.
[41] See section 1.1 of the *Competition Act*.
[42] These complaints are prosecuted by the Commissioner of Competition and may be heard at the Competition Tribunal, the Federal Court or the superior court of a province. Deceptive marketing practices include: misleading advertising; misleading representations of products; bait and switch selling; misleading pricing; and inaccurate or misleading promotional contests.

- merger review (sections 91 to 100).

The Commissioner of Competition[43] can institute formal civil proceedings against individuals or companies that engage in reviewable anti-competitive practices. These complaints are heard by the Competition Tribunal, a quasi-judicial body[44] that has the power to issue injunctions and remedial orders preventing practices that are likely to reduce competition substantially.

A person who has suffered loss or damage as a result of a breach of one of the criminal provisions of the Act, or of a Tribunal order, also has a private right of action against the potential infringer.[45]

Finally, the Commissioner of Competition is responsible for the review of potential mergers if the size of the merging parties, or if the revenue generated by the assets being purchased, meet a defined threshold, which would require the parties involved to notify the Competition Bureau ("pre-merger notification").[46]

[43] With leave from the Competition Tribunal, private individuals and corporations can bring a complaint under the refusal to deal (section 75) and exclusive dealing, tied selling and market restriction (section 77) sections of the *Competition Act*.
[44] The Competition Tribunal is comprised of judges from the Federal Court and lay persons appointed by the Governor in Council upon recommendation by the Minister of Industry.
[45] See section 36 of the *Competition Act*.
[46] See Part IX of the *Competition Act*.

Appendix B – Changes to the *Competition Act* in the *Budget Implementation Act, 2009*

Part 12 of the *Budget Implementation Act, 2009* significantly amended the *Competition Act*. In particular, Part 12 made changes in respect of:[47]

(a) airlines

- remove the exemptions from conspiracy and price maintenance for agreements made between or among travel agents involving commissions paid by a domestic airline
- remove prescribed airline activities from the list of restricted anti-competitive acts
- repeal the special temporary order provisions
- remove the special administrative monetary penalty;

(b) the conspiracy offence[48]

- in respect of the criminal conspiracy offence, clarify restricted activities, increase the term of imprisonment and potential fines, and clarify defences to conspiracy allegations related to ancillary agreements
- create a new civil offence for conspiracy, prohibiting agreements or arrangements that prevent or lessen competition substantially;

(c) penalty provisions

- increase the monetary penalty from $5,000 to $100,000 for violations of a court order
- increase the term of imprisonment from 5 years to 14 years for individuals found to be providing false or misleading representations, deceptive telemarketing or a deceptive notice of winning a prize
- increase the term of imprisonment from two years to ten years and monetary penalties from $5,000 to $100,000 for individuals found to be obstructing an inquiry or investigation
- increase the term of imprisonment from two years to ten years and monetary penalties from $50,000 to $100,000 for individuals found to be destroying or altering records or things required to be produced in a court order
- create a general administrative monetary penalty to prohibit abuses as a consequence of an entity's dominant position in the market
- raise the monetary value of administrative penalties, and create a new administrative remedy and procedure to refund amounts obtained from reviewable conduct to the retail purchaser;

[47] For a review of the changes, see: Competition Bureau, *A Guide to Amendments to the Competition Act*, http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03045.html.
[48] The revised criminal conspiracy offence and the new civil conspiracy offence will come into force on 12 March 2010.

(d) bid-rigging

- expand the definition of bid-rigging to include agreements to withdraw a bid and the withholding of the existence of the agreement from the person calling for, or requesting, the bid
- increase the term of imprisonment for individuals found to be guilty of bid-rigging;

(e) the criminal status of certain offences

- decriminalize "resale price maintenance" and discriminatory behaviour against a low-price seller, and make these civil offences
- repeal the illegal trade practices provisions that prohibit price discrimination and predatory pricing;

(f) mergers

- require businesses that wish to acquire or merge with another business to file a pre-merger notification with the Commissioner of Competition if the size of the resulting business will have assets, or gross revenue from sales in Canada, greater than $70 million (up from $35 million), indexed to nominal gross domestic product according to the prescribed formula
- create a two-stage pre-merger notification filing obligation where the Commissioner of Competition can request additional information 30 days after receiving the initial notification from the parties contemplating the merger
- create a 30-day waiting period for proposed mergers such that a proposed merger will not be completed until 30 days after the Commissioner of Competition has received the prescribed information or, if additional information is requested by the Commissioner, until 30 days after he or she has received the additional information
- enable the Commissioner of Competition to waive the waiting period in certain cases
- provide that failure to comply with the time limits can result in a court order by the Competition Tribunal for additional information, an injunction, dissolution of the merger, disposition of assets or shares, payment of administrative monetary penalties or other relief
- reduce, to one year from three years after the merger is substantially completed, the limitation period for applications by the Commissioner of Competition for a remedial order to change or prevent the merger; and

(g) miscellaneous changes

- lower the evidentiary burden for proof in respect of false or misleading representations and deceptive marketing practices

- create a new interim injunction to freeze the assets of an individual engaging in, or about to engage in, reviewable conduct.

Appendix C: Witnesses

Date appeared	Name of organization	Name of presenter(s)	Bilingual Brief or no brief
May 13, 2009	Competition Bureau	Melanie Aitken	Bilingual brief available
May 13, 2009	Industry Canada	Colette Downie	Bilingual brief available
May 13, 2009	Canadian Chamber of Commerce	Shirley-Ann George & George Addy	Bilingual brief available
May 13, 2009	Retail Council of Canada	Peter Woolford	Bilingual brief available
May 14, 2009	Canadian Bar Association	John D. Bodrug, Paul Collins, Janet Bolton and Omar Wakil	Bilingual brief available
May 14, 2009	As an individual	Tim Kennish, Osler, Hoskin & Harcourt LLP	Bilingual brief available
May14, 2009	Public Interest Advocacy Centre	Michael Janigan	No brief
May 14, 2009	Option consommateurs	Anu Bose	No brief

Appendix D: - Briefs submitted but did not appear before the Committee

Name of Organization	Name	Date brief was received and distributed to members
Association of Canadian Advertisers	Robert Reaume	May 2009
Canadian Real Estate	Pierre Beauchamp	April 2009

Association		
Tipacimowin Techonology	Thomas Townsend	March 2009