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Canada Flirts With Expanded Private Antitrust Legislation

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It is expected that members of Parliament will seek to introduce private rights of action for various reviewable practices in the Competition Act[1] when Bill C-23[2] comes before the Industry Committee of the House of Commons ("Industry Committee") in the autumn. These controversial proposals would radically alter the treatment of various vertical nonprice restraints and other distribution practices.

HISTORY OF PRIVATE ACTION PROPOSALS

In June 1995, the Canadian Competition Bureau (the "Bureau") proposed establishing private actions for the reviewable practices contained in Part VIII of the Competition Act.[3] The stated rationale was to overcome resource limitations on the Bureau's enforcement of these provisions of the Act. However, a Consultative Panel of experts (commissioned by the Bureau) concluded that the most appropriate way to achieve adequate enforcement of the Act was to ensure that the Bureau is properly funded. The Consultative Panel also recommended that the private action concept should not proceed without a thorough analysis of all the costs and benefits to the Canadian economy.[4] While the Bureau has commissioned selective studies relating to theory,[5] its own litigation costs,[6] and other jurisdictions,[7] a comprehensive cost-benefit analysis has yet to be undertaken.

In April 2000, Bill C-472, a private member's bill,[8] proposed private rights of action in respect of four reviewable practices: refusal to deal, tied selling, market (i.e., territorial or customer) restriction, and exclusive dealing.[9]

The *2000 Discussion Paper*– the accompanying consultation paper issued by the Bureau– indicated that the major reason for establishing private actions was to allow private parties to bring their own actions in cases where the Bureau has

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decided not to initiate a Tribunal proceeding because the conduct's "impact on competition is minimal and does not warrant public intervention."[10] It provided no analysis of the need for or desirability of private reviewable practices litigation. Nor did it explain how this change would contribute to the stated overall objective of ensuring that Canada's framework legislation "keeps pace with the rapidly changing global economy."[11]

At the same time, the Bureau retained the Public Policy Forum (the "Forum"), an Ottawa-based think-tank which specializes in the analysis of public policy issues, to conduct a formal consultative process regarding the proposed amendments.[12] The Minister of Industry indicated that the private member's bills would be incorporated into a government bill only if there was substantial consensus on the proposals.

PRIVATE ACTIONS ELICIT WIDESPREAD CONCERN

Not surprisingly, there was widespread concern in the business community that the proposal to introduce private actions for reviewable practices was based on benefits and rationales which were assumed but not demonstrated, that the risks of strategic litigation were being given inadequate attention, and that the litigation costs, compliance burdens, and chilling effects of the policy change were likely to outweigh any potential benefits by a wide margin.

The proposal to introduce private actions for reviewable practices was based on benefits and rationales which were assumed but not demonstrated.

Also troubling was the fact that the list of reviewable practices to be subject to private rights of action had doubled since the Commissioner of Competition (the "Commissioner") suggested a regime limited to refusals to deal and tied selling two years ago. There was no guarantee that it would not be further extended to mergers, abuse of dominance, the deceptive marketing practices, and/or the special remedy related to intellectual property.[13] Proponents of private actions have already encouraged many of these extensions in submissions to the Forum, as well as the addition of single or double damage regimes and class actions. Each of these modifications would create enormous additional opportunities for strategic litigation by competitors and other marketplace participants.

The *2000 Discussion Paper* asserted that four safeguards would be sufficient to address the acknowledged risks of strategic or frivolous litigation:

(1) the Tribunal would have no power to award damages;
(2) plaintiffs would have to obtain leave from the Tribunal to proceed with an action;
(3) the Tribunal would be empowered to award costs; and
(4) summary dispositions could be sought from the Tribunal at any time.

However, no analysis was provided to support the assumption that such measures would prevent strategic litigation.

Stakeholder input received by the Forum during the consultative process indicated that there was no consensus on this issue: twenty-five submissions endorsed private reviewable practices litigation and twenty-seven were opposed.[14] Many of the supporters of private actions were lawyers and economic consultants (a constituency which would benefit from competition litigation)[15] or other government departments that would not be directly affected. Most Canadian companies and business associations (including the Business Council on National Issues, the Alliance of Canadian Manufacturers and Exporters, and numerous industry associations) felt that it would be damaging to the Canadian economy to promote private litigation for these types of ordinary commercial activities. Various companies and associations have subsequently expressed additional concerns to Industry Canada about this policy initiative. Since it did not meet the consensus test, it was not included in Bill C-23 which was tabled in April 2001. However, private action proposals remain on the agenda of the Bureau and at least one member of Parliament. Thus, these almost certainly will resurface when the current bill is reviewed by the Industry Committee, likely in October 2001.

CURRENT REVIEWABLE PRACTICES LEGAL FRAMEWORK

Competition laws and their enforcement have consistently been regarded in Canada primarily as matters of public, not private, interest. The Commissioner has been endowed with an extraordinary range of investigative powers for this reason.[16]

The current reviewable practices regime in which conduct is legal unless and until the Bureau obtains a prohibition or other remedial order from the Competition Tribunal, is widely admired for having given Canada one of the most modern and economically enlightened frameworks for dealing with

ordinary commercial conduct that is only occasionally anticompetitive. The introduction of private rights of action for reviewable practices would represent a major change in approach.

The Bureau's own enforcement statistics demonstrate that mergers and other reviewable practices that raise genuine competition concerns are rare:

- ? An average of 230 merger examinations per year have been conducted since the Stage II Amendments were enacted in 1986 (close to 500 in fiscal year 2000). However, only 2 percent of all mergers have been considered by the Bureau (not the Competition Tribunal– i.e., after investigation, not adjudication) to be anticompetitive.[17]
- ? The Civil Matters Branch handled an average of 537 non-merger reviewable practices complaints per year between 1992-93 (when these statistics began to be reported) and 1999-2000. Every complaint is reviewed, but only 5 percent were found to require a detailed "examination" (i.e., two or more staff days of review). Less than 1 percent of reviewable complaints were ultimately found to be anticompetitive (again by the Bureau, not the Competition Tribunal).[18]

Decisions not to initiate enforcement action where the public interest in competition has not been injured are a fundamental component of the Bureau's mandate. Identifying unmeritorious complaints early in the investigation stage minimizes the time and cost inflicted on marketplace participants which are engaged in activities that are competitively neutral or procompetitive. The Bureau's annual reports are replete with summaries of complaints that proved to be unfounded after detailed investigations were undertaken.

ANALYSIS OF THE RATIONALES FOR PRIVATE ACTIONS

In May 1996, the then Director (now the Commissioner) indicated that he would accept the challenge posed by his Consultative Panel to make the case for private actions.[19] However, the Bureau, the present Commissioner, and other proponents of this policy initiative have yet to do so. The rationales that have been offered are not compelling and the studies of the issue have not demonstrated need or benefits in excess of costs.

Public interest cases are now being brought

The argument that private actions would "complement public enforcement" by allowing private parties to "deal essentially with private matters between buyers and suppliers" in situations where the Bureau has concluded that the "impact on competition is minimal and does not warrant public intervention" carries no weight when the distinction between a reviewable practice and an offense is understood and when the role of existing common law contract and tort rules are recognized. If there is no impact on the public interest in competition, there is no need or basis for a remedial order. Contract and tort law already provide an extensive legal framework in respect of private commercial matters. The introduction of a private right of action primarily to deal with private matters and/or local issues would also raise constitutional issues.

Resources have not constrained meritorious cases

Although the Bureau has had to operate in an environment where government resources have been carefully controlled over the past several years, it has never suggested in its annual reports to Parliament that resource constraints have prevented it from pursuing meritorious refusal to deal, tied selling, market restriction, exclusive dealing, or other reviewable practice cases. Nor has the Bureau's enforcement track record deteriorated since government fiscal restraint became a major concern in the early 1990s. Moreover, the Bureau has received budget and staff increases that far exceed the growth in total examinations undertaken over the past five years.

"Correctional justice" theory is at odds with the design of reviewable practices

The "corrective justice" rationale put forward in the *Roach/Trebilcock Study* commissioned by the Bureau would have the absurd result of requiring a firm to pay potentially substantial retrospective damages in respect of conduct that was entirely lawful when undertaken. Reviewable practices are very different from the cartel and other offenses set out in Part VI of the Act.[20] They are *lawful* unless and until the Competition Tribunal makes a remedial order. There is simply no violation, tort, or other wrongdoing that gives rise to an injury to be "corrected."

Competition Commissioner brings cases as an accountable public official

The *Roach/Trebilcock Study* appears to assume that a public "monopoly power of enforcement" is somehow akin to the traditional competition policy concern with monopolies in the marketplace and hence a natural candidate for privatization. Although the metaphor is powerful, it is clear from basic economic concepts that it is completely inappropriate. It is also noteworthy that neither the Commissioner nor other proponents of this policy change are suggesting real privatization of enforcement, which would entail the Commissioner giving up his responsibilities for enforcing Part VIII of the Act!

Law enforcement is one of the classic illustrations of a "market failure" which warrants government intervention to protect the public interest. There is a serious "moral hazard" which makes private enforcement particularly problematic in the field of competition law. Private parties that usually have the most resources and motivation to bring an action are competitors who often have incentives to "raise rivals' costs" or otherwise advantage themselves at the expense of their rivals.

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Entrusting law enforcement to a public official may, of course, give rise to accountability issues. While the *Roach/Trebilcock Study* properly highlights this possibility, it does not assess the collective accountability resulting from federal government management control systems, the specific statutory regime applicable to formal complaints to the Bureau,[21] and the existing opportunities for private actions in respect of various conduct covered by either Part VI of the Competition Act or common law torts. Collectively, these mechanisms already provide a substantial level of accountability.

RISKS OF STRATEGIC LITIGATION

Even the proponents of private rights of action acknowledge that strategic litigation is a serious risk. Stakeholder submissions in the Forum process underscored the widespread concern about strategic litigation, the numerous ways in which it can be manifested, and the inadequacy of safeguards for controlling it.

Strategic litigation is most often brought by competitors who seek protection of their own self-interests rather than to protect the public interest in competition. Customers and suppliers may also engage in strategic litigation, particularly when their business relationships have deteriorated (e.g., complaints regarding refusal to supply). The open-textured nature of competition law provides considerable scope for strategic litigation and makes it problematic to design safeguards that would prevent such actions.

The incentives of private plaintiffs to initiate or threaten legal proceedings for self-interested strategic purposes include:

(1) using the time, cost and disruptive effect of litigation to raise a rival's costs;
(2) deterring, delaying or pressuring the defendant to abandon procompetitive business initiatives;
(3) creating or maintaining barriers to entry into the incumbent's market; acquiring information about the defendant through the discovery process;
(4) using actual or threatened litigation as a platform to advance employment, regional development, or other non-competition interests;
(5) exposing the defendant to media scrutiny, public embarrassment and/or loss of goodwill; and
(6) using the costs and risks of protracted litigation as leverage to extract an unwarranted settlement.

PROPOSED PROCEDURAL SAFEGUARDS ARE INADEQUATE

As noted, Bill C-472 contained four procedural mechanisms which, it was argued, would adequately address the acknowledged problem of strategic litigation. Reliance on safeguards puts the cart before the horse: it makes no sense to construct an elaborate procedural infrastructure in support of a policy initiative that is not necessary and has not been shown to offer any significant benefits. Moreover, none of the proposed mechanisms would be sufficient to prevent strategic litigation.

? *Leave requirement*

The requirement that plaintiffs would have to obtain leave of the Tribunal to proceed with a case would be inadequate to prevent strategic litigation because the Tribunal can be expected to be reluctant to refuse leave for any case unless it is absolutely clear that it is devoid of merit. Capable competition law

counsel will almost always be able to frame leave applications that appear to have some plausibility even when the underlying factual case may be weak.

? *Summary judgment*

Even if a "hard look" standard was employed, it is doubtful that a summary judgment process would provide a reliable safeguard against strategic litigation. Summary judgment procedures can be useful when there is a clear legal issue which may be determinative of the outcome of a case. They are not well-suited for making quick decisions at an early stage in proceedings where there are complex or disputed facts at issue, as there invariably are in reviewable practices cases.

? *Absence of damages*

The unavailability of damage awards is a necessary but not sufficient condition for reducing strategic litigation incentives. As noted above, plaintiffs may have numerous motives for engaging in strategic litigation aside from the recovery of a monetary award. The benefits of delaying, disrupting, deterring, embarrassing, obtaining information from or imposing costs on a defendant can easily justify the time and cost needed to commence and keep alive a piece of strategic litigation, even if it is not pursued to conclusion.

? *Cost rules*

The traditional "loser-pay" cost rules proposed in Bill C-472 would be fairer than the "no-way" or "one-way" cost rules recommended in the *Roach/Trebilcock Study*.[22] However, they are not adequate to deter strategic litigation because they do not fully compensate defendants even when successful in legal proceedings (as the Bureau's own international comparative study reported), let alone in cases where strategic litigation is threatened but not commenced, or is settled, or abandoned. Moreover, a recovery of legal costs ignores distraction of management, damage to the firm's goodwill/reputation and other negative impacts, which are difficult to quantity but may be substantial.

The *Roach/Trebilcock Study*[23] and a recent report by the Industry Committee[24] grossly understate the frequency of reported private litigation under Part VI of the Act (as well as ignore settlements and threatened litigation which are not reported[25]). The historical record and recent trends suggest that the introduction of private actions in Part VIII of the Act would likely generate significant litigation. Some cases will be pursued to a conclusion, while many others may

simply be used to harass or distract the defendant, attempt to induce a favourable settlement, or influence commercial negotiations.

In the absence of any data from the Bureau demonstrating that there are worthy complaints not being pursued, it is reasonable to expect that most incremental private cases would be strategic rather than meritorious.

STRATEGIC LITIGATION IS LIKELY TO DWARF GOVERNMENT ENFORCEMENT

The table below illustrates the extent to which the number of unmeritorious actions per year would dwarf government cases even assuming that low, medium, and high estimates of 5 percent, 10 percent, and 20 percent of non-enforcement decisions by the Bureau would result in private proceedings. There can be no doubt that the total annual costs of such litigation to participants and the Canadian economy would be substantial.

POTENTIAL INCREMENTAL UNMERITORIOUS CASES RESULTING FROM PRIVATE RIGHTS OF ACTION FOR REVIEWABLE PRACTICES
(# *of cases per year)*

MERGERS		OTHER REVIEWABLE PRACTICES	
Average Annual Number of Transactions Receiving a Significant Assessment	230	Average Annual Number of Civil Branch Complaints	537
Assume 5% Result in Unmeritorious Private Actions	12	Assume 5% Result in Unmeritorious Private Actions	27
Assume 10% Result in Unmeritorious Private Actions	23	Assume 10% Result in Unmeritorious Private Actions	54
Assume 20% Result in Unmeritorious Private Actions	46	Assume 20% Result in Unmeritorious Private Actions	107

A CHANGED LEGAL RISK ENVIRONMENT

Under the present legal framework, Canadian businesses only occasionally need to purchase in-depth legal advice before engaging in reviewable practices. Negative effects on competition are rare, and the Bureau's enforcement track

record and objectivity provide a stable environment in which to do business. Making these activities subject to attack at any time by other marketplace participants would dramatically change the legal risk analysis for businesses. While it would be difficult to quantify the potential compliance burdens for firms throughout the economy on even a rough basis, the possibility of time-consuming private actions will certainly cause firms to spend more resources on legal opinions before embarking on any activities that may constitute reviewable practices.

Private rights of action will likely also deter some businesses from engaging in conduct which is reviewable. Uncertainty is the enemy of business. Given the scope of the reviewable practices in Part VIII of the Act and the risks and costs of strategic litigation, the potential for chilling effects on a wide variety of procompetitive or competitively benign business activities is massive. For example, suppliers may decide to operate their own vertically-integrated distribution systems even though a network of independent distributors or dealers would have been more efficient. Alternatively, they may decide to engage in the practice in a jurisdiction where the legal risks are not as high. In either case, the Canadian economy as a whole will suffer a net loss if the reviewable practice would have been efficiency-enhancing.

Potential targets of private reviewable practice suits will be wise to speak up when Bill C-23 comes before the Industry Committee this autumn if they want to avoid the expanded use of strategic competition litigation in Canada.

Neither the Commissioner, nor the private member's proponents of this policy change have quantified its purported benefits. But it seems doubtful that they would be anywhere near the potential incremental private and public costs of such litigation, let alone the unquantified increase in compliance costs and the chilling effects on efficiency-enhancing activities. The result would undoubtedly be a serious negative overall impact on the Canadian economy. This in turn will reduce government tax revenues, potentially by much more than any net savings that might be achieved in government expenditures. Potential targets of private reviewable practice suits will be wise to speak up when Bill C-23 comes before the Industry Committee this autumn if they want to avoid the expanded use of strategic competition litigation in Canada.

NOTES

1. Competition Act, R.S.C. 1985, c. C-34, as amended, pt. VIII.

2. *An Act to Amend the Competition Act and the Competition Tribunal Act*, Bill C-23, 1st Sess., 37th Parliament (2001).

3. Industry Canada, Bureau of Competition Policy, *Competition Act Amendments* (June 1995).

4. *Report of the Consultative Panel on Amendments to the Competition Act* (Mar. 6, 1996).

5. Kent Roach & Michael Trebilcock, *Private Party Access to the Competition Tribunal* (prepared for the Amendments Unit, Competition Bureau, Industry Canada, May 7, 1996) [hereinafter the *Roach/Trebilcock Study*].

6. Richard Wise & Sheri-Anne Doyle, *Study of the Historical Cost of Proceedings Before the Competition Tribunal* (prepared for the Competition Bureau, Industry Canada, Jan. 28, 2000).

7. R. Jack Roberts, *International Comparative Analysis of Private Rights of Access* (prepared for the Competition Bureau, Industry Canada, Apr. 18, 2000) [hereinafter the *Roberts Study*].

8. *An Act to Amend the Competition Act* (conspiracy agreements and right to make private applications), *the Competition Tribunal Act* (costs and summary dispositions) *and the Criminal Code as a Consequence*, Bill C-472, 2nd Sess., 36th Parliament (1999-2000).

9. *Id.* § 5 (which would establish a new § 77.1 in the Competition Act).

10. Competition Bureau, *Amending the Competition Act– A Discussion Paper on Meeting the Challenges of the Global Economy,* at 5 (Government of Canada, Apr. 2000), *available at* http://strategis.ic.gc.ca/SSG/ct0174e.html.

11. *Id.* at 1.

12. *See* Letter of Konrad von Finckenstein QC, Commissioner of Competition, to Dr. David Zussman, President, Public Policy Forum (Apr. 14, 2000), *available at* http://strategis.ic.gc.ca/SSG/ct0174e.html.

13. *See* Competition Act §§ 91-100, pt. VII.1, §§ 78-79, § 32.

14. The full text of all submissions is available at Public Policy Forum, www.ppforum.com/english/competitionact/submissions.html.

15. *See, e.g.,* Submissions of Charles River Associates Inc. (economic consultants), Goodman Phillips & Vineberg (law firm), Ogilvy Renault (law firm), & Thomas W. Ross (professor of economics), *available at* www.ppforum.com/english/competitionact/submissions.html.

16. Competition Act §§ 9-23.

17. Compiled from Director of Investigation & Research & Commissioner of Competition, *Annual Reports*, for fiscal years 1986-87, 1999-2000.

18. *Id.*

19. George N. Addy, Director of Investigation & Research, Remarks for a Luncheon Address to the Canadian Institute, Toronto, Canada (May 10, 1996).

20. Competition Act pt. VI.

21. Individuals or firms who believe they have been affected by conduct which warrants a remedial order under Part VIII of the Act have three options for ensuring that their concerns are examined by the Bureau: informal complaints; requesting the Minister of Industry to order an inquiry (see Competition Act § 10(1)(c)); or making an application under oath by any six Canadian residents (which forces the Commissioner to conduct an inquiry (see Competition Act §§ 9, 10(1)(a))). Proponents of private actions have not produced evidence to show that the six resident and Ministerial inquiry mechanisms are defective. Indeed, all evidence points to a system which appears to be operating effectively**.**

22. *Roach/Trebilcock Study, supra* note 5, at 73-

74.

23. *Id.* at 24.

24. House of Commons Standing Committee on Industry, *Interim Report on the Competition Act* (June 2000).

25. The *Roberts Study* also ignored this important aspect of strategic litigation. *See supra* note 7.

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