Submission on the

Public Policy Forum Consultation Concerning Amendments to the *Competition Act* and the *Competition Tribunal Act*

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

July 2000

TABLE OF CONTENTS

Submission on the Public Policy Forum Consultation Concerning Amendments to the *Competition Act* and the *Competition Tribunal Act*

PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.

Submission on the Public Policy Forum Consultation Concerning Amendments to the *Competition Act* and the *Competition Tribunal Act*

I. EXECUTIVE SUMMARY

A. Part II – Introduction

The government's approach in this consultation will not provide a sufficient opportunity for genuine consideration of the benefits or risks of the proposed changes. Some of the proposed changes to the *Competition Act* and the *Competition Tribunal Act*, and in particular to section 45 (the conspiracy provision), will have far-reaching implications which require more thought and consultation, as they are not yet fully understood.

B. Part III – Private Rights of Access to the Competition Tribunal and Procedural Reforms

There are divided views within the Section in this area. A private right of access to the Competition Tribunal (the Tribunal) may have a significant impact on the way in which competition law is enforced in Canada.

The Section agrees with granting the Tribunal the power to determine references of questions of law, fact or mixed law and fact arising in specific cases. Either the Commissioner or a private party should be able to invoke the reference procedure, as long as it arises from a *lis* between them. Section 124.1 should apply to all mergers or

proposed mergers, not just notifiable transactions. The proposed power for the Tribunal to award costs can be used to deter frivolous applications for references.

The Section supports the proposal to grant the Tribunal the power to award costs. We recommend that the proposed provision be modified to ensure that the Tribunal has the same discretion in awarding costs as the Federal Court of Canada.

The Section supports the proposal to grant the Tribunal the power to dispose of matters summarily.

C. Part IV – Bill C-402 – Specific Anti-Competitive Acts

The Section opposes the provisions in Bill C-402. The *Act* is a law of general application and its effectiveness would be diluted by including industry-specific provisions. Moreover, the *Act* already provides an effective remedy for the conduct that is the intended target of this Bill.

D. Part V – Bill C-438 – Games of Chance

The Section opposes the provisions in Bill C-438. The rationale given for these amendments is not persuasive, as the *Competition Act* and the *Criminal Code* already effectively regulate the conduct prohibited by this Bill. As well, the amendments in Bill C-438 would prohibit certain types of promotional contests which most would agree are acceptable forms of marketing.

E. Part VI – Bill C-472 – Temporary Orders

The Section opposes the proposal to grant the Commissioner the power to grant temporary orders. The exercise of such a judicial function by the Commissioner would be tainted by the Commissioner's role as investigator and prosecutor and *vice versa*. The

Section proposes instead that section 100 of the *Competition Act*, which permits the Commissioner to apply to the Tribunal for a temporary order in merger cases, be amended to provide for the same procedure in cases of alleged violations of abuse of dominance and any other provision of Part VIII. This would provide an expedited procedure for obtaining temporary orders, while preserving the necessary separation of judicial and investigatory roles.

F. Part VII – Bill C-471 – International Assistance

In principle, the Section supports having a legal framework for international enforcement cooperation in civil competition matters. However, any such framework must contain explicit safeguards and protections regarding: (i) the circumstances in which confidential information may be disclosed to a foreign enforcement authority; (ii) the use which the recipient agency may make of such information; (iii) the disclosure of such information to private parties, other government agencies or other third parties in the recipient country; and (iv) the expeditious return or destruction of the disclosed information, along with any photocopies and work product which may contain the disclosed information. The proposed amendments in Bill C-471 address these principles insufficiently in a number of respects and leave enough room for uncertainty that parties' continued co-operation with the Bureau can reasonably be expected to suffer.

G. Part VIII – Bill C-472 – Section 45 of the Competition Act

The Section agrees that it would be appropriate to consider amendments to the conspiracy provisions in section 45 of the *Act*. Section 45, which is the cornerstone of the *Act*, has been used effectively to prosecute criminal behaviour. The meaning of the provision has developed through a large body of case law over the past 111 years. Any modification to section 45 will have far-reaching implications, will create uncertainty for the business community and may make prosecution of hard-core cartel conduct more difficult.

Accordingly, the Section submits that no amendments to section 45 should be made until a more detailed and extensive study has been undertaken. This would help clarify the objectives of the proposed amendments and allow alternative proposals to be considered.

II. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the Section) welcomes the opportunity to comment on the proposed amendments to the *Competition Act* (the *Act*) and the *Competition Tribunal Act* contained in Bills C-402, C-438, C-471, and C-472.

Historically, the Government has pursued broad consultation respecting changes to the *Act*. Such consultation has typically commenced with a discussion paper which outlines the types of changes proposed and the reasons for those proposed changes. There has then been a reasonable period of public comment and, often, stakeholder panels or other mechanisms to allow for useful commentary and input. We believe that this approach has led to effective legislation.

The government's approach in the current process has been to review some or all aspects of various private members' bills, which may or may not be incorporated into draft government legislation, without publishing a meaningful white paper articulating the reasons for proposed changes. The process does not allow for an appropriate comment period or for mechanisms such as consultative panels. In our view, this will not provide a sufficient opportunity for genuine consideration of the benefits or risks of the proposed changes. In addition, by using these bills as the focus of legislative reform, the government is creating the impression that amendments are not needed in other areas – for example, price discrimination or section 75.

The national consultation process led by the Public Policy Forum will be an important first step in evaluating the proposed amendments. However, some of the proposed changes to the *Competition Act* and the *Competition Tribunal Act* represent a marked departure from the current legal framework and will have far-reaching implications which are not yet fully understood. In particular, a great deal more thought and consultation on the proposed changes to section 45 of the *Competition Act* (the conspiracy provision) will be required to ensure that the amendments do not have unintended negative consequences.

We understand that the objective of this consultation process is to seek common ground on the principles underlying the proposed amendments and we have tailored our comments accordingly. We request an invitation to participate in the technical roundtable, which we understand will take place in Toronto in Summer 2000, in order to provide detailed drafting comments. We intend to comment on any draft Bill which arises from this process and hope to be provided the opportunity to do so before it is introduced in Parliament. After this, it is often difficult to have meaningful dialogue on the more technical aspects of proposed legislation.

III. PRIVATE RIGHTS OF ACCESS TO THE COMPETITION TRIBUNAL AND PROCEDURAL REFORMS

A. Consultation Process

The proposal to allow private parties to challenge vertical practices before the Tribunal is an extremely significant change in Canadian competition law. Private access to the Tribunal has been a topic of public discussion, in one form or another, for approximately five years.

There is no consensus among the Section's members on whether this is a desirable change. However, we recognize that permitting private access would shift the focus of the

Competition Act from being a regime which challenges behaviour based purely on public interest motivations to one in which challenges will arise from competitive rivalries and private interests. This would likely have consequences on the number of applications brought and, more importantly, on the willingness of firms to engage in the sorts of vertical reviewable conduct that could become subject to private attack.

We cannot predict whether private access will have a negative or a positive effect on the efficiency or adaptability of the Canadian economy. However, there is certainly a significant potential that it will have some impact. Private access, among other things, risks inhibiting pro-competitive vertical restraints. Private access may also discourage firms from altering distribution arrangements, for fear of prompting litigation challenges, even though altering those arrangements may be efficient.

The above considerations do not necessarily mean that private challenges to the vertical practices covered by sections 75 and 77 of the *Act* should not be permitted. They do, however, suggest that the positive reasons for the proposed changes ought to be sufficiently persuasive that they clearly outweigh the risks.

B. Has the Case for Private Access in Respect of Sections 75 and 77 Been Demonstrated?

The views within the Section are divided on this issue. In speeches and consultation papers, various justifications have been put forward for considering private access, including the following:

(a) The Bureau has insufficient resources to pursue all the cases it might wish to pursue.

(b) The sorts of cases which the Bureau has chosen not to pursue involve essentially private disputes: (i) with no significant public interest component; (ii) where the

impact on competition is minimal; or (iii) in the nature of contractual disagreements or private disagreements which do not warrant public intervention.

(c) The Bureau wishes the jurisprudence to develop.

(d) The parties directly affected are more knowledgeable than the Commissioner about the circumstances in the marketplace.

(e) Private access would make Canada an attractive investment destination.

(f) Private enforcement would increase the effectiveness of the provisions.

Correspondingly, opponents of private access have advanced the following responses to these arguments:

(a) Resource issues ought not to be addressed by substantially altering the provisions of the law. Instead, proper financial or other resources should be made available. In this connection, the operations of the Bureau have generated significant revenues for the government as a result of user fees and very large fines recently obtained. Resources should not, therefore, drive decisions about legislative amendments as serious as these.

(b) Private law remedies are available to the aggrieved party in private contractual disputes. If there is little or no impact on competition then such arrangements ought not to be challenged under the *Act*.

(c) While there is some advantage to generating additional jurisprudence, that is true of virtually all aspects of the *Act*. It is not a compelling reason to alter the statutory

framework, which was designed to encourage pro-competitive vertical arrangements. In the absence of jurisprudence, the Bureau can give guidance through guidelines and bulletins. If the Bureau believes that additional jurisprudence is necessary, based on the facts of cases brought to its attention, it is capable of pursuing those cases.

(d) The present system provides a full opportunity for affected parties to make the Bureau completely and intimately aware of the nature and impact of the impugned practices. As a practical matter, the complainant often becomes an intervenor in cases brought by the Commissioner. This allows the complainant to put forward its perspective directly.

(e) There does not appear to be any evidence suggesting that foreign investors are seeking additional private antitrust enforcement of these provisions.

(f) No additional remedies will be available for private parties. It is not clear, therefore, that allowing private access will further deter practices which genuinely injure competition – which now may be the subject of challenge by the Bureau. Private access will deter vertical arrangements which would not be challenged by the Bureau because they have a positive – or at worst a neutral – effect on competition, although they may affect a competitor or other person in the distribution chain. Yet, this is the type of arrangement that should be permitted, in order to promote the efficiency and adaptability of the Canadian economy. Unfortunately, it may be discouraged as a result of this proposed change in the law.

Another argument for a private access regime is that the Commissioner ought not to be the only gatekeeper to the Tribunal. The Commissioner has probably chosen not to pursue some meritorious cases for reasons such as lack of resources, although we have no

information on how frequently that occurs. On the other hand, private access may encourage the Bureau not to pursue cases which it might have previously, hoping that the complainant will take up the torch.

We believe there will be anti-competitive and efficiency-reducing consequences of allowing private access in respect of the vertical practice provisions. We expect that there will be ill effects when firms choose not to enter into or update distribution arrangements or when they choose vertical integration rather than contractual integration.[1] No one is able to say how significant the impact on the economy will be.

It is unlikely that enhancing private access will open the floodgates to litigation. There has been private access since 1975 under section 36 with respect to conduct under Part VI (criminal) of the *Act*. However there have been very few cases brought under this section. Indeed, there has been no successful decided case.

C. Specific Comments on the Proposed Amendments to Sections 75 and 77

Should private access be determined, on balance, to be a desirable goal, we recommend that the proposed amendments be modified as set out below.

Bill C-472 would add the following provisions to the *Competition Act*:

---

1 See G.F. Matthewson and R.A. Winter, *Competition Policy and Vertical Exchange*, (Toronto: University of Toronto Press, 1985).

77.1(1)	A person who alleges that they are directly affected in their business or are precluded from carrying on business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms may, with leave of the Tribunal, make an application under section 75.
77.1(2)	A person who alleges that they are directly affected in their business by exclusive dealing, tied selling or market restriction may, with leave of the Tribunal, make an application under section 77.

Sections 77.1(1) and 77.1(2) each refer to "a person who alleges that they are directly affected" by the conduct at issue. This permits anyone to commence an application under sections 75 and 77, so long as they "allege" they are directly affected and obtain leave. It does not require – and may not even permit – the Tribunal to consider whether a private party seeking leave is in fact directly affected. As under section 36, private access should only be available to persons who can establish that they are in fact appropriately affected by the conduct in question, not those who merely "allege" they are. Consequently we recommend that the words "who alleges that they are" be deleted and replaced by the word "is" in section 77.1. The proposed applicant would then bear the onus of establishing that it is directly and (for reasons discussed below) substantially affected by the practice in question.

There is an unexplained discrepancy between the language used in sections 77.1 and 75. Section 77.1 allows private access to the Tribunal for persons "directly affected in their business". Section 75 provides that a remedy is available to persons "substantially affected". Thus, if someone were "directly affected" but not "substantially affected" by a refusal to deal, that person could independently commence a private action but would not be entitled to receive a remedy. We therefore recommend that the word "directly" in section 77.1 be replaced with the words "directly and substantially".

Should private access to the Tribunal be permitted, there must be safeguards to minimize strategic litigation and litigation chill. However, requiring a private party to obtain leave of

the Tribunal to bring an application is not a meaningful safeguard. If the test for leave is set too high, it will improperly inhibit meritorious applications from proceeding. If the test is set too low it will become a meaningless, perfunctory (and costly) hoop for parties to jump through. At the end of the day, it is difficult to get into "preliminary" assessment of the merits of the case without getting into extensive evidence. Motions for summary judgment may provide some protection. However, requiring leave at the outset does not appear to be useful. Consequently we recommend deletion of the words "with leave of the Tribunal" in section 77.1(1) and replacement with a summary judgment procedure.

Section 75 is unusual because it does not require the Tribunal to determine that the conduct in question results in a substantial prevention or lessening of competition before granting a remedy. This becomes more significant if private parties may bring applications for refusal to deal under section 75. Under the current regime, access is limited to applications brought by the Commissioner, who is concerned with the overall public interest. We believe that in practice, the Bureau tends to bring section 75 cases only where it believes there is a substantial lessening of competition. By contrast, private applications would be unfettered by this consideration and could be brought to seek remedies that would reduce, rather than promote, "the efficiency and adaptability of the Canadian economy". This is contrary to one of the purposes of the *Act* as found in section 1.1.

For example, proposed section 77.1(1) would permit a terminated distributor to bring an application against a supplier who elected to adopt a more efficient method of distribution which entailed no reduction in competition. In a regime of private access, applications under section 75 may well become standard in terminated distributor challenges. Yet an order requiring the supplier to reinstate the distributor could actually reduce the efficiency of the Canadian economy. In an era of rapid development of new and efficient distribution regimes and technologies such as the internet, we would expect reduced efficiency to be a typical result.

Where there is no demonstrable anti-competitive impact in any relevant market, it is inappropriate to allow any such challenges under a statute designed to promote competition. Where there is a no competitive impact, it is particularly dangerous to allow a business to challenge another's decision about those with whom it does business. If private access is going to be permitted for section 75, we recommend very strongly that section 75 be amended to require that the conduct result in a substantial prevention or lessening of competition.

Sections 77.1(4) and (5) would provide that:

> 77.1(4) Any person making an application under section 75 or 77 shall serve the person in respect of whom the order is sought and the Commissioner with a copy of the application for leave.
>
> 77.1(5) The Tribunal shall give notice to the Commissioner of its decision on an application for leave pursuant to this section.

It is uncertain whether the Commissioner would have standing to make representations at the leave application. We recommend that this section expressly provide the Commissioner with standing.

Section 77.1(6) would provide that:

> 77.1(6) Within 30 days of the granting of leave to a person to make an application under section 75 or 77, the Commissioner may becoming party to the application but, after 30 days, may do so only at the request of or with leave of the Tribunal.

In an adversarial system, we submit that it is not appropriate for the decision maker to actively solicit the involvement of a particular party. The Commissioner should be at liberty to decide on his or her own, whether to seek leave in a particular application. We therefore recommend that the phrase "at the request of or" be deleted from section 77.1(6).

Full party status for the Commissioner may automatically give rise to discovery obligations, potential liability for costs, and so on and thus may not be appropriate in all cases. We

therefore recommend that the Commissioner should be able to seek a lesser level of participation than full party status (for example, *amicus curiae*). Also, there appears to be a typographical error in this section. We recommend that the word "becoming" should be "become a".

Section 77.1(7) and (8) would provide that:

> 77.1(7) Where an application is made to a court for an order under section 75 or 77 and the parties agree on the terms of the order and such terms on in accordance with the terms of this *Act*, whether or not any of the terms could have been imposed by the court under this Part, the order agreed to may be filed with the court for immediate registration.
>
> 77.1(8) On being filed under subsection (7), an order shall be registered and, when registered, shall have the same force and effect, and all proceedings may be taken, as if the order had been made by the court.

Sections 77.1(7) and (8) constitute a fundamental change in the role of the Tribunal. They provide for the immediate registration of consent orders, thereby eliminating the Tribunal's mandate to review consent orders before they are granted. This registration process is inconsistent with the Tribunal's mandate under section 105 in relation to all other consent orders. There is no apparent rationale for giving the Tribunal a fundamentally different role in relation to consent orders granted under section 75 and 77 than with respect to those granted under the other sections of Part VIII. In our view, all consent orders under the *Act*, including those between private parties, should be subject to Tribunal oversight or none should be.

Breach of a Tribunal order can give rise to contempt proceedings. We therefore question whether it is appropriate to expect the Tribunal to deal with contempt proceedings in respect of consent orders that never came before the Tribunal for review before they became effective. This position radically changes the role of the Tribunal in relation to some, but not all, consent proceedings. In our view, such a change should not be

implemented on a piecemeal basis. Sections 77.1(7) and (8) should either be deleted or revised such that the Tribunal's mandate is consistent with the treatment of consent orders under section 105.

Allowing private parties to consent to Tribunal orders may permit anti-competitive arrangements to be sanctioned. We presume that the words "and such terms on (sic) in accordance with the terms of this *Act*", were designed to address this issue, but that phrase is vague.

This section also permits parties to incorporate terms into a consent order "whether or not any of the terms could have been imposed by the court under this Part". Again, there is no apparent rationale why such terms should be permissible in consent orders under section 75 and 77 but not under the other provisions of Part VIII. This change also represents a radical departure from the Tribunal's approach to consent orders that we do not believe should be implemented on a piecemeal basis, if at all. It could allow the Commissioner or a private litigant to pressure a respondent to agree, as part of a consent order, to accept terms that go well beyond the types of remedies contemplated in section 75 or 77 (for example, money damages). That would not be appropriate.

There appear to be some typographical errors in this section. We recommend that the word "on" in section 77.1(7) be "are", and the references to "court" in section 77.1(7) and 77.1(8) instead refer to the "Tribunal".

D. Use of References - Bill C-471

Bill C-471 would add sections 124.1, 124.2 and 124.3 to the *Competition Act* to permit references to the Tribunal. Questions of law, fact, or mixed law and fact that arise during an inquiry or during the review of a notifiable transaction could be referred to the Tribunal. Such references could only be made with the agreement of the Commissioner and the

subject of the inquiry or party to the notifiable transaction. The Commissioner could unilaterally refer questions to the Tribunal on the interpretation or application of the deceptive marketing practices, reviewable matters or notifiable transactions provisions. References to the Tribunal would be determined without delay and in a summary way.

We believe that these proposals would be beneficial as they would permit contentious matters to be resolved at an early stage. This would have a salutary effect on the process, as both the Commissioner and private parties would be encouraged to take more realistic positions in the course of an inquiry or merger review. However, the requirement that the Commissioner and the person or party agree to use the reference procedure severely limits its use. Accordingly, section 124.1 should allow the Commissioner or any party to refer any question of law, fact, or mixed fact and law to the Tribunal. This should be limited to questions arising in the context of a *lis* between the parties. Frivolous or unmeritorious references can be controlled through the Tribunal's power to award costs, as discussed below. This reference procedure would permit the identification and determination of matters at issue at an early stage so as to encourage more focussed and expeditious inquires and merger reviews.

The reference procedure should also be available during the review of non-notifiable transactions, which can also become contentious. Accordingly, we would substitute the words "merger or proposed merger" for the references to "transaction or a proposed transaction" in subsection 124.1(1) and "proposed transaction notifiable under Part IX" in paragraph 124.1 (2)(b). This will clarify that all mergers, whether notifiable or not, will be subject to the reference procedure.

Section 124.2 allows the Commissioner to refer questions of interpretation or application of Parts VII.1, VIII or IX of the *Act*. We doubt the value of references on questions of interpretation or application which are not tied to a specific fact situation. Competition law

adjudication primarily involves questions of mixed law and fact. In this area, determinations of "pure" questions of law are difficult to make without some kind of factual foundation. Again, references should not be permitted where there is no underlying *lis* between the parties. We therefore recommend that section 124.2 be deleted.

The proposed legislation should address the scope of participation in references by parties and intervenors. In a reference under section 124.1, the Commissioner and all persons referred to in subsection 124.1(2) should be entitled to become parties to the reference. As references under section 124.1 would deal with specific disputes between the Commissioner and certain private parties, other persons should only be permitted to intervene in limited circumstances with leave of the Tribunal. Generally, non-parties should not be permitted to intervene. This would ensure that the reference process is as fair, effective and streamlined as possible.

E. Awarding Costs - Bill C-472

Section 13 of Bill C-472 proposes to amend section 9 of the *Competition Tribunal Act* by giving the Tribunal the discretion to award costs of a proceeding or a step in a proceeding.[2]

The Tribunal should have the power to award costs, whether in applications commenced by private parties (if the *Act* is so amended) or in applications by the Commissioner. The issue of whether costs are to be imposed at any particular stage of a proceeding and in what amount should be left to the discretion of the Tribunal. It may be advisable, therefore, to include in the proposed subsection 9(4) a specific statement that the Tribunal has the same powers with respect to costs as a superior court. The *Act* could simply

---

[2] The advantages and disadvantages of various costs awards are fully canvassed in the study entitled "Private Party Access to the Competition Tribunal" by Kent Roach and Michael Trebilcock, dated May 7, 1996.

incorporate by reference Rule 400 of the *Federal Court Rules*, including the provision that party and party costs are to be determined in accordance with the Federal Court Tariff.

F. Summary Dispositions - Bill C-472

Section 13 of Bill C-472 proposes that the *Competition Tribunal Act* be amended by permitting a party to an application to move for a summary disposition of the application. These motions would be determined by a judicial member of the Tribunal. We support this.

IV. BILL C-402 – SPECIFIC ANTI-COMPETITIVE ACTS

Bill C-402 provides specific examples of anti-competitive acts of particular relevance to the grocery and other retail markets. These would be added to the illustrative list of anti-competitive acts in section 78 of the *Competition Act* for purposes of the abuse of dominance provision. We support the goal of ensuring that Canadian competition laws adequately address the dominance of a few large players in the grocery and other retail markets. However, the list of anti-competitive acts set out in section 78 is not intended to be exhaustive and the addition of highly specific examples detracts from the inclusive nature of the provision.

The Section is of the view that the proposed Bill C-402 should not be enacted for the following additional reasons:

- there is no evidence that section 78 is deficient in any way or that the "anti-competitive conduct" sought to be proscribed by the amendments could not be enforced under the current legislation;

- the "anti-competitive" conduct described in the Bill relates only to conduct in the retail sector. The *Act* is framework legislation and should not deal with industry-specific matters; and

- the proposed new provisions could limit the effectiveness of the current section.

A. Section 78(j)

Proposed subsection 78(j) would define an anti-competitive act to include:

> [r]equiring a supplier to pay a fee to a retailer as a condition for selling a product, if the fee is unrelated to, or in excess of, the actual costs incurred by the retailer with respect to the product for the purpose of impeding or preventing a supplier's entry into or expansion in a market.

It appears that the proposed paragraph is intended to protect unintegrated suppliers from vertically integrated retailers who are able to exact a shelf space fee from suppliers of products, presumably where the retailers also supply the product. In our view, this extremely specific proposed addition to the examples already in section 78 does not strengthen the *Act*'s ability to address the problem of anti-competitive behaviour. Both the Bureau's and the Tribunal's approach to section 78 has consistently been based on the principle that the list of anti-competitive acts set out in section 78 is not exhaustive. Therefore we are satisfied that the existing legislation is sufficiently broad to catch the behaviour targeted by this proposed amendment, provided, of course, that the facts support such a finding.

Slotting allowances by their nature are display fees and typically are not set by reference to costs incurred by a retailer. Similarly, other advertising fees are not typically set by reference to actual costs incurred to permit or display the advertisement. The cost of a full page advertisement in a newspaper or of an advertisement on a well-positioned billboard may have little relationship to the cost incurred by the advertiser actually to print the advertisement. Slotting allowances should not be treated any differently.

B. Subsection 78(k)

The proposed subsection 78(k) would make an anti-competitive act:

> Squeezing, by a vertically integrated retailer, of the margin available to an unintegrated person competing with the retailer, for the purpose of impeding or preventing the person's entry into, or expansion in a market.

This subsection is covered by the existing 78(a), and is therefore unnecessary.

C. Subsection 78(l)

The proposed subsection 78(l) would make an anti-competitive act:

> Unilaterally withholding amounts owing to a supplier for some purported reason without the prior agreement of the supplier for the purpose of disciplining the supplier.

The proposed provision is oddly worded. Anti-competitive behaviour only occurs where the retailer is dominant relative to the supplier, so the words "unilaterally" and "without the prior agreement of the supplier" would seem unnecessary. Further, if the intention and effect of withholding money owed is to discipline the supplier, the fact that a dominant retailer secured the supplier's prior agreement to such abusive behaviour should not be relevant.

This proposed provision could prohibit a purchaser's behaviour that is unrelated to competitive activities. There are many circumstances in which a purchaser might wish to withhold monies from a supplier without competition being involved in the slightest. For example, withholding or "setting off" amounts owed to the supplier may be in response to the supplier's own breach of contract but may have no anti-competitive intent or effect. We assume the proposed provision is not intended to prohibit a business from setting off debts. The Tribunal should not be inquiring into such behaviour.

D. Conclusion

The Bill should not be enacted, as it either applies to activities which are already covered under the *Act* or applies to activities which are not anti-competitive and therefore should not be covered under the *Act*.

V. BILL C-438 – GAMES OF CHANCE

A. Overview

The key provision in the Bill proposes to add section 52.2(1) of the *Act*, which states:

> Subject to subsection (2), no person shall, for the purpose or promoting, directly or indirectly, the supply or use of a product, or for the purpose of promoting, directly or indirectly, any business interest, cause to be delivered, by mail or through any other system of delivery, printed material that conveys the general impression that the recipient of the printed material has won a prize or advantage, and the distribution of such prize or advantage or any request for information regarding them is conditional on the prior payment of a sum of money or specific telephone charges.

The Bill also proposes to amend section 33 of the *Act* to allow interim injunctions in the same manner as the telemarketing provision. Presumably this would be used to deny alleged offenders access to postal and other delivery services.

The proposed section 52.2 contains a due diligence defence, provides for corporate liability for acts of employees and agents and provides for vicarious liability for officers and directors. All of these are parallel to the telemarketing provision (section 52.1).

The offence, punishment and sentencing provisions proposed by Bill C-438 are similar to those found in the current section 52.1. A proposed amendment to section 73 of the *Act* would add this new section 52.2 to the list of criminal matters that may be prosecuted in the Federal Court Trial Division. Finally, the reviewable practice provisions contained in sections 74.01 through 74.06 would not apply to the subject matter of section 52.2.

B. Discussion of the Proposed Bill

In some respects, Bill C-438 parallels the recently enacted section 52.1, which deals with telemarketing. By singling out one type of marketing activity, this Bill creates a similar inconsistency between the treatment of specific matters and the general rules applicable to all advertising or market undertakings.

The telemarketing provision resulted from significant concerns related to telemarketing abuses. Section 52.1 was the result of several years of study and consultation between the Canadian and United States governments, which culminated in the Report of the Canada-United States Working Group on Telemarketing Fraud in the Autumn 1997. There has been no similar process with respect to the proposed amendment contained in Bill C-438.

More fundamentally, the telemarketing provision responded to an articulated need for action in an area of the economy where gross abuses were perceived to exist. Elderly persons were being "befriended" by unscrupulous telemarketers, who tricked them out of large amounts of money – in some cases, their life savings.

The same types of concerns do not arise with the proposed section 52.2. Printed materials cannot impart the same sense of urgency, hurriedness or abusiveness that can occur with telephone marketing. The consumer always has time to consider the printed materials, if they care to take that time. With telemarketing, proving the offence is very difficult due to a lack of documentation. With printed materials, the lack of documentary evidence is not an issue. They have a permanence that allows enforcement authorities to review fully the behaviour in question.

There is not a demonstrated need to prohibit this type of behaviour. In the absence of such demonstrated need, the *Act* should not contain specialized provisions dealing with particular industries or conduct. The *Act* works most effectively by applying general

provisions to all marketplace conduct. Such specific, targeted provisions create inconsistencies and weaken the general application of the law.

Provisions which target specific marketing activities or methods of communication tend to require explanatory guidelines – such as those released by the Bureau interpreting the telemarketing provisions. No guidelines have been prepared to indicate how the proposed games of chance provision would be interpreted and enforced.

Section 52.2(1) refers to printed material which conveys the "general impression that the recipient...has won". It suggests that the provision is applicable only to situations in which the recipient has not actually won a prize. In fact, a recipient may have actually won. The offence may be committed under the section regardless of whether a valuable prize is won.

The misleading advertising provisions of the *Act* already address contest "scams" where marketing materials incorrectly give the general impression that a valuable prize has been won (see cases noted in Appendix I, below). Thus, the proposed Bill would only extend the *Act* to contests in which the contestant has won a valuable prize but where the winner must make a prior payment or incur telephone charges to claim the prize. Where a contestant wins a genuinely valuable prize but is required to make some payment, criminal prohibition is not appropriate provided that other laws (such as the "games of chance" provisions of the *Criminal Code*) are complied with.

The proposed provision requires that there be a delivery of "printed material". It is unclear whether this applies to electronically transferred information, such as e-mail, information downloaded from web sites or fax transmission. There is no reason to limit this kind of provision to printed material only.

Section 52.2(2) of the proposed amendment states:

> where the printed material indicates that it is necessary to make a telephone call in order to obtain information regarding the prizes to be won or how to obtain them and specific charges apply to the telephone call, such charges are deemed to be specific telephone charges for the purposes of subsection (1).

This definition does not anticipate changes in telecommunications technology, such as those involving the internet. It is not clear, for instance, whether the use of internet telephony would be caught by this section.

When Section 52.1 was added to the *Act*, it provided for an injunction to cut-off supply of a service. This was specifically tailored to the supply of telephone services. At the time, the stakeholders' panel considered that this injunctive power was likely to be a key to achieving compliance in the case of telephone promotions. By contrast, it is not clear that this extraordinary power will be helpful in the context of printed materials delivered by a post office or some other system of delivery. A "boiler room" operation engaged in unlawful telemarketing can effectively be shut down by an injunction cutting off service to a particular physical location. This is unlikely to apply in other contexts.

Officers and directors of corporations who know or ought to know of the commission of an offence can and have been charged as individuals under the *Act*. However, prior to the introduction of Section 52.1, the *Act* had not imposed liability on those with no knowledge of or involvement in the offence. Imposing statutory liability on persons with no personal involvement in or knowledge of an offence is unusual and generally inappropriate. It was invoked in the peculiar circumstance of telemarketing (allegedly involving great social harm and a difficulty in obtaining evidence) for the reasons noted above – reasons which simply do not apply in respect of printed materials. There has not been a sufficient case made for such a provision in respect of allegedly misleading contests.

One of the sentencing criteria in section 52.1 is "the manner in which information is conveyed, including the use of abusive tactics". In the proposed section 52.2, "abusive tactics" is not repeated as one of the factors to be considered. The "abusive tactics" provision has had limited utility under the telemarketing provision, and consequently we support its absence from the proposed section 52.2.

To summarize, there is no obvious need for Bill C-438. The general criminal misleading advertising provision (section 52) has been used on many occasions to challenge improper contests or sweepstakes. Indeed, a number of recent contest "scams" have been successfully prosecuted under the existing law (see Appendix I). These prosecutions illustrate that the Bureau is able to deal with this kind of chicanery. Although case law has narrowed the scope of section 52, the contest "scams" which are the likely target of Bill C-438 would almost certainly be considered to be engaged in "knowingly" or "recklessly". They are therefore subject to criminal sanctions already. We are also unaware of any enforcement problems in this area. By singling out some sorts of conduct for peculiar treatment the Bill will treat marketing initiatives inconsistently.

The following is an illustration of how the Bill might have an adverse impact on what is now considered to be perfectly acceptable marketing behaviour. Consumers are familiar with promotional contests that give away automobiles. Under the typical rules of such promotions, winners may not take delivery of the prize until they pay provincial registration fees along with any taxes and obtains appropriate insurance required by law. The contest rules and advertising materials typically set out the detail of what is and is not included in the prize. It is also common for advertisers to use mail or courier to inform prize-winners that they have won. Under proposed section 52.2, the advertiser will be "promoting...the supply or use of a product...or…any business interest" and will have caused "to be delivered, by mail or through any other system of delivery, printed material that conveys the general impression that the recipient...has won a prize...and the distribution of such

prize...is conditional on the prior payment of a sum of money..." Requiring a prize-winner to have legally mandated liability insurance before being allowed to take possession of the automobile prize could be a criminal offence pursuant to section 52.2.

Another practical example involves *de minimis* payment issues. In the Information Bulletin on telemarketing (1999-09-22), the Bureau states that postage cost for initial entry into a contest will not be considered a condition for the delivery of a prize. Presumably this is because it is a *de minimis* amount. In the context of the proposed section 52.2, *de minimis* amounts for telephone calls, or other costs, may trigger criminal liability. This is anomalous.

With respect to marketing and advertising activity, the *Act* should be concerned with misleading representations. Those "harms" can and have been addressed under existing sections of the *Act*. As long as the existence and amount of any charges associated with the contest are not hidden, the prize is not described in a misleading fashion, and the value of the prize is not misrepresented, the *Act* should not be concerned with such contests.

VI. BILL C-472 – TEMPORARY ORDERS

Section 11 of Bill C-472 would amend the *Act* to authorize the Commissioner to issue temporary orders. These would apply to ongoing inquiries under section 79 (abuse of dominant position). Orders would prohibit a person from doing an act that could, in the opinion of the Commissioner, constitute an anti-competitive act. The Commissioner can also require a person to take steps that the Commissioner considers necessary to prevent injury to competition or harm to a competitor.

This proposal extends a similar proposal in Bill C-26, which related to the restructuring of the airline industry. Section 15 of Bill C-26 limited temporary orders to inquiries under section 79 relating to a domestic airline.

In April 2000, the Section presented a written submission to Parliament on Bill C-26. The relevant portions are attached as Appendix II. We adopt the comments concerning the cease-and-desist temporary order, as the proposal in Bill C-472 is virtually identical.

We also make the following comments.

A. Need for an Interim Order with respect to section 79 (Abuse of Dominance Provision)

The present *Act* contains three provisions for interim orders: section 33 relating to criminal offences, section 100 relating to a proposed merger and section 104 relating to an application made under Part VIII.

Under section 33, the Commissioner may apply to court for an interim order pending the commencement of a prosecution under the *Act* or a proceeding under section 34(2) (prohibition order without conviction). These orders may prohibit a person from doing an act or thing that may constitute or be directed toward the commission of an offence under Part VI or section 66.

Under section 100, the Commissioner may apply to the Tribunal for an interim order prohibiting the completion of a proposed merger pending the completion of an inquiry of the proposed merger under section 10. This application may only be made where an application has not been made under section 92 (mergers).

Under section 104, the Commissioner may apply to the Tribunal for an interim order where an application has been made under Part VIII.

To deal with what are likely to be rare circumstances, the Section supports amending section 100 of the *Act* in a limited way. We would support the Commissioner being able to apply to the Tribunal with respect to an inquiry under a provision of Part VIII where an application has not been made to the Tribunal. In principle, nothing prevents extending the availability of interim orders to all provisions of Part VIII rather than simply conduct under section 79. Our comments would apply in any case.

B. Overall Structure of Bill C-472 Proposal

Under Bill C-472, the preconditions for issuing a temporary order are:

1. the Commissioner has commenced an inquiry under section 10 with respect to conduct that is reviewable under section 79;
2. the Commissioner considers that in the absence of an order:
   (a) "injury to competition that cannot adequately by remedied by the Tribunal is likely to occur" ("harm to competition"); or
   (b) "a person is likely to be eliminated as a competitor, suffer a significant loss of market share, suffer a significant loss of revenue, or suffer other harm that cannot be adequately remedied by the Tribunal" ("harm to a person").

If the preconditions are satisfied, Bill C-472 would allow the Commissioner to issue a temporary order:

1. "prohibiting a person from doing an act or thing that could, in the opinion of the Commissioner, constitute an anti-competitive act"; or
2. "requiring the person to take the steps that the Commissioner considers necessary to prevent injury to competition or harm to another person".

Our fundamental objections to this proposal are that the interim order is made by the Commissioner, without prior judicial authorization, and that the onus is on the party against whom the order is directed to demonstrate to the Tribunal that the Commissioner was not justified in making an order. In Canada, government officials are normally required to seek judicial authorization for such coercive powers. Neither the Commissioner nor proponents of Bill C-472 have provided cogent reasons why Parliament should depart from this norm. Courts and tribunals have always been able to issue interim relief on a timely basis to deal with exigent circumstances.

i) Pre-Conditions

Commencement of an inquiry under section 10

The Bill would allow the Commissioner to issue a temporary order without a reasonable belief that grounds exist for the Tribunal to make an order under Part VIII. This is unacceptable.

Under section 10, an inquiry may be started in three ways: where the Commissioner "has reason to believe" that grounds exist for making an order; where an application for an inquiry has been made by six Canadian residents under section 9; or where the responsible Minister has directed the Commissioner to do so. Only one of the three grounds for commencing an inquiry under section 10 is based on the Commissioner's reasonable belief that grounds exist for making an order under Part VIII.

By contrast, in an application for an interim order under section 33 for criminal matters, the Crown is required to persuade a court that it appears the person "has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI or section 66". In an application for a search warrant under section 15 – which can be used in connection with an investigation into conduct reviewable under

Part VIII – the court must be satisfied of "reasonable grounds to believe" that, among other things, grounds exist to make an order under Part VIII.

Effect(s) in the absence of a temporary order

Under the proposed amendments, the Commissioner has to determine that there is injury to competition that cannot be remedied or that there is significant harm to a competitor that cannot be remedied.

The Commissioner is not required to demonstrate that the alleged "injury to competition" is within the Tribunal's remedial jurisdiction. Almost all of the substantive provisions of Part VIII require the Tribunal to find there has been a substantial lessening or prevention of competition. In other words, the Commissioner may issue a temporary order even if harm to competition is not likely to be substantial. In addition, the Commissioner would be entitled to issue a temporary order to prevent harm to a competitor or another person even if there were no harm to competition, whether substantial or not. The purpose of the *Act* is to protect competition and not competitors. A temporary order should only be available if the likely harm to a competitor would constitute substantial harm to competition.

An interim injunction may be obtained under section 33 if a person is likely to suffer harm that cannot be adequately compensated under another provision of the *Act*, subject to a balancing test. This is understandable since section 33 deals with criminal offences which by definition constitute harm to the public. The balancing test we would propose under Section 100 requires the court to be satisfied that the damage to competition is greater than damage to the person against whom the order is made if it is subsequently determined that a violation has not been committed, was not about to be committed and was not likely to be committed. Such a balancing test should be incorporated into Bill C-472.

In summary, the proposed section 104.1 would permit the Commissioner to issue a temporary order prohibiting a person from doing any act that could injure a competitor, whether or not the actor has any market power and whether or not that act would harm competition or consumers. This gives the Commissioner a power to make orders which exceed the jurisdiction of the Tribunal and which is at odds with the purpose of the *Act* (in other words, to protect competition, not competitors). Many actions by businesses which may be considered harm competitors (for example, reducing prices, introducing new products, providing better service) are healthy competitive acts which benefit consumers. A temporary order should be restricted to preventing a pattern of anti-competitive acts by a dominant competitor which results in a substantial lessening of competition.

ii) Conduct to be Enjoined or Required

Under the proposal, the Commissioner may prohibit "a person from doing an act or thing that could, in the opinion of the Commissioner, constitute an anti-competitive act". As noted above, there is no requirement for the Commissioner to believe there are grounds for making an order under section 79. Thus, the Commissioner may enjoin an isolated "anti-competitive act" by a person without market power, even where the act is not part of a "practice of anti-competitive acts" and has no effect (or no substantial effect) on competition.

iii) **Ex Parte** *Nature of the Order*

It is troubling that prior to making a temporary order, the Commissioner is not obliged to give notice or to receive representations from any person, including the person against whom the order is to be made. As with our objection that the order is not subject to prior judicial authorization or review, this objection focusses on the lack of natural justice or procedural fairness in the proposal. These are essential elements of our legal system and should not be ignored.

We recognize that, in rare circumstances, it may not be appropriate for the Commissioner to notify or receive representations from the person against whom an interim order is sought. Under the present section 100, the Commissioner is required to give 48 hours' notice of an application. The Commissioner may apply *ex parte* in appropriate circumstances but the reasons for doing so must be sanctioned by the Tribunal. If section 100 were amended to include reviewable conduct other than mergers, the existing provisions regarding notice and *ex parte* applications should be retained.

iv) Review by the Tribunal

Onus on applicant and scope of review

The proposal permits a person against whom a temporary order is made to ask the Tribunal to review the order. In such an application, the Tribunal is asked to consider whether one or more of the preconditions (harm to competition or harm to a competitor) is satisfied. The proposal shifts the onus to the applicant to demonstrate that the preconditions are not satisfied.

Again, this is incompatible with our legal traditions. It is the party seeking the order who should be required to establish that there are grounds for making an order under Part VIII and that the alleged harm is of a nature and degree that could be remedied under Part VIII.

Standing of person affected

In addition to the Commissioner and the person against whom the temporary order is made, the Bill C-472 proposal would provide "any person directly affected by the temporary order with a full opportunity to present evidence and make representations before the Tribunal makes an order".

There is no basis to depart from the Tribunal's well-developed practice with respect to intervenors. By providing an automatic right to be heard to an "affected person" the proceedings would be lengthened. The appropriate approach is to allow the Tribunal the discretion to decide whether a person may intervene and to determine the scope of any such intervention.

The present proposal ignores the right of the person against whom the temporary order is issued to have a speedy resolution of its application for review. While the Commissioner may make a temporary order for up to 80 days, the order continues indefinitely while an application for review by the Tribunal is pending.

C. Conclusion

The Bill C-472 proposal to authorize the Commissioner to make temporary cease and desist orders with respect to any inquiry under section 79 of the *Act* is fundamentally flawed and should not be adopted. Instead, the Section proposes that section 100 be amended to apply to inquiries into conduct reviewable under section 79 and other provisions of Part VIII.

VII. BILL C-471 – INTERNATIONAL MUTUAL ASSISTANCE

Bill C-471 provides a framework under which the Minister of Industry may enter into an agreement with a foreign state providing for mutual legal assistance on competition law enforcement in that country. This framework is directed towards outbound information exchanges (away from Canada) and is intended to dovetail with corresponding legislation enacted by other jurisdictions. This, in turn, is directed towards inbound information exchanges (to Canada).

The Section recognizes that cooperation between the Bureau and its foreign counterparts is in the Canadian public interest. For example, it would facilitate the detection, investigation and prosecution of international cartels and assist with a coordinated approach to the analysis and resolution of the complex issues that may be raised by international mergers.

However, it is also in the Canadian public's interest that this framework for international cooperation contain explicit safeguards and protections regarding: (i) the circumstances in which confidential information of Canadian companies and individuals may be disclosed to a foreign enforcement authority; (ii) the use which may be made of such information by the recipient agency; (iii) the downstream disclosure of such information to private parties, other government agencies (including sub-national authorities or, in the case of the European Union, authorities of specific member states) or other third parties in the recipient country; and (iv) the expeditious return or destruction of the disclosed information, along with photocopies and any work product in which the disclosed information may be contained. Unfortunately, Bill C-471 insufficiently addresses these basic safeguards and protections.

A. Limitation to Civil Matters

The summary to Bill C-471 states that the Bill's purpose is "to promote international mutual cooperation in *civil* reviewable matters" (emphasis added). However, the Bill itself does not limit its operation to civil matters. Given that a legal framework for international enforcement cooperation in the criminal field already exists,[3] the objective of limiting the

3. *Mutual Legal Assistance in Criminal Matters Act* (the MLACMA), R.S.C., 1985, c. 30 (4th Supp.). Note that pursuant to the MLACMA, the governments of Canada and the U.S. entered into the *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* (the Canada-U.S. MLAT). Enforcement cooperation under the MLACMA and the Canada-U.S. MLAT has been highly successful and has been a model for cooperation between other jurisdictions. If

scope of the Bill to civil matters makes good sense. Accordingly, any future legislation which may contain provisions relating to international enforcement cooperation should explicitly state that it applies only to civil matters. In this regard, the term "violate", as used in paragraphs 30.3(a) and (b) of Bill C- 471, is inappropriate in the context of civil matters. These matters cannot be labelled as pro-competitive or anti-competitive until a court or tribunal makes a determination. Even then, as under the *Act*, the court or tribunal may exercise its discretion not to issue a remedial order, for very legitimate reasons.

B. When Confidential Information May Be Disclosed

Proposed section 30.4 of Bill C-471 deals with the circumstances in which the confidential information of Canadian companies and individuals may be disclosed to a foreign enforcement authority. The section simply states that an agreement entered into under the Bill must contain "provisions" respecting certain matters. At a minimum, the legislation should elaborate on certain fundamental elements of those provisions. Specifically, the legislation should clarify that someone other than the Commissioner (such as the Minister of Justice) will determine whether Canada should refuse a request for information for reasons related to security, sovereignty or public interest.

C. Notice

In addition, the legislation should clarify that notice will always be provided to the party whose information the Commissioner proposes to disclose pursuant to an international enforcement cooperation agreement. Assuming the Bill is limited to civil matters, there is almost no circumstance in which notice should not be provided. This contrasts with the criminal field, where "dawn raids" are sometimes necessary to obtain documents before the target of an investigation is alerted to the existence of an investigation and has an

---

an MLAT with the European Union or another jurisdiction were considered desirable, this could be achieved under the MLACMA.

opportunity to destroy them or other evidence. "Dawn raids" are extremely rare in the civil area – and even then the company may be well aware of the existence of an investigation. In merger matters, parties typically prepare to deal with the Bureau. In the ordinary course of its investigative review process for non-merger civil matters, the Bureau typically contacts parties whose conduct may have been the subject of a complaint.

Accordingly, there is almost never a legitimate basis for failing to provide notice to parties whenever the Commissioner proposes to disclose confidential information obtained in connection with a civilly reviewable matter. This position is consistent with a recent recommendation made by the International Chamber of Commerce Working Party on Information Exchange between Antitrust Authorities.[4] At the limit, in those rare cases where there may be a basis for not providing notice, the Commissioner should be required to seek an order from the Tribunal or a court authorizing disclosure of confidential information without notice.

The notice should contain the specific information the Commissioner proposes to disclose, as well as the identity of the foreign agency to whom the disclosure is proposed to be made and the reasons for such disclosure. Each of these elements should be set out in the

---

4. ICC Policy Statement, "ICC recommendations to the International Competition Policy Advisory Committee ("ICPAC") on exchange of confidential information between competition authorities in the merger context", Document 225/525, May 21, 1999. These recommendations are consistent with an earlier 1996 ICC policy statement, "ICC Statement on International Cooperation between Antitrust Authorities", Document No. 225/450, Rev. 3 (28th March, 1996). Note also that ICPAC's final report recommended that U.S. antitrust authorities consider providing notice of their intent to disclose information to antitrust authorities in other jurisdictions unless such notice would violate a treaty obligation of the U.S. or a court order or jeopardize the integrity of any U.S., state or foreign investigation. See ICPAC, *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, February 28, 2000 , at 199.

legislation.[5] Also, the legislation should contemplate a mechanism for the Tribunal or a court to resolve any disputes that may arise concerning the proposed disclosure.

D. Voluntarily Supplied Information

Moreover, the legislation should contain specific provisions protecting the confidentiality of information which has been voluntarily supplied. At a minimum, the legislation should amend section 29 of the *Act* to cover voluntarily supplied information. This would be consistent with existing enforcement practice, as reflected in the Commissioner's 1995 statement on confidentiality.[6] It also would be consistent with a recommendation made in the 1996 *Report of the Consultative Panel on Amendments to the Competition Act*, which further observed that "[c]ommentators overwhelmingly agreed that all information in the Bureau's possession should fall within the *Act*'s confidentiality protections".[7]

E. Use and Return of Confidential Information

Subsection 30.4(e) of Bill C-471 deals with downstream disclosure and the use which may be made of any confidential information provided to a foreign enforcement agency. It simply states that an agreement should contain an undertaking that information or evidence obtained will be used only for the purpose of enforcement and administration of the competition law of the foreign state. This is insufficient. The provision should go further in four important ways. First, it should clarify that the enforcement and administration of the competition law of the foreign state does not include enforcement by private parties or sub-national authorities (for example, state or provincial authorities, or, in the case of the

---

5 This recommendation is consistent with the ICC's recommendation that the company receiving notice should be informed of all of the circumstances, terms and conditions of the disclosure. *Ibid*. (1999) and (1996).

6 Industry Canada, *Communication of Confidential Information Under the Competition Act*, May 1995.

7 March 1996, at 8.

European Union, member states). Second, it should state that the information or evidence will only be used for the specific investigation in respect of which it was requested. Third, it should require that the confidentiality laws of the recipient jurisdiction provide at least the same protections and safeguards as provided under Canadian law.[8] Fourth, it should require recipient states to use their best efforts to resist disclosure to third parties (by asserting any relevant privilege claims or disclosure exemptions that may apply).

With respect to the return of any information or evidence that has been disclosed, subsection 30.4(g) of Bill C-471 simply requires that there be "provisions" requiring the return of all the evidence provided by Canadian authorities. At a minimum, the legislation should include the requirement that such return of information should be prompt. It should also extend to include copies and derivative work product in which disclosed information may be contained.

F. Current Arrangements

For the foregoing safeguards and protections to be meaningful, the Section submits that subsection 30.2(3) should be dropped. That provision provides:

> Nothing in this Part or an agreement shall be construed so as to abrogate or derogate from an arrangement or practice respecting cooperation between a Canadian competent authority and a foreign or international authority or organization.

To the extent that existing practices or arrangements are inconsistent with legislated safeguards and protections, those safeguards and protections would be rendered

---

8 The latter two recommendations have also been made by the ICC. See supra, note 2 (1999). Similarly, the *Report of the Consultative Panel on Amendments to the Competition Act* specifically concluded that "information sent from Canada [should] be subject to confidentiality protection in the foreign jurisdiction which is substantially similar to that provided by Canada". *Supra*, note 5, at 11.

meaningless by a provision such as subsection 30.2(3). There is substantial uncertainty in Canadian law relating to the ability of the Commissioner to exchange information with foreign counterparts. Transparency, certainty, fairness and predictability therefore demand that any legislation clarify once and for all the safeguards and protections applicable to the disclosure of confidential information of Canadian companies and businesses.

VIII. BILL C-472 – SECTION 45 OF THE COMPETITION ACT

A. General Comments

The Section agrees that it would be appropriate to consider amendments to improve the manner in which the *Act* addresses horizontal agreements – in other words, agreements between competitors, including potential competitors – as there are substantial concerns that the present system is not working well.

Section 45 is the major substantive provision of the *Act*, dating back to 1889. The specific amendments proposed by Bill C-472 would represent the most comprehensive change to section 45 in its history. Its implications for Canadian competition policy are arguably far more important than any of the amendments in Bill C-20 which were made to the *Act* in 1999. These received significantly greater public consultation than currently contemplated by the Public Policy Forum process.

Any proposal to overhaul section 45 in the manner contemplated by Bill C-472, or in the manner contemplated by the Interim Report recently released by the House of Commons Standing Committee on Industry (the Committee),[9] must be the subject of very extensive analysis and consultation. To date, this has not occurred. Even then, it still may not be possible to define narrowly the criminal track of any two-track framework in a way which

---

9 House of Commons Standing Committee on Industry, *Interim Report on the Competition Act*, June 2000

would avoid inadvertently bringing within its scope a significant range of agreements not ordinarily considered hard-core cartel conduct.

Moreover, the Section has serious reservations regarding the prospects for completing this exercise in time for government legislation to be introduced in the Autumn 2000. We have equally serious concerns regarding the risks that may flow from a hasty approach. These include: (i) the potential chilling effect of any ambiguity in the amendments, on a broad range of legitimate conduct; and (ii) inadvertently decriminalizing or otherwise reducing the ability of the law to deter truly hard-core cartel conduct.

Accordingly, the Section submits that amendments to section 45 of the *Act* ought not to be part of any package of government amendments which may be introduced later this year. Instead, consistent with the Committee's Interim Report, the Section recommends that a more detailed and extensive study be undertaken. This would clarify the objectives being sought by the proposed amendments and would consider alternative proposals to amend section 45.

Also consistent with the Interim Report, the Section submits that any such study should consider dealing with horizontal price maintenance under an amended section 45 rather than under section 61. Currently, these types of agreements are addressed by section 45, which is sufficiently broad to cover vertical agreements (for example, between a customer and a supplier) as well as any other agreements between two or more persons. The Section would support confining a revised section 45 to horizontal agreements, and relying on other provisions of the *Act* to deal with potentially anti-competitive vertical agreements, for example, sections 61, 77 and 79.

The stated rationale to amend section 45 is twofold. First, some believe that certain elements are difficult to prove on the criminal burden of proof. Specifically, the Bureau and

various commentators have observed that it is very difficult to establish that an agreement between competitors has unduly prevented or lessened competition, or is likely to unduly prevent or lessen competition. This is because establishing these elements requires proving concepts which are difficult to litigate, such as the relevant product market, the relevant geographic market and market power (including the inability of parties who did not participate in the impugned agreement to provide effective competition to the alleged conspirators). Second, some contend that the current provision inhibits a broad range of potentially pro-competitive agreements between competitors as well as between parties in vertical relationships.

We are not yet persuaded that the evidence establishes that the *Act* should be amended to create a two-track approach to agreements between competitors, as specifically contemplated by Bill C-472. Accordingly, the Section strongly recommends that any study into future amendments to section 45 ought to include a detailed review of the two principal rationales noted above.

We are prepared to participate in any study that may be conducted to improve the manner in which the *Act* addresses horizontal agreements.

B. Specific Comments

i) The Proposed Subsection 45(1) - Criminal Agreements

The proposed amendments in Bill C-472 appear to be based on a model which was the subject of recent articles by Tim Kennish and Thomas W. Ross[10] and by Presley L. Warner and Michael J. Trebilcock.[11] While the proposed model is an interesting basis for

---

10 "Toward A New Canadian Approach To Agreements Between Competitors", (1997) Can. Bus. L.J. 22.

11 "Rethinking Price-Fixing Law" (1993), 38 McGill L.J. 679.

discussion, the details need careful consideration. We note that Mr. Ross expressed a number of concerns about the proposed Bill in his appearance before the Committee in its Spring 2000 review of the *Act*.[12]

Any attempt to focus a reformulated section 45 on the effects of horizontal agreements will be fraught with difficulties. As reflected in Bill C-472, such an approach easily leads to substantial over-inclusiveness. It also makes it exceptionally hard to distinguish between the object of an agreement and its ancillary effects. A principal purpose of a two-track approach is to retain criminal sanctions – and the corresponding deterrent effect of those sanctions – only for truly hard-core cartel agreements. However, it would be far more effective and workable to define the revised criminal offence in terms of the object of the agreement, rather than its effects (which can be either ancillary or central to the agreement). Some believe that even this suggestion may not prove workable after further consultation and analysis.

Instead of casting the new criminal provision in terms of whether an agreement would have one of the enumerated effects, the government should phrase it in terms of the object of the agreement. This focus on the object of agreements, instead of their effects, should have the additional benefit of addressing the significant difficulties that exist in the ancillary agreements provision (proposed paragraph 45(7)(d)). An exemption for ancillary agreements might no longer be necessary, because agreements which (i) incidentally affect prices or output levels, or (ii) incidentally result in allocating markets, customers or territories, would not be rendered *per se* illegal by a revised subsection 45(1) focussing solely on the object of an agreement. This assumes that it is possible to reach a consensus on the categories of agreements which would be covered by that new provision.

---

12 *Minutes of Proceedings*, House of Commons Standing Committee on Industry, May 4, 2000

If the government does not accept our proposal to focus upon the object of agreements, then it should make every effort to avoid the type of approach contemplated by Bill C-472. This approach would stifle a broad range of potentially pro-competitive conduct which may have ancillary or unintended effects on prices or other matters which may be enumerated in a revised subsection 45(1). Subject to the possible application of the ancillary agreement exemption (paragraph 45(7)(d)), some of the more obvious examples of legitimate conduct that could be caught by the revised subsection 45(1), as revised in the Bill, include:

(i) one-way or reciprocal agreements between competitors to store product in the other's warehouse, use the other's distribution facilities or exchange products at different locations. These types of agreements could have an incidental impact upon prices or the supply of a product;

(ii) risk-sharing joint ventures, for example in the resource sector, where it is often necessary to develop the resource jointly to ensure maximum conservation of the resource;

(iii) arrangements between producers to buy and sell production from each other or to market production on behalf of other joint venture participants;

(iv) exclusive dealing covenants and other restrictions on competition contained in typical franchise agreements in markets where the franchisor has its own competing operation;

(v) non-competition covenants in the sale of a business to a competitor; and

(vi) the sale of products between competitors (which unavoidably requires a price to be fixed).

Any proposed new criminal offence should not be confined to horizontal agreements between actual competitors, but should also capture agreements between potential competitors. For example, the purpose of many market allocation agreements is to protect the participants against geographic or other expansion by each other.

The word "minimum" should not be included in proposed paragraph 45(l)(a). Various types of price-related agreements which do not fix the minimum price of a product can be just as pernicious and harmful to the economy as agreements which fix the minimum price of a product.

Some are concerned that proposed paragraph 45(1)(c) may prevent two competitors from legitimately refusing to admit other competitors or potential competitors into a proposed joint venture or strategic alliance. Again, this concern presumably could be addressed by shifting the focus of subsection 45(1) to the object of the agreements.

Paragraph 45(l)(d) of Bill C-472 is so broad that it would substantially undermine one of its stated objectives – namely, reducing the chilling effect of section 45 on a broad range of agreements between competitors. Although a shift to focussing on the object of an agreement should help to address this problem, the targeted conduct also should be more clearly defined. Presumably, that conduct is the reduction of production or output levels. If that is the case, the provision should state this more clearly.

ii) The Proposed Defences and Exemptions

In an increasingly globalized society, some believe that the government should reconsider whether the defence for export cartels should be maintained. This is consistent with the

emerging view in the international antitrust community.[13] The defence appears in subsection 45(5) of the current *Act* and is set forth in subsection 45(5) of Bill C-472. Any review of this exemption should include a full consultation with any stakeholders who currently may benefit from this exemption.

We also recommend that the government consider expanding the exception in subsections 45(8) of the *Act* and paragraph 45(7)(b) of Bill C-472. It should arguably include agreements between companies each of which is, in respect of every one of the others, an affiliate or effectively controlled by a company that is an affiliate.

The proposed exemption in paragraph 45(7)(c) needs full consideration. It may permit parties to an otherwise criminal agreement to escape criminal liability by simply *notifying* the Commissioner of their intention to enter into the agreement, pursuant to subsection 79.2(1) of Bill C-472. Bill C-472 would not require the Commissioner actually to grant the certificate sought pursuant to the notice provided under subsection 79.2(1). It may be that this whole concept has not been widely understood.

Ancillary Agreements

As noted above, the proposed exception for ancillary agreements is also problematic. It would create an exemption for agreements that are "ancillary to, and reasonably necessary for, another agreement or arrangement among the same participants", where "the other agreement or arrangement would not itself constitute collusion, when considered on a separate basis". The most fundamental deficiency with this proposal is that it would require the existence of two separate agreements before it would apply. This would preclude its application to the large number of horizontal restraints that are ancillary to, yet still a part

---

13 See, for example, *Report of the Task Force of the Antitrust Section of the American Bar Association on the Competition Dimension of the North American Free Trade Agreement* (July 20, 1994), at 180 et seq. and 300.

of, a perfectly legitimate agreement. Accordingly, the exemption for ancillary restraints should not require the existence of two separate agreements.

However, if subsection 45(1) is amended to eliminate the focus on the effects of agreements, then an exemption for ancillary restraints may not be necessary. If the restraints in question are ancillary to an agreement which has as its object something other than one of the matters that would be identified in subsection 45(1), criminal liability would not attach to those agreements.

Paragraph 45(7)(d) of Bill C-472 would require a determination of whether an ancillary provision was "reasonably necessary for" the achievement of the principal object of the agreement. This is a significant difficulty. Such determinations are inherently difficult to make, thus introducing uncertainty into the potential applicability of such a provision.

Safe Harbour

The Section also has difficulty with the proposed exemption in paragraph 45(7)(e). The underlying intent of this provision appears to be to provide a "safe harbour" for smaller competitors to engage in conduct which otherwise might contravene the *Act*. Such conduct would be permitted where it either: (i) does not in fact have a material anti-competitive effect in the relevant market, or (ii) assists the smaller competitors to better compete against the larger competitor. Unfortunately, this would significantly undermine one of the stated objectives for creating a two-track approach, namely to reduce the difficulties and costs of deterring price fixing, market allocation, customer allocation and group boycotts.

This proposal would impose significant costs on the Bureau as well as on parties to proposed agreements in a broad range of cases where the scope of the relevant market, its size and the parties' market shares were not readily ascertainable. Instead of increasing

certainty in these cases, the amendments would have the opposite effect. This would be inconsistent with a key rationale underlying the *per se* approach to certain types of anti-competitive agreements. This is to increase certainty and predictability while reducing the costs associated with pursuing those types of agreements. Generally such agreements are considered to be unambiguously harmful to the economy in the vast majority of cases.

This problem would be exacerbated by the fact that market shares in most markets fluctuate over time, in some cases quite significantly. As a result, parties who were able to satisfy the exemption at the time their cooperative initiative was implemented may find themselves in contravention of section 45 after a period of time. This would be either as a result of their own efforts or of one or more other firms exiting the market.

Even if the government implements the "safe harbour" proposal, we suggest that the problems with market share fluctuation, together with the significant monitoring costs that businesses would have to incur, would inhibit businesses from relying on the type of safe harbour exemption contemplated by paragraph 45(7)(e).

Defences in Subsection 45(3)

Finally, some are concerned that the list of defences in subsection 45(3) of the *Act* does not appear in Bill C-472, although we recognize that this list may not be necessary if the focus of subsection 45(1) is changed to the object of agreements.

iii) Proposed Subsection 79.1 - Civilly Reviewable Agreements

As with the proposed subsection 45(1), any new legislation directed towards non-criminal agreements between competitors ought to include agreements between a competitor and a potential competitor.

iv) Clearance Certificates (Section 79.2)

A pre-clearance procedure is not likely to be broadly utilized by businesses contemplating entering into a potentially pro-competitive agreement with one or more competitors unless the Bureau is prepared to issue pre-clearance certificates in cases where the issues are somewhat "grey". Experience with advance ruling certificates (ARCs) issued under the merger provisions in section 102 of the *Act* suggests that this is unlikely to be the case. Typically, ARCs are only granted in relatively straightforward cases, in other words, where there clearly is no significant competition issue (and therefore, arguably, no need for the comfort provided by an ARC). Accordingly, we are skeptical that a pre-clearance procedure for horizontal agreements would ultimately produce benefits that would outweigh the significant costs and delays that such a procedure could involve.

In addition, the proposed three-year limitation period for validity of clearance certificates would eliminate their potential benefit for the vast majority of persons. Agreements between competitors or potential competitors typically are not limited to such a short period of time. On the contrary, strategic alliances, joint ventures and agreements with respect to most of the types of matters currently listed in subsection 45(3) of the *Act* often last for significantly longer than three years.

The time limited nature of the orders contemplated by the specialization agreements provision (section 86) is a significant reason why no orders have been sought under section 86 since that provision was inserted in 1986. As with other types of horizontal agreements that may benefit from a pre-clearance procedure, specialization agreements often require a substantial amount of up-front time and investment and could require substantial costs to reverse. Businesses have simply not been willing to risk not being able to extend a specialization agreement order beyond the initial time period.

Accordingly, any amendments to the *Act* to create a pre-clearance procedure for horizontal agreements should not contain a time limitation on their validity. The provisions in sections 102 and 103 of the *Act* do not contain a similar time limitation.

The clearance certificate process may lead to an administrative backlog. Also, there is no deadline by which a final decision must be made on whether to grant the clearance certificate. We suggest that 60 days would be appropriate. Finally, we are concerned that additional user fees could be imposed for such clearance certificates.

v) Prevention of Duplicate Review

The *Act* currently contains various provisions designed to ensure that proceedings are not brought under multiple sections of the *Act* in respect of the same conduct (for example, section 45.1, subsection 79(7) and section 98). However, in recent years the Commissioner and other representatives of the Bureau have raised the prospect of applying the price maintenance provisions in section 61 to horizontal agreements between competitors. Unfortunately, there are no provisions in the *Act* or in Bill C-472 that would prevent proceedings being brought under section 61 after proceedings had been commenced under section 45 or Part VIII. Accordingly, we recommend that any future amendments prohibit multiple proceedings under sections 61 and section 45 or Part VIII.

IX. CONCLUSION

Once again, the Section appreciates the opportunity for input into these matters, although we have serious concerns about the consultation process. These four proposed Bills contain several policy proposals which are worth implementing and a number which are not.

The *Act* is a complex statute which is a cornerstone of our economy. Some of the proposals represent significant changes to the *Act* and the *Competition Tribunal Act* They therefore require further study and consultation, as they could have a widespread impact on the Canadian economy.

We trust our comments have been helpful and look forward to continued consultation with the government on these bills. We hope to have the opportunity to provide detailed drafting comments through the technical roundtables in Summer 2000 and in the legislative drafting process.

APPENDIX I

Contest "scams" prosecuted recently under the existing provisions of the *Competition Act*.

1. The Bureau commenced prosecution against 3076784 Canada Inc., carrying on business as National Clearing House, Nationwide Clearing House and the National Clearing House, and its president Jack Stroll. The company was fined $290,000 and Mr. Stroll was fined $10,000 for a deceptive telephone prize pitch. Customers were mailed "official claim certificates", indicating that they would win one of five valuable prizes (a Ford Explorer, a satellite TV dish, a diamond and sapphire pendant, airfare to Hawaii, and a cellular phone). Consumers were required to telephone within 72 hours to obtain the prize. When they telephoned, they were told that they had to buy overpriced promotional items to receive the prize. The only prizes which were ever actually awarded (the pendant, the airfare and the cellular phone) had very little or no actual value, due to the nature of the products (industrial diamonds and sapphires) or the restrictions and extra charges attached to the airfare and cellular phone.

2. A second case involved the conviction of America Family Publishers, its president Vijay Sharma, and various telemarketers working for the company. Consumers were asked, through telephone pitches, to buy thousands of dollars worth of promotional products (pens, jewellery, letter openers, etc.) at inflated prices, in order to receive prizes. However, no prizes were provided. Various telemarketers working for the company received jail sentences of between two and six months, and community service orders. Some received fines. The company itself was fined $1 million, and Mr. Sharma was fined $100,000.

3. On October 7, 1999 Cave Promotions Ltd. was convicted under section 52(l)(a) of the *Act*. The conduct resulting in the conviction was a promotion in which some twenty million "scratch and win" cards were mailed to Canadians. If the consumer scratched a "winning" card, they were to call a 1-900 number for prize claim instructions. These calls cost consumers between $20 and $40 each. They generally learned that they had in fact not won any prize, or that the prize they had won was not available. Cave Promotions was fined $75,000 and was made subject to a prohibition order.

4. On December 1, 1999, 85 criminal charges were laid, again under the general misleading advertising provisions, against three related Montreal based telemarketing companies, S.S. Viking Industries, S.C. Canadian Clearing Centre Inc. and Executive Premium Distribution Centre S.C. Corporation. As well, three executives and 11 individual telemarketers were charged. Consumers were advised that they had been selected to receive valuable awards or premiums if they purchased a product. It is alleged that these representations were misleading. At the time of writing these charges remained outstanding.

APPENDIX II

Excerpt of Submission of the National Competition Law Section of the Canadian Bar Association on Bill C-26

* * *

Commissioner's new power to make temporary orders

Undoubtedly, the most troubling aspect of the proposed Bill, is the sweeping new power of the Commissioner to make temporary orders. Such orders may prohibit a person operating a domestic airline service from doing anything that, in the opinion of the Commissioner, could constitute an anti-competitive act. They may require this person to take such steps as the Commissioner considers necessary to prevent injury to competition or harm to another person.

This provision is presumably intended to control the sort of behaviour against which the Tribunal would have power to issue a remedial order under section 79. However, unlike section 79 orders, there is no requirement that the party against whom the order is made must control that business – either substantially or completely, throughout Canada or any area thereof. There is also no requirement that the party be engaged in a *practice* of anti-competitive acts or that the practice have, or be likely to have, the effect of preventing or lessening competition *substantially* in a market. Indeed, it appears that the Commissioner is authorized to act under the section to prevent harm to a competitor or other person irrespective of whether any of these other requirements has been satisfied. In other words, the Commissioner would appear to be authorized to make temporary orders in circumstances where the Tribunal would not have jurisdiction to make an order under section 79.

A second point of real concern relates to the Commissioner's power, under subsection (2) of proposed section 104.1, to issue such orders without providing any notice to the affected party and without permitting that party to make representations. This is significant because the Commissioner's temporary order is enforceable in the same manner as an order of the Tribunal and because the section contains provisions which purport to insulate the Commissioner's orders from court review.

It is highly unusual for administrative officials not to be required to give any notice to, or to hear any representations from, a party to be affected by the order. Elsewhere in the *Competition Act*, the extraordinary power to issue interim injunctions is reserved to the Federal Court (section 33(1)). The Commissioner's interim orders are to be enforceable in the same manner as Tribunal orders, which are in turn enforceable in the same manner as orders of a superior court of record (subsection 8(2) of the *Competition Tribunal Act*). The breach of a temporary order issued by the Commissioner will similarly be an offence punishable by fine or incarceration (see section 74 of the *Competition Act*). It is thus possible that a person could be imprisoned for breach of a temporary order of the Commissioner even where that person has been given no prior notice and has had no opportunity to be heard concerning the question of whether the order should have been issued. There is, of course, a subsequent right to appeal the Commissioner's temporary order to the Tribunal but that does not change the fact that, at the initial stage, there is no requirement of notice or of a hearing.

Ordinary principles of natural justice and procedural fairness require that a person whose rights or interests may be affected by an order be given notice and an opportunity to make representations, either orally or in writing, before the order is made. Parliament or a legislature may derogate from administrative law principles of natural justice or fairness, subject to only the constraints of the *Canadian Charter of Rights and Freedoms*. Apart from *Charter* considerations, the proposed legislation raises important policy concerns in

its derogation from these basic principles of natural justice and fairness. The power to issue injunctions, the breach of which carries the possibility of imprisonment, is extraordinary. This is even more the case where that power may be exercised by an administrative official such as the Commissioner (ordinarily a law enforcement officer) rather than a court, and without any requirement of notice or a hearing. In this connection, it is worth recalling Chief Justice Dickson's statement in the *Hunter v. Southam*[5] case in regard to the role of the Restrictive Trade Practices Commission:

> "In my view, investing 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 when authorizing a search or seizure under [the *Combines Investigation Act*]. 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. A member of the [Commission] passing on the appropriateness of a proposed search under [the *Act*] is caught up by the maxim *nemo judex in sua causa*. He simply cannot be the impartial arbiter necessary to grant an effective authorization."

Putting aside the ordinary administrative law principles of natural justice and fairness, the proposed legislation also raises potential *Charter* issues. Since there is a possibility of imprisonment for breach of an order of the Commissioner, the "liberty" interest under section 7 of the *Charter*[6] is engaged.[7] Accordingly, that potential deprivation of liberty must be in accordance with the "principles of fundamental justice" in order for the legislation to be constitutional. The Supreme Court of Canada has said much about the

---

5 *Hunter v. Southam op. cit.* fm 2 at page 164.

6 Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

7 See *Re ss. 193 and 195.1 of the Criminal Code* (Prostitution Reference), [1990] 1 S.C.R. 1123 at pp. 1140, 1215 (the "possibility of imprisonment" is a deprivation of liberty under section 7).

meaning of the "principles of fundamental justice", but at a minimum, it is clear the protection includes the concept of procedural fairness.[8] It is also clear that the requirements of procedural justice vary according to the context in which they are invoked,[9] and that those requirements "can be attenuated when urgent and unusual circumstances require expedited court action".[10] Thus, the Supreme Court has held that in certain circumstances, an *ex parte* injunction issued by a court will not offend the principles of fundamental justice – for instance, where the delay necessary to give notice might result in an immediate and serious violation of rights.[11]

Whether a court would find this proposed legislation constitutional would depend on the court's contextual assessment of whether the circumstances in which a temporary order may be made are sufficiently urgent and unusual. The legislation establishes a standard of "likely" injury to competition and "likely" exit of a competitor from the market if a temporary order is not made. On its face, this would appear to be a high standard; however, much would depend on how this test is actually applied by the Commissioner. Given that a temporary order is effective for only 20 days in the first instance, the Commissioner must presumably be satisfied that it would be "likely" that there would be injury to competition or the exit of a competitor in the following 20 days. One wonders whether, if such injury or exit is so imminent, a temporary order would have any effect at all. A court is also likely to consider that the temporary injunctive order is being issued by an administrative official, rather than a court – thus lacking the ordinary judicial safeguards. While it is difficult to predict whether a court would find these extraordinary powers to be

---

8 *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

9 *R. v. Lyons*, [1987] 2 S.C.R. 309.

10 *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1995), 122 D.L.R. (4th) 1 at p. 45 (S.C.C.), *per* La Forest J.

11 *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

constitutional, it is clear that they do raise important *Charter* concerns relating to procedural fairness under section 7.

Whether the proposed legislation would ultimately be determined to be constitutional is not necessarily the only relevant question. We assume that the government has closely reviewed this question and concluded that the proposed legislation will withstand scrutiny. However, even if this is ultimately the result, it seems to us there are sufficient questions concerning its legality as to invite a court challenge, which may then result in the legislation being mired in litigation for years.

We are also concerned that a temporary order is enforceable in the same manner as an order of the Tribunal. Orders of the Tribunal – a quasi-judicial body – are enforceable in the same manner as orders of a superior court of record (s. 8(2) of the *Competition Tribunal Act*). The Tribunal also has a power to find a person in contempt of the Tribunal and to impose a punishment that is "appropriate in the circumstances" (s. 8(3) of the *Competition Tribunal Act*). Failure to comply with an order of the Tribunal is punishable by fine or imprisonment for up to 5 years (s. 74 of the *Competition Act*). The proposed legislation would appear to confer these severe enforcement powers on the Commissioner in enforcing temporary orders. A party challenging the legislation could argue that the proposed provision invests the Commissioner with some of the powers of a superior court of record. This potentially infringes the judicature provisions – and in particular section 96 – of the *Constitution Act, 1867*. Courts have established that a legislature may not confer on a body other than a superior court judicial functions analogous to those functions performed by superior courts.[12] Such a conferral is all the more objectionable if the

---

12 See *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714; *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725; see also generally P.W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 1, pp. 7-24 – 7-44 "Implications of the Constitution's Judicature Sections".

administrative body (here the Commissioner) does not even exercise adjudicative functions.

The third concern about the temporary order power is that temporary orders of the Commissioner are not reviewable by the courts (proposed section 104.1(11)). A party challenging the legislation could argue that it runs afoul of section 96 of the *Constitution Act, 1867*, which protects superior court review of administrative tribunals.[13] This principle was recently reaffirmed by the Supreme Court of Canada, which confirmed that section 96 guarantees a core of superior court jurisdiction that cannot be abridged by Parliament or a legislature. The core of a superior court's jurisdiction arguably includes the power of judicial review by prerogative writ.[14] In *MacMillan Bloedel v Simpson*, Lamer C.J. for a majority of the Court, noted that "powers which are the 'hallmarks of superior courts' cannot be removed from those courts". These powers could arguably include the power to review decisions of the Commissioner in proposed section 104.1(11) of Bill C-26.

A further potential difficulty concerns how the proposed provision is intended to operate with the appeal provisions under the *Competition Tribunal Act*. Proposed section 104.1(11)(a) provides that "a temporary order made by the Commissioner shall not be questioned or reviewed in any court", but also provides that there may be a hearing before the Tribunal to vary or set aside the Commissioner's order (proposed section 104.1(7)). Section 13 of the *Competition Tribunal Act* provides that an appeal lies to the Federal Court of Appeal from "any order" of the Tribunal. Is the proposed amendment therefore

---

13 *Crevier v. Attorney-General of Quebec*, [1981] 2 S.C.R. 220.

14 *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725, a decision which Professor Hogg has described as "rather a clear affirmation that a superior court's power of judicial review for jurisdictional error cannot be taken away in any circumstances by either the federal Parliament or a provincial Legislature": see Hogg, *Constitutional Law of Canada*, looseleaf, p. 7-44.

intended to preclude review by a court notwithstanding section 13? The categorical language of the proposed amendment would appear to suggest so, but such a conclusion would mean that the government has intended that there be neither judicial review nor appeal from the Tribunal's review of the Commissioner's order. This is a surprising conclusion.[15] At the very least, there is significant ambiguity in the proposed legislation which merits clarification.

We also have concerns about the following procedural aspects of the issuance of temporary orders by the Commissioner:

(a) The order is described as "temporary", but in fact the Commissioner may extend the order beyond its original 20-day period for up to two further periods of 30 days each without any further act or authorization beyond giving notice of the extension to the person affected. A temporary order may therefore continue for upwards of 80 days or almost three months. We believe this is excessive.

(b) The person against whom the temporary order is made has the burden of applying to the Tribunal to have the temporary order varied or set aside. In doing so, that person is required to demonstrate that none of the conditions set out in paragraph (1)(b) existed or were likely to exist, failing which the Tribunal is obliged to continue the temporary order in effect for such duration as it determines up to a maximum of 60 days.

(c) Unlike the circumstances in which the Commissioner may issue a temporary order, the appeal of that order by the affected party must be on notice to the

---

15 Of course, even if there is an appeal to the Federal Court of Appeal under section 13 of the *Competition Tribunal Act* from the Tribunal's decision to review a temporary order, the argument is still there that the exclusion of judicial review would *still* be unconstitutional for the reasons set out earlier.

Commissioner and others who receive notice of the order in the first instance. At the hearing of the application, the Tribunal is obliged to provide the Commissioner "and any other person directly affected by the temporary order" with a full opportunity to present evidence and make representations before the Tribunal makes any order. These rights are in fact much broader than those given to any intervener in other Tribunal proceedings.

(d) Subsection (15) purports to confer complete immunity on the government, the Minister, the Commissioner and any other person employed in the public service of Canada acting under the direction of the Commissioner for anything done in connection with proceeding under this section "in good faith". This provision, when taken with the privative clause in subsection (11), provides significant latitude to the Commissioner to issue orders under section 104.1 without concern regarding liability for any violation of the rights of parties.

We understand that an impetus for this provision has to do with difficulties which have been encountered in obtaining interim orders from the Tribunal under the *Competition Act*'s current procedural requirements, which sometimes prevent prompt action from being taken in urgent circumstances. However, we believe the proper approach is to modify the rules pertaining to the obtaining of interim orders from the Tribunal, rather than going through this alternative procedure. The proposed power not only places the Commissioner in the role of both police officer and judge, but also clearly trenches upon on the legal rights of the parties affected by orders of this type.

* * *