Submission on Bill C-23

Competition Act Amendments

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

October 2001

TABLE OF CONTENTS

Submission on Bill C-23
Competition Act Amendments

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 Bill C-23
Competition Act Amendments

I. EXECUTIVE SUMMARY

A. Introduction

Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, would significantly affect the administration and enforcement of Canada's competition laws. While the Bill contains less sweeping changes than those proposed in four private members' bills introduced in Parliament in 2000 (Bills C-402, C-438, C-471, and C-472), the significance of their potential impact should be fully appreciated. The National Competition Law Section of the Canadian Bar Association (the Section) therefore welcomes this opportunity to comment on the Bill.

The Bill represents a step in the right direction. It addresses many, though not all, of the concerns identified during the Summer 2000 Public Policy Forum (PPF) consultation process concerning the above-noted private members' bills. However, serious reservations remain about: the confidentiality provisions of the mutual legal assistance regime; the necessity and excessive breadth of the provisions concerning deceptive prize notices; the proposed scope of the consent agreement process and the potential for the abuse of such process; and the low threshold and lack of procedural fairness in the proposed interim order process.

B. Mutual Legal Assistance

Subject to one important issue that the draft legislation fails to address, the Bill represents a significant step toward establishing an appropriate framework for international enforcement co-operation in civil competition law matters. The outstanding issue involves clarifying the protection for confidential information held by the Competition Bureau. Until this is addressed, administration or interpretation of these provisions will be difficult, if not impossible. This is particularly true in relation to the reciprocity requirements for foreign competition law. In other respects, it is apparent that the drafters paid significant attention to many of the comments that were made with respect to Bill C-471, including those made by our Section.

C. Deceptive Notice of Winning a Prize

The Section has a number of concerns with respect to this proposed amendment. Its two principal concerns are: (1) as drafted, the proposal would prohibit virtually all standard promotional contests; and (2) the specific prohibition of particular types of marketing and certain types of communications is inconsistent with the approach of the *Act* as a statute of general application. Such specific provisions ought only to be introduced, if at all, where there is an obvious and significant demonstrated need. This need is not evident.

D. Registration of Consent Agreements & Competition Tribunal Procedures

The Section supports the proposal to create a process for registering a consent agreement, thereby giving it the force of a Competition Tribunal order. However, we have significant reservations with allowing the terms of a consent agreement to extend beyond orders that could be issued in contested proceedings. As a matter of law, parties cannot consent to enlarge the scope of a tribunal's statutory jurisdiction. There is no justification for granting parties the statutory power to do

so. In addition, the Bureau should be required to file a Statement of Grounds and Material Facts at the same time as it registers a consent agreement. This would facilitate the variation or rescinding of consent agreements where there has been a material change in circumstance.

The Section supports the proposal to allow references to the Tribunal. However, the Commissioner should not be able to block the disposition of a question of law, jurisdiction, practice or procedure. Finally, the Section supports the principle that the Tribunal be authorized to award costs in certain circumstances.

E. Interim Orders

The proposal to authorize the Tribunal to issue interim orders in connection with certain reviewable matters is a significant improvement over the proposal to vest that power in the Commissioner. However, the Section continues to have reservations about these amendments. For example, the Bill would allow the Tribunal to issue an interim order without the Commissioner having a reasonable belief that grounds exist for the Tribunal to make an order under Part VIII of the *Act*. Similarly, there is no requirement that the Commissioner demonstrate that substantial harm to competition will result if an interim order is not issued. As well, the Commissioner should be obliged to give notice to the person against whom the order is to be made. It is particularly important that rules of procedural fairness be observed, as the alleged unlawful conduct would not have been subject to a Tribunal determination on the merits. These concerns could be resolved by amending section 100 of the *Act* to include anti-competitive acts and other reviewable matters. The Section recognizes that there are limited circumstances where interim injunctions may be appropriate. Accordingly, it supports expanding section 100 to allow interim orders in all reviewable matters under Part VIII.

II. CAVEAT

This submission does not reflect or comment on two companion documents which were only recently released by the Commissioner, namely the Model Treaty Respecting International Co-operation in Non-criminal Competition Matters and the Proposed Guidelines for the Deceptive Prize Notice Provisions of the *Competition Act*. These documents may be relevant to certain areas in this Submission, but there has not been sufficient time to deal with them for this purpose.

In addition, the Section understands that the draft Bill may be amended to enable private litigants to enforce certain of the remedial provisions of Part VIII of the *Act*. At the time of drafting this submission, no draft language of such an amendment had been proposed. Assuming, however, that the language is the same as that contained in Bill C-472, we attach as Appendix "A" a copy of our comments on the PPF consultation concerning that Bill.

III. INTRODUCTION

The PPF consultation demonstrated significant or qualified support for the following four principles in this Bill:

- establishing a framework for international agreements to allow co-operation between the Bureau and foreign competition authorities in investigating and gathering evidence for civil (non-criminal) competition matters;
- prohibiting deceptive prize notices to be sent through electronic or regular mail or by any other means;
- empowering the Tribunal to award costs, make summary dispositions, hear and determine references, and providing for the Tribunal to issue consent orders on an expedient basis; and
- expanding the Tribunal's ability to issue temporary orders.

The Section supports most of these principles. However, to a large degree, the devil is in the details. This Bill represents a marked improvement over Bills C-402, C-438, C-471, and C-472, but there is still work to be done. To this end, we make general comments on the proposed changes to the *Act* and the *Competition Tribunal Act*, as well as specific proposals for changes to the Bill. The Section would be pleased to assist the Committee further if additional insight is needed regarding the more technical aspects of the proposed legislation.

IV. MUTUAL LEGAL ASSISTANCE

A. Introduction

The globalization of markets and the significant increase in international trade and transactions has created an environment where co-operation between the Bureau and its foreign counterparts is necessary for the effective enforcement of the *Act*. This co-operation may include the co-ordination of regulatory reviews or

the sharing of confidential information. Such co-operation is in the Canadian public interest.

The legal framework permitting this co-operation must contain explicit safeguards concerning:

- disclosure of confidential information of Canadian companies and individuals to foreign enforcement authorities;
- the use which may be made of such information; and
- the expeditious return or destruction of the disclosed information.

Considering the proliferation of jurisdictions with antitrust regimes, including the large number with pre-merger notification review mechanisms, the necessity for these safeguards is clear.[1] Some of these countries have large state trading enterprises or may employ their competition laws with different goals than we do. In such circumstances, disclosure of confidential information to foreign antitrust authorities could result in disclosure to competitors of Canadian businesses. It could also be used to otherwise injure the ability of Canadian businesses to compete effectively in these jurisdictions or give foreign entities an undue competitive advantage in international markets.

The Bill outlines a three-step process for dealing with requests for information gathering in Canada under mutual legal assistance agreements. A court order would be obtained authorizing search and seizure or some other form of information gathering. Once the information is obtained, the court and the Minister of Justice would each determine whether it should be provided to the

---

[1] In 1990 there were fewer than 10 jurisdictions with merger review systems. By the mid-1990s, this number had increased to between 25 and 30. Today there are more than 60 jurisdictions with merger review systems and it has been estimated that there are another 20 jurisdictions preparing to put such systems into effect (*International Mergers - The Antitrust Process,* (3rd ed.) Rowley & Baker).

requesting foreign state. The Bill also would establish a process to share evidence used in Canadian proceedings with foreign jurisdictions.

The Mutual Legal Assistance Treaty in Criminal Matters (MLAT) governs co-operation between the Bureau and foreign agencies on the investigation of criminal competition law offences. Because many jurisdictions do not criminalize much anti-competitive conduct or activity, MLAT has little or no application to criminal offences under the *Act* which are not considered criminal in the foreign jurisdictions where the Bureau is seeking assistance. The MLAT also does not cover reviewable matters under Part VIII of the *Act*.

Mutual assistance between Canada and foreign jurisdictions in non-criminal competition law matters is in the public interest. Canada cannot expect assistance from foreign jurisdictions without offering assistance in return. We should not, therefore, enter into mutual assistance agreements with any foreign jurisdiction unless (a) the goals of the competition laws of the foreign jurisdiction are substantially similar with those of Canada; and (b) there are explicit safeguards for the disclosure of confidential information of Canadian businesses to a foreign enforcement authority, the potential use of such information and the expeditious return or destruction of such information.

The Section cannot support the mutual assistance proposal in the Bill until the issue of confidentiality is satisfactorily addressed. Although section 29 of the *Act* does protect some confidential information, there remain serious areas of controversy and uncertainty about its scope. The Section has previously

commented on the uncertain interpretation of section 29 and believes this may be a good opportunity to amend the section to clarify its application.[2]

Other than this significant omission, the Bill represents a significant step toward establishing an appropriate framework for international enforcement co-operation in competition law matters. However, without clarification of the confidentiality issue, it would be difficult, if not impossible, to administer or interpret the proposed provisions, particularly in relation to the reciprocity requirements that the foreign competition law must satisfy on the protection of confidential information. Specifically, the Minister of Justice would be hard-pressed to determine whether the foreign confidentiality protections are "substantially similar" to those available under Canadian law if the latter is itself not clear. Similarly, counsel would have difficulty assessing the extent of protection under a co-operation agreement and whether that standard has been violated in a particular instance.

It is apparent that significant attention was paid to previous comments on Bill C-471 and that many of these have been reflected in the current Bill. Specifically, the Section is encouraged by the provisions in the Bill:

- requiring that any country, with which Canada intends to enter into an agreement for mutual legal assistance, have competition laws substantially similar to the *Act*;

---

2 Please refer to the Section's December 1994 *Commentary on the Draft Information Bulletin Respecting Confidentiality of Information Under the Competition Act* (an excerpt of which is attached as Appendix B to this submission) for a detailed discussion of the issues raised by the Commissioner's interpretation of section 29. One concern was with respect to information not specifically protected by section 29. Also, the Commissioner's interpretation of the phrase "for the purposes of the administration or enforcement of this *Act*" was overly broad and provided no certainty as to when information would be confidential and when it would be disclosed to third parties.

- requiring that a foreign state undertake that any record or thing provided under such an agreement, with some exceptions, be used only for the purpose for which it was requested;
- providing the Minister of Justice with the responsibility for dealing with requests for assistance from foreign states as well as generally providing the Minister with a review function before documents are sent to a foreign state; and
- recognizing the importance of providing notice to interested parties and providing a mechanism for parties to make submissions to a judicial body before records or things are provided to a foreign state pursuant to a request for information.

B. Assessment

i) Substantial Similarity of Foreign Competition Law

Given the discrepancies between the goals and provisions of competition laws in other countries and the *Act*, agreements under the proposed amendments should only permit the exchange of information with, or provision of information to, a foreign state when the foreign state is investigating a matter that is substantially similar to a civil matter or criminal offence under the *Act* (other than a provision covered by a MLAT agreement).

ii) Information in the Possession of the Competition Bureau

While the Bill provides a mechanism dealing with information and records that are obtained by court order at the request of a foreign state, the proposed amendments must also specifically address the protection of records or information already in the Bureau's possession. Records obtained for a Bureau investigation through the use of the compulsory investigative powers in the *Act* should be incorporated into the scheme set out in the Bill. Otherwise, records already in the possession of the Bureau would not benefit from the same

protection as records obtained by the Bureau in response to a request from a foreign state. From a legal perspective, there is no reason to protect records differently depending upon the initial purpose for which they were obtained. Information provided voluntarily to the Bureau or obtained for merger review purposes is addressed below.

The provisions in the Bill for judicial and Ministerial review of records being sent to a foreign state should also apply to the provision of records or information already in the possession of the Bureau, unless the Bureau has obtained the explicit waiver of the parties from whom the information was obtained and who claim to have an interest in the records. This will ensure that the Bill's protections apply regardless of whether information is obtained solely for use by the foreign state or whether it had been previously obtained by the Bureau. There is no principled basis for this differential treatment of confidential information.

iii) Information Supplied to the Competition Bureau on a Voluntary Basis

The Bill should protect information voluntarily provided to the Bureau. Currently, such information sent to a foreign state is only subject to the confidentiality protection in section 29 of the *Act*.[3] Section 29 permits the disclosure of otherwise confidential information so long as it is disclosed or provided to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the *Act*. There are no mechanisms to protect the confidentiality or limit the use of information provided voluntarily to the Bureau when such information is provided to a foreign state. The Bill creates a process to

---

[3] In fact, information provided voluntarily to the Bureau (with the exception of certain merger review information) does not fall within the protection of confidentiality provided by section 29 of the *Act*. However, the Bureau's May 1995 notice *Communication of Confidential Information under the Competition Act* states that the Competition Bureau will treat such information as if it fell within the protection. While this position is commendable, the preferred approach should be to amend section 29. For the purposes of the remainder of this Submission, it is assumed that section 29 applies to voluntarily provided information on the basis of the May 1995 Notice.

protect information obtained under provisions substantially similar to sections 11, 15 and 16 of the *Act*. There is no reason why information and records that a party provides on a voluntary basis should be afforded any less protection.

Information provided voluntarily to the Bureau requires at least as much, if not greater, protection than that provided in the Bill. Effective resolution of matters arising under the *Act* depends, in part, on informed negotiations between the involved parties and the Bureau. This creates an incentive for parties to provide information voluntarily to the Bureau to facilitate such negotiations and the expeditious resolution of the Bureau's concerns. The risk that such information might be provided to foreign governments without restriction creates a chill on parties' willingness to provide such information to the Bureau. Further, limiting protection to information obtained through compulsory processes creates an incentive for Canadian businesses to require the Bureau to invoke these processes to obtain information. This will reduce the efficiency of the Bureau and increase costs of both the Bureau and Canadian businesses.

Our proposal will not affect the Bureau's ability to provide information to foreign states in appropriate circumstances. Rather, it would merely require the use of the compulsory process created under the Bill and trigger the protections contemplated under these amendments.

iv) Information Relating to Proposed Mergers

Information provided under a pre-merger notification process or an application for an advance ruling certificate, including information obtained through the Bureau's compulsory investigative powers, warrant the greatest degree of protection under the *Act*. The merger review process involves the most sensitive business information of the parties involved, and often of third parties. It includes historical records, future projections and strategic plans. The disclosure of such information, particularly to foreign jurisdictions that may not respect the

sensitivity of the information to the same degree could have a devastating impact on Canadian businesses, their employees, shareholders and the communities in which they operate. Some foreign jurisdictions are known to be lax in dealing with merger information supplied by parties and, on occasion, provide such information to competitors and merger opponents in the course of their merger review. Such information should be excluded from exchange with foreign states, unless there is waiver from the parties. This would be consistent with the practice currently followed by United States and European Union antitrust enforcement authorities. Moreover, the laws of a number of foreign jurisdictions actually prohibit the disclosure of pre-merger filings. These include the United States, where authorities are constrained from disclosing information provided in Hart-Scott-Rodino filings without a waiver from the parties. Canada's ability to do so ought to be similarly constrained. Securing such co-operation in the context of a merger review is not onerous given the parties' usual desire to secure expeditious approval of the merger and their consequent inclination to agree to reasonable waiver requests.

v) Protection of Confidentiality

Prior to the conclusion of a mutual legal assistance agreement under the Bill, the Minister of Justice must be satisfied that the foreign state will protect the confidentiality of records in a substantially similar fashion to the protection provided under Canadian law. Any such agreement must contain specific provisions regarding confidentiality protection. Given the uncertainty of the confidentiality protection under section 29 of the *Act*,[4] section 29 should not be the standard by which to judge the confidentiality protection provided by a foreign state. That section must first be clarified to allow all interested parties to understand the scope of protection conferred by that provision with relative certainty. Section 29 should set out a more explicit standard of confidentiality

---

4 See note 2, above.

protection, both for the benefit of parties subject to the *Act* and for the establishment of a meaningful standard by which to evaluate a foreign state's confidentiality protection.[5]

vi) Third-Party Requests for Disclosure

Sub-paragraph 30.01(d)(vi) of the Bill contemplates that a foreign state must notify the Minister of Justice if confidentiality protections contained in an agreement with that foreign state are breached. A foreign state that has obtained confidential information under these proposed amendments should also be required to notify the Minister of any attempt by a third party to obtain disclosure of this information and of any disclosure or intended disclosure to a third party (including other foreign states) that is not in breach of the confidentiality protections. Further, the Minister should be required to notify the parties from whom the records were obtained or to whom the records relate of any notice provided by a foreign state. This notice will permit Canadian businesses to take appropriate steps to protect confidential information that has been provided to a foreign state.

vii) Criteria for Judicial Determinations

Proposed sub-paragraph 30.06(1)(c) provides that a judge may issue a search warrant if reasonable grounds exist to believe that, among other criteria, it would be inappropriate to use the "section 11" provisions of these amendments. The Section recommends that a description of the criteria for this determination be set out to provide greater certainty.

Proposed sections 30.08 and 30.13 contemplate that any order to send confidential information of Canadian businesses to a foreign state is discretionary.

---

5 The policy espoused in the May 1995 Notice, *supra*, note 3, is an inadequate benchmark to use for the purposes of assessing the confidentiality protections contained in foreign competition laws.

The Bill should incorporate criteria for judges to determine the circumstances under which it would be appropriate to issue such an order.

viii) Notice of Judicial Review

The proposed judicial hearings prior to the release of information to a foreign state (sections 30.08 and 30.13) contemplate representations by parties other than the parties from whom a record was obtained. Appropriate notice should be provided to such parties to ensure that they have a meaningful opportunity to participate in such hearings. This is particularly important if they have an interest in the documents or information that was seized.

ix) Terms and Conditions for Sending Abroad

The Bill provides that a judge may order that records or information be provided to a foreign state subject to terms and conditions that the judge considers desirable. The Bill also provides some guidance with respect to the terms and conditions that might be ordered including "in respect of the protection of the interests of third parties". Certain other terms and conditions — specifically terms and conditions protecting the confidentiality of the information and limiting the use of the documents — must be included in each order that directs the delivery of records to a foreign state.

x) Designation of a Foreign Judge to Obtain Information

Subsection 30.11(3) permits a judge to designate a judge of a foreign court to obtain records or information ordered to be produced under subsection 30.11(1). However section 30.13 contemplates a hearing before a Canadian judge before such records or information are provided to a foreign state. In order to prevent a foreign state from obtaining this information prior to review by a Canadian judge and the Minister of Justice, a judge of a foreign court should not be permitted to be designated under subsection 30.11(3).

C. Conclusion

The Section commends the government for the obvious care that went into the drafting of the mutual legal assistance provisions of the Bill. It appreciates that many of the comments and concerns raised in the consultations on Bill C-471 were addressed. However, without clarifying the scope of the protection afforded by section 29, the confidentiality provisions of any mutual legal assistance agreement will also be unclear. Because the protection of confidential information is at the very heart of any such agreement, until this matter is addressed, the Section cannot endorse these provisions.

V. DECEPTIVE NOTICE OF WINNING A PRIZE

A. Introduction

The key provision in the deceptive prize promotions aspect of the Bill is proposed section 53(1), which states:

> No person shall, for the purpose or promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means, a notice or other document if the notice or document gives the general impression that the recipient has won, will win, or will on meeting a condition win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

Proposed section 53(2) contains a "defence" if the person actually wins the prize and the promoter meets the standard section 74.06 contest conditions. 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 authority would be used to deny alleged offenders access to postal, internet and other delivery services. The proposed section contains a due diligence defence (section 53(3)); provides for corporate liability for acts of employees and agents (section 53(4));

and provides for vicarious liability for officers and directors (section 53(5)). All of these are parallel to the telemarketing provision (section 52.1).

The proposed offence, punishment and sentencing provisions are also similar to those found in the current section 52.1. A proposed amendment to section 73 of the *Act* would add the new section 53 to the list of criminal matters that may be prosecuted in the Federal Court Trial Division. Finally, the reviewable practice provisions in sections 74.01 through 74.06 would not apply to the subject matter of section 53.

B. Assessment

The Section has a number of concerns with respect to this proposed amendment. The principal concern is that a specific prohibition on certain types of marketing and certain types of communications is inconsistent with the approach of the *Act*, as a statute of general application. Such specific provisions ought only to be introduced based on obvious and significant demonstrated need. This has not been demonstrated. In addition, the Bill would prohibit virtually all standard promotional contests. This could not have been the government's intention.

We also raise a number of subsidiary concerns below on the drafting and implementation of the provision.

i) Overbroad Drafting - Prohibition on most Contest Promotions

The Bill would effectively prohibit most, if not all, standard contest promotions. It is much broader than the earlier proposal contained in Bill C-438 with regard to games of chance. Proposed section 53(1) addresses contests for the purpose of promoting a business interest or the supply of a product — that is, all standard promotional contests. It addresses communication of such contests by notices or other documents. That includes a very wide range of communications, and

presumably includes all written communications. It likely applies to notices printed on product packages, or which appear as an aspect of the video portion of television advertisements. In its recently released *Proposed Guidelines for the Deceptive Prize Notice Provisions of the Competition Act* (October 2001), the Bureau states that it considers a notice or document of any kind sent by any means, including mail, electronic mail, facsimile transmissions, door-to-door delivery, billboards or retail distribution, to be subject to proposed subsection 53(1).

The proposed provision addresses the transmission of such notices by electronic or regular mail, or by any other means. It is not entirely clear whether promotions on a product package are sent "by any other means", but virtually any other form of communication, such as television, radio and print advertisements could fall within the ambit of the provision. It potentially covers notices which consumers may pick up in stores, see on packages or view on a firm's web site.

The Bill would prohibit communications:

- which give the general impression that the recipient has won, will win, or will on meeting a condition win a prize or other benefit;
- where the recipient is asked or given the option to pay money or incur a cost or do anything that will incur a cost; and
- where the person does not actually win the prize or other benefit.

This is exceptionally broad. It prohibits virtually all standard promotional contests. Such promotions virtually always provide the consumer the option of paying money (buying the product) to enter the contest. Typically they do not require a purchase but the vast majority of contestants enter the contest in conjunction with purchasing a product. All standard promotions provide that the recipient will, on meeting a condition, win a prize. The typical condition is that a person's name is drawn (or the person otherwise satisfies the random element of

the contest) and he or she successfully answers a skill-testing question. In other words this provision would explicitly prohibit perfectly standard and innocuous promotional contests.

The problem with the proposed provision is that it does not requires a consumer to be deceived. If it did not prohibit communications where winning a prize depends on meeting a condition, then arguably only deceptive contests (that is, those which give the general impression the consumer has won when the consumer has in fact not won) would be prohibited. However, by including a provision with respect to having to meet a condition to win, virtually all standard promotional contests will be prohibited.

ii) The Provision is Redundant

In this part, we assume that the provision focuses only on misleading contest promotions (i.e. those which give consumers the general impression that they have won when in fact they have not) and not all standard promotional contests.

In some respects the proposal parallels the recently enacted section 52.1, which deals with telemarketing. By singling out one type of marketing activity, it creates a similar inconsistency between the treatment of specific matters and the general rules applicable to all advertising or marketing undertakings. The Section was concerned about singling out certain instrumentalities or types of marketing for peculiar treatment in the 1999 amendments respecting telemarketing, and is even more concerned about such special treatment in respect of the current proposed amendment.

The telemarketing provision of 1999 resulted from significant concerns related to perceived hard-core telemarketing abuses involving senior citizens losing their life savings. 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. It does not appear that there has been any similar process with respect to the proposed section 53. Rather, it appears to be motivated by sporadic consumer complaints. However, without more study, such as a White Paper, which evidences the basis for such concerns and explains the need for such remedial legislation, such complaints are little more than anecdotal evidence.

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. The same types of concerns do not arise with the proposed section 53. 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. There is not the same personal interaction as with a telephone call. 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. Electronic mail may be somewhat more immediate than pre-printed mail, but the speed of the interaction still remains within the consumer's control, and proof of the conduct is available. There is no demonstrated need to specifically prohibit misleading promotional contests. In the absence of such demonstrated need, the *Act* should not contain specialized provisions dealing with particular industries or narrow types of conduct. The *Act* works effectively by applying general provisions to all marketplace conduct. Such specific, targeted provisions create inconsistencies and weaken the general application of the law.

The proposal is also redundant. Section 52 of the *Act* now prohibits false or misleading representations, made knowingly or recklessly, to promote the supply or use of a product or any business interest. In addition, it is reviewable conduct under section 74.01 for a person otherwise to make a false or misleading

representation person to promote the supply or use of a product or any business interest. Thus, the *Act* already has a complete code governing false or misleading representations, including representations for the purpose of promoting the sale of a product or a business interest. It provides criminal penalties if the representation is made knowingly or recklessly, and significant civil penalties if the representation is otherwise. In either case these prohibitions apply to representations with respect to promotional contests.

Case law under the *Act* has addressed contest "scams" under the misleading advertising provisions. These cases are noted in Appendix "B".

iii) Miscellaneous Specific Comments

When it was added to the *Act*, section 52.1 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 reviewing the proposal 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 through some other system of delivery. A telephone "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 as clearly in other contexts.

Officers and directors of corporations who know or ought to know of the commission of an offence always can be 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 personal knowledge of or involvement in the offence. Imposing criminal liability on persons with no personal involvement in or knowledge of an offence is unusual and generally inappropriate.

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 contained in Bill C-438 the existence of "abusive tactics" was not one of the factors to be considered. The Section applauded that omission in its comments on the PPF consultation, as the phrase "abusive tactics" provides little or no guidance to a court. It may have some limited substantive content in connection with telephone communications between disreputable telemarketers and vulnerable elderly consumers (where it was alleged that elderly persons were verbally and emotionally abused by their supposed friends). However, it can have virtually no meaningful content in respect of printed material or e-mails.

Regrettably, the "abusive tactics" sentencing criterion has been proposed in section 53(7)(e) of the Bill. For the reasons noted, this provision should be deleted.

C. Conclusion

In summary, this proposal would effectively prohibit virtually all standard publicity contests. While we presume that this was not the intention of the government, it appears to be the result.

In addition, there is no obvious need for the proposed section 53 and its associated amendments to sections 33, 73 and 74.07. 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 B). These prosecutions illustrate that the Bureau is able to deal with this kind of chicanery. Although recent amendments have narrowed the scope of section 52, the contest "scams" which are the likely target of the proposal 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.

Further, by singling out some sorts of conduct for peculiar treatment, the Bill treats various marketing initiatives inconsistently. 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 contestants are not misled the *Act* should not be concerned with such contests. If they are misled, the *Act* already addresses that concern.

VI. CONSENT AGREEMENTS AND COMPETITION TRIBUNAL PROCEDURES

A. Consent Agreements

i) Introduction

At present, draft consent orders are negotiated between the Commissioner and the parties that would be subject to the order. Once its terms are finalized, the draft consent order is filed with the Tribunal and is subject to a public hearing. While the parties need not present the same evidence as in contested proceedings, the Tribunal is not a mere rubber stamp. It must be convinced that the proposed order would remedy the alleged harm to competition. Consent order applications are subject to both public comment and possible intervention by any person that is directly affected by the order.

The Bill would create the concept of a "consent agreement" with a substantially different procedure. Under the proposal, the Commissioner and a party would sign a consent agreement based on terms that could be the subject of a Tribunal order. However, the agreement may include other terms that could not otherwise be imposed by the Tribunal.

Once signed, the consent agreement may be filed with the Tribunal for immediate registration. Registration terminates any proceedings before the Tribunal. A registered agreement has the effect of an order of the Tribunal. No public comment or intervention is contemplated.

ii) Assessment

Consent order applications are unnecessarily complex, expensive and time consuming. Moreover, their outcome has become more uncertain since the *Interac* case,[6] where the Tribunal suggested that intervenors can raise new issues which were not raised by the Commissioner. The current process needs to be changed.

Absent a full-blown Tribunal hearing on the merits, the Commissioner is in the best position to safeguard the public interest in competition. Consent order negotiations are carried out under the Commissioner's mandate and involve consideration of the seriousness of the Bureau's concerns, the strength of the respective cases of the parties and the potential costs of a contested hearing. These factors are weighed against the potential benefit if contested proceedings were undertaken. The Commissioner is in the best position to undertake this assessment.

The proposed new process is less transparent than the current one and eliminates the ability of third parties to influence the terms of a consent order (at least at the Tribunal level). However, we expect that the Commissioner would continue to negotiate the terms of a consent agreement in a consultative and transparent fashion.

---

6 *Canada (Director of Investigation and Research)* v. *Bank of Montreal* (1996) CCCTD No. 12 Trib. Dec. No. CT 9502/93.

On balance, the Section supports the proposal. It would create a consent agreement process that is simpler, less costly and more certain in its operation. We do have some reservations, however, with the proposition that the terms of consent agreement could extend beyond those that could be issued in contested proceedings. Parties cannot consent to enlarge the scope of a tribunal's jurisdiction. There is no justification for them to be given the statutory power to do so.

Moreover, we are concerned about the potential for abuse of this provision. Parties could be pressured into granting concessions that are unwarranted and unnecessary from a legal perspective, but that are expedient to avoid the burdens of contested proceedings. Whether in contested or non-contested proceedings, the remedies that the Commissioner can obtain should be limited to those specifically in the *Act* and terms that are reasonably ancillary to them (e.g. monitoring or reporting requirements).

B. Variation/Rescission

i) Introduction

The Bill purports to retain the current variation/rescission provisions in the *Act*. These state that a consent agreement (or any other Tribunal order) may be varied or rescinded where the parties consent or where there is a change in circumstances such that the agreement would not have been made or would have been ineffective in achieving its intended purpose.

ii) Assessment

Section 105 makes sense in the context of the current procedure, where the Tribunal either makes findings of fact or the parties place before the Tribunal a Statement of Grounds and Material Facts. The proposed regime, however, does

not contemplate any such filing when a consent agreement is registered. This makes it difficult, if not impossible, to determine whether changed circumstances exist. Consequently, the Commissioner should be required to file a Statement of Grounds and Material Facts at the same time that he registers a consent agreement.

C. References

i) Introduction

The Bill would provide for references to the Tribunal in two circumstances. First, the Commissioner and a person that is subject to a section 10 inquiry could agree to refer a question of law, mixed law and fact, jurisdiction, practice or procedure relating to Part VII.1 or VIII to the Tribunal. Second, the Commissioner could at any time refer to the Tribunal a question of law, jurisdiction, practice or procedure relating to Parts VII.1 to IX. The Tribunal would be required to decide any references informally and expeditiously.

ii) Assessment

We support the concept of references and believe that they may afford another means of simplifying Tribunal proceedings and reducing their costs. However, the Commissioner should not have the ability to unilaterally block the disposition of an issue that is based on a question of law, jurisdiction, practice or procedure. Parties that are subject to a section 10 inquiry should have the right to bring a reference to the Tribunal on the limited bases that are currently proposed to be granted to the Commissioner.

D. Costs

i) Introduction

At present, the Tribunal has no authority to award costs of any sort. The Bill would amend the *Competition Tribunal Act* to allow the Tribunal to award costs against any party where proceedings are frivolous or vexatious or where any step in the proceedings is taken to hinder or delay their progress.

ii) Assessment

Historically, Tribunal proceedings have been lengthy and expensive to all parties, but particularly to respondents. The cost and complexity of Tribunal cases have stemmed from a number of factors, including the lack of an effective summary judgement procedure and the unwieldy inquiry/discovery process. In applications brought under the abuse of dominance provisions, a significant contributing factor has been the large number of anti-competitive acts which have been alleged. In *Tele-Direct*,[7] for example, 19 anti-competitive practices were alleged but only parts of two became the subject of an order. The Tribunal should have the power to consider an award of costs in circumstances such as this.

Costs in Tribunal cases should be left in the discretion of the presiding member of the Tribunal. Cost awards could be used to punish unnecessary delaying tactics. They could also be used to compensate a party who has been put to large, unnecessary expense through no fault of its own.

E. Summary Dispositions

i) Introduction

The Bill would allow a party to an application under Part VII.1 or VIII of the *Act* to bring a motion before a judicial member of the Tribunal to hear and determine the application in a summary way. The judicial member may dismiss the application in whole or in part if the member finds that there is "no genuine basis

---

7 *Canada (Director of Investigation and Research)* v. *Tele-Direct (Publications) Inc.*, (1997), 73 C.P.R. (3d) 1 (Comp. Trib.).

for it". The member may also allow the application in whole or in part if the member is satisfied that there is "no genuine basis" for the response to it.

ii) Assessment

We recognize the need for summary judgment proceedings and believe that the proposed provision creates an opportunity for the Tribunal to reduce the cost and complexity of proceedings by expeditiously disposing of issues outside of the formal hearing. The key questions will be the Tribunal's construction of the words "no genuine basis" and its willingness to make decisions without hearing evidence. The language of the proposed amendments should indicate more clearly that the Tribunal must dispose of an issue on a summary basis where it finds, assuming evidence most favourable to the responding party in the motion, either that an order could not be made in respect of that issue or that a defence could not be made out.

VII. INTERIM ORDERS

A. Introduction

The Bill would authorize the Tribunal to issue interim orders in connection with certain reviewable matters (such as refusal to deal, exclusive dealing, tied selling, market restriction and abuse of dominance) upon an *ex parte* application brought by the Commissioner. Currently, such interim orders can only be issued after litigation has been commenced by the Commissioner. This entails some delay and means that the target of the alleged anti-competitive conduct could suffer irreparable harm before an interim order can be issued.

Under the Bill, the Tribunal may issue an interim order if it is satisfied that, in the absence of the interim order, any of the following is likely to result:

- an injury to competition that cannot adequately be remedied by the Tribunal;
- a person is likely to be eliminated as a competitor;

- a person will suffer a significant loss of market share or revenue; or
- other harm that cannot adequately be remedied by the Tribunal.

Interim orders have effect for 10 days from the day they are made and can be renewed for no more than two additional 35-day periods. The Commissioner must give notice to the affected party of the intention to apply to extend the order. The party against which the order is made may apply to set aside or vary the order, but must do so within the first 10 days after the order is in effect.

B. Assessment

The previous private members' bill, Bill C-472, proposed to vest interim order powers in the Commissioner. Bill C-23 appears to take into account the negative reaction to that proposal, by vesting the power to issue interim orders in the Tribunal rather than the Commissioner. While the Bill has remedied this serious flaw, significant problems remain. Many of these are described in the Section's submission to the PPF consultation and apply to the proposed section 103.1 found in section 12 of the Bill.

i) Pre-Conditions

Under the Bill, the preconditions for issuing an interim order are:

- the Commissioner certifies that an inquiry is being made under section 10; and
- the Tribunal finds that in the absence of an interim order:
  - injury to competition that cannot adequately by remedied by the Tribunal is likely to occur;
  - a person is likely to be eliminated as a competitor; or
  - a person is likely to suffer a significant loss of market share, a significant loss of revenue, or other harm that cannot be adequately remedied by the Tribunal.

We refer to the first factor as "harm to competition" and the combination of the second and third factors as "harm to a competitor".

If the preconditions are satisfied, the Bill would allow the Tribunal to issue an interim order:

- to prevent the continuation of conduct that could be the subject of any order under any of sections 75 to 77, 79, 81 or 84; or
- to prevent the taking of measures under sections 82 or 83.

Commencement of an inquiry under section 10

The Bill would allow the Tribunal to issue an interim order where the Commissioner does not hold 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 one of 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 reviewable conduct 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.

The proposed amendments should require evidence to be led before the Tribunal that the Commissioner believes that grounds exist for the Tribunal to make an order under Part VIII.

Effect(s) in the absence of an interim order

Under the proposed amendments, the Tribunal has to determine that there is a likelihood of injury to competition that cannot be remedied by the Tribunal or that there is a likelihood of significant loss or harm to a competitor that cannot be remedied by the Tribunal in the absence of issuing the order.

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 Tribunal may issue an interim order where harm to competition is not likely to be substantial or where the harm to competition has not been determined to be unlawful or the subject of an order of the Tribunal on the merits. In addition, the Tribunal would be entitled to issue an interim 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. An interim order should only be available if the likely harm to a competitor would constitute substantial harm to competition.

In summary, the proposed section 103.1 would permit the Tribunal to issue an interim order prohibiting a person from engaging in conduct that could injure a competitor, whether the actor has any market power and whether the act would

harm competition or consumers generally. Many actions by businesses which may be considered to harm competitors (for example, reducing prices, introducing new products, providing better service) are healthy competitive acts which benefit consumers. An interim order should be restricted to preventing a pattern of anti-competitive acts by a dominant competitor which results in a substantial lessening or prevention of competition.

Conduct to be Enjoined or Required

Under the proposed provisions, the Tribunal may prohibit a person from continuing to engage in conduct that could be the subject of an order under certain sections of Part VIII. As noted above, there is no requirement for the Commissioner to believe there are grounds for making an order under Part VIII before applying for an interim order. Thus, for example, the Tribunal could enjoin on an interim basis 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 on competition.

***Ex Parte* Nature of the Order**

Prior to seeking the interim order, the Commissioner is not obliged to give notice to the person against whom the order is to be made. This troubling aspect of the Bill is contrary to natural justice and procedural fairness, which are essential elements of our legal system.

We recognize that, in rare circumstances, it may not be appropriate for the Commissioner to notify the person against whom an interim order is sought. In the current *Act,* section 100 requires the Commissioner 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 accepted by the Tribunal. If section 100 is to be amended to include reviewable conduct other than mergers,

the existing provisions regarding notice and *ex parte* applications should be retained.

Tribunal orders are enforceable in the same manner as orders of a superior court of record (subsection 8(2) of the *Competition Tribunal Act*). The breach of an interim order is an offence punishable by fine or incarceration (section 66 of the *Act*). It is thus possible that a person could be imprisoned for breach of an interim order 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. The Bill would allow a subsequent right to appeal the interim order, but that does not change the fact that, at the initial stage, there is no requirement of notice and the conduct at issue may not even have been unlawful.

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 may derogate from administrative law principles of natural justice or fairness, subject to 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.

The proposed legislation raises potential *Charter* issues. Since there is a possibility of imprisonment for breach of an interim order, the “liberty” interest

under section 7 of the *Charter*[8] may be engaged.[9] Accordingly, that potential deprivation of liberty must be in accordance with the "principles of fundamental justice". The Supreme Court of Canada has said much about the meaning of the "principles of fundamental justice", but at a minimum it includes the concept of procedural fairness.[10] The requirements of procedural justice can vary according to the context in which they are invoked,[11] and "can be attenuated when urgent and unusual circumstances require expedited court action."[12] Thus, 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.[13]

Whether a court would find this proposed legislation constitutional would depend on its contextual assessment of whether the circumstances in which an interim order can 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 an interim 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. Given that an interim order is effective for only 10 days in the first instance, the Tribunal 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 10 days. The

---

8 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."

9 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).

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

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

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

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

question of urgency would also raise interesting arguments, as it typically takes considerable time for a case to reach the stage where the Commissioner would seek an order. While it is difficult to predict whether a court would find these extraordinary powers to be constitutional, it is clear that they do raise important *Charter* concerns relating to procedural fairness under section 7.

ii) Review by the Tribunal

Onus and scope of review

The proposed provisions would permit a person against whom an interim order is made to ask the Tribunal to review its order. The request must be made within the first 10 days the order is in effect. In such an application, the Tribunal is to consider whether one or more of the preconditions (harm to competition or harm to a competitor) is satisfied. However, the Bill does not state who bears the onus to demonstrate whether these preconditions exist. Section 104.1(9) of the *Act* states that in the event of an application under section 104.1(7) – which is identical to the proposed section 103.1(7) – the Commissioner is the respondent. Proposed section 103.1 does not contain such a statement.

Because the person against which the order is made would be applying for the review, presumably that person would bear the onus. If that is the case, then the Bill would shift the onus to the applicant to demonstrate that the preconditions are not satisfied. This is incompatible with our legal traditions, which almost always require a party who seeks an order to demonstrate why the order should be made. In an application for review of the order, the Commissioner 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.

A further concern about the proposed interim order power is that interim orders of the Tribunal are not reviewable by the courts (proposed section 103.1(10)). 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.[14] This principle has been 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.[15] 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 Tribunal in proposed section 103.1(10).

Standing of person affected

In addition to the Commissioner and the person against whom the interim order is made, the Bill provides "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 Bill ignores the right of the person against whom a temporary order is issued to have a speedy resolution of its application for review. While the Tribunal may make an interim order for up to 80 days (including two extensions of 35 days), the order continues indefinitely while an application for review by the Tribunal is

---

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

15 *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.

pending. The Commissioner should be given an incentive to proceed in an expeditious manner, particularly because the conduct in question has not been found to be unlawful or been the subject of an order of the Tribunal on the merits.

The Bill should also allow the Tribunal to balance the parties' interests and the public interest prior to issuing an order. For example, the Tribunal should be required to satisfy itself that the damage to competition would be greater than the damage to the person against whom the order is made if it were subsequently determined that a civilly reviewable act was not committed or about to be committed.

C. Conclusions

The proposed interim order power is designed to address the need for quick action to protect businesses from an anti-competitive act by a dominant competitor. However, there are better ways to address this concern. The Commissioner can already apply to the Tribunal for an interim order to prevent the completion of a proposed merger (section 100). The application can be brought on 48 hours notice, or without any notice in the appropriate circumstances. Amending section 100 to include anti-competitive acts and other reviewable matters would address the need for quick action and satisfy all of the concerns expressed above.

Any harm which could result from the slight delay in obtaining an order from the Tribunal is substantially outweighed by the benefit of procedural fairness which would be introduced to the process. In two recent applications by the Commissioner for interim orders, the Tribunal has demonstrated its ability to conduct a hearing and reach a decision in a relatively short time.[16] With the

---

[16] In *Superior Propane*, the Commissioner applied for the interim order December 1, 1998, the hearing took place December 4-6, and the matter was decided by the Tribunal December 6. In

(continued...)

proposed increase in the number of Tribunal members, issues of timing and access should also be allayed. It is hard to imagine a case where a delay of less than two weeks will irreparably harm an otherwise vigorous competitor.

The proposed section 103.1 would permit the Tribunal to issue a temporary order prohibiting a person from engaging in conduct that could injure a competitor, whether or not the actor has any market power and whether or not the act would harm competition or consumers. The purpose of the *Act* is to protect competition, not competitors. Most actions by businesses which harm competitors (e.g. reducing price, introducing new products, providing better service) are healthy competitive acts which benefit consumers. In our view, interim orders should be available to prevent a practice of anti-competitive acts by a dominant competitor which result, or are likely to result, in a substantial lessening of competition. 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.

VIII. CONCLUSION

Once again, the Section appreciates the opportunity to provide its input into these proposed amendments. As suggested above, the Bill contains several principles which should be adopted, either as drafted or with some minor re-drafting. As well, we believe that certain provisions should be deleted from the Bill, most notably the proposed section 53 dealing with deceptive prize notices. We trust

---

[16](...continued)
Universal Payphone Systems, the Commissioner's application was made September 15, 1999, two days of hearings were held September 23 and 24, and the Tribunal decided the matter September 24. In a press release following the *Universal Payphone Systems* decision, the Commissioner indicated that he was "pleased to see that the new [misleading advertising] provisions of the Act can be applied quickly…"

that these comments have been helpful and look forward to providing further assistance as the Bill progresses through the legislative process.